TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

FILED MAY 31, 1955

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA OMAHA DIVISION

No. Civ-76-53

UNION PACIFIC RAILROAD COMPANY

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION

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[fol. 1] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[File endorsement omitted]

Civil Action No. 76-53

UNION PACIFIC RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; AND WABASH RAILROAD COMPANY, PLAINTIFFS,

VS.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

COMPLAINT—Filed June 25, 1953

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific

Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, bring this suit to enjoin, annul, suspend and set aside the order issued by the Interstate Commerce Commission (hereinafter called the "Commission") on January 12, 1953, in a proceeding entitled Docket No. 30297, The Denver and Rio Grande Western Railroad Company vs. Union Pacific Railroad Company, et al. The order, copy of which is attached and made a part hereof as Appendix A, requires:

[fol. 2] "*It is ordered*, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

"*It is further ordered*, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn

along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Okahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

"*It is further ordered*, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

"*And it is further ordered*, That this order shall continue in force until the further order of the Commission."

II

Union Pacific Railroad Company (hereinafter called "Union Pacific") as a corporation under the laws of the State of Utah, and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the State of Nebraska and other states hereinafter mentioned.

[fol. 3] Chicago and North Western Railway Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Wisconsin, Illinois, Minnesota, Iowa, South Dakota, Nebraska and other states.

Chicago, St. Paul, Minneapolis & Omaha Railway Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Nebraska, Iowa, Minnesota, and other states.

Northern Pacific Railway Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Minnesota, North Dakota, Montana, Idaho, Washington and other states.

Great Northern Railway Company is a corporation under the laws of the State of Minnesota and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon, California and other states.

The Atchison, Topeka and Santa Fe Railway Company is a corporation under the laws of the State of Kansas and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Illinois, Missouri, Kansas, New Mexico, Arizona, California, and other states.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Illinois, Indiana, Wisconsin, Minnesota, North Dakota, South Dakota, Montana, Idaho, Washington and other states.

Wabash Railroad Company is a corporation under the [fol. 4] laws of the State of Ohio and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Michigan, Indiana, Illinois, Missouri and other states.

III

Jurisdiction of this Court over this cause of action is provided by Title 28 U. S Code, Sections 1336, 2284 and 2321-2325, inclusive, which authorizes suits to be brought

in the District Courts of the United States against the United States of America to enjoin, annul, suspend and set aside orders of the Interstate Commerce Commission. Venue of this action is in this Court pursuant to Title 28 U. S. Code, Section 1398, because of the fact that the principal office of the Union Pacific is at 1416 Dodge Street, Omaha, Nebraska.

IV

The proceeding before the Commission in said Docket No. 30297 was initiated by a complaint filed August 1, 1949, by The Denver and Rio Grande Western Railroad Company, as complainant (hereinafter called "Rio Grande") against the Union Pacific and some 200 other railroads, including the plaintiffs herein, alleging, among other things, that the Union Pacific and other railroads, or some of them, failed and refused—

> "* * * to join with complainant in establishing competitive joint rates for the transportation of the freight traffic involved between
>
> "(a) points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof,
>
> "and
>
> "(b) on freight traffic betwen Utah common points on the one hand, and places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia, on the other hand,
>
> "which failure and refusal by the defendants constitute violations o Section 1(4), Section 3, Section 15 (1) and Section 15(3) of the Interstate Commerce Act, and is contrary to the National Transportation Policy."

The complaint also alleged that freight rates and charges via the Rio Grande on traffic to and from the territories [fol. 5] described were so much greater than rates and charges via routes of the Union Pacific and other defendants as to prevent the Rio Grande from obtaining a haul "on an unknown volume of competitive traffic" because shippers

will not route their traffic via the Rio Grande at the higher rates and charges.

V

Answers to the complaint were filed by the Union Pacific and numerous other defendant railroads denying the allegations of the complaint. The complaint did not allege that through routes via the Rio Grande are necessary or desirable in the public interest, or that existing routes of the Union Pacific and other railroads are unreasonably long compared to routes via the Rio Grande, or that through routes and joint rates via the Rio Grande to and from the described territories are needed to provide adequate and more efficient or more economic transportation.

[fol. 6]

VI.

Intervenors opposing the complaint and supporting the Union Pacific and other defendants named in the complaint include the State of Nebraska, City of Cheyenne, Wyoming, the Public Service Commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska and Kansas, chambers of commerce and other associations, certain industrial employe groups in Wyoming, and employe groups of the Union Pacific, the Chicago and North Western Railway Company and the Wabash Railroad Company.

Intervenors in support of the Rio Grande's complaint include the Secretary of Agriculture of the United States, the Public Utilities Commissions of Colorado and Utah, which intervened as their interests might appear, but later fully supported the complaint, the American National Live Stock Association, other live stock and stock feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce and certain groups of employes of the Rio Grande. The Public Utilities Commission of Idaho intervened without stating its position, but later took the position that the demands of the Rio Grande's complaint should be denied except with respect to live stock and fruits and vegetables.

VII.

Union Pacific owns and operates nearly 10,000 miles of railroad serving more than 1,700 cities, towns and stations

in the States of Iowa, Missouri, Nebraska, Kansas, Colorado, Wyoming, Utah, Nevada, California, Idaho, Montana, Oregon and Washington. Its eastern termini are at Council Bluffs, Iowa, and Kansas City, Missouri, and its western termini are at Los Angeles, California, Portland, Oregon, and Seattle, Washington, and at Ogden, Utah, where it made connection with what is now the Southern Pacific Company on May 10, 1869, to form the first transcontinental railroad in the United States. Beginning in 1878 the Union Pacific constructed and acquired railroad lines north of Ogden in Utah, Idaho, Montana, Oregon and Washington and now owns and operates 5,606.7 miles of railroad in the states just named of which 2,913.19 miles, [fol. 7] or over 50 per cent, consist of numerous branch lines connected with and extending from its main lines in those states.

The standard gauge lines of the Rio Grande, completed in 1890, extend from Ogden through Utah and Colorado to Denver, approximately 600 miles, and to Pueblo and Trinidad, Colorado. The Rio Grande connects with the Union Pacific at Denver, and interchange of traffic between the two railroads can be made at Ogden through the facilities of the Ogden Union Railway & Depot Company, a terminal facility owned and maintained by the Southern Pacific Company and the Union Pacific for the interchange between them of eastbound and westbound transcontinental and other traffic.

VIII.

In the States of Utah north of Ogden, Idaho, Montana, Oregon and Washington (designated by the Commission as the "northwest area" or "excluded territory"), more than 157,000 carloads of freight originate and terminate annually at stations on the main and branch lines of the Union Pacific. Most of the traffic now moves and for many years has moved over the lines of the Union Pacific through Pocatello, Idaho, and Granger, Wyoming, to or from the termini of the Union Pacific at Council Bluffs, Iowa, or Kansas City, Missouri, and the lines of connecting railroads at those two points. A portion of the traffic is moved by the Union Pacific to junctions with other railroads in Oregon, Washington and Montana, and by those

railroads to points on their lines or to connections with still other railroads. By far the greater portion of the traffic moves between the northwest area and the area east of the Missouri River and north of the Ohio River. It is this traffic and the revenue derived from it, or as much thereof as possible, which the Rio Grande seeks through its complaint to the Commission to divert to its line for a "bridge" haul over the entire length of its line between Ogden and Denver for the purpose, as testified by its president, of improving the financial condition and position of the Rio Grande. Routes via the Rio Grande are from [fol. 8] 33 to 219 miles longer than Union Pacific routes and diversion of the traffic to the Rio Grande would short haul or deprive the Union Pacific of its present haul to the extent of about 1,000 miles and would deprive other railroad plaintiffs herein of their entire haul on many thousand carloads of such traffic annually.

[fol. 9]

IX

Union Pacific and other railroads have never established or maintained any through routes and joint rates with the Rio Grande via Ogden on traffic from and to the described territories, except on eastbound sheep or goats and except during a period when the Union Pacific and the Oregon Short Line Railway Company, which is wholly owned by the Union Pacific, were in separate receiverships, at the conclusion of which period, the through routes and joint rates with the Rio Grande were cancelled in 1906 and 1912 with approval of the Commission. No complaints have been filed by shippers or the public or by any state public service commission demanding the through routes and joint rates which the Rio Grande seeks to compel via its line as a result of its complaint to the Commission.

X

Concurrently with the filing of the complaint August 1, 1949, and thereafter, officials of the Rio Grande conducted a vigorous and wide-spread campaign in Colorado, Utah, Idaho, Oregon and other northwestern states in which it solicited, agitated and sought to persuade and procure shippers located upon and served by the Union Pacific and

public service commissions of those states to join with the Rio Grande by intervention and testimony of such nature as to help it win its case. In that campaign, the Rio Grande condemned and vilified the Union Pacific, accused it of violations of law and of the rights of shippers served by it and urged upon shippers that they would benefit by joining with the Rio Grande in supporting its case. Some evidence of that campaign was received by the Commission at hearings hereinafter mentioned, but the Commission excluded and refused to receive most of the evidence offered by the Union Pacific disclosing and portraying the nature, vigor and extent of the Rio Grande's efforts to procure testimony of shippers to help it win its case before the Commission.

After the Examiner's proposed report and recommendations were issued November 20, 1950, U. S. Senator Edwin [fol. 10] C. Johnson of Colorado, then Chairman of the Senate Committee on Interstate and Foreign Commerce which approves or disapproves appointments and reappointments of persons nominated by the President of the United States for positions as Interstate Commerce Commissioners, made radio broadcasts on January 27 and February 2, 1951, over radio station KFEL at Denver, Colorado, in which he praised the Examiner's recommendations as "a great victory for Colorado shippers," denounced the desire of the Union Pacific to retain to its shorter route the traffic originated and terminated on its main line and numerous branch lines in the northwest as "the selfish interests of the Union Pacific" and announced that "I am, and will continue to do all that I can to rid my people of such economic tyranny." Again, on October 28, 1952, immediately following reargument of the case before the Commission on October 15 and 16, 1952, and while the case was under consideration and pending decision by the Commission, Senator Johnson caused or permitted to be published over his signature in the newspaper, Wichita Beacon, Wichita, Kansas, an "editorial" in which he charged Union Pacific with discrimination against shippers located on its own railroad, with maintaining a "transportation monopoly" by refusing to voluntarily deprive itself of revenues from traffic originated and terminated on its own railroad and refusing to join in the Rio Grande's plan to divert the traffic to its line for its financial improvement, asserted that

he had "investigated" the case then pending before the Commission and concluded "that the public interest was on the side of the Rio Grande."

The Commission rejected the Union Pacific's petition to reopen the record and receive copies of the radio broadcasts and "editorial" in evidence.

XI

Hearings upon the complaint were conducted by an Examiner of the Commission at Salt Lake City, Utah, Boise, Idaho, and Cheyenne, Wyoming, after which a proposed report of the Examiner was served upon the parties November 20, 1950, recommending that the Commission grant the [fol. 11] full demands of the Rio Grande's complaint. Exceptions to the proposed report of the Examiner were filed by the Rio Grande with respect to one feature of the proposed report and by the Union Pacific, other railroad defendants, the six state commissions, and other parties supporting the defendants. Oral arguments upon the exceptions were heard by the entire Commission October 11 and 12, 1951, and reargument ordered by the Commission was heard October 15 and 16, 1952.

XII

On January 12, 1953, a majority of the Commission, with certain of the Commissioners dissenting, issued the report and decision attached and made a part hereof as Appendix B hereto in which it announced the following "Conclusions":

> "1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in

carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kan., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the lower peninsula of Michigan and in Oklahoma and Texas.

"2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act.

"4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

Upon the same date the Commission entered its order [fol. 12] mentioned above and attached as Appendix A to this complaint.

XIII

Petitions for reopening, reargument and reconsideration of its decision and order were filed with the Commission by the Union Pacific and several other railroads, by the public service commissions of Nebraska, Wyoming, Idaho, Mon-

tana, Oregon and Washington, and by Union Pacific employees. In those petitions, the Commission was urged to reverse its findings and order and to dismiss the complaint. Petitions for reconsideration were also filed with the Commission by the Rio Grande and a number of shippers and others. On June 22, 1953, the Commission issued and made public its order dated June 10, 1953, denying all the petitions for reconsideration. Copy of that order is attached hereto as Appendix C and made a part hereof.

XIV

Plaintiffs allege that said order of the Commission dated January 12, 1953, is based upon errors of law, is not supported by evidence or adequate findings, exceeds the statutory power of the Commission, and is unlawful, arbitrary, null and void and should be set aside for the following reasons:

1. In rejecting testimony timely offered to prove that the Rio Grande agitated, solicited and procured shippers and others as witnesses to intervene and testify in such manner as to help it win its case and in rejecting transcripts of radio broadcasts over station KFEL at Denver, and an "editorial" by Senator Ed. C. Johnson, published in the Wichita Beacon, the Commission acted arbitrarily, unreasonably and unlawfully.

2. The Commission acted arbitrarily, unreasonably and unlawfully in refusing to accept and consider court decisions and other authorities offered by the Union Pacific in support of the contention that the Rio Grande's solicitation and procurement of shippers to intervene and testify so as to help it win its case, and that the intrusion of and utterances by Senator Johnson vitiated and nullified the proceeding requiring its dismissal by the Commission.

[fol. 13] 3. The Commission acted arbitrarily, erroneously and contrary to law in overruling plaintiffs' motion to dismiss the complaint on the ground that the Rio Grande seeks only to obtain additional revenues to improve its financial position and that the Commission is prohibited by section 15(4) of the Interstate Commerce Act from compelling through routes for that purpose.

4. In holding that, despite the fact that the Rio Grande's

complaint did not and could not raise an issue of undue preference and prejudice among shippers under section 3(1) of the Interstate Commerce Act, such issue nevertheless was tendered for decision because of testimony submitted by shippers, the Commission acted arbitrarily, erroneously and contrary to law.

5. In finding that the combination rates via the Rio Grande are unjust and unreasonable and that joint rates applicable via the Union Pacific and other defendants are reasonable for application via the Rio Grande, the Commission acted arbitrarily, unreasonably and unlawfully in that there was no evidence before it to justify or support such findings.

6. The Commission acted arbitrarily, erroneously and contrary to law in failing to find and hold that the refusal of the Union Pacific and other defendants named in the complaint to equalize shippers in the matter of transit privileges offered by the Rio Grande by joining in lower rates via the Rio Grande does not and cannot violate section 3(1) of the Interstate Commerce Act.

7. The Commission's finding that the combination rates applicable via the Rio Grande on traffic from and to the northwest area or "excluded territory" are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande's routes and unduly preferential of shippers and receivers using the Union Pacific's routes, is arbitrary, capricious, erroneous and contrary to law in that shippers in said northwest area using or desiring to use the Rio Grande's routes are the same shippers who were found by the Commission to be unduly preferred because they have available and make use of Union Pacific routes at lower joint rates.

8. After correctly finding that there are substantial differences and dissimilarities in transportation conditions [fol. 14] over the Union Pacific compared with those over the Rio Grande, the Commission acted arbitrarily, erroneously, contrary to and without support of evidence in finding that those substantial differences and dissimilarities in transportation conditions "become relatively insignificant" and that "transportation conditions are substantially similar" for the longer hauls and greater distances

between points in the northwest area and points in the southern and eastern part of the United States.

9. The finding that through routes and joint rates via the Rio Grande are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" is contrary to the overwhelming preponderance of the evidence, contrary to and inconsistent with facts clearly found and stated in the Commission's report and is based upon an erroneous interpretation of the words "needed in order to provide adequate, and more efficient or more economic, transportation" used in section 15(4) of the Interstate Commerce Act.

10. The finding that, regardless of the fact that there is no allegation or contention by the Rio Grande that through routes and joint rates via its line for the involved traffic are needed to provide adequate and more efficient or more economic transportation, or that routes of the Union Pacific and other railroads are not adequate, testimony of shippers raises "a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities" is arbitrary, erroneous in law and is not supported by evidence.

11. The basic facts found by the Commission are inconsistent with and do not justify or support, but are contrary to its ultimate conclusions and the order based thereon is arbitrary, erroneous and void.

12. The finding that the commodities specified in the order must be moved over as many routes as possible is arbitrary, erroneous and in conflict with and contrary to the provisions of sections 1(4) and 15(4) of the Interstate Commerce Act.

13. The Commission acted arbitrarily, capriciously, erro- [fol. 15] neously, and contrary to the evidence of record in finding that because of the refusal of the Union Pacific and other railroads to join with the Rio Grande in through routes and equal joint rates so that the specified commodities may move over the Rio Grande instead of routes of the Union Pacific and other railroads "the shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation

in the wide-spread system developed for the marketing of such commodities."

14. The finding that for traffic reconsigned or accorded transit privileges at points on the Rio Grande "defendants' routes are inadequate and less economical than are the Rio Grande routes" because higher rates apply via the Rio Grande and "the Union Pacific routes and the joint rates which apply over them are not available" at such points on the Rio Grande, is arbitrary, capricious, erroneous and is based upon a misinterpretation of law.

15. The finding that the situation as to the commodities specified in the order is similar to that in *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I. C. C. 333, is erroneous, contrary to the facts stated in the decision in that case and contrary to the evidence of record in this case.

16. In view of the facts correctly found that there are substantial dissimilar transportation conditions over the Rio Grande compared with those over the Union Pacific, that operating conditions on the Rio Grande are "more onerous" than those on the Union Pacific, that Union Pacific routes are shorter, that the line of the Rio Grande is less favorably situated than that of the Union Pacific and that traffic diverted to the Rio Grande would require at least 24 hours more time in transit and two more terminal yard or interchange services than presently required for movement of traffic over the Union Pacific, the further finding that those substantially different transportation conditions become relatively insignificant when spread over long hauls between the northwest area and the eastern and southern part of the United States, is arbitrary, erroneous, capricious, contrary to law and without any evidence to support or justify it, and is based on an erroneous assumption that [fol. 16] the Commission may lawfully ignore the substantial differences and more onerous transportation conditions of the Rio Grande for longer hauls.

17. The Commission acted arbitrarily, unlawfully and contrary to the evidence in refusing to find and hold that the joint rates via the Union Pacific and other railroads are too low for application via the longer route of the Rio Grande and that such application of the joint rates would

result in wasteful and uneconomic transportation which the Interstate Commerce Act intends to prevent.

18. The findings that the combination rates via the Rio Grande are unreasonable because they are higher than the joint rates applicable via Union Pacific routes and that said joint rates are reasonable for application via the longer routes of the Rio Grande because although depressed and sub-normal the joint rates are the "going rates", and have been in effect for many years, are arbitrary, erroneous, capricious and contrary to law and the evidence of record.

19. The finding that "there is no claim that any of those (joint) rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates" is arbitrary, capricious, erroneous in law and contrary to the evidence.

20. The Commission acted arbitrarily and unlawfully in failing and refusing to give effect to the requirement in section 15(4) of the Interstate Commerce Act that reasonable preference be given the originating carrier.

21. The Commission misconstrued and misapplied section 15(4) of the Interstate Commerce Act and exceeded its power in finding and requiring that the shorter Union Pacific routes may be short hauled because routes not more than 37 per cent longer could be made via the Rio Grande and because the Union Pacific would still retain a substantial haul after being short hauled approximately 1,000 miles. [fol. 17] 22. The Commission acted arbitrarily, erroneously and contrary to the evidence in finding that the additional traffic which will be diverted to the Rio Grande under the order can be interchanged through present terminal facilities at Ogden or Salt Lake City without serious detriment to operating efficiency, and in ignoring evidence portraying obstacles of interchange of traffic between the Union Pacific and the Rio Grande at Denver.

23. The Commission acted arbitrarily, capriciously and erroneously in failing to consider the probable injurious effect that any substantial diversion of traffic and revenues from the Union Pacific to the Rio Grande would have upon the Union Pacific, its employes and its service on cities, towns and communities served by it and in failing to find

that the probable diversion of traffic to the Rio Grande would impair and deteriorate service required by shippers and a large segment of the commerce of the country and the national defense.

24. The finding that maintenance by the Union Pacific of joint rates with the Bamberger Railroad at points between Ogden and Salt Lake City, Utah, while refusing to participate in like rates with the Rio Grande discriminates against the latter in violation of section 3(4) of the Interstate Commerce Act is without support of any evidence.

XV

Plaintiffs will be irreparably injured and damaged if the Commission's said order of January 12, 1953, is not restrained, suspended, enjoined, set aside and annulled. Plaintiffs would have no remedy at law to recover such loss or damage.

Said order of January 12, 1953, was originally made to become effective on April 7, 1953, by publishing and filing tariffs with the Commission on not less than 30 days' notice. [fol. 18] Further orders of the Commission dated February 13, April 15, and June 24, 1953, modified the order of January 12, 1953, so that it will become effective on October 7, 1935, by publishing and filing tariffs on September 7, 1953, unless the effective date thereof is further postponed by the Commission, or unless this Court restrains, enjoins, suspends and prevents said order from becoming effective.

If said order becomes effective and plaintiffs have not complied with its requirements, they and each of them will be subject to a penalty of $5,000.00 provided by Title 49, U. S. Code, Section 16(8) for each day they fail to comply with the order.

XVI

Wherefore, Plaintiffs pray:

1. That process may issue against the United States of America and Interstate Commerce Commission;

2. That this Court, by temporary stay, preliminary or interlocutory injunction, stay, restrain and suspend the operation of the order of the Commission dated January 12,

1953, pending the final hearing and determination of this action;

3. That a Court constituted as required by U. S. Code, Title 28, Sections 2284, and 2321-2325, consisting of three Judges, of whom at least one shall be a Circuit Judge, be convened, and that said Court so constituted and convened shall hear this petition upon due and legal notice to defendants;

4. That said Court, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside and annulling the said order of the Commission;

5. That Plaintiffs have recovery of the defendants of the proper costs of this suit; and

[fol. 19] 6. That the Plaintiffs have such other and further relief in the premises as to equity may appertain and as may be deemed by this Court fit and proper.

Respectfully submitted, Elmer B. Collins, Attorney for Union Pacific Railroad Company, Plaintiff, 1416 Dodge Street, Omaha 2, Nebraska; F. O. Steadry, Attorney for Chicago and North Western Railway Company, and Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiffs, 400 West Madison Street, Chicago 6, Illinois; Conrad Olson, Attorney for Northern Pacific Railway Company, Plaintiff, 5th & Jackson Streets, St. Paul 1, Minnesota; L. E. Torinus, Jr., Attorney for Great Northern Railway Company, Plaintiff, 175 East 4th Street, St. Paul 1, Minnesota; Roland J. Lehman, Attorney for The Atchison, Topeka and Santa Fe Railway Company, Plaintiff, 80 East Jackson Blvd., Chicago 4, Illinois; Carson L. Taylor, Attorney for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Plaintiff, 516 West Jackson Blvd., Chicago 6, Illinois; Eugene S. Davis, Attorney for Wabash Railroad Company, Plaintiff, Railway Exchange Building, St. Louis 1, Missouri.

Of Counsel: W. R. Rouse, 1416 Dodge Street, Omaha 2, Nebraska, for Union Pacific Railroad Company; Nye F. [fol. 20] Morehouse, 400 West Madison Street, Chicago 6,

Illinois, for Chicago and Northwestern Railway Company, and Chicago, St. Paul, Minneapolis & Omaha Railway Company; M. L. Countryman, Jr., 5th & Jackson Streets, St. Paul 1, Minnesota, for Northern Pacific Railway Company; Edwin C. Matthias, 175 East 4th Street, St. Paul 1, Minnesota, for Great Northern Railway Company; J. C. Gibson, 80 East Jackson Blvd., Chicago 4, Illinois, for The Atchison, Topeka and Santa Fe Railway Company; M. L. Bluhm, 516 West Jackson Blvd., Chicago 6, Illinois, for Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Joseph H. Miller, Railway Exchange Building, St. Louis 1, Missouri, for Wabash Railroad Company.

[fol. 21] APPENDIX "A" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 12th Day of January, A. D. 1953

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, et al.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points

are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas [fol. 22] to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company

and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

George W. Laird, Acting Secretary. (Seal.)

APPENDIX B to Complaint

20423

INTERSTATE COMMERCE COMMISSION

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY
v. UNION PACIFIC RAILROAD COMPANY ET AL.

Submitted October 16, 1952. Decided January 12, 1953

1. Through routes and joint rates found necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with complainant, on certain commodities from and to points in the excluded territory in the northwest area as described in the report, to and from points in official, southern, and southwestern territories, including Missouri and a portion of Iowa.
2. Rates on the same commodities from and to the same points over complainant's routes via Ogden or Salt Lake City, found unreasonable and unduly prejudicial to and preferential of shippers and receivers.
3. Maintenance by defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the line of complainant south of Ogden, found to subject complainant to unlawful discrimination.
4. Order entered requiring removal of unlawfulness found to exist and establishment of through routes and joint rates found reasonable.

Robert E. Quirk, *Otis J. Gibson*, and *H. L. Mulliner* for complainant.

Elmer B. Collins, *L. H. Anderson*, *John B. Burchell*, *Robert H. Bierma*, *L. E. Clarahan*, *F. H. Cole, Jr.*, *Eugene S. Davis*, *Lee S. Davis*, *P. H. Draver*, *F. G. Fitzpatrick*, *P. F. Gault*, *R. J. Hagman*, *L. W. Hobbs*, *Roland J. Lehman*, *B. P. Leverich*, *James E. Lyons*, *E. F. McGuire*, *F. J. Melia*, *Conrad Olson*, *W. R. Rouse*, *James S. Souby, Jr.*, *Carson L. Taylor*, and *L. E. Torinus, Jr.*, for defendants.

C. A. Miller for a railroad association; *Chas. B. Bowling*, *Carl R. Bullock*, *Henry A. Cockrum*, and *J. L. Pease* for Secretary of Agriculture; *Ralph C. Horton*, *John H. Winchell*, *Joseph W. Hawley*, *T. S. Wood*, and *Ralph Sargent, Jr.*, for Public Utilities Commission of the State of Colorado; *W. B. Joy*, *H. N. Beamer*, *B. Auger* and *L. F. Purvis* for Public Utilities Commission of Idaho; *Byron M. Gray* for State Corporation Commission of the State of Kansas; *Edwin S. Booth* and *Sidney T. Smith* for Board of Railroad Commissioners of the State of Montana; *Clarence S. Beck*, *Harold A. Palmer*, *Bert L. Overcash*, and *Harry C. King* for State of Nebraska and Nebraska State Railway Commission; *John H. Carkin* and *Thomas W. Dench*

for Public Utilities Commissioner of Oregon; *Smith Troy*, *Phil H. Gallagher*, *Joseph Starin*, and *Bartlett Burns* for Washington Public Service Commission; *Norman B. Gray* and *Jefferson C. Church* for the State Board of Equalization and Public Service Commission of Wyoming; *Hal S. Bennett*, *Donald Hacking*, *W. R. McEntire*, and *Chas. A. Root* for Public Service Commission of Utah; and *George F. Guy* for the city of Cheyenne, Wyo., interveners.

Calvin L. Blaine, *Chas. E. Blaine*, *Maurice H. Greene*, *Alden T. Hill*, *E. K. Kohlwes*, *Lowe P. Siddons*, *Reginald T. Titus*, and *Lee J. Quasey* for other interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the complainants, the defendants, and certain interveners and the issues were twice argued orally. Our conclusions differ in part from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant, sometimes called the Rio Grande, a common carrier by railroad operating in interstate commerce within the States of Colorado, Utah, and New Mexico, requests us to order the Union Pacific Railroad Company, which with its leased lines is referred to as the Union Pacific system or the Union Pacific, and the other defendants to establish and maintain for the future just, reasonable, and nondiscriminatory competitive joint through rates[1] and charges for the transportation of freight in connection with the complainant through Salt Lake City or Ogden, Utah, referred to as the Ogden gateway. More particularly, we are asked to require the defendants to establish such joint rates on freight traffic in connection with the complainant through its Colorado and Utah gateways, (1) between (*a*) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington,[2] and British Columbia, Canada, and (*b*) Colorado common points and points east thereof; and (2) between Utah common points and the northwest territory specified in 1 (*a*).

No evidence was submitted with respect to rates from or to British Columbia, and such rates will not be considered.

Interveners in support of the complaint include the Secretary of Agriculture of the United States, the public utility commissions of the States of Colorado and Utah, the American National Live Stock Asso-

[1] Rates and rate differences named herein are per 100 pounds and are those in effect at the time of the hearing herein.

[2] This area is referred to in this report as the northwest area or territory.

ciation, other livestock and stock-feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce, and certain groups of employees of the complainant.

Interveners in support of the defendants include the State of Nebraska, city of Cheyenne, Wyo., the public utility commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska, and Kansas, various chambers of commerce and other associations, certain employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago and North Western Railway Company, and the Wabash Railroad Company.

In its exceptions to the proposed report, the State Corporation Commission of the State of Kansas took the position that the recommended finding that joint rates should be established over the existing through routes by way of Ogden and the Rio Grande is amply sustained by the evidence with respect to the rates on wheat and livestock but not otherwise, and that the recommended findings as to commodities generally are too broad in scope.

The Public Utility Commission of the State of Idaho intervened but presented no evidence. It filed a brief in which it took the position that the relief sought by the complainant should be denied, except that joint through competitive rates should be required to be established via Ogden and the Rio Grande on livestock and fruits and vegetables.

We granted a petition for leave to intervene filed by the American Short Line Railroad Association. That association appeared in support of the complaint and was represented at the hearing and the oral argument, but offered no evidence. The defendants filed a petition for reconsideration of the order permitting intervention. The request was denied at the hearing, but it is renewed on brief. It appears that 44 of the defendants named in the complaint are members of the association and that 8 defendant members are subsidiaries under common control and management with other defendants. Additional facts were developed at the hearing with respect to the relation of certain members of the association as defendants and indicating that they, as well as some others, opposed the complaint. The association filed a brief from which it appears that it has a current membership of 314 common carriers by railroad and that the association as such and many of its members are interested in the issues presented in the complaint. The intervention sought and granted was by the association as such, and not by or in behalf of the respective members thereof named herein as defendants. The petition of intervention was properly granted, and the petition for reconsideration is denied.

Immediately prior to the oral argument, counsel for the defendants submitted a memorandum of additional authorities and discussion

relating to certain exceptions filed by the Union Pacific to the proposed report of the examiner. The complainant and certain interveners objected to the receipt of the document. Our rules of practice do not permit the submission of such a document so late in the proceeding. Permission to file it was not requested in time to permit opposing parties to examine it and to make reply thereto prior to the oral argument when the proceeding was finally submitted. The objection to its receipt in the proceeding is sustained.

The complainant alleges that the defendant's failure and refusal to join with it in establishing joint rates to and from the territories described on transcontinental and other traffic through the gateways referred to result in violations of sections 1 (4) and 3 of the Interstate Commerce Act, and is contrary to the national transportation policy as declared by the Congress. We are asked to prescribe just and reasonable rates over the Rio Grande routes to remove the alleged unlawfulness.

Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions. The principal ones of importance in this proceeding are those under which the Union Pacific for the most part restricts routing on traffic to and from points in Utah north of Ogden and in Idaho, Montana, Oregon, and Washington over its lines so that it may obtain the long haul from and to the Missouri River. On transcontinental traffic that moves over its lines to and from California, Nevada, and portions of Utah, the Union Pacific participates in through routes and joint rates with other lines, including the Rio Grande. On that traffic interchange is made with the Rio Grande at Salt Lake City and Provo, Utah.

As hereinafter explained, the Rio Grande participates in joint rates on transcontinental traffic with all of its connections at its Utah junctions, except the Union Pacific, from and to the western portions of the northwest area. Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect,

close the Ogden gateway in a commercial sense. We are asked to exercise our authority under section 15 (3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest.

The power to establish through routes and joint rates is limited by the provisions of section 15 (4), which declares that, except as provided in section 3 of the act, and except where one of the carriers is a water line, we may not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (*a*) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (*b*) unless we find that the through route proposed is needed in order to provide "adequate, and more efficient or more economic, transportation." The foregoing provisions are subject to the further proviso that in prescribing through routes, we shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (*a*) and (*b*), give reasonable preference to the carrier by railroad which originates the traffic. The section further provides that no through route and joint rates applicable thereto shall be established by us for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15 (4) are not applicable and need not be considered. It further contends that the principal task here is to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such through routes are unjust, unreasonable, or discriminatory, in violation of sections 1 and 3 of the act, and contrary to the national transportation policy. The complainant argues that there is public need for joint rates via the Ogden gateway equal to the joint rates now maintained by the defendants over the competitive routes, and that the public interest as well as the national transporation policy will be served by the establishment of such rates.

THROUGH ROUTES

The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute "through routes" as that term is used in section 15 (3) and (4) of the

act. As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.

In *Thompson* v. *United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the content of the term "through route" as used in the act, upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr.* v. *Missouri Pac. R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15 (1) of the act. The Court held:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. * * * Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route.

The Court cited with approval *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, wherein the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, "that one shipment was not representative of the carriers' course of business." It thus becomes necessary to determine whether the carriers in this proceeding "hold themselves out as offering through transportation service" from and to the points here concerned via the Ogden gateway as indicated by their "course of business" in respect of traffic over the routes in question.

The evidence shows that 37 carload shipments were made in 1948, which may be accepted as a representative year, on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment, paper bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

West-bound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destination so as to avoid paying the applicable combination rates on Ogden.

In that same year, 21 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint

through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly used routes to the routes here sought to be opened commercially. For example, in February 1949, when the main line of the Union Pacific in Wyoming was blocked by snowstorms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute "through routes" within the meaning of that term as used in the act.

So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads east-bound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the

same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, *supra*, cited with approval by the Supreme Court in *Thompson* v. *United States*, *supra*. Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15 (3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15 (4) made in 1940 (see *D. A. Stickell & Sons, Inc.*, v. *Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson* v. *United States*, *supra*.

We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic[a] here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15 (3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together.

Before proceeding to a discussion of the evidence relating to the foregoing issues, we shall give consideration to a procedural contention and a motion made by the defendants. The contention is that an allegation of undue prejudice and preference under section 3 (1) of the act is not properly before us. As stated, the complaint embodies an allegation, among other things, of violation of section 3, without specifying any particular paragraph or paragraphs of that section. We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3 (1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con, was received on this issue and we think it has been fairly tendered here for decision.

[a] Except on east-bound shipments of sheep or goats, to which reference is made later in this report.

The motion is that the complaint be dismissed on the ground that the request of the complainant for joint rates over the Rio Grande via the Ogden gateway is for the purpose of assisting that carrier to meet its financial needs. As stated, section 15, (4) of the act forbids us to require the establishment of any through route and joint rate applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs. Consistently throughout the proceeding, the complainant disclaimed any intent to prosecute the complaint with the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion is overruled.

PROPONENTS' TESTIMONY

Joint rates now apply via the Ogden gateway over the Rio Grande on traffic from and to Colorado common points and points east thereof to and from California and certain Pacific coast points in connection with the Union Pacific, the Southern Pacific Company, The Western Pacific Railroad Company, and The Great Northern Railway Company, as more particularly described later.

The Union Pacific with its leased lines has operated since January 1936 as a single system. It consists of the Union Pacific Railroad Company operating from Omaha, Nebr., and Kansas City, Mo., to Ogden via Julesburg, Colo., Cheyenne and Granger, Wyo., and via Limon and Denver, Colo., and Cheyenne; the Oregon Short Line Railroad Company operating in Utah north of Ogden, and in Wyoming, Idaho, Oregon, Montana, and Nevada, extending from Salt Lake City to Butte, Mont., and Huntington, Oreg.; the Oregon-Washington Railroad and Navigation Company operating in Idaho, Oregon, and Washington north and west of Huntington to Spokane, Wash., Portland, Oreg., and Seattle, Wash.; the Los Angeles & Salt Lake Railroad Company from Salt Lake City to Los Angeles, Calif.; and the St. Joseph & Grand Island Railroad Company in Kansas, Nebraska, and Missouri from St. Joseph, Mo., and Grand Island, Nebr. Lease of the properties of the foregoing roads, which had been operated with the Union Pacific under common control and management, was considered and approved in *Union Pac. R. Co. Unification*, 189 I. C. C. 357 (1933) and 207 I. C. C. 543 (1935).

The railroad now operated by the complainant was originally the Denver, Rio Grande Railway organized in 1870 as a narrow-gage line. After passing through various hands and receiverships, the Denver and Rio Grande Railroad Company was organized in 1886 to operate the property. When the main line was converted to standard gage

in 1890, the railroad was opened for through traffic between Denver and Ogden by way of Pueblo, Rio Grande, and Tennessee Pass, Colo. Prior to that date, the Rio Grande could participate in transcontinental traffic only by transferring the lading to its narrow-gage cars. In 1901, it acquired the Rio Grande Western Railroad Company operating between Grand Junction, Colo., and Ogden via Provo and Salt Lake City.

Although opened for through business, the line was handicapped by the fact, among others, that traffic originated at or destined to its Colorado gateways or east thereof could not be interchanged at joint through rates at Ogden or Salt Lake City with its connections, the Oregon Short Line, to or from points on that line in Utah north of Ogden and through southern Idaho to Butte and Huntington. Also, traffic from and to Oregon over the Southern Pacific, to or from Colorado common points and east, could not be transported over the Rio Grande at joint rates equal to those over competitive routes. In 1897, however, the Union Pacific and its controlled lines, the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company operating north and west of Huntington, were in separate receiverships. In that year the two lines last named established joint through rates to and from points in the northwest area with the Rio Grande via Ogden and thus opened that gateway at rates equal to the rates then in effect over the Wyoming line of the Union Pacific through Cheyenne and Granger. Those rates applied on traffic between the Pacific coast terminals, including Portland, Tacoma, and Seattle, and Missouri and Mississippi River points and numerous points east thereof.

In the same year, the Oregon-Washington Railroad and Navigation Company established joint through rates between its Oregon and Washington stations and points on, or reached by, the lines of the Great Northern and Northern Pacific Railway Company through Spokane and Wallula, Wash. Joint rates through those junctions from and to Union Pacific stations have been continued in effect.

Ogden remained as an open gateway through which joint rates over the Rio Grande applied until 1906, when such rates were canceled by the Union Pacific from and to Colorado common points and east, to and from points in Montana, Idaho, and Oregon on the Oregon Short Line and its connections. In 1912, transcontinental freight rates to and from points on the Oregon-Washington Railroad and Navigation Company (resulting from reorganizations in the interval) over the Rio Grande and its Utah junctions were also canceled. During this period the Southern Pacific was controlled by the Union Pacific and that circumstance greatly influenced the routing of freight and passenger traffic over the Union Pacific to and from

Oregon and California. As a result of competitive stresses, as well as for other reasons, the Rio Grande financed the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast. The Western Pacific was opened in July 1911 and participates in through routes and joint rates on transcontinental traffic via Salt Lake City with the Rio Grande and the Union Pacific, its two connections at that point. In 1912, the Union P cific was required to divest itself of control of the Southern Pacific. *United States* v. *Union Pac. R. Co.*, 226 U. S. 61.

Through passenger fares also were in effect over the lines of the Union Pacific and the Rio Grande via the latter's Colorado and Utah junctions from 1897 to 1915, when they were canceled by the Union Pacific. *Ogden Gateway Case*, 35 I. C. C. 131.

In 1915, the Western Pacific and, in 1918, the Rio Grande, went into receivership. After various changes, the latter was reorganized on April 11, 1947, as The Denver and Rio Grande Western Railroad Company. *Denver & R. G. W. R. Co. Reorganization*, 267 I. C. C. 862. As a part of its reorganization on that date, the Rio Grande merged with the Denver and Salt Lake Railway Company, and thereby acquired the Moffat tunnel line of that carrier. By that line and the Dotsero cut-off, completed in 1934, from Orestod, Colo., on the Denver & Salt Lake to Dotsero, Colo., on its own line, the Rio Grande obtained a route from Denver to Ogden 175 miles shorter than its route through Pueblo.

The Rio Grande now operates between Denver and Ogden over the two routes. By way of the Moffat tunnel the distance is 607 miles, and the other route through Pueblo is 782 miles. These two are the main lines and constitute 951 miles, or 51 percent, of the Rio Grande standard-gage tracks. In addition, there are 1,452 miles of branch lines, of which 527 miles are narrow gage serving western Colorado and northwestern New Mexico in areas of small population and light traffic. In all, it operates about 2,400 miles of road.

Eastern connections of the Rio Grande are in Colorado at Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad. At Denver, it connects and interchanges traffic with the Union Pacific, the Chicago, Burlington & Quincy Railroad Company, called the Burlington, the Chicago, Rock Island and Pacific Railroad Company, called the Rock Island, The Atchison, Topeka and Santa Fe Railway Company, called the Santa Fe, and The Colorado and Southern Railway Company, of the Burlington system. At Colorado Springs, 75 miles south of Denver, it interchanges with the Rock Island and the Santa Fe. At Pueblo, 119 miles south of Denver, it interchanges with the Missouri Pacific Railroad Company (Guy A. Thompson, trustee), the Santa Fe, and the Colorado & Southern. At Walsenburg, 51

miles farther south, it interchanges with the Colorado & Southern. At Trinidad, a short distance from the Colorado-New Mexico State line and 92 miles south of Pueblo, it interchanges with the Colorado & Southern and the Santa Fe.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City, and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City, 37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line.

Since 1890, when its standard-gage line was completed between Denver and Ogden via Pueblo, the Rio Grande, through its eastern and western connections, has been a part of several transcontinental routes. It now participates in through routes and joint rates on equal terms with other carriers on transcontinental traffic between (1) points in an area generally described as west of a line beginning at Vancouver, British Columbia, thence south, just east of Seattle and Portland, and southeasterly to a point west of Ogden and Salt Lake City, crossing the line of the Union Pacific at Lynndyl, Utah, 118 miles west of Salt Lake City, and thence southwesterly, east of the Union Pacific's Los Angeles line, to a point south of San Diego, Calif., and (2) all points in the United States east of a line beginning at the Canadian border and extending southward along the Montana-North Dakota State line and the western border of South Dakota, thence southwesterly through the extreme southeastern portion of Wyoming, west of Cheyenne, and the eastern part of Colorado just west of Denver, Pueblo, and Trinidad, thence southwest and south through the central or western part of New Mexico to a point just west of El Paso. However, joint rates generally do not apply in connection with the Rio Grande on transcontinental traffic originating at or destined to points in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington east of the line first described. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande such traffic would move at higher combinations of rates to and from Ogden or Salt Lake City.

The area in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington, to and from which joint rates generally do not apply in connection with the Union Pacific and the Rio Grande, will be referred to as the excluded territory. Transcontinental traffic to or from such territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than over the Rio Grande route, because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande route. The Rio Grande desires to participate as a bridge line on such traffic via

its Colorado gateways and Ogden at the joint through rates. This also would include traffic to or from points in the excluded territory on lines which join with the Union Pacific in joint rates.

Representative origins, destinations, commodities, rates, distances, average loadings per car, and revenues per car-mile are shown in an appendix to this report, for east-bound and west-bound movements, compiled from exhibits of record. The distances shown are those over existing routes over the Union Pacific and its connections by which joint through rates apply, and over the Rio Grande and its connections over which combination rates apply. Revenues per car-mile are computed for such rates and distances and, in addition, for the distances over the Rio Grande at joint rates on the same basis as those over the Union Pacific routes, as sought herein.

Traffic between the excluded territory and Colorado common-point territory (points in eastern Colorado from Denver south to Trinidad and west to Canon City) generally must move over the Union Pacific through Denver to get the lowest rate. Similarly, traffic between the excluded territory and Utah common-point territory (points in Utah from Ogden south to Provo and Payson) generally must move over the Union Pacific to get the lowest rate. There are some exceptions, however, with respect to rates between Utah common points on the Rio Grande and the northwest area on livestock, lumber, grain, and other commodities.

An analysis of distances from and to 5 representative points[4] on the Union Pacific in Utah north of Ogden, and in Idaho and Washington, to 14 destinations, Denver and east, over restricted routes of the Union Pacific for distances, computed over the short routes, ranging from 649 miles to Denver to 3,279 to Boston, Mass., shows that routes via Ogden and the Rio Grande to the same points are longer by from 1 percent (from Spokane to New Orleans, La.) to 16 percent (from Idaho Falls to Kansas City). To the same destinations from nine other representative points[5] on the Union Pacific, from which through routes and joint rates are available in connection with the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, referred to as the Milwaukee, the Great Northern, the Northern Pacific, or the Southern Pacific, the routes via Ogden and the Rio Grande would be longer than the short workable and service routes by from 1 percent (from Seattle to Fort Worth, Tex., and Oklahoma City, Okla.) to 37.5 percent (from Yakima to Minneapolis, Minn.). To Minneapolis from seven of the nine origin points, the routes via the Great Northern form the short workable and service routes.

[4] Logan, Utah; Boise, Idaho Falls, and Twin Falls, Idaho; and Spokane, Wash.

[5] Hood River, Milton, Pendleton, Portland, Elgin, and Redmond, Oreg., and Yakima, Kent, and Seattle, Wash.

The Ogden-gateway routes of the Union Pacific consist of two lines. The Los Angeles line runs southwesterly through Salt Lake City, Provo, and Delta, Utah, Caliente and Las Vegas, Nev., and Barstow, Calif., to Los Angeles. Through routes with joint rates are maintained over that route in connection with the Rio Grande, as hereinbefore described. The other line of the Union Pacific runs north from Ogden, 111 miles to McCammon in southeastern Idaho. At that point it meets the Wyoming line of the Union Pacific leading west 486 miles from Granger, the junction point with the main line through Cheyenne to Ogden from the east. From McCammon the line extends north to Pocatello, Idaho, 22 miles, and from that point the main line runs in a northwesterly direction across Idaho into Oregon and Washington. From Pocatello another line extends northerly to Butte. From Cheyenne, the main line extends east across Nebraska to Omaha, 507 miles, and south to Denver, 109 miles. From Ogden through Granger to Cheyenne the distance is 488 miles.

All shipments to or from points in Idaho, Montana, Oregon, and Washington north or west of McCammon over present Union Pacific routes, or over routes through Ogden and the Rio Grande, must pass through McCammon. That point therefore, is used as the point of divergence in computing distances over the Union Pacific routes and the routes over the Rio Grande by way of Ogden. A shipment from McCammon over the Union Pacific to Cheyenne would move 529 miles; and to the Denver gateway, also over the Union Pacific, 623 miles. But over the Union Pacific to Ogden, thence the Rio Grande to the Denver gateway, the shipment would move 718 miles, or 198 miles farther than over the Union Pacific route to Cheyenne and 95 miles farther than over its route to Denver. On shipments carried through to the Missouri River and points east, the Union Pacific route through Cheyenne also has the advantage in distance.

From Cheyenne to Kansas City a shipment would move 624 miles, as compared with 636 miles for a movement off the Rio Grande from Denver to Kansas City over the Rock Island, its short-line connection. A through shipment, therefore, from McCammon to Kansas City over the direct line of the Union Pacific through Granger and Cheyenne would move 1,153 miles, as compared with 1,352 miles, 199 miles longer, via Ogden and the Rio Grande to Denver, thence the Rock Island. The latter route on such a shipment would be 17.2 percent circuitous. To points east of Kansas City the maximum excess mileage from McCammon over the Rio Grande route is on a haul to Pittsburgh, Pa. Over the Union Pacific to Omaha, thence the Chicago & North Western to Chicago, Ill., and The Pennsylvania Railroad Company beyond, the haul would be 1,991 miles, and over the Union Pacific to Ogden, the Rio Grande to Denver, the Burlington to Chi-

cago, thence the Pennsylvania, the haul would be 2,203 miles, 212 miles longer, or a circuity of 10.7 percent.

In the following table are shown representative destinations and the distances from McCammon over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming. Joint through rates apply over the latter routes. Over routes that include the Rio Grande higher combination rates apply. The table does not contain complete routing, except over the Union Pacific direct to Omaha and Kansas City. The last column of the table shows the percentages by which the Rio Grande routes are longer, or the circuity, from the point of divergence, McCammon, to the points shown.

From McCammon, Idaho to—	Via Union Pacific	Distance	Via Rio Grande	Distance	Difference	Circuity via Rio Grande
		Miles		*Miles*	*Miles*	*Percent*
Omaha, Nebr	(1)	1,036	(2)	1,255	219	21.1
Kansas City, Mo	(3)	1,153	(2)	1,352	199	17.2
Minneapolis, Minn	(3)	1,396	(2)	1,593	197	14.1
St. Louis, Mo	(3)	1,428	(2)	1,627	199	13.9
Chicago, Ill	(1)	1,524	(2)	1,735	211	13.8
Pittsburgh, Pa	(1)	1,991	(2)	2,203	212	10.7
Charleston, W. Va	(3)	2,018	(2)	2,218	200	10.0
Columbia, S. C	(3)	2,274	(2)	2,473	199	8.8
Baltimore, Md	(1)	2,319	(2)	2,521	202	8.7
Norfolk, Va	(3)	2,438	(2)	2,637	199	8.2
New York, N. Y	(1)	2,477	(2)	2,674	197	8.0
Tulsa, Okla	(4)	1,377	(5)	1,427	50	3.6
Dallas, Tex	(6)	1,456	(5)	1,489	33	2.3
Fort Smith, Ark	(4)	1,458	(5)	1,538	80	5.5
Memphis, Tenn	(3)	1,593	(5)	1,786	193	12.1
New Orleans, La	(3)	1,970	(5)	2,003	33	1.7
Atlanta, Ga	(3)	2,044	(5)	2,204	160	7.8
Savannah, Ga	(3)	2,327	(5)	2,486	159	6.8

[1] Union Pacific through Wyoming to Omaha.
[2] Union Pacific to Ogden, Rio Grande to Denver.
[3] Union Pacific through Wyoming to Kansas City.
[4] Union Pacific to Pacific Junction, Kans.
[5] Union Pacific to Ogden, Rio Grande to Pueblo.
[6] Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

The differences in the distances to destinations in the Southwest over routes including the Rio Grande from points in the excluded territory, as compared with the Union Pacific routes through Wyoming, are much less than they are to Missouri River crossings and points east and southeast. About 90 percent of the traffic upon which joint through rates are sought via Ogden and the Rio Grande moves to the latter areas, and about 10 percent to the Southwest.

Over its routes through Wyoming, the Union Pacific gets its long haul from McCammon to Omaha, 1,036 miles, and to Kansas City, 1,153 miles. If joint rates were prescribed over the Union Pacific to Ogden and the Rio Grande to Denver, the Union Pacific's haul from McCammon to Ogden on traffic to Omaha or Kansas City and beyond would be 111 miles. However, if such traffic were routed beyond Denver over the Union Pacific, the latter would get a further

haul of 560 miles to Omaha via Julesburg, or 640 miles to Kansas City via Salina, Kans., a total haul from McCammon of 671 miles to Omaha or 751 miles to Kansas City. Joint through rates are in effect over that route on sheep from Union Pacific origins in southern Idaho and eastern Oregon, but are 19 cents higher to the Missouri River and east (20 cents to Chicago) than rates over more direct routes of the Union Pacific. That railroad would establish a similar basis on cattle if requested. Over the route in connection with the Rio Grande, it would lose its haul of 529 miles from McCammon to Cheyenne, or 623 miles to Denver. On traffic routed via Ogden, the Rio Grande, and Pueblo to destinations east thereof, the Union Pacific would not be in a position to get any additional haul.

All of the foregoing distances, as stated, are computed from McCammon as the point of divergence. The great bulk of the traffic, however, from the excluded territory in Idaho, Montana, Oregon, and Washington originates or terminates on the Union Pacific or its connections west and north of that junction. On such traffic the Union Pacific would have a substantial haul in addition to that of 111 miles from McCammon to Ogden.

The hauls to Ogden would be, for example, from Lewiston, Idaho, 847 miles; from Centralia, Wash., 937 miles; and from Seattle, 1,029 miles. Over the Union Pacific direct from those respective origins to Omaha, the hauls would be 1,772, 1,862, and 1,954 miles. Those figures show the extent to which the Union Pacific would lose its long haul, the loss in mileage being 925 miles in each instance.

From and to points in the excluded territory in Oregon and Washington, and on the Burke and Headquarters branches of the Union Pacific in northern Idaho, the Union Pacific and certain other defendants have arrangements for the interchange of traffic in various commodities at junctions or gateways in Oregon, Washington, and Idaho, under joint rates. On traffic through such gateways moving under the joint rates, the Union Pacific in many instances foregoes its long haul. The gateways through which the rates are in effect, with certain limitations upon their application specified in the tariffs, are: Portland, in connection with the Southern Pacific; Marengo, Wash., and Plummer, Idaho, in connection with the Milwaukee; Spokane, in connection with the Great Northern; Wallula, Wash., and Spokane, in connection with the Northern Pacific; and Spokane, in connection with the Spokane International Railroad Company connecting with the Canadian Pacific Railway Company at Eastport, Idaho, at the Canadian border.

Illustrative of the hauls over the Union Pacific on traffic routed through these gateways are the following: From Lewiston, 132 miles via Marengo or 193 miles via Spokane; from Centralia, 393 miles

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on a route through Marengo; from Seattle, 184 miles through Portland; and from Pendleton, Oreg., 165 miles via Marengo, 227 miles via Spokane, or 70 miles via Wallula, Wash., on traffic routed over its connections at such points. If joint rates were established from the same origin points to Omaha and beyond via Ogden and the Rio Grande, the hauls of the Union Pacific to Ogden would be substantially greater than many of its hauls via other junctions with its connections, as illustrated.

For example, from Pendleton, a representative point, on traffic to Chicago the Union Pacific has a haul of 1,560 miles on its route through Omaha, but only 70 miles over an established through route via Wallula and the Northern Pacific and connections. The rates are the same over both routes. Over a route via Ogden and the Rio Grande to Denver, thence the Burlington, the distance is 2,257 miles, or 6.4 percent longer than the route via Wallula and 10.4 percent longer than the Union Pacific route through Omaha. The Union Pacific's haul over the Rio Grande route would be 633 miles. From Pendleton to St. Louis, the Rio Grande route sought would be shorter by 168 miles than a through route now available via Spokane and the Spokane International and its connections, and would be 201 miles, or 10.3 percent, longer than the Union Pacific route through Kansas City. To Oklahoma City, Okla., the haul of the Union Pacific would be increased from 227 miles, over the present route via Wallula and the Northern Pacific and connections, to 633 miles via Ogden and the Rio Grande to Pueblo and the Santa Fe beyond. The distance over the latter route is 1,910 miles, or only 34 miles, 1.3 percent, longer than the route which gives the Union Pacific its long haul, and 692 miles, or 36.2 percent, shorter than the foregoing route through Wallula.

The foregoing are illustrative of numerous established through routes in which the Union Pacific participates from points in the excluded territory which short haul that carrier. Many of such routes are longer than those here sought via Ogden and the Rio Grande, and this is true to all sections of the country east of the Rocky Mountains, except western trunk-line territory. To the latter territory the short-hauling routes are generally shorter than the routes by which the Union Pacific retains its long haul, and considerably shorter, for example, by 37.5 percent from Yakima to Minneapolis, than the routes sought via Ogden and the Rio Grande. As indicated, the portion of the excluded territory from and to which this short hauling of the Union Pacific occurs does not include points in Utah nor points in Idaho, except on the Burke and Headquarters branches of the Union Pacific in the northern portion of that State.

These short-hauling routes have been in effect for many years. Most of them were established prior to the dates when the Union

Pacific assumed control of the portions of its line west of Huntington and south of Salt Lake City. Joint rates with the Southern Pacific through Portland have been in effect since about 1910, with the Milwaukee through Marengo and Plummer since about 1902, with the Great Northern through Spokane since about 1894, with the Northern Pacific through Wallula since about 1883, and with the Spokane International through Spokane since about 1907.

On some of the traffic interchanged at these gateways the Union Pacific obtains a short haul, as compared with its connections, and on other traffic a long haul. East-bound traffic through the specified Washington and Idaho gateways consists of apples, pears, lumber and other forest products, some steel products, and miscellaneous commodities. A large portion of the traffic, particularly lumber, moves to North and South Dakota, Minnesota, and Wisconsin over the northern routes. Traffic over such routes moves also to Midwestern States and to States east of the Mississippi River. West-bound traffic through the same gateways consists of manufactured products and miscellaneous commodities from the Middle West and from eastern and southern territories.

These interchange arrangements are warranted and in the public interest, according to the defendants, because each carrier shares in long hauls on some traffic as well as short hauls on other traffic, and because the arrangements make it possible for the carriers to handle traffic over shorter routes in many instances. This latter statement, however, applies only, except to an insignificant extent, to such routes to and from points in western trunk-line territory.

As indicated, through routes and joint rates apply in connection with the Rio Grande through Provo on traffic to or from points on the Los Angeles line of the Union Pacific. Such routes generally are shorter than routes over the Union Pacific direct to or from Omaha, Kansas City, or Denver. The following is illustrative:

From Los Angeles, Calif., to—	Via Union Pacific	Distance	Via Rio Grande	Distance
		Miles		*Miles*
Omaha, Nebr.	(1)	1,808	(2)	1,813
Minneapolis, Minn.	(1)	2,168	(2)	2,152
Kansas City, Mo.	(3)	1,925	(3)	1,911
St. Louis, Mo.	(3)	2,200	(3)	2,185
Denver, Colo.	(4)	1,395	(2)	1,276
Chicago, Ill.	(1)	2,296	(2)	2,293
Atlanta, Ga.	(3)	2,816	(5)	2,762
Little Rock, Ark.	(3)	2,430	(3)	2,272
Dallas, Tex.	(5)	2,226	(5)	2,045

[1] Union Pacific to Omaha.
[2] Union Pacific to Provo and Rio Grande to Denver.
[3] Union Pacific to Kansas City.
[4] Union Pacific to Denver.
[5] Union Pacific to Provo and Rio Grande to Pueblo.

Other defendants also participate in through routes with joint rates on traffic moving to or from points on the Union Pacific in the excluded territory from and to eastern points and voluntarily forego their long hauls. For example, the Burlington, the Rock Island, the Santa Fe, and the Missouri Pacific participate in joint rates with the Union Pacific through Kansas City and Omaha. The railroads named could haul the traffic for longer distances over their own rails to Pueblo, Denver, or Cheyenne, instead of permitting shippers to route through Kansas City and Omaha in connection with the Union Pacific.

The total amount of traffic moving between the four Northwestern States and points east of the Colorado common points is substantial. According to figures computed by the Union Pacific, transcontinental carload traffic from the East in the year 1948 over the Union Pacific through Wyoming to those Northwestern States totaled 55,631 cars. of these, (1) 81.7 percent originated in eastern Colorado, Kansas, Missouri, Kentucky, Virginia and all States north thereof, (2) 10.8 percent in Texas, Oklahoma, Arkansas, and Louisiana, and (3) 7.5 percent in Tennessee, Mississippi, Alabama, Georgia, Florida, North Carolina, and South Carolina. About 62 percent of the total consisted of manufactures and miscellaneous traffic, most of which originated in group (1). East-bound traffic from the four States to the same three groups in the same year totaled 116,278 carloads, of which 84.1 percent went to group (1), 10.5 percent to group (2), and 5.4 percent to group (3). About 75 percent of that total consisted of agricultural and forest products.

Of the total carloads, 171,909 in both directions, 121,909 originated or terminated in the excluded territory and the remainder, 50,000, originated or terminated at points in Oregon and Washington west of that territory. The Rio Grande is in a position to solicit movements of the latter traffic over its line at competitive joint through rates in connection with longer routes over the Southern Pacific from Portland to Odgen or over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City. These joint rates are the same as the rates which apply over the direct routes of the Union Pacific from origins on that road in the same area west of the excluded territory. For example, from Seattle to Denver the distance is 1,538 miles over the Union Pacific direct and 1,894 miles over the Union Pacific to Portland, the Southern Pacific to Odgen, and the Rio Grande beyond. In addition to the joint rates sought via the Ogden gateway from the excluded territory, the complainant is also seeking joint rates from the northwest area west of the excluded territory, the same as those in effect over the Union Pacific, Southern Pacific, and Great Northern-Western Pacific routes, for application in connection with the Union Pacific via the Ogden gateway.

A substantial volume of traffic is handled by the Rio Grande in connection with the described routes over which it participates in competitive joint through rates to and from Oregon, Washington, and British Columbia. For example, in 1948 the Rio Grande handled 30,486 carloads in connection with the Southern Pacific and 7,152 carloads in connection with the Western Pacific-Great Northern. In 1947, the volume was 22,722 and 8,909 carloads over the respective routes. Most of this consisted of lumber from Southern Pacific origins south of Portland.[6]

The complainant's estimate of the traffic in carloads that would be potentially available to and from the excluded territory for solicitation by the Rio Grande, in the event competitive joint rates were established over its line via Ogden, from Idaho, Montana, Oregon, and Washington is about 29 percent greater than the volume of traffic, according to the Union Pacific, that moved in 1948 over its Wyoming lines. The estimate was based upon the total carload traffic originated and terminated by the Union Pacific in the years 1944 to 1948, inclusive. It included commodities within the description of products of agriculture, animals and animal products, products of mines, products of forests, and manufactures and miscellaneous commodities. The total carloads estimated as originated by the Union Pacific annually in the area specified was 101,476 and the number terminated 56,286, a total "potential" of 157,762 carloads.

This estimate did not include any shipments that might originate or terminate off the line of the Union Pacific and mover over that carrier as part of a longer haul. Although stated to be a conservative estimate of potential traffic, it was computed from a substantial number of reliable sources, and represents the complainant's best analysis of the traffic considered available for solicitation. No attempt was made to estimate the amount of traffic that the Rio Grande might actually obtain from these potential sources other than a statement that there was no probability that it would get more than 10 percent and that the amount probably would be less than 10 percent because of the vigorous competition of the Union Pacific. This figure of 10 percent as a maximum was derived from the experience of the Rio Grande in obtaining other transcontinental traffic now moving at joint rates in competition with the Santa Fe, Southern Pacific, Union Pacific, Great Northern, Northern Pacific, and Milwaukee. If the Ogden gateway were opened to traffic to and from the four States named, there would be active

[6] Prior to February 1, 1949, joint rates applied over the Bieber route in connection with the Rio Grande to competitive territory in Colorado and east thereof on lumber from certain origins in Oregon and Washington on the Oregon Trunk Railway and the Spokane, Portland and Seattle Railway Company (subsidiaries of the Great Northern and Northern Pacific). Those rates were canceled on February 1, 1949, in connection with the Rio Grande; there is no indication that the cancellation was protested.

competition with the Union Pacific, the Wabash, the Chicago & North Western, and the Missouri River connections that favor Union Pacific routing. At the present time the Rio Grande gets less than 5 percent of the traffic to and from California over the available through routes, with joint rates in connection with its line, because of competition with other routes.

A transportation specialist of the United States Department of Agriulture testified that the Rio Grande would be doing well if it obtained 1,000 cars additional annually from this traffic, an amount that is less than 1 percent of the estimated potential total traffic.

Whatever the amount, it would be the result mainly of (*a*) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (*b*) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it.

Since 1934, when the Dotsero cut-off was constructed, affording a shorter route by the Rio Grande between Denver and the Utah gateways, there has been a marked increase in the traffic carried over that railroad. For the 2 years prior thereto, the total tons carried were less than 6,000,000 although the tons carried exceeded that figure in each year before that, back to 1924. Beginning in 1934, the traffic gradually increased and reached a maximum of 18,517,000 tons in the war year of 1944. In 1945 it dropped to 14,213,000 tons, but increased in 1947 to 18,331,000 tons and in 1948 to 18,473,000 tons. This tonnage has shown a considerable increase percentagewise in traffic received from connecting lines and a decrease in traffic originated. In 1924, 23.2 percent was received from connections and 76.8 percent originated. In 1934, the respective percentages were 39.3 and 60.7. In 1947, they were 49.8 and 50.2, and in 1948 they were 52.3 and 47.7 percent. This traffic in 1948 did not differ markedly from the traffic handled in the four war years 1942–45, when the percentages of traffic received from connections ranged from 52.6 percent in 1942 to 58.2 percent in 1945.

Of the traffic received from connections in the 15-year period 1934 to 1948, inclusive, the percentage terminated on the line of the Rio Grande has ranged from 16.4 percent in 1941 to 20.7 percent in

1948. In the war years the percentages were 16.7 to 19.9 percent. In the same 15-year period, of the traffic received from connections, the amount delivered to connections, that is, bridge traffic, ranged from 20.7 percent in 1935 to 39.6 percent in the war year of 1945. Excluding the war years, the percentage of traffic received from connections that was delivered to connections was 30.1 percent in 1947 and 31.6 percent in 1948. In 1934, the corresponding percentage was 21.7 percent and in 1924 it was 9 percent. These percentages show the increasing importance of the Rio Grande as a bridge line. In tons of freight carried in 1947, such traffic accounted for 5,519,239 tons out of a total of 18,331,176 tons, and in 1948 accounted for 5,846,793 tons of a total of 18,473,356 tons carried. In revenue, the Rio Grande received in 1947 from its bridge traffic $22,894,412, which was 43.3 percent of its total revenue of $52,883,339; and in 1948, $27,654,086 or 44.2 percent of its total revenue of $62,505,951.

Although the percentage relation of the traffic originated on the Rio Grande to the total traffic of that carrier has decreased, such traffic both in tonnage and revenue has increased in the same 15-year period. In 1934, the tons originated were 3,826,049 and the revenue received therefrom was $8,311,254; in 1947, the tons originated were 9,202,867 and the revenue therefrom $20,190,318; and in 1948, the corresponding figures were 8,804,334 tons and $22,018,519. The 1947 and 1948 figures exceeded those of the war years. The volume of strictly local traffic; that is, traffic both originated and terminated on the line, also increased; this traffic in 1934, for example, accounted for 2,048,544 tons and $4,351,807 in revenue, and in 1948, for 3,307,374 tons and $7,630,587. Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

The reasons given for the decline or lack of proportionate growth in traffic originated are (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many sawmills; and (4) loss of local traffic to other forms of transportation.

The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from connecting lines and terminated. Such traffic affords a measure of the increasing importance of the Rio Grande to the shippers and receivers of freight in the localities and areas in the States of Colorado and Utah served by it. Although percentagewise, bridge traffic in relation to the total was greater in 1948 than in 1934,

and increased by over 326 percent in the 15-year period, traffic originated or terminated also increased by substantial amounts, or over 155 percent. In terms of revenue, however, less was received from bridge traffic than from the other traffic. In 1934, for example, the Rio Grande received from bridge traffic $5,648,891, and in 1948 it received $27,654,086; from the other traffic, it received $11,519,335 in 1934 and $34,851,865 in 1948.

The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled "20 Questions" as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representatives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimulated in any questionable manner.

Transit.—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. West-bound traffic to that territory is made up for the most part of manufactures and partially manufactured articles, some of

which are stopped for storage, partial unloading at a number of points, and fabrication in transit.

On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the stoppage-in-transit arrangements offered by that railroad at such Rio Grande points. Pueblo has a population of about 75,000; Colorado Springs, 50,000; Grand Junction, 17,500; and Price, 5,000. All of these are distributing points for surrounding areas. A shipper at Chicago, for example, may have a carload containing shipments for consignees at Pueblo and Boise, Idaho. If the car is partially unloaded at Pueblo, it cannot be reshipped over the Rio Grande to Boise at a joint through rate; but the car can be moved to Boise via Pueblo and Denver, thence the Union Pacific, at a joint through rate. If stops are desired on the Rio Grande at Grand Junction, Price, or Provo, for example, joint through rates would not be available.

A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows.

Building materials.—A dealer in and distributor of general building materials in Salt Lake City, who handles from 400 to 500 carloads annually, obtains from 150 to 200 cars from points east of Colorado common points, including cellotex from Marrero, La., roofing from Cincinnati, Ohio, doors from Louisville, Ky., hardwoods and plywoods from Algoma, Wis., and Orangeburg, N. C., asbestos products from St. Louis, and asphalt siding from Minneapolis. Distribution is made in carloads, from pool cars, and from warehouses to customers located on the Rio Grande on the western slope of Colorado, such as Glenwood Springs and Grand Junction, Colo., and in Utah, such as Price, Helper, Ephraim, and Manti; and also on the Union Pacific in northern Utah; in Wyoming, Rock Springs and west; and in southern Idaho northward to and including Ashton on the West Yellowstone branch and westward to and including Magic, Shoshone, and Buhl. This dealer cannot now serve these customers from shipments made in through cars at joint rates over the Rio Grande when such cars also carry shipments for points on the Union Pacific beyond Ogden. Ephraim and Manti are on a branch line about 52 and 59 miles, respectively, south of Thistle, Utah.

In some instances this shipper has had to forego business east of Salt Lake City at points as far as Glenwood Springs because of the rate situation. If joint through rates were established, this distribu-

tor could give customers at a number of intermediate points on the Rio Grande, who generally are small dealers and can take only less-than-carload quantities, better service through partial unloading in transit and more efficient service by frequent deliveries under more flexible schedules, instead of being limited, as at present, to furnishing service in connection with pool cars consigned to Salt Lake City as the ultimate destination. Pool cars with partial loads for that point or Ogden and points on the Union Pacific beyond do not now move over the Rio Grande, but are routed over the Union Pacific to get the benefit of joint rates.

Of the 150 or more cars annually from the east, this distributor estimated that he would have stopped for partial unloading about 25 percent. Witness made no mention of commercial competition, but indicated that his chief concern was better service to his customers and a saving in cost to his company if such carloads could be stopped for partial unloading at intermediate points on the Rio Grande while moving at the through rates to Union Pacific destinations in the area served by him.

Farm machinery.—A distributor of farm machinery and equipment at Salt Lake City receives carloads of these commodities from eastern origins, including farm tractors from Detroit, Mich., and distributes them by his own motor vehicles to points in Utah and Idaho. This business was established in 1947, at which time the production of these commodities was insufficient to meet all demands, and a system of allocations based on prior needs was introduced. While the system of allocations was in effect, it was found to be more convenient and efficient to bring all shipments to Salt Lake City and distribute them by truck. This distributor is located on the Rio Grande at Salt Lake City and all shipments move over that line. He expressed a desire for joint through rates from eastern origins to points in Utah and Idaho in connection with the Rio Grande, but admitted that no attempt was being made to partially unload shipments at points on the Rio Grande south of Salt Lake City when carloads are consigned to the latter point, or to ship over the Union Pacific to Salt Lake City where carloads could be partially unloaded or stored and later shipped to Union Pacific destinations in Utah and Idaho at joint through rates. The witness for this distributor stated that he preferred to ship in-bound over the Rio Grande and forego the stopping-in-transit provisions that are now in effect at Salt Lake City and other points on the Union Pacific when traffic is routed over that line.

A factory branch of a large manufacturer of farm machinery and equipment which distributes in the intermountain area is located on the Rio Grande at Salt Lake City. In 1949 it received 369 carloads

from its eastern manufacturing points. Of these, 70 percent were sold at points north of Salt Lake City, mostly at points served by the Union Pacific as far as Ontario, Oreg., and the remainder in Utah and western Colorado. About one-half of the shipments to Salt Lake City moved over the Rio Grande route and one-half over the Union Pacific. Shipments which move in over the Union Pacific may be stopped at Salt Lake City for partial unloading or storage in transit at the joint through rates when the ultimate destinations are on the lines of that carrier, but combinations of rates to and from Salt Lake City apply when such shipments move into that point over the Rio Grande. The manager of this branch testified that it would be desirable to establish joint through rates over the Rio Grande so that shipments moving over that line could be stored in transit at Salt Lake City and later reshipped, or partially unloaded thereat and the remainder forwarded, to points on the Union Pacific at charges no greater than apply on similar shipments moving over the Union Pacific. However, he did not know what effect this would have on the parent company, as some shipments have been routed over the Rio Grande when Union Pacific routing was requested. To indicate a need for joint through rates, reference was made to a shipment of tractors which were routed over the Rio Grande to Salt Lake City. At that time a customer at Ontario needed two tractors, and it cost about $50 each to ship them from Salt Lake City by motor carrier. If joint through rates had been in effect, the car could have been partially unloaded at Salt Lake City and the two tractors could have been forwarded to Ontario at the joint rate from origin to Ontario. The record fails to show the difference in the joint rates to Salt Lake City and to Ontario. On a 34,000-pound shipment of tractors from Chicago, the joint through rate is $2.68 to Ogden and $2.98 to Boise, which is southeast of Ontario, representing a difference of $102 in charges.

Monuments.—A fabricator and wholesaler of granite and marble monuments at Brigham City, Utah, on the Union Pacific 21 miles north of Ogden, obtains his stone from Vermont, Georgia, Wisconsin, and Minnesota and sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington. This dealer has keen competition with dealers in like articles in Salt Lake City. Its business is such that straight carloads rarely can be shipped to retailers. If joint through rates were established over the Rio Grande through Ogden, cars could be stopped in transit at Colorado points, such as Grand Junction. A retailer at the latter point testified that he finds it impracticable, except in unusual instances, to purchase the various kinds of monuments needed in the trade in carloads, and that the keen

competition cannot be met when shipments are made in less than carloads. There is thus an urgent need for the establishment of joint through rates on this traffic to destinations in the excluded territory with stop-off privileges at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

Livestock.—Large volumes of traffic are involved in connection with the livestock industry and with the processing and marketing of agricultural products. With respect to livestock, evidence was submitted by producers, feeders, and marketers. A number of producers in the northwest area, particularly in Idaho at such points as Pocatello, Burley, Soda Springs, and Blackfoot, desire joint rates via Ogden and the Rio Grande to markets in Denver, Pueblo, and east thereof on the same basis that applies on shipments moved over the Union Pacific through Cheyenne. Much of the evidence dealt with the advantages from such joint rates when applied on livestock shipped to grazing and feeding areas in Utah and Colorado on the Rio Grande for reshipment beyond under transit arrangements. In the areas in Utah and Colorado served by the Rio Grande are good pasture lands for grazing livestock. In addition to livestock produced locally in those areas, substantial quantities are shipped in the summer season from other sections in Colorado, Utah, and surrounding States, both for feeding in feed lots and pastures and for grazing on the livestock ranges. Movements of livestock, both sheep and cattle, into and out of Colorado are substantial in volume.

Evidence as to the needs of raisers of livestock and operators engaged in fattening livestock for markets was submitted by persons engaged in those pursuits, individually and as representatives of livestock and feeder associations. These came from several representative points or districts served by the Rio Grande, such as Heber City and La Sal, Utah, and Burns, Lamar, and Las Animas, Colo. Those served only by the Rio Grande generally buy from areas from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit on feeder stock when the fattened animals are shipped to Denver or markets east thereof. The evidence shows that such operators have to absorb the difference in transportation costs and are not able to purchase cattle or sheep economically in the northwest area in competition with buyers from Iowa, Wyoming, Nebraska, Colorado, and Kansas that have the benefit of competitive joint rates from the excluded territory over Union Pacific routes with grazing or feeding in transit arrangements.

Due to the curtailment of the use of grazing lands in national forests in Colorado, as part of a general policy for all such forest

lands, livestock raisers in Colorado have curtailed their operations in raising livestock, and have engaged more in fattening stock by grazing in private pastures or feeding in feed lots. They purchase most of their feeder stock in Colorado and surrounding areas, but for supply, quality, and price reasons they have been seeking some feeder stock from more distant origins, and the need for doing so, particularly by reason of the curtailment of the pasture area, has been increasing. Livestock produced in the northwest area, particularly in Idaho, Montana, and Oregon, is of excellent grade, does well on the range, and is considered very desirable for feeding and breeding purposes. About 90 percent of the sheep produced in Colorado are produced in the area served by the Rio Grande, and the operators in this territory purchase replacement or breeding ewes in the excluded territory for summer grazing and the production of white-faced or mutton-type lambs. One witness indicated that in-bound billing on breeding ew s is used under the feeding-in-transit arrangements, when available, at points on the Rio Grande when the newborn, fattened lambs are shipped to markets, but the feeding-in-transit arrangements apparently do not apply for breeding in transit.

Operators on the Rio Grande in western Colorado and those in the eastern Arkansas Valley sections (in southeastern Colorado east of Pueblo and in southwestern Kansas) feel that they cannot now profitably purchase stock in the excluded territory for feeding in transit in competition with similar operators on the Union Pacific in Wyoming, Colorado, Nebraska, and Kansas, due to the rate situation. For example, from Dillon, Mont., to Kansas City the rate on sheep or goats in double-deck cars is $1.21 over the Union Pacific direct and $1.40 over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond, a difference of 19 cents. The 19-cent differential over the latter route applies generally on sheep and goats from Union Pacific origins in the excluded territory to Missouri River markets and points east thereof. These rates are published as joint rates over through routes via Ogden and the Rio Grande. On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to all of the territory Colorado common points and east theref, via Ogden and the Rio Grande, the rates are on a combination basis. Cattle and sheep may be shipped from the excluded territory over the Union Pacific to Denver and connecting lines beyond to points in the Arkansas Valley, such as Lamar, for feeding in transit and subsequent reshipment to Missouri River markets, or markets east thereof, at the rates applicable over the Union Pacific direct to the Missouri River markets, plus an arbitrary of 8.5 cents per 100 pounds. Feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are

now able to overbid the Arkansas Valley feeders on northwest stock when destined to the Missouri River and east thereof, and the latter are thus unable to compete successfully because of their unfavorable rate situation. The northern Colorado-Nebraska operators feed a majority of the lambs fattened for market in the United States.

A packing plant at Pueblo purchases lambs at the Ogden market, some of which originate at points on the Union Pacific in Idaho and Oregon. These shipments are routed over the Rio Grande from Ogden even though it costs from $70 to $80 per car more than the total charges would be if the shipments were routed over the Union Pacific to Denver at the transit balance of the through rate. The Rio Grande is used from Ogden because shipments do not have to be stopped for feed and water en route to Pueblo, whereas shipments routed from Ogden over the Union Pacific usually require feed and water at Denver. There is less shrinkage on shipments moved over the Rio Grande, but not enough to offset the additional freight charges.

The rates on livestock in western territory were prescribed in *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535. Generally, the rates are predicated on the shortest routes over which carload traffic can be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the act. The rates on stocker or feeder livestock were prescribed on a basis not in excess of 85 percent of the rates prescribed on the same kind of stock when fit for slaughter, and the carriers were authorized to establish tariff provisions which allow stock moving toward a market to be fed in transit at intermediate points on the basis of the through rates plus a reasonable charge for such privilege. On December 6, 1932, the Rio Grande was authorized (190 I. C. C. 175) to add certain arbitraries to the rates prescribed for mountain-Pacific territory for hauls over its standard-gage lines between Pueblo and Walsenburg on the east, and Provo on the west, including branch lines connecting with the main lines between those points. For hauls of 500 miles or more, the arbitrary authorized at that time was 6 cents on cattle and on hogs and sheep, double deck. Later, these same arbitraries were authorized for application between Denver and Provo over the Dotsero cut-off (200 I. C. C. 535).

In establishing the prescribed rates on livestock, the carriers appear to have limited their application over routes which do not result in short hauling, and over other and longer routes to have provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the dis-

tance involved. As indicated, operators in the Arkansas Valley may now obtain cattle and sheep in the excluded territory for feeding in transit at an arbitrary of 8.5 cents, and this same arbitrary applies when the stock originates on the Burlington in Montana and Wyoming. On the other hand, such operators may obtain feeder stock in other areas, such as Texas and New Mexico, for feeding in transit and reshipment to the Missouri River markets or markets east thereof, at lower rates than would apply if the same stock were fed in transit by operators on the Union Pacific in Colorado, Nebraska, or Kansas. For example, the rate on cattle from Las Vegas, N. Mex., to Chicago is $1.13 when stopped for feeding at Lamar, but if the same cattle were fed at Barton, Nebr., just east of Julesburg on the Union Pacific, the rate would be $1.26, of 13 cents higher. On cattle from Raton, N. Mex., fed in transit at Lamar, the rates are $1.07 to Chicago and 76 cents to Kansas City, but if the same cattle were fed in transit at Barton the rates would be $1.21 and 89 cents, respectively. Many other examples of a similar nature are shown.

The arbitrary of 19 cents, originally 13 cents, applicable on lambs from the northwest area and moving over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond was established prior to the opening of the Dotsero cut-off, and was based in part on the mileage over the Rio Grande via Pueblo. The evidence indicates that this arbitrary was based on the difference between the prescribed scale rates for the average distance from 12 representative origins, on the line of the Union Pacific from Pocatello north to Butte and west to Pendleton, to the several Missouri River markets over the Union Pacific direct and over that road to Ogden, the Rio Grande to Denver via Pueblo, and the Union Pacific beyond. Using the same formula, but giving consideration to the shorter distance over the Rio Grande's Dotsero cut-off, the Union Pacific states that the arbitraries on traffic routed over the Rio Grande should be 5 cents to Denver and Pueblo and 15 cents to the Missouri River markets, and it is willing to establish these arbitraries and make them applicable to cattle as well as sheep. The arbitrary of 8.5 cents on cattle and sheep from origins on the Union Pacific and the Burlington when fed in transit at points in the Arkansas Valley and reshipped to the Missouri River and beyond apparently is based on a similar formula. Reasonable groupings were authorized in *Livestock, Western District Rates, supra.*

In seeking to have the rates on livestock which apply over the Union Pacific made applicable over its lines from Ogden, the Rio Grande indicates a desire to waive the arbitraries which were authorized over its line from Provo to Denver and Pueblo and, in addition, to have estab-

lished over its routes lower rates than would result from the application of the prescribed scales for the distances over its routes. On shipments moving over the Union Pacific-Ogden-Rio Grande route, this would result in short hauling the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City, which are the differences in the Union Pacific distances from McCammon to Ogden and from McCammon to Denver and Kansas City.

Reference is made to *Crouch* v. *Nevada N. Ry. Co.*, 208 I. C. C. 586, which concerned the rates on feeder cattle moved from East Ely, Nev., to Davis, Calif., over the lines of the Nevada Northern Railway Company to Shafter, Nev., thence the Western Pacific to Sacramento, Calif., and the Southern Pacific beyond, 760.4 miles. A rate of 47.5 cents was applicable over the Nevada Northern to Shafter and the Southern Pacific beyond, 705 miles. This rate was collected, but the defendants later sought to collect a rate of 58 cents, which was the combination rate based on Sacramento. Division 4 found that the combination rate was applicable but unreasonable to the extent that it exceeded 49.5 cents, which was the prescribed scale rate for distances of 775 miles and over 750 miles. See also *Routing Livestock to and from Oregon Points*, 209 I. C. C. 349. We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden gateway.

Agricultural commodities.—Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific, and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.

In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.

The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the Central, Southwestern, and Southeastern States. Carloads moved over the Union Pacific to the

Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

Wichita and Liberal, Kans., are described as pocket markets on potatoes and other vegetables originating in Idaho because they cannot be diverted or reconsigned therefrom to points east of the Missouri River at joint through rates. However, the record indicates that shipments refused at these two points may be diverted or reconsigned to destinations in the Southwest at the joint through rates. Wichita is not located on the direct line of any carrier operating between the Colorado common points and the Missouri River gateways, and Liberal is located in the southwestern part of Kansas near the Oklahoma border. Shipments to Kansas City and east thereof would require an out-of-line haul via Wichita and a substantial back haul via Liberal.

Storage facilities are available at Pueblo for the storage of perishables, including potatoes, onions, apples, pears, frozen poultry, frozen foods, butter, and eggs. Joint through rates are applicable from the excluded territory via Pueblo on shipments routed over the Union Pacific to Denver and connecting lines beyond to destinations in the Southwest and to points west of the Missouri River. The route of the Rio Grande from Ogden would be used if joint through rates were available over that route to additional destinations with storage in transit at Pueblo. Storage operators at Pueblo are now handicapped, in relation to two competitors at Denver, because the through rates do not apply via Pueblo to Denver and other northern destinations where a back haul would be required on shipments routed to Pueblo via Denver, whereas the competitors can ship at the through rates in all directions, except westward. The application of the through rates via Ogden and the Rio Grande is sought so that these shippers may have available the same distribution markets as their competitors.

A shipper who deals in dried beans from Idaho and other Western States is located at Colorado Springs. His principal markets are in southeastern territory. Beans which originate in California, Colorado, and Wyoming may be stopped at Colorado Springs for cleaning and packaging and reshipped at the balance of the joint through rates.

Beans which originate in Idaho may be shipped over the Union Pacific to Denver and the Rio Grande or other connections to Pueblo and reshipped therefrom at the balance of the through rates, except to points east of the Missouri River. The route of the Rio Grande from Ogden would be used on Idaho beans if it would result in the application of joint through rates to points east of the Missouri River on the same competitive basis as is now applicable when such beans are transited at points on the Union Pacific. Another bean dealer at Fruita, Colo., on the Rio Grande about 10 miles west of Grand Junction, would like to transit Idaho beans on the same competitive basis as is applicable at Union Pacific points. This dealer is now engaged primarily in buying pinto beans from growers in the vicinity of Fruita and shipping them in carload lots to others, including the shipper at Colorado Springs. These dealers in dried beans are in competition with like dealers at points on the Union Pacific who have the benefit of transit at the through rates to destinations, among others, east of the Missouri River.

A company which is engaged in the purchase and sale of dried beans and peas maintains plants in Nebraska at Morrill on the Burlington and at Gering on the Union Pacific. Carloads of dried beans and peas originating in California, Utah, Oregon, Washington, Idaho, Colorado, Wyoming, Montana, and Nebraska are shipped to Morrill and Gering where they are cleaned, sorted, and packaged, and reshipped generally eastward and to Oklahoma and Texas. This company can obtain Idaho beans and reship them from Gering to eastern and southern destinations at the joint through rates. It was stated, however, that a substantial amount of pinto beans (about 6,000,000 pounds per year) are obtained from Colorado, mostly on the Rio Grande, on which an out-of-line charge of 7 cents per 100 pounds is applicable in addition to the joint through rates over direct routes when such beans are processed at Gering and reshipped to the Missouri River and points east thereof; also that when such beans are processed at Gering and reshipped to destinations west of the Missouri River, combinations of rates to and from Gering are applicable.

The Utah Growers' Cooperative operates throughout Utah in the production and shipment of vegetables, including potatoes and onions. It has two branches on the Union Pacific and three on the Rio Grande in Utah, the latter at Midvale, American Fork, and Springville, all south of Salt Lake City. These three points are served by the Union Pacific and the Rio Grande, but track connections exist only at Midvale. Shipments of box shooks and of seed potatoes from Idaho and of fertilizer from Montana may move into American Fork and Springville over the Union Pacific at lower rates than when they are

interchanged with the Rio Grande at Ogden or Salt Lake City, but when they are received over the Union Pacific they must be trucked to the plants on the Rio Grande. The differences in the rates are not shown.

Various flour mills at southern Kansas points, such as Moundridge and Wichita, support the complaint because they cannot at present purchase wheat at points on the Union Pacific in Idaho, Oregon, and Washington, mill it in transit, and reship to the Missouri River and points east thereof at the same rates that are applicable when similar wheat is milled at points on the Union Pacific. A specific instance was shown where nine carloads of wheat moved from Ogden to Moundridge on which the Ogden shipper applied in-bound transit billing on wheat originating at Idaho Falls. The shipments moved from Ogden over the Union Pacific to Denver, the Rio Grande to Pueblo, and the Missouri Pacific beyond. Moundridge is a local point on a branch line of the latter carrier north of Eldorado, Kans. After the wheat was milled at Moundridge the in-bound billing thereon was applied against an out-bound movement of flour to New Cumberland, Pa. The rate on flour from Idaho Falls to New Cumberland over the route of movement through Denver and Moundridge was $1.335, or 12.5 cents higher than the rate would have been if the same wheat had been milled at a point on the Union Pacific. The distances over the route of movement through Denver and Moundridge and the more direct route of the Union Pacific are not shown.

The rate restrictions complained of by shippers of and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from the excluded territory to Colorado common points and east thereof have placed these shippers and dealers at a serious disadvantage in marketing their products, as compared with competing shippers and dealers located on the Union Pacific and having the benefit of the lower joint through rates from and to the same points. Some of these restrictions complained of, such as those by operators of flour mills in southern Kansas, could be remedied by the establishment of additional joint through rates from the excluded territory over routes of the Union Pacific to Denver and connecting lines beyond. From McCammon and points north thereof such routes would in all instances be shorter than the routes over the Union Pacific to Ogden, the Rio Grande to Denver or Pueblo, and connecting lines beyond. The Union Pacific states that it has not been requested to establish additional joint through rates via Denver. Its position with respect thereto is that the rates on agricultural commodities are on a low basis and, therefore, the carriers should be permitted to limit their application to more direct routes, thereby maintaining their long

hauls and preventing undue circuity. For example, it believes that if competitive joint through rates were established on grain for milling at Wichita and other southern Kansas points and reshipment beyond to the Missouri River and east, other and longer routes probably would be demanded on the same basis at points in Oklahoma and Texas where competing mills are located.

The establishment of additional routes and rates by way of the Union Pacific, however, would not remedy the disadvantage complained of by the shippers of and dealers in these products in the excluded territory who are compelled to pay combination rates on shipments diverted or reconsigned at intermediate points on the Rio Grande, including those stored at Pueblo or Colorado Springs on that road, and reshipped to Colorado common points and east thereof. The only effective remedy in those instances would appear to be the establishment of through rates, the same as those over the Union Pacific routes, over Rio Grande routes via Ogden or Salt Lake City.

Lumber.—A number of lumber dealers and lumber mills are located at Grand Junction and other points, and a wood-treatment or preserving plant is located at Salida, Colo., all on the Rio Grande. Generally, the complaints of these parties relate to their inability to ship lumber and millwork from the excluded territory on competitive joint rates via Ogden and the Rio Grande with stoppage in transit for partial unloading, storage, milling, or treatment and reshipment beyond to Colorado common points and east thereof at the balance of the joint rates. Mention also was made of a handicap in diverting or reconsigning at the joint rates to such points carloads originally shipped to local stations on the Rio Grande via Ogden. As previously indicated, joint through rates apply on lumber and millwork from points in California and in Oregon and Washington west of the excluded territory, including areas around Seattle, Tacoma, and Portland, over the Southern Pacific or the Western Pacific and the Rio Grande through the Utah gateways to points on the Rio Grande and east thereof, with storage, milling, and treatment under transit arrangements. Lumber may also be shipped at joint through rates from the excluded territory when the final destinations are local points on the Rio Grande, but such rates are not applicable from that territory over the Union Pacific to Ogden and the Rio Grande when the final destinations are Colorado common points or points east thereof, whether the shipments move direct or are stopped for milling or other transit purposes.

A lumber company with a wholesale yard, a box factory, a mill, and a storage and drying yard is located at Grand Junction. This company buys most of its lumber, both rough and dressed, and plywood and doors at points west of the excluded territory and sells in Colorado

and points east and south thereof. This company also has a financial interest in a wholesale lumber company at Colorado Springs. It has purchased some lumber at points in the excluded territory, such as Cascade and Winchester, Idaho, Burns, Oreg., and Metaline Falls, Wash. Lumber shipped from Cascade, Winchester, and other points in the excluded territory over the Union Pacific to Ogden and the Rio Grande to Grand Junction could not be stored in transit at the latter point and later reshipped to Colorado common points or points east thereof at the joint through rates as those rates apply only over the Union Pacific routes.

Another lumber company on the Rio Grande at Military Junction, Colo., about 10 miles south of Denver, purchases lumber in California and Oregon; also a small amount in Washington, for milling in transit and reshipment beyond. Lumber from the excluded territory can now be milled in transit at Military Junction and reshipped to Colorado points south thereof and to points in the Southwest at the joint through rates to final destination, but this is not true to other destinations east of the Rocky Mountains. Military Junction is about 1 mile outside of the Rio Grande's switching limits at Denver.

The wood-treatment plant at Salida purchases some lumber, poles, piling, and cross ties in Colorado, Utah, and New Mexico, but most is obtained from points in Oregon and Washington west of the excluded territory. This plant has a contract for treating cross ties for the Rio Grande, but about 60 percent of the forest products which it treats are reshipped to points outside of Colorado. It has not purchased products in the excluded territory, but probably would do so if the joint through rates to eastern and southern destinations were made applicable over the Union Pacific to Ogden and the Rio Grande through Salida. The company which owns the plant at Salida has a similar plant at Denver and 22 others scattered throughout the country. The plant at Denver can perform treatment in transit at the joint through rates from the excluded territory to final destinations in the East, South, and Southwest, and apparently joint through rates apply on about 40 percent of the business at Salida which does not move outside of Colorado.

OPPOSITION TESTIMONY

The Union Pacific operates about 9,724 miles of railroad serving over 1,700 points in 13 States.[7] It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte,

[7] Iowa, Nebraska, Wyoming, Idaho, Oregon, Washington, Missouri, Kansas, Colorado, Montana, Utah, New Mexico, and California.

Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 percent and westbound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grand is 66.3 percent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services.

The Union Pacific objects to the establishment of joint through rates to points beyond Denver or Pueblo via Salt Lake City or Ogden over the Rio Grande upon the principal grounds that such routes would short haul the Union Pacific and that the diversion of traffic over such route from the Union Pacific routes now available would curtail the service and growth of the Union Pacific in the territories it alone serves and in which it pioneered in railroad construction. Such diversion, it fears, would adversely affect the operation of its numerous branch lines in Idaho, Montana, Oregon, and Washington, which are feeders for its main line and are not self-sustaining. In those States the Union Pacific operates a total of 5,606 miles of railroad, with 2,913 miles of branch lines upon which about 46 percent of the total traffic in that territory originates or terminates. It contends that unless it has a substantial main-line haul on branch-line traffic, the operation of many, if not most, of such branches would not long be justified.

Another objection is that yard facilities of the Ogden Union Railway and Depot Company, referred to as the Depot Company, jointly owned by the Southern Pacific and the Union Pacific, at Ogden terminal are inadequate to interchange any additional volume of traffic with the Rio Grande that may be routed to or from the northwest area through Ogden, and that expansion of facilities there is not possible. Several instances of delays to trains, particularly in the fall when traffic is heavy, are shown. The record describes in detail the yard and track lay-out at this terminal and interchange point. At present the Union Pacific finds it necessary to bypass the Ogden terminal as much as possible by taking its trains for Pocatello, Salt Lake City, or Green River over an outside wye track which avoids the terminal proper. In addition to these deficiencies, icing facilities now maintained at Ogden for east-bound and west-bound traffic are not considered adequate for icing perishable commodities from Idaho and the Pacific Northwest for delivery to the Rio Grande. The Depot Company estimated that the cost of interchanging cars between the Rio Grande and the Union Pacific and Southern Pacific is at least twice the average cost of cars in the terminal because of the additional handling required.

The largest volume of traffic was moved through the Ogden terminal in the war year 1945, when a total of 2,847,277 cars were handled. In July, the peak month in that year, the total was 284,711 cars in 2,966 trains, an average of 96 trains daily, which required an average of 70 switching shifts a day. Of that number in July, 894 were solid trains that moved through the terminal without switching. The handling of such a large volume caused considerable congestion and delays to trains. In 1949, the total number of cars handled was 1,955,219. In the peak month of that year, 2,359 trains were handled, an average of 76 trains per day, requiring about 59 switching shifts daily. These figures show that 892,058 fewer cars were handled in 1949 than in the peak year of 1945.

To show that the Union Pacific cannot afford to lose any part of its haul on traffic, attention is directed to the large deficits which the Union Pacific incurred in its passenger service. In 1948, that deficit amounted to $28,462,000, equivalent to $4,291 per mile of road operated, as compared with a passenger deficit incurred by the Rio Grande of $4,954,000, equivalent to $3,127 per mile of road. In the last 20 years the Union Pacific in only 6 years, principally in the war years, has had railway operating income sufficient to pay fixed charges plus declared dividends, and in 1949 it had a net railway operating income of $21,707,437, which was not sufficient by $10,269,865 to pay declared dividends and interest on funded debt. This is contrasted with the

results on the Rio Grande, which in 1948 had a net railway operating income of $12,156,284, out of which it provided for all fixed charges, paid a declared dividend, provided for sinking-fund requirements, and had left for its surplus account $5,167,148.

The Wabash and the Chicago & North Western, important eastern connections of the Union Pacific, furnished estimates of the possible loss of traffic to those roads, and its effect upon train service and employment on their lines in the event that the volume of traffic embraced in the Rio Grande estimate of potential traffic were diverted over the Rio Grande route.

The Wabash in 1948 participated in 9.07 percent of the total traffic handled by the Union Pacific from the Northwest and about one-half of that on west-bound traffic to that area. It estimates the value to it of the potential traffic which it might lose at $1,602,000.

The revenue derived by the Chicago & North Western from the traffic to and from the northwest territory handled in connection with the Union Pacific in 1948 was about $4,000,000. Based on the loss of the potential traffic as estimated by the Rio Grande, it urges that it will lose that amount of revenue if the joint through rates sought in this proceeding are established.

The Great Northern, Northern Pacific, Santa Fe, and Milwaukee oppose granting the Rio Grande's request for the establishment of competitive joint through rates via Ogden. Neither of these defendants, except the Santa Fe, connects with the Rio Grande. They participate, however, in joint rates with the Union Pacific on traffic between the northwest area and eastern points, but there are numerous exceptions. For example, from origins on the Great Northern joint rates are not applicable via Spokane and the Union Pacific on wool, livestock, ores, concentrates, or smelter products, and the joint rates east-bound on fruits and vegetables over that route are limited to destinations reached by the Union Pacific. These restrictions became effective on September 15, 1932, although they were protested by various shipping interests. On lumber from origins on the Great Northern, joint rates apply over that line to Spokane and the Union Pacific only when the traffic is destined to points on and west of the Missouri River, Council Bluffs to Kansas City, thence the line of The Kansas City Southern Railway Company to the Gulf of Mexico. Reference is made also to *Transcontinental Traffic Routed via Bieber, Calif.*, 213 I. C. C. 487, wherein the Great Northern was permitted to cancel joint rates via Bieber and Salt Lake City on transcontinental traffic originating at or destined to various points on the Great Northern in Idaho and Washington.

The Milwaukee, the Santa Fe, and the Wabash, in a joint brief, contend, as does the Great Northern, that upon the evidence submit-

ted the establishment of joint rates which would short haul the defendants is not warranted.

A large number of shippers and representatives of communities served by the Union Pacific, and traffic associations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock.

It is not practicable to deal with all of this evidence in detail, but the testimony and position of the parties have been considered. Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four Northwestern States, a total of 157,762, that number was used as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to $49,880,000 yearly.

Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (*a*) the discontinuance of four trains daily east-bound and four trains daily west-bound between Pocatello and North Platte; (*b*) three trains east-bound and three west-bound daily between North Platte and Council Bluffs; and (*c*) one train east-bound and one west-bound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of $5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300. Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on

these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed as 5,144, with a total loss of wages of $21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real-estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect such employees from loss, as conditions upon the establishment of the joint rates and through routes.

There is no specific provision in section 15 (3) or (4) requiring that such conditions be imposed, but it is argued that in finding joint rates and through routes necessary and desirable in the public interest, as required by section 15 (3), the interests of employees must be considered as they are in proceedings involving consolidations, mergers, and abandonments. Reference is made to the decision in *Cancelation of Rates and Routes via Short Lines*, 245 I. C. C. 183. In that proceeding certain carriers sought to cancel their joint rates over through routes with specified short lines. It was found that cancellation of the rates and routes would result in abandonment of the short lines with resulting inconvenience and loss to shippers and to carrier employees. Permission to cancel certain of the routes was denied.

Upon the record before us it is impossible to find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made. Shippers have a right to route their own traffic, and where traffic is not routed

by the shipper, the originating carrier has the right to control the routing within certain limitations.

GENERAL DISCUSSION AND ULTIMATE FACT FINDINGS

In support of its contention that the assailed rates over its line are unreasonable, the Rio Grande submitted a large number of comparisons showing the differences in such rates and the competitive joint through rates on various commodities, together with the car-mile and ton-mile revenue under the respective rates and what the revenue would be if the lower joint rates were made applicable over its line. Neither factor of the combination rates is assailed, but the aggregates of such factors are alleged to be unreasonable to the extent that they exceed the competitive joint rates.

Many of the present joint rates on the transcontinental traffic here affected are commodity rates which were established originally on particular commodities to meet water competition. Others, such as those applicable on agricultural commodities, were established from producing areas in the excluded territory to enable growers and shippers to market such commodities in eastern and midwestern territories. For these reasons, and others, the defendants contend that it would be unreasonable to require the application of the joint rates over the Rio Grande, as it would result in depleting their revenues and in wasteful transportation over circuitous routes, as well as in short hauling the defendants, especially the Union Pacific. For example, the rates on potatoes to Chicago are 96 cents from Monte Vista and Greeley, Colo., and $1.14 from Idaho Falls, Idaho, a difference of 18 cents, although the distance from Idaho Falls to Chicago, 1,597 miles, is 315 miles greater than from Monte Vista and 590 miles greater than from Greeley. Computations were submitted which indicate that on a carload of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of $1.14 would yield a net profit of $1.97 per car when moved over the Union Pacific to Omaha and the Chicago & North Western beyond, and a net loss of $62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington beyond, 1,809 miles. The computed costs were based on general cost scales compiled by our Bureau of Accounts and Cost Finding and were not based on studies of particular movements of traffic over the respective routes. Many other examples of this nature were submitted.

With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and

the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates.

With respect to the issue under section 15, the facts before us here are in some respects similar to those considered in *United States* v. *Union Pac. R. Co.*, 28 I. C. C. 518, and *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I. C. C. 127, in both of which the complaints were dismissed. In the first, the complainant sought through routes and joint rates over the Rio Grande, among others, in connection with the Santa Fe at Pueblo or Denver on the east and the Oregon Short Line at Salt Lake City or Ogden on the west, on traffic moving between Chicago and certain Mississippi and Missouri River points, on the one hand, and stations on the Oregon Short Line, on the other. The joint rates sought were the same as those then in effect over generally shorter routes of the Union Pacific and other defendants. The short-hauling provision of the statute was held to be a bar to the establishment of the routes and rates sought.

In the second proceeding, the Western Pacific alleged that the failure of the defendants to join with it in the establishment and maintenance of joint rates between points in California on the Northwestern Pacific Railroad Company, controlled by the Southern Pacific, on the one hand, and eastern defined groups, on the other hand, over routes in which the Western Pacific would be an intermediate participating carrier, was discriminatory and prejudicial, and that the combination rates between such points over such routes were unreasonable. Therein, division 2 said, at pages 136 and 137:

> In requesting the application of the joint rates over its line complainant is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic which, under the act, belongs, in the absence of emergency, to the Northwestern Pacific and Southern Pacific.

The instant complainant likewise is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul. In that proceeding, the distance over the Southern Pacific route to Ogden was about 200 miles shorter than the route sought, which is substantially the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves. Again, the short-hauling provision was held to be a bar to the relief sought.

Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons., Inc.*, v. *Alton R. Co.*, *supra*, the Supreme Court said that the expressions "more efficient or more economic" transportation, as used in section 15 (4), "may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found." These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.

In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

There is no contention here by complainant that the present routes of the defendants are not adequate for the traffic hauled, and no finding is sought by complainant to that effect. The absence of such a request may well be due to complainant's contention, not sustained herein except as to sheep and goats to points on the Missouri River and east thereof, that through routes via Ogden and the Rio Grande already exist within the meaning of section 15 (3) of the act. Testimony on behalf of shippers, however, does raise a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities.

In order properly to evaluate the testimony of shippers it is necessary to consider the nature, extent, and functioning of our intricate and far-flung commodity marketing system. The growth of our population and the development of the country have required a constantly expanding flow of diverse commodities. Great consuming areas in many instances are far distant from the points of production of the necessities of every-day life, particularly articles of food. Movements of transcontinental proportions are involved in important instances. That is true here. A complex but efficient marketing

system has been evolved to provide as orderly a distribution of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and over as many routes as possible. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities. *Southeastern Vegetable Case*, 200 I. C. C. 273, and *Routing Lumber and Fruits, South to C. F. A. Territory*, 256 I. C. C. 223.

While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes.

In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established.

The situation as to the commodities above named, as to which the defendants' routes are inadequate, is largely similar to that considered in *D. A. Stickell & Sons, Inc.*, v. *Alton R. Co.*, *supra*. There is one point of difference. There, the operating conditions, mile for mile, on the respective routes were substantially similar. Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recog-

nized by the Commission in prior proceedings. See *Livestock, Western District Rates, supra*, and *W. H. Bintz Co.* v. *Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486. There is before us no data from which the exact differences in the costs over the Union Pacific routes and the Rio Grande routes can be determined. Several estimates were made by witnesses for both the Rio Grande and the defendants, but the estimates vary so widely and are so obviously incomplete as to be practically useless. The record is sufficiently complete, however, to enable us to make a rough approximation of the differences in the operating conditions and to appraise the weight which should be given to those differences, as well as to the differences in the distances over the respective routes, in determining the issues before us.

The differences in the distances between the Union Pacific routes through Wyoming, on the one hand, and the Rio Grande routes sought, on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles, or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls between the excluded territory, on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United

States east and south of the points and territory above described, the differences in the transportation conditions are, in general, spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments westbound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs east-bound, who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3 (1) of the act.

As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. No such a showing has here been made.

The situation is different with respect to traffic between Utah common points, on the one hand, and the northwest area, on the other. On such traffic the Union Pacific interchanges with the Bamberger Railroad Company at Ogden at joint through rates to and from

points on that line, including Salt Lake City. There is no apparent reason why similar arrangements should not apply on like traffic interchanged with the Rio Grande. The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande.

The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points, embraced within the findings of unlawfulness herein made.

The testimony dealing with the terminal facilities at Ogden has been carefully considered. We are persuaded that the additional traffic over the Rio Grande routes which will result under the findings herein made can be interchanged at that point or at Salt Lake City by the use of the present facilities and without serious detriment to the operating efficiency of the railroads concerned.

CONCLUSIONS

We conclude:

1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and

unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

An appropriate order will be entered.

LEE, *Commissioner*, concurring in part:

I concur in the conclusions of the majority that joint rates the same as apply over the Union Pacific and its connecting lines should be established via Ogden or Salt Lake City, in connection with the Rio Grande, on the commodities and from and to the origins and destinations specified by the majority; that the rates assailed on such commodities from and to such origins and destinations are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes; and that the maintenance by the Union Pacific and other defendants of joint rates from and to points on the Bamberger Railroad south of Ogden, while refusing to participate in like rates from and to the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act. The decision in this case will correct in part, a long-standing, unlawful rate adjustment, an adjustment which has discriminated against the industries and people of Washington, Oregon, Idaho, Montana, and Utah, the area from and to which such unlawful adjustment applies being referred to in the report as the "excluded territory." However, I am of the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment. On the facts shown in the record, the act requires that the rates on all commodities, between points in the excluded territory and Colorado common points and points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes. The act contemplates that there shall be no excluded territory with respect to any commodity or persons.

Transcontinental joint rates on freight traffic were established in 1897, from and to the territory here considered, applicable over the Rio Grande routes via Ogden. These joint rates were in effect for many years, until 1906 from and to some points and until 1912 from and to other points, when they were canceled by the Union Pacific and higher combination rates became effective. However, the through routes were not closed. Numerous shippers testified that these routes are open and available and that they can route traffic over them. This testimony was not challenged or contradicted. On the contrary, a responsible traffic official of the Union Pacific testified that the Rio Grande routes are "actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon, and Washington." That these routes are open and used is proved by evidence in the record (1) of east-bound shipments of various commodities made in 1948 from points on the Union Pacific in the excluded territory to Colorado common points, and which moved over the Rio Grande routes, including the entire length of the Rio Grande line, on through bills of lading issued by the Union Pacific, (2) of west-bound shipments of various commodities made in the same year from various eastern points to points in the so-called excluded territory, and which moved on through bills of lading over carriers east of Colorado junctions to the Rio Grande at such junctions and thence over the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond, and (3) of numerous shipments moved over the Rio Grande routes between eastern points and the excluded territory during World War II and in 1949 when the Union Pacific main line in Wyoming was blocked by snow. The year 1948, the calendar year immediately preceding the hearing, was selected as typical of the situation which prevailed in the prior years and which continued up to the time of the hearing.

I am unable to agree with the majority that the shipments referred to above must be regarded as of an isolated nature and as falling in the same category as the single shipment considered in the *Beaman Elevator case*, 155 I. C. C. 313, referred to in a footnote to the opinion of the United States Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. In the *Beaman* case a single carload shipment of grain moved over the lines of two connecting railroads from Beaman, Iowa, via Clinton, Iowa, to St. Louis, Mo. The evidence plainly showed that the bill of lading covering this shipment was issued and recognized by these railroads through error. There was no evidence "of any like movement before or since." Adequate service was available over nine other routes. A wholly different situation is before us in this proceeding. Numerous shipments of a variety of commodi-

ties have been transported in both directions over the Rio Grande routes on through bills of lading deliberately issued and recognized by the Union Pacific and the other participating carriers. The situation here before us is similar to that considered by the Supreme Court in *Virginia Ry.* v. *United States*, 272 U. S. 658, also referred to in a footnote to the decision in *Thompson* v. *United States*, *supra*, in which, in referring to the route over which the Commission there prescribed reasonable and nondiscriminatory rates, the Court stated that "that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive." The Court held however, that even though the route was closed commercially, open through routes to the West were in existence.

In the *Thompson* case the court pointed out that "there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line" or that the carriers have ever offered through service over the Missouri Pacific-Burlington route. Thus, the facts before the Court in that case likewise were wholly different from those before us in this proceeding. I think that the Court's opinion in that case supports the conclusion that through routes on freight traffic over the Rio Grande routes have existed for many years and now exist and that the short-hauling provision of section 15 (4) is not applicable.

If, however, the Rio Grande routes were actually closed, the short-hauling provision of section 15 (4) of the act would not be a bar to the correction in full of the present discriminatory rate adjustment. The discrimination in violation of section 3 of the act, shown by the evidence, makes that provision of section 15 (4) inapplicable. In any event, the Rio Grande routes are shown to be needed in order to provide adequate, and more efficient and more economic transportation, and, if they were not already open through routes, we could and should require that they be opened.

As stated in the report of the majority, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments, livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, who reconsign shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific. The evidence is equally impressive with respect to the disadvantage or handicap to shippers

or receivers of lumber, building materials, farm machinery, and other commodities. For instance, the lumber company at Military Junction, Colo., referred to in the majority report, is handicapped in its efforts to compete with mills at Denver and Kansas City because it cannot obtain lumber from the excluded territory for milling in transit on the same basis as these competing mills. A representative of that company testified that it would purchase several million feet of lumber annually from points in the excluded territory if it had available reasonable and nonprejudicial joint rates over the Rio Grande routes. By reason of the rate situation complained of, the lumber dealer at Grand Junction, Colo., who is also referred to in the majority report, has lost business to competitors who have the benefit of transit at the joint rates applicable over the Union Pacific routes. This evidence is only typical; it was presented as representative of the prevailing situation.

Shippers and receivers of freight at points in eastern Oregon and southern Idaho, on the line of the Union Pacific, have been, and are, excluded from additional markets that would be available to them if reasonable and nonprejudicial joint rates were in effect over the Rio Grande routes. Some of these shippers express the belief that the establishment of such joint rates would provide them with a better car supply, in that the Rio Grande would furnish additional cars to move out shipments routed over its line. It is common knowledge that a better supply of cars is available to shippers who have competitive routes to the consuming markets. The record clearly establishes that the present rate adjustment results in a substantial disadvantage to the industries, shippers, and receivers located in the considered territory, and in undue prejudice to them.

Likewise, the evidence establishes that the defendant railroads discriminate against the Rio Grande, in that from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections, its long haul, while refusing to establish the same joint rates over the Rio Grande routes. The routes by which defendants short haul themselves are generally as long as, and in many instances substantially longer than, the Rio Grande routes, and the hauls of the Union Pacific and of other defendants are shorter over such established routes than over the Rio Grande. The evidence does not establish that transportation conditions are more favorable over these routes

than over the Rio Grande routes which are discriminated against by defendants. On the contrary, the record, in my opinion, warrants finding that the transportation conditions over such routes are, in general, no more favorable than over the Rio Grande routes. The Union Pacific and the other defendants are, and for the future will be, violating section 3 (4) of the act by failing and refusing to participate in joint rates with the Rio Grande, from and to points in the excluded territory, to and from points in official, southern, and southwestern territories, while participating with each other in joint rates from and to the same points, over routes over which the Union Pacific and other defendants short haul themselves.

The Union Pacific is a strong and progressive railroad. It is ably managed and efficiently and economically operated. Being the only railroad in southern Idaho, every shipper in that area is dependent on it for rail service. I am persuaded that, instead of being allowed to continue to maintain an "excluded territory," it should be required to provide these shippers with joint rates which will enable them to buy and sell in all markets on an equality with other shippers, and that such joint rates will not result in any substantial diversion of the traffic now moved over its lines.

The joint rates now in effect on freight traffic over the Union Pacific routes are shown by the record to be reasonable for application over the Rio Grande routes. We should require that these rates be maintained over the latter routes.

PATTERSON, *Commissioner*, concurring in part:

I concur in the relief granted to the Rio Grande and transit operators thereon who are handicapped by the lack of through routes and joint rates the same as those over the Union Pacific routes. It seems to me, however, that the findings of unlawfulness are inconsistent in that they fail to include lumber and articles taking lumber rates in the relief granted.

The showing made of a need for such through routes and joint rates, in my opinion, is more persuasive as to lumber and articles taking lumber rates than as to any of the commodities included in the foregoing findings, with the possible exception of livestock. The record shows that at least one lumber dealer at Grand Junction, another at Military Junction, near Denver, and a wood-treatment plant at Salida, all on the Rio Grande, are handicapped in their efforts to compete with like dealers on the Union Pacific routes, and that at least the dealer at Grand Junction has lost business, by reason of the rate situation complained of, to competitors who have the benefit of transit at the joint rates over the Union Pacific routes. I

believe this evidence is adequate support for the inclusion of this commodity group in the findings of unlawfulness made.

The order entered in connection with this report requires the establishment on particular commodities, in connection with the Rio Grande, of through routes and joint rates the same as those now in effect over the Union Pacific routes. The formation of those through routes is appropriately left, in large measure, to the carriers. I want to make it clear that in my view, on traffic to or from the area east of the Colorado common points, where the provisions of the order so permit, these new routes should be formed in such a manner as to short haul the Union Pacific only to the extent necessary to afford the Rio Grande its line haul and avoid unduly circuitous routes.

ARPAIA, *Commissioner*, concurring:

In my opinion there are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of section 15 (4) of the Interstate Commerce Act is not required.

The evidence of record shows that these routes presently are open and available to shippers on combination rates. The history of the relationship between these carriers leaves no doubt as to that fact.

When joint rates over these routes, which were in effect from 1897 to 1906 and 1912, were canceled by the Union Pacific, no specific cancellation was made of the through routes over which the joint rates applied. To my mind it would be necessary for the Union Pacific to have shown affirmatively that it refused traffic on through billing over the Ogden Gateway in order to negative the existence of such through routes. Instead, the record shows information elicited from an official of the Union Pacific to the effect that routes via Ogden were available subject to the application of combinations of local rates.

The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.

We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires.

MAHAFFIE, *Commissioner*, dissenting in part:

I dissent from the majority report insofar as it fails to find that the existing routes to and from the northwest territory, described in

the report, via the Rio Grande through the Ogden gateway are effective through routes and that the failure of the Union Pacific and other defendant railroads to establish joint rates with the Rio Grande via Ogden unjustly discriminates against that carrier. I disagree also because the report does not find that it is necessary and desirable in the public interest that joint rates on commodities generally, in addition to those specified, should be established over such through routes.

We are not called upon in this proceeding to exercise our authority, under section 15 (4) of the Interstate Commerce Act, to establish new through routes via that gateway. Therefore, the conditions in that paragraph are not applicable. We are free to exercise our power under section 15 (3) to establish joint rates unhampered by those restrictions.

A finding that these routes are open and freely available to shippers today is fully supported by the evidence. It was acknowledged by a freight traffic official of the Union Pacific that a shipper has the right under the act (section 15 (8)), to specify such routes for the carriage of his shipments. That right, it should be noted, can be availed of only when two or more through routes and through rates are actually established and in existence.

The record shows that some joint through rates, as distinguished from combination rates, are in fact now published in a Union Pacific tariff for application through Ogden over the entire length of the Rio Grande to Denver and the Union Pacific beyond. These apply on shipments of sheep or goats originating on the Union Pacific in southern Idaho and eastern Oregon, billed to destinations on the Missouri and Mississippi Rivers and to Chicago and other points. The joint rates are higher than rates on like livestock moved over the direct route of the Union Pacific and, therefore, retard use of the Rio Grande route. But the publication of such joint rates in connection with transportation over the whole length of the Rio Grande is proof of the consent of the Union Pacific for the use of that rail line as part of a through route at joint rates. And it was further stated by the same witness that the Union Pacific has no objection to publishing the same joint rate arrangement on shipments of cattle.

In 1941–42 mixed military trains with troops in passenger cars and military supplies in freight service were transported over this route on through billing. Four examples of such trains are described in the record. These moved from Fort Sill, Okla., and Camp Claiborne, La., to Fort Lewis, Wash., in December 1941 and February 1942. The trains were routed and moved to Colorado junctions of the Rio Grande, thence over that railroad to Ogden and the Union Pacific

beyond. Unlike certain other movements to and from the northwest area via Ogden in the war period in connection with these two lines, the military trains were not routed under service orders issued by us or the Office of Defense Transportation. Arrangements for the through movements were made with the railroads and the rates charged were settled on the basis of the joint rates applicable in connection with the Union Pacific routes through Wyoming.

The existence of the route as an established through route was undoubtedly an important consideration for its use in February 1949, when the line of the Union Pacific was blocked by snow. In that emergency, freight cars, passenger cars, express and mail were promptly diverted by the Union Pacific through Denver over the Rio Grande to Salt Lake City and to Ogden for movement beyond. Of the freight cars diverted, 1,493 were for destinations in Idaho on the Union Pacific and in the northwest area.

Actual and continuous use of the Rio Grande route at through rates made by combinations of separate rate factors via Ogden to and from the Northwest without opposition or objection by the Union Pacific or other participating railroads is amply shown by the evidence of typical movements of numerous commodities. The calendar year 1948 was used by the Rio Grande as a representative year. In that year 16 carloads of various commodities were shipped from the northwest territory over the Union Pacific to Ogden and the Rio Grande beyond to Denver, Louviers, Pueblo and Trinidad, Colo., over the entire length of the Rio Grande. They originated on the Union Pacific and moved on through bills of lading. Some of the cars were partly unloaded at Rio Grande points and then continued through to their destinations. Seventeen carloads of various commodities moved, from late in December 1947, and in the year 1948, from various eastern points on through bills of lading at through combinations of rates over rail lines east of the Colorado junctions to the Rio Grande at such junctions thence over that line to Salt Lake City or Ogden and the Union Pacific beyond. Some of the cars were stopped for partial unloading at stations on the Rio Grande or the Union Pacific.

The same kinds of movements as those exhibited in 1948 prevailed to about the same extent in years prior to 1948 and continued into 1949 at the time of the hearings.

All of this evidence clearly supports a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for a finding that

they are established through routes announced by the United States Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. In that case, the Court said "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the Court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit and, therefore, no through routes existed between those points.

The situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole inevitably leads to that conclusion. To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.

Even if a finding that no through routes exist over this line be sustained, there is substantial evidence that the rate situation results in undue prejudice and undue disadvantage to shippers and to districts and localities in Utah and Colorado dependent upon the Rio Grande for rail service, in violation of section 3 (1) of the act. Such violation removes the restrictions imposed in section 15 (4) upon our authority to establish through routes. That undue prejudice and undue disadvantage exist is fully supported by the testimony of numerous witnesses. Briefly, the testimony shows that livestock producers in Utah and Colorado, in areas served by the Rio Grande, are not able, due to the combination through rates via Ogden, to buy on a reasonably competitive basis, cattle and sheep in Idaho, Montana, Oregon, and Washington for grazing and feeding in transit on the ranges in Utah and Colorado, in competition with buyers and stock feeders in northern Colorado, Nebraska, and northern Kansas. The same undue prejudice and undue disadvantage is experienced by buyers and feeders in southeastern Colorado east of Pueblo, Colo., and

in southwestern Kansas served by the Santa Fe and the Missouri Pacific railroads. Their failure to obtain joint through rates from the producing areas in the Northwest over the Union Pacific to Ogden, Rio Grande to Pueblo and its connections beyond places them at an undue disadvantage.

The record contains convincing evidence by representatives of large groups of shippers that there is undue prejudice and undue disadvantage to wool producers, as well as to livestock operators in Colorado served by the Rio Grande; also to lumber dealers and processors; dealers in farm machinery and other commodities, and to a cold storage warehouse operator in Pueblo. There is substantial evidence from producers and shippers of agricultural commodities in the Northwest, particularly in Idaho, to support findings that the refusal of the defendant railroads to join in joint through rates via Ogden and the Rio Grande to and from points beyond the Colorado gateways of that carrier exclude them from additional markets needed for their products. All of that evidence sustains and fully supports the finding that there is a violation of section 3 (1) of the act and justifies a general finding that joint through rates via the Ogden gateway should be established on commodities generally. The findings should not be limited, as are the findings of the majority, to particular commodities as to which evidence was offered but should be broadened to include all commodities.

We are fully warranted in dealing with this situation broadly, in considering what is necessary and desirable in the public interest, with respect to joint rates over these established through routes. We are not limited to consideration of proof as to every rate on every commodity from every origin to every destination. Such a view of our authority is too narrow and is not justified by the law or the evidence.

In other types of proceedings where we found it necessary to deal generally with a comprehensive rate situation, the Supreme Court has held that we may properly make general findings upon typical evidence representative of the situation as a whole.

In exercising authority under section 13 (4) as to the lawfulness of rail rates on intrastate traffic in a State and under section 15 (6) as to divisions of joint rates of rail carriers we may make general findings when the evidence is shown in numerous and representative instances that are typical of the rate situation as a whole. Similarly we need not attempt the impracticable, if not impossible, task of examining every rate on every commodity and class of commodities, from every origin to every destination in the large areas and territories under scrutiny here. We can adjust the remedy to the evil and make our order as broad as the discrimination and undue prejudice. See *Illinois*

Central R. Co. v. *Public Utilities Commission*, 245 U. S. 493, 507. In *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579, a proceeding dealing with intrastate rates on a State-wide basis, the Court stated that "any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute." In *Georgia Public Service Comm.* v. *United States*, 283 U. S. 765, 774, the Court said that "when an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings." That case also arose under section 13 (4) of the act with respect to intrastate rates. There the order related to a few commodities but the rates prescribed were State-wide in operation and applied to shipments between hundreds of points of origin and destination. Under those circumstances the Court held that "To require specific evidence and separate adjudication in respect of each would be tantamount to denying the possibility of granting relief."

To the same effect is the holding of the Court in *New England Divisions Case*, 261 U. S. 184, 197. There the Court had under consideration contentions with respect to the nature of the evidence in support of our order as to divisions of joint rates between groups of rail carriers. The Court pointed out that our order was based on evidence which we assumed was "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." That method of proof was found to be our common practice in adjudicating comprehensively upon substantially all rates in a large territory, and that the actual necessities of procedure and administration had led to the adoption of that method also in passing upon the reasonableness of proposed rate increases. That method was found equally appropriate in passing upon multitudes of divisions of joint rates. That it has similar application in a comprehensive case such as we have here where we are called upon to establish joint rates via a gateway through which substantially all joint rates have been refused, is equally clear. In the case cited, the Court said that there was no constitutional obstacle to the adoption of the method pursued and that only in the way could the task be performed.

The same rule should be applied in the instant case, in order to carry out effectievly our authority to prescribe, in the public interest, joint rates by way of the Ogden gateway. The report of the majority finds it necessary in the public interest that joint rates via that gateway be established on particular commodities as specified in the report. The same evidence is, and should be concluded to be typical of the rate situation as a whole. In accordance with our practice in other types of comprehensive proceedings which has been found lawful and neces-

sary under principles announced in the Supreme Court cases cited, that evidence should be found adequate to support an order that joint rates be established via that gateway on commodities generally.

I am authorized to state that COMMISSIONERS SPLAWN and CROSS join in this expression.

COMMISSIONER KNUDSON did no participate in the disposition of this proceeding.

APPENDIX

From—	To—	Commodity	Rates[1]		Distances[2]		Revenues per car-mile			Average carload weight
			Via Union Pacific routes	Via D&RGW routes	Via Union Pacific routes	Via D&RGW routes	Via Union Pacific joint rates	Via D&RGW combination rates	Via D&RGW joint rates[3]	
			Cents	*Cents*	*Miles*	*Miles*	*Cents*	*Cents*	*Cents*	*Pounds*
Pendleton, Oreg	North Salt Lake, Utah	Cattle	58	90	342	342	37.99	58.95	37.99	22,400
Logan, Utah	Denver, Colo	do	83	111	649	679	28.65	36.62	27.38	22,400
Huntington, Oreg	Chicago, Ill	do	168	213	1,872	2,083	20.10	22.91	18.07	22,400
Idaho Falls, Idaho	Oklahoma City, Okla	Potatoes	90	128	1,428	1,462	28.44	39.50	27.78	45,120
Redmond, Oreg	Atlanta, Ga	do	183	203	2,808	3,008	26.19	30.45	24.45	45,120
Armstead, Mont	Oklahoma City, Okla	Dry beans and peas	93	203	1,550	1,584	50.89	108.70	49.80	84,820
Twin Falls, Idaho	Atlanta, Ga	do	148	187	2,172	2,372	57.80	66.87	52.92	84,820
Nampa, Idaho	Detroit, Mich	Lettuce	175	217	2,074	2,286	20.96	23.58	19.02	24,840
Hood River, Oreg	Pittsburgh, Pa	Apples	192	252	2,666	2,877	29.99	36.47	27.79	41,640
Spokane, Wash	Kansas City, Mo	Wheat	86.5	132	1,901	2,101	47.40	65.45	42.89	104,180
Pocatello, Idaho	Wichita, Kans	do	68.5	96	1,206	1,240	59.17	80.66	57.55	104,180
Spokane, Wash	Omaha, Nebr	Lumber	92	143.5	1,784	2,003	35.76	49.68	31.85	69,340
Kellogg-Wardner, Idaho	Fort Worth, Tex	do	104	143.5	2,237	2,271	32.24	43.81	31.75	69,340
Portland, Oreg	Provo, Utah	Canned goods	84	116	943	930	53.82	75.36	54.57	60,420
Do	New Orleans, La	do	143	209	2,762	2,728	31.28	46.29	31.67	60,420
St. Louis, Mo	Logan, Utah	Roofing	153	196	1,433	1,588	64.76	75.91	59.25	61,500
Chicago, Ill	Spokane, Wash	do	161	250	2,272	2,483	43.58	61.92	39.88	61,500
Geneva, Utah	Boise, Idaho	Iron and steel articles	63	78.55	447	440	109.76	139.03	111.51	77,880
Do	Portland, Oreg	do	63	78.55	928	921	52.87	66.42	53.27	77,880
Pittsburgh, Pa	do	do	167	205	2,729	2,941	47.50	54.10	44.08	77,880
Salt Lake City, Utah	Butte, Mont	Agricultural implements	141	173	433	434	98.67	120.78	98.44	30,300
Detroit, Mich	Malad, Idaho	do	295	333	1,836	1,982	49.17	51.41	45.54	30,300
Denver, Colo	Spokane, Wash	Vehicle parts	251	370	1,371	1,466	79.16	109.13	74.03	43,240
Fort Worth, Tex	Seattle, Wash	Animal and poultry feed	119	278	2,338	2,372	31.48	72.48	31.02	61,840
Denver, Colo	Butte, Mont	Tires and tubes	179	294	908	1,004	73.41	109.05	66.39	37,240
Atlanta, Ga	do	Furniture	396	596	2,318	2,518	28.63	39.67	26.36	16,760
Kansas City, Mo	Seattle, Wash	Paper	154	373	2,069	2,269	31.72	70.06	28.93	42,630
Oklahoma City, Okla	Boise, Idaho	Petroleum and petroleum products.	141	188	1,612	1,645	48.09	62.83	47.13	54,980
Kanssa City, Mo	Portland, Oreg	Paint and paint material	170	364	1,891	2,091	52.84	102.32	47.79	58,780

[1] In cents per 100 pounds; in effect September 1, 1949.
[2] Over existing routes of Union Pacific and connections; and over Denver & Rio Grande Western routes.
[3] At joint rates applicable over competitive routes of Union Pacific and connections.

23-61
U. S. GOVERNMENT PRINTING OFFICE: 1953
287 I. C. C.

[fol. 24] APPENDIX "C" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission Held at Its Office in Washington, D. C., on the 10th Day of June, A. D. 1953

No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, et al.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petitions for reconsideration, and for modification of the findings and order filed by complainant, defendants and various interveners, and the several replies to the petitions, and it appearing that none of the petitions presents matters that are materially different from those of record in the proceeding, or offers new or additional contentions or arguments that vary substantially from those previously advanced and considered by the Commission in disposing of the issues:

It is ordered. That said petitions be, and they are hereby, denied.

By the Commission.

George W. Laird, Acting Secretary. (Seal.)

[fol. 25] [File endorsement omitted]

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

[Title omitted]

SUMMONS AND RETURNS—Filed July 2, 1953

Defendants

To the above named Defendants:

You are hereby summoned and required to serve upon Elmer B. Collins, and W. R. Rouse, plaintiff's attorneys,

whose address is: 1416 Dodge Street, Omaha 2, Nebraska, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Mary A. Mullen, Clerk of Court, by Evelyn Copeland, Deputy Clerk. (Seal of Court.)

Date: June 26, 1953.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. LMP.

[fol. 25a] Return

I hereby certify and return that I received this Summons on the 26th day of June, 1953 and on the 26th day of June, 1953 I served the same upon the within named United States of America and the Interstate Commerce Commission by leaving a true and correct copy thereof with Joseph T. Votava, United States District Attorney for the District of Nebraska, at Omaha, Douglas County, State and District of Nebraska and by mailing two true and correct copies thereof to the Honorable Herbert Brownell, Jr., Attorney General of the United States at Washington, D. C. in a duly registered envelope, a receipt for same is herewith attached and made a part of this return and by mailing a true and correct copy thereof to George W. Laird, Acting Secretary of the Interstate Commerce Commission at Washington, D. C. in a duly registered envelope a receipt for same is also attached and made a part of this return. And at the same times and places and in the same manner and upon the same parties I also served copies of the Complaint herein.

(S.) Frank Golden, U. S. Marshal, District of Nebraska.

(Here follows 4 photolithographs, side folios 25b, 25c, 25d, 25e)

Post Office Department
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300
(GPO)

Washington, D.C. 28
June 29, 1953
11:00 P.M.

POSTMARK OF DELIVERING OFFICE

Return to United States Marshall
(NAME OF SENDER)

Street and Number, or Post Office Box,

REGISTERED ARTICLE

NO. 77136

INSURED PARCEL

NO.

OMAHA,
NEBRASKA.

16—12421-1 16—12421-1 25b

881

Form 3811
Rev. 1-52

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this Card.

1 Hon. Herbert Brownell
(Signature or name of addressee)

2 Geo. H. Virts
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery 6 - 29 -, 19 53

U. S. GOVERNMENT PRINTING OFFICE 16—12431-2

25c

881

Post Office Department
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300
(GPO)

Washington, D.C.
Jun. 29, 1953
5:00 P.M.

POSTMARK OF DELIVERING OFFICE

Return to United States Marshall
(NAME OF SENDER)

Street and Number, or Post Office Box,

REGISTERED ARTICLE

No. 77137

INSURED PARCEL

No.

OMAHA,

NEBRASKA.

16—12421-1 16—12421-1 25d

881

Form 3811
Rev. 1-52

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this Card.

1 Interstate Commerce Commission
(Signature or name of addressee)

2 D. J. O'Connor
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery Jun 29, 1953

U. S. GOVERNMENT PRINTING OFFICE 16—12421-2

25e

[fol. 26] [File endorsement omitted]

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ORGANIZING THREE-JUDGE COURT—July 2, 1953

The above named plaintiffs having filed suit which is now pending in the above entitled court, seeking temporary and permanent injunction enjoining, suspending, annulling and setting aside a certain order of the Interstate Commerce Commission dated January 12, 1953, on the grounds, among others, that said order is and the enforcement thereof will be violative of certain provisions of the Constitution of the United States; and said application for temporary injunction having been presented to the Honorable John W. Delehant, United States District Judge for the District of Nebraska, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

It Is Now Here Ordered that Honorable Joseph W. Woodrough, United States Circuit Judge, and Honorable Harvey M. Johnsen, United States Circuit Judge, be and they [fol. 27] hereby are designated to with *with* the above named Honorable John W. Delehant, United States District Judge for the District of Nebraska, to hear and determine said action and proceeding.

Dated this 2nd day of July, A. D. 1953.

Archibald K. Gardner, Chief Judge, United States Court of Appeals, for the Eighth Circuit.

[fol. 28] CLERK'S CERTIFICATE OF SERVICE OF ORDER ORGANIZING THREE-JUDGE COURT (omitted in printing).

[fol. 29] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ORGANIZING THREE-JUDGE COURT—July 13, 1953

The above named plaintiffs having filed suit which is now pending in the above entitled court, seeking temporary and permanent injunction enjoining, suspending, annulling and setting aside a certain order of the Interstate Commerce Commission dated January 12, 1953, on the grounds, among others, that said order is and the enforcement thereof will be violative of certain provisions of the Constitution of the United States; and said application for temporary injunction having been presented to the Honorable John W. Delehant, United States District Judge for the District of Nebraska, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

It Is Now Here Ordered that Honorable John B. Sanborn, United States Circuit Judge, and Honorable Harvey M. Johnsen, United States Circuit Judge, be and they hereby [fol. 30] are designated to sit with the above named Honorable John W. Delehant, United States District Judge for the District of Nebraska, to hear and determine said action and proceeding.

The order organizing a three-judge court, dated herein July 2, 1953, is hereby revoked and cancelled for the reason that the Honorable Joseph W. Woodrough, United States Circuit Judge, deems himself disqualified to sit in said action.

Dated this 13th day of July, A. D. 1953.

Archibald K. Gardner, Chief Judge, United States Court of Appeals, for the Eighth Circuit.

[fol. 31] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed July 17, 1953

The Interstate Commerce Commission, one of the defendants in the above-entitled case, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs I to III, inclusive, of the complaint, the Commission admits the same.

II

Answering the allegations of paragraph IV of the complaint, the Commission admits the same but refers to the complaint filed August 1, 1949, referred to in said paragraph, for a more full and complete statement as to the relief sought by said complaint.

[fol. 32] III

Answering the allegations of paragraph V of the complaint, the Commission admits the allegations contained in the first sentence of said paragraph. In answer to the remaining allegations of said paragraph V of the complaint, the Commission refers the Court to the complaint in the Commission proceedings, which is a part of the record before the Court, for a statement as to the exact allegations contained therein.

IV

Answering the allegations of paragraph VI of the complaint, the Commission admits the same and avers that the

American Short Line Railroad Association also intervened in support of the Rio Grande's complaint.

V

Answering the allegations of paragraph VII of the complaint, the Commission admits the same, except that it alleges that The Denver and Rio Grande Western Railroad Company, as well as the Union Pacific Railroad Company, has numerous branch lines connecting with and extending from its main lines in Utah and Colorado.

VI

Answering the allegations of paragraph VIII of the complaint, the Commission admits the first four sentences thereof; the Commission neither admits nor denies the remaining allegations of paragraph VIII because they are argumentative in character and require no further answer. The Commission denies that diversion of the traffic to the Rio Grande would short-haul or deprive the Union Pacific of its present haul to the extent of about 1,000 miles and would deprive other railroad plaintiffs herein of their entire haul on many thousand carloads of traffic annually.

[fol. 33]

VII

Answering the allegations of the first sentence of paragraph IX of the complaint, the Commission admits that the joint rates were cancelled, but not with the approval of the Commission, and alleges that the through routes referred to in said paragrah IX were not cancelled as alleged in this paragraph of the complaint. The Commission denies the allegations contained in the last sentence of said paragraph IX.

VIII

Answering the allegations of paragraph X of the complaint, the Commission denies the same and alleges that said allegations are not material to any of the issues that were before it, or to any of the issues before this Court.

IX

Answering the allegations of paragraphs XI, XII, and XIII of the complaint, the Commission admits the same but respectfully refers the Court to its report of January 12, 1953, annexed to the bill of complaint as Appendix B, for a more full and complete statement as to its conclusions and findings, and the reason therefor, that is contained in the excerpt quoted in paragraph XII of the complaint.

X

Answering the allegations of paragraph XV of the complaint, the Commission denies that its order is invalid for any of the reasons set forth in said paragraph or for any other reason or reasons.

XI

Answering the allegations of paragraph XI the complaint, the Commission denies that its said order of January 12, 1953, if permitted to become effective would irreparably injure and damage plaintiffs.

[fol. 34]

XII

The Commission admits and alleges that in the proceedings in Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, 287 I. C. C. 611, involved in this suit, the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said report and order of January 12, 1953, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiffs herein by their counsel; that at said hearings and subsequently, in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiffs in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including

the plaintiffs herein, its said order and report of January 12, 1953, annexed to and made parts of the complaint as Appendices A and B; that said report and order included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which its said report and order were based.

The Commission further alleges that the findings and conclusions of said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

[fol. 35] The Commission further alleges that in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

The Commission further alleges that said report and order of January 12, 1953, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said report and order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the complaint. The Commission denies that its said report and order are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said complaint, or for any other reason or reasons. The Commission denies that its said report and order cause, or will cause, plaintiffs either irreparable damage or any damage if said report and order are not enjoined.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said order and report referred to and made parts of the complaint as Appendices A and B.

All of which matters and things the Commission is ready

to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, by Edward M. Reidy, Chief Counsel.

Samuel R. Howell, Assistant Chief Counsel, of Counsel.

[fols. 36-37] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 38] CLERK'S CERTIFICATE OF SERVICE OF ANSWER ON JUDGES (omitted in printing)

[fol. 39] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PETITION OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY FOR LEAVE TO INTERVENE—Filed July 21, 1953

To The Honorable Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

Now comes The Denver and Rio Grande Western Railroad Company and represents that it has an interest in the issues and matters involved in the above-entitled proceeding adverse to the interest of the plaintiffs herein and files this its petition for leave to intervene in and become a party defendant to said proceeding, with a right to be heard and to file an answer and other pleadings therein; and for cause shows:

1. That the petitioner, a corporation organized and existing under the laws of the State of Delaware, is a common carrier by railroad engaged in the transportation of persons

and property in intrastate, interstate and foreign commerce; that it owns and operates approximately 2400 miles of railroad in the States of Colorado, New Mexico and Utah; that it has interchange track connections and interchanges traffic with the Union Pacific at Denver, Colorado, [fol. 40] and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and with the Western Pacific at Salt Lake City. The Rio Grande also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern, which is a part of the Burlington System. At Colorado Springs the Rio Grande interchanges traffic with the Santa Fe and the Rock Island. At Pueblo, Colorado, it interchanges traffic with the Santa Fe, the Colorado and Southern, and the Missouri Pacific. At Walsenburg, Colorado, it interchanges traffic with the Colorado and Southern, and at Trinidad, Colorado, with the Santa Fe and the Colorado and Southern.

2. The petitioner was the complainant in the proceeding before the Interstate Commerce Commission, the decision and order in which the plaintiffs herein seek to enjoin and set aside. By that complaint petitioner sought an order from the Interstate Commerce Commission requiring plaintiffs herein and other defendants in that case to establish joint rates on freight traffic via the route of the complainant through its Colorado and Utah gateways, between (a) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Trinidad, etc., and points east thereof; and between Utah common points and the northwest territory served by the Union Pacific and its connections already described. In its decision of January 12, 1953, reported in 287 I. C. C. 611, the Commission granted a part of the relief sought by the petitioner as complainant in the proceeding described. It is that decision of the Commission which the plaintiffs seek to annul, set aside and enjoin in the instant proceeding.

[fol. 41] 3. Under the provisions of Section 2323 of the Judicial Code, 28 U. S. C. 2323, the petitioner is authorized to intervene in the above-entitled proceeding as of right.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled case and to file an answer or other pleading herein with the right to have notice and to be treated in all other respects as if it had been named as defendant, and for such other and further relief as the Court shall determine.

Respectfully submitted, Harry L. Welch, Farm Credit Building, Omaha, Nebraska; Herbert M. Boyle, 1531 Stout Street, Denver, Colorado; Robert E. Quirk, 1116 Investment Building, Washington 5, D. C., Attorneys for Petitioner.

[fols. 42-43] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 44] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

MOTION OF WASHINGTON PUBLIC SERVICE COMMISSION, ET AL., TO INTERVENE AS PLAINTIFFS UNDER RULE 24, AND NOTICE THEREOF—Filed July 22, 1953

I

Washington Public Service Commission, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of Montana, State Board of Equalization and Public Service Commission of Wyoming, State of Nebraska and Nebraska State Railway Commission, file this motion pursuant to Rule 24(a) and (c), (28 U. S. C. A., Federal Rules of Civil Procedure, Rules 17-51), to intervene as plaintiffs in the above-entitled proceeding.

II

Movants are duly constituted administrative agencies of the states named in the foregoing paragraph and are em-

powered and required to regulate and supervise railroads [fol. 45] and other transportation agencies operating intrastate in their respective states and to appear on behalf of and represent the public interest of their states in proceedings in which such public interest may be involved.

III

The complaint in the above-entitled proceeding seeks to enjoin, suspend, annul and set aside an order issued January 12, 1953, by the Interstate Commerce Commission (hereinafter called "Commission") in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al.* Because the demands of the Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande"), in its complaint in said proceedings threatened seriously to jeopardize and harm the interest of shippers and the public generally in their respective states as well as the economic and general welfare of those states, movants intervened in said proceedings before the Commission and presented testimony and oral and written arguments in support of their contentions that the Commission should deny the demands of the Rio Grande and dismiss its complaint. Said order grants a large part of the Rio Grande's demands and potentially jeopardizes and threatens to deteriorate railroad service to shippers and citizens of said states without affording any additional transportation service or other compensating results or substantial benefits to anyone in any manner except the enhancement of the financial position of the Rio Grande.

IV

Movants believe said order is unlawful, null and void and they desire to intervene in the above-entitled proceeding and present to the Court on behalf of the public in their respective states the grounds upon which they contend that said order should be enjoined, annulled and set aside as referred to and shown in the attached pleading.

[fol. 46] Respectfully submitted, Don Eastvold, Attorney General of Washington; Robert L. Simpson,

Asst. Attorney General of Washington, Attorneys for Washington Public Service Commission, State Capitol, Olympia, Washington; John H. Carkin, C. W. Ferguson, Attorneys for Public Utilities Commissioner of Oregon, Public Service Building, Salem, Oregon; John H. Riskin, Attorney for Board of Railroad Commissioners of the State of Montana, Helena, Montana; Howard B. Black, Attorney General of Wyoming, Attorney for State Board of Equalization and Public Service Commission of Wyoming, Cheyenne, Wyoming; Clarence S. Beck, Attorney General of Nebraska; Bert L. Overcash, Assistant Attorney General of Nebraska, Attorneys for State of Nebraska and Nebraska State Railway Commission, State Capitol, Lincoln, Nebraska.

NOTICE OF MOTION (omitted in printing)

[fol. 47] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

CLAIMS FOR WHICH INTERVENTION IS SOUGHT AS PLAINTIFFS BY WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.—Filed July 22, 1953

I

Washington Public Service Commission, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of Montana, State Board of Equalization and Public Service Commission of Wyoming, State of Nebraska and Nebraska State Railway Commission, seek intervention in the above-entitled proceeding upon the claims, and grounds and for the reasons and the purpose set forth in the complaint therein, which are hereby adopted and made the claims, grounds and reasons of these movants, together

with the matters hereinafter set forth, for enjoining, setting aside and annulling the order of the Interstate Commerce Commission dated January 12, 1953, in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company vs. Union Pacific Railroad Company, et al.*

[fol. 48]

II

Movants intervened in said proceedings before the Interstate Commerce Commission (hereinafter called "Commission") and presented testimony, written and oral arguments showing that the demands of the Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") in that proceeding, were inconsistent with and contrary to the National Transportation Policy and other legislation enacted by Congress, and granting such demands in whole or in substantial part, would, through the diversion of traffic and revenue from the Union Pacific Railroad Company to the Rio Grande, impair and deteriorate the railroad transportation service of shippers and the public in said states; would jeopardize and impair the ability of the Union Pacific Railroad Company to continue to render its satisfactory and efficient transportation service in those said states; would result in curtailment of train service and railroad employment in numerous cities, towns and communities in said states, thus impairing and deteriorating the economic welfare of their citizens; and would result in wasteful and uneconomic transportation through diversion of traffic to the longer routes of the Rio Grande.

III

The evidence and showing in said proceeding required a finding and conclusion that there is no public need for through routes and joint rates as requested by Rio Grande; that said respective intervener states and the shippers and citizens therein represent and constitute the public interest directly involved and controlling in this case; that the Rio Grande has no remedial interest in the claims of any shippers, cannot maintain this proceeding as a representative of any shipper or public interest and cannot obtain relief herein upon any claims of individual shippers; that

no complaints have been filed with and no demands have been made by any shipper or the public upon the respective [fol. 49] commissions of said states and that the only purpose served by granting the Rio Grande's demands would be to improve its financial position to the harm and detriment of citizens and the public in said states.

IV

Movants by this intervention seek an opportunity to present to the Court their reasons and arguments as indicated above and in the allegations set forth in the complaint in the above-entitled case upon which they believe the Commission's order of January 12, 1953, should be enjoined and annulled.

Respectfully submitted, Don Eastvold, Attorney General of Washington, Robert L. Simpson, Asst. Attorney General of Washington, Attorneys for Washington Public Service Commission, State Capitol, Olympia, Washington; John H. Carkin, C. W. Ferguson, Attorneys for Public Utilities Commissioner of Oregon, Public Service Building, Salem, Oregon; John H. Risken, Attorney for Board of Railroad Commissioners of the State of Montana, Helena, Montana; Howard B. Black, Attorney General of Wyoming, Attorney for State Board of Equalization and Public Service Commission of Wyoming, Cheyenne, Wyoming; Clarence S. Beck, Attorney General of Nebraska, Bert L. Overcash, Assistant Attorney General of Nebraska, Attorneys for State of Nebraska and Nebraska State Railway Commission, State Capitol, Lincoln, Nebraska.

[fol. 50] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

MOTION OF UNION PACIFIC RAILROAD COMPANY, ET AL., TO DENY AND STRIKE PETITION OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY FOR LEAVE TO INTERVENE—Filed July 23, 1953

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, move that the Court deny and strike the document filed July 21, 1953, entitled "Petition of The Denver and Rio Grande Western Railroad Company for Leave to Intervene" in the above-entitled proceeding, on the ground that said petition does not conform to the requirements of Rule 24(c) of the Federal Rules of Civil Procedure (Title 28 U. S. C. A., Federal Rules of Civil Procedure, Rules 17-51).

In support of their motion, plaintiffs invite the Court's attention to the fact that said petition does not inform the Court or the parties to the above-entitled suit of the claim or defense for which intervention is sought and is not accompanied by a pleading setting forth the claim or defense for which intervention is sought. In support of this motion, plaintiffs respectfully invite the Court's attention to *Cowan v. Tipton*, 1 F. R. D. 694; *Mullins v. De Soto Securities Co.*, 2 F. R. D. 502, 507; *Miami County Nat. Bank of Paola, Kan. v. Bancroft*, 121 F. 2d 921, 925; and *Interna-*
[fol. 51] *tional Brotherhood, Etc. v. Keystone F. Lines*, 123 F. 2d 326, 328.

Respectfully submitted, Elmer B. Collins, 1416 Dodge Street, Omaha 2, Nebraska; F. O. Steadry, 400 West Madison Street, Chicago 6, Illinois; Conrad Olson, Northern Pacific Railway Bldg., 5th &

Jackson Streets, St. Paul 1, Minnesota; L. E. Torinus, Jr., 175 East 4th Street, St. Paul 1, Minnesota; Roland J. Lehman, 80 East Jackson Blvd., Chicago 4, Illinois; Carson L. Taylor, 516 West Jackson Blvd., Chicago 6, Illinois; Eugene S. Davis, Railway Exchange Building, St. Louis 1, Missouri, Attorneys for Plaintiffs.

NOTICE OF MOTION (omitted in printing)

[fol. 52] CERTIFICATE OF SERVICE (omitted in printing)

[fols. 53-53c] CLERK'S CERTIFICATE OF SERVICE OF NOTICE OF HEARING ON MOTIONS (omitted in printing)

[fol. 54] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY TO WITHDRAW ITS PETITION OF INTERVENTION—August 14, 1953

On application duly made in court for leave of The Denver and Rio Grande Western Railroad Company to withdraw its petition to intervene heretofore filed in the above-entitled proceeding;

It Is Ordered that leave be and the same is hereby granted to The Denver and Rio Grande Western Railroad Company to withdraw its petition for leave to intervene heretofore filed in this cause.

Dated August 14, 1953.

By the Court, John W. Delehant, United States District Judge.

[fol. 55] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

AMENDED PETITION OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY FOR LEAVE TO INTERVENE—Filed August 17th, 1953.

To The Honorable Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

Now comes The Denver and Rio Grande Western Railroad Company and represents that it has an interest in the issues and matters involved in the above-entitled proceeding adverse to the interest of the plaintiffs herein and files this its amended petition for leave to intervene in and become a party defendant to said proceeding, with a right to be heard and to file an answer and other pleadings therein; and for cause shows:

1. That the petitioner, a corporation organized and existing under the laws of the State of Delaware, is a common carrier by railroad engaged in the transportation of persons and property in intrastate, interstate and foreign commerce; that it owns and operates approximately 2400 miles of railroad in the States of Colorado, New Mexico and Utah; that it has interchange track connections and interchanges traffic with the Union Pacific at Denver, Colorado, [fol. 56] and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and with the Western Pacific at Salt Lake City. The Rio Grande also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern, which is a part of the Burlington System. At Colorado Springs the Rio Grande interchanges traffic with the Santa Fe and the Rock Island. At Pueblo, Colorado, it interchanges traffic with the Santa Fe, the Colorado and Southern, and the Missouri Pacific. At Wal-

senburg, Colorado, it interchanges traffic with the Colorado and Southern, and at Trinidad, Colorado, with the Santa Fe and the Colorado and Southern.

2. The petitioner was the complainant in the proceeding before the Interstate Commerce Commission, the decision and order in which the plaintiffs herein seek to enjoin and set aside. By that complaint petitioner sought an order from the Interstate Commerce Commission requiring plaintiffs herein and other defendants in that case to establish joint rates on freight traffic via the route of the complainant through its Colorado and Utah gateways, between (a) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Trinidad, etc., and points east thereof; and between Utah common points and the northwest territory served by the Union Pacific and its connections already described. In its decision of January 12, 1953, reported in 287 I. C. C. 611, the Commission granted a part of the relief sought by the petitioner as complainant in the proceeding described. It is that decision of the Commission which the plaintiffs seek to annul, set aside and enjoin in the instant proceeding.

3. Under the provisions of Section 2323 of the Judicial Code, 28 U. S. C. 2323, the petitioner is authorized to intervene in the above-entitled proceeding as of right.

[fol. 57] 4. Petitioner, upon intervening herein, will show that, although the order of the Commission here assailed granted only part of the relief sought by petitioner in its complaint before the Commission, that order is not invalid for any of the reasons herein alleged by the plaintiffs, and therefore, the suit of the plaintiffs should be dismissed.

5. Accompanied herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., is the answer of your petitioner, which answer sets forth the defense for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled case and to file the answer which is tendered herewith, with the right to have notice and to be treated in all other respects as if

it had been named as defendant, and for such other and further relief as the Court shall determine.

Respectfully submitted, Harry L. Welch, 730 Farm Credit Building, Omaha 2, Nebraska; Herbert M. Boyle, 1531 Stout Street, Denver, Colorado; Robert E. Quirk, 1116 Investment Building, Washington 5, D. C., Attorneys for Petitioner.

[fols. 58-59] Certificate of Service (omitted in printing)

[fol. 60] [File endorsement omitted]

In the District Court of the United States for the District of Nebraska, Omaha

[Title omitted]

Answer of The Denver and Rio Grande Western Railroad Company, Intervening Defendant—Filed August 17, 1953

To the Honorable Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

Your petitioner, The Denver and Rio Grande Western Railroad Company, hereinafter called the Rio Grande, pursuant to leave granted by this court to become an intervening defendant herein, files this its answer to the complaint of the plaintiffs. In filing this answer the Rio Grande does not waive but reserves the right to assail in a court of competent jurisdiction the validity of that part of the order of the Interstate Commerce Commission which arbitrarily imposed territorial and other restrictions in respect to the joint competitive rates prescribed and arbitrarily failed and refused to prescribe the joint competitive rates and competitive routes on all of the traffic and between all of the points involved in the complaint of the Rio Grande before that Commission. The Rio Grande now and at all times hereafter saving and reserving to itself all rights and all

manner of benefit and advantage of exception to the many [fol. 61] errors and insufficiencies contained in the complaint, for answer thereunto or unto so much of such parts thereof as it is advised that it is material for it to answer, answers and says:

I

The Rio Grande admits the allegations of paragraphs I to III, inclusive, of the complaint.

II

The Rio Grande admits the allegations of paragraph IV of the complaint herein, but refers to its complaint filed with the Interstate Commerce Commission August 1, 1949, described in paragraph IV of the complaint, for a more full and complete statement as to the relief sought by the Rio Grande in that complaint.

III

Answering the allegations of paragraph V of the complaint, the Rio Grande admits that the plaintiffs and 41 other defendants, out of a total of 217 defendants, filed answers to the complaint of the Rio Grande. For answers to the remaining allegations of paragraph V of the complaint, the Rio Grande refers the court to the complaint filed with the Interstate Commerce Commission which is a part of the record before the court, for a statement as to the allegations made therein.

IV

The Rio Grande admits the allegations of paragraph VI of the complaint and avers that the American Short Line Railroad Association also intervened in support of the complaint of the Rio Grande before the Commission.

V

The Rio Grande admits the allegations of paragraph VII of the complaint, except that it alleges that the Rio Grande, [fol. 62] as well as the Union Pacific Railroad Company, has numerous branch lines connecting with and extending from its main lines in Utah and Colorado.

VI

Answering the allegations of paragraph VIII of the complaint, the Rio Grande admits that the first three sentences thereof are substantially correct; the Rio Grande neither admits nor denies the remaining allegations of paragraph VIII because they are conclusions and argumentative in character which require no further answer. The Rio Grande denies that the diversion of traffic to it would short-haul or deprive the Union Pacific Railroad Company of its present haul to the extent of about 1,000 miles, and would deprive other railroad plaintiffs herein of their entire haul on many thousand carloads of traffic annually. The Rio Grande alleges that the joint competitive rates and the competitive routes via the Rio Grande sought by it and approved in part by the Interstate Commerce Commission in its report and order will in numerous instances result in longer hauls and in larger revenue to the Union Pacific than it now obtains in connection with its participation with plaintiffs and other railroads in numerous other joint competitive rates and routes.

VII

Answering the allegations of the first sentence of paragraph IX of the complaint, the Rio Grande admits that the joint rates therein described were canceled in 1906 and in 1912, but denies that the joint rates were canceled with the approval of the Interstate Commerce Commission, and the Rio Grande alleges that the through routes established in the year 1897 on the freight traffic involved via Ogden and Salt Lake City, Utah, and the route of the Rio Grande between points on the Oregon Short Line Railroad and the [fol. 63] Oregon Railroad and Navigation Company and points such as Trinidad, Pueblo, Canyon City, Colorado Springs, Denver and other Colorado common points and points east thereof, were not canceled in 1906 or 1912 by the tariffs which canceled the joint rates, or by any other means then or later adopted by plaintiffs, or any of them, but that such through routes continued in effect and are still in effect. The Rio Grande denies the allegations in the last sentence of paragraph IX.

VIII

The Rio Grande denies the allegations of paragraph X of the complaint and alleges that said allegations are neither relevant nor material to any of the issues that were before the Commission or to any of the issues that are before this court.

IX

The Rio Grande admits the allegations of paragraphs XI, XII and XIII of the complaint, but refers the court to the report and order of the Commission of January 12, 1953, annexed to the complaint as Appendix "B", (287 I. C. C. 611), for a more full and complete statement as to the findings, reasons and conclusions of the Commission than is recited in the excerpt quoted in paragraph XII of the complaint.

X

Answering the allegations of paragraph XIV of the complaint, the Rio Grande denies that the order and decision of the Commission is invalid for any of the reasons set forth in that paragraph. The Rio Grande further alleges that many, if not most of the averments in paragraph XIV of the complaint are mere conclusions and are argumentative in character, which require no further answer.

[fol. 64]

XI

Answering the allegations of paragraph XV of the complaint, the Rio Grande denies that the order of the Interstate Commerce Commission of January 12, 1953, if permitted to become effective, would cause irreparable injury and damage to plaintiffs.

XII

Except as herein expressly admitted, the Rio Grande denies each and every allegation contained in the complaint.

All of which matters and things the Rio Grande is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Harry L. Welch, Farm Credit Building, Omaha, Nebraska; Herbert M. Boyle, The Denver and Rio

Grande Western Railroad Company, 1531 Stout Street, Denver, Colorado; Robert E. Quirk, 1116 Investment Building, Washington 5, D. C.. Attorneys for The Denver and Rio Grande Western Railroad Company, Intervening Defendant.

[fols. 65-66] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 67] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civ. 76-53

ORDER GRANTING MOTION TO INTERVENE AT WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.—August 14, 1953

On this 14th day of August, 1953, the Motion to Intervene as Plaintiffs of Washington Public Service Commission, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of Montana, State Board of Equalization and Public Service Commission of Wyoming, State of Nebraska and Nebraska State Railway Commission, came on for hearing, pursuant to notice, and in default of any opposition thereto.

It is ordered that said Motion to Intervene as Plaintiffs be and the same is hereby granted.

John W. Delehant, United States District Judge.

[fol. 68] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING AMENDED PETITION OF INTERVENTION OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY—Filed August 18, 1953.

On application duly made in Court for leave of the Denver and Rio Grande Western Railroad Company to intervene, as party defendant, in the above-entitled cause;

It Is Ordered that leave be and the same is hereby granted to the Denver and Rio Grande Western Railroad Company to intervene in this cause, and it is hereby allowed to enter its appearance in said cause, to file its answer in intervention to appear by counsel and to defend as fully as if named as a defendant by the complaint.

By the Court: John W. Delehant, United States District Judge.

[fol. 69] [File endorsement omitted]

In the United States District Court for the District of Nebraska, Omaha Division

[Title omitted]

Answer of The United States—Filed August 19, 1953.

The United States of America (hereinafter referred to as the United States), one of the defendants in this action, answering the complaint filed herein, says:

1. Answering the allegations contained in paragraphs I and II of the complaint, the United States admits the same, but respectfully refers the Court to the order of the Commission of January 12, 1953, which is attached as Appendix A to the complaint, for a complete and accurate statement of the matters contained in the order.

2. Answering the allegations contained in paragraph III of the complaint, the United States admits the same.

3. Answering the allegations contained in paragraph IV of the complaint, the United States admits that the Denver and Rio Grande Western Railroad Company filed a complaint before the Commission on August 1, 1949. This complaint is a part of the record before the Commission in this case, which will be submitted at the trial, and the Court is respectfully referred to the complaint for a true and accurate statement of all the matters contained therein. In so far as the allegations in paragraph IV of the complaint are inconsistent therewith, they are hereby denied.

[fol. 70] 4. Answering the allegations contained in para-

graph V of the complaint, the United States admits that answers to the complaint before the Commission were filed by the Union Pacific Railroad Company and numerous other defendants. The Court is respectfully referred to the complaint itself for the matters alleged therein, and in so far as the allegations contained in paragraph V of this complaint are inconsistent with the complaint before the Commission they are hereby denied.

5. Answering the allegations contained in paragraph VI of the complaint, the United States admits the same.

6. Answering the allegations contained in paragraph VII of the complaint, the United States avers that it does not have sufficient knowledge and information to form a belief as to the truth of such allegations and therefore denies the same.

7. Answering the allegations contained in paragraph VIII of the complaint, the United States admits the first four sentences thereof. With respect to the remaining allegations in the paragraph, the United States avers that they are argumentative in character and require no answer.

8. Answering the allegations contained in paragraph IX of the complaint, the United States avers that the allegations in said paragraph, which assert that no through routes and joint rates have ever been established between the Denver and Rio Grande Western Railroad Company and the Union Pacific Railroad Company, involve conclusions of law which require no answer. Further answering paragraph IX of the complaint, the United States denies that the Commission approved the cancellation of any joint rates between the Denver and Rio Grande Western Railroad Company and the Union Pacific Railroad Company in 1906 and 1912. With respect to the other allegations in paragraph IX of the complaint, the United States avers that it does not have [fol. 71] sufficient knowledge and information to form a belief as to the truth of such allegations, and therefore denies the same.

9. Answering the allegations contained in paragraph X of the complaint, the United States avers that it does not have sufficient knowledge and information to form a belief as to the truth of such allegations, and therefore denies the same. The United States further avers that the allegations contained in paragraph X of the complaint are immaterial

to the issues involved in this case, and in many respects are improper in their implications and should be completely disregarded by the Court.

10. Answering the allegations contained in paragraph XI of the complaint, the United States admits the same.

11. Answering the allegations contained in paragraph XII of the complaint, the United States respectfully refers the Court to the report and decision of the Commission attached to Appendix B to the complaint for a complete and accurate statement of the matters contained therein. In so far as the allegations of paragraph XII of the complaint are inconsistent with the report and decision attached to the complaint, they are hereby denied.

12. Answering the allegations contained in paragraph XIII of the complaint, the United States admits the same.

13. Answering the allegations contained in paragraph XIV of the complaint, the United States denies each and every allegation contained therein.

14. Answering the allegations contained in paragraph XV of the complaint, the United States denies that the plaintiffs will be irreparably injured by the order of the Commission of January 12, 1953. All other allegations in this paragraph of the complaint are admitted.

15. For further answer to the complaint, the United States avers that the order of the Commission assailed in this action was entered pursuant to its statutory authority after full and fair hearing upon substantial evidence, that [fol. 72] the report of the Commission is clear and carefully drawn and contains all required findings, and that the order is valid in all respects.

Wherefore, having fully answered the allegations in the complaint, the United States prays that the relief sought be denied, and that the complaint be dismissed with costs to the plaintiffs.

James E. Kilday, E. Riggs McConnell, Special Assistants to the Attorney General, Department of Justice, Washington 25, D. C., Attorneys for the United States of America. Stanley N. Barnes, Assistant Attorney General. Joseph T. Votava, United States Attorney.

Certificate of Service (omitted in Printing)

[fol. 73] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

AMENDED ORDER ORGANIZING THREE-JUDGE COURT—September 21, 1953

The above named plaintiffs having filed suit which is now pending in the above entitled court, seeking temporary and permanent injunction enjoining, suspending, annulling and setting aside a certain order of the Interstate Commerce Commission dated January 12, 1953, on the grounds, among others, that said order is and the enforcement thereof will be violative of certain provisions of the Constitution of the United States; and said application for temporary injunction having been presented to the Honorable John W. Delehant, United States District Judge for the District of Nebraska, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

It is now here ordered that Honorable Harvey M. Johnsen, United States Circuit Judge, and Honorable John [fol. 74] C. Collett, United States Circuit Judge, be and they hereby are designated to sit with the above named Honorable John W. Delehant, United States District Judge for the District of Nebraska, to hear and determine said action and proceeding.

The order organizing a three-judge court herein, dated July 13, 1953, is hereby revoked and cancelled for the reason that the Honorable John B. Sanborn, United States Circuit Judge, has other engagements making it inadvisable for him to attempt to sit in this case.

Dated this 21st day of September, A. D. 1953.

Archibald K. Gardner, Chief Judge, United States Court of Appeals, for the Eighth Circuit.

[fols. 75-76] CLERK'S CERTIFICATE OF SERVICE OF AMENDED ORDER ORGANIZING THREE-JUDGE COURT (omitted in Printing)

[fol. 77] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION.

[Title omitted]

PETITION OF SECRETARY OF AGRICULTURE FOR LEAVE TO INTERVENE—Filed October 2, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division:

I

The Secretary of Agriculture of the United States, under Rule 24 of the Rules of Civil Procedure, hereby moves the Court for an order permitting him to intervene as a defendant in this action so that he may make and establish the defenses in the proposed answer attached hereto.

II

The Secretary of Agriculture was a party in interest in the proceeding before the Interstate Commerce Commis-[fol. 78] sion entitled "Docket No. 30297—*Denver & Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, out of which this court action arose; and he may intervene in this action as a matter of right, as contemplated by Title 7, section 1291, and Title 28, section 2323, of the United States Code. For convenience of the Court there is quoted below the said section 1291 of Title 7, being section 201 of the Agricultural Adjustment Act of 1938:

> "(a) The Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, the Commission shall cause the Secretary to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard.

"(b) If such rate, charge, tariff, or practice complained of is one affecting the public interest, upon application by the Secretary, the Commission shall make the Secretary a party to the proceeding. In such case the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. The liability of the Secretary in any such case shall extend only to liability for Court costs.

"(c) For the purposes of this section, the Interstate Commerce Commission is authorized to avail itself of the cooperation, records, services, and facilities of the Department of Agriculture.

"(d) The Secretary is authorized to cooperate with and assist cooperative associations of farmers making complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products."

Wherefore, the Secretary of Agriculture prays that an order be entered permitting him to intervene in this action and to file the proposed answer attached hereto.

[fol. 79] Respectfully submitted, by direction of the Secretary of Agriculture of the United States.

Charles W. Bucy, Associate Solicitor, Henry A. Cockrum, Attorney, Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.

[fol. 80] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF THE SECRETARY OF AGRICULTURE OF THE UNITED STATES

The Secretary of Agriculture of the United States, intervening defendant in the above-captioned action, for answer to the complaint filed herein states:

I

Answering the allegations contained in paragraphs I to III, inclusive, of the complaint, the Secretary admits the same.

II

Answering the allegations contained in paragraph IV of the complaint, the Secretary admits the same but respect-[fol. 81] fully refers the Court to the Complaint filed on August 1, 1949, in the administrative proceeding before the Commission entitled No. 30297—*Denver & Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, referred to in said paragraph, for a full and complete statement respecting the matters contained in the complaint in the administrative proceeding.

III

Answering the allegations contained in paragraph V of the complaint, the Secretary admits the first sentence thereof. The Court is respectfully referred to the complaint filed on August 1, 1949, in the administrative proceeding before the Commission for a full and complete statement respecting the allegations contained therein and insofar as the allegations in paragraph V of the complaint herein are inconsistent with the complaint in the administrative proceeding they are denied.

IV

Answering the allegations contained in paragraph VI of the complaint, the Secretary admits the same.

V

Answering the allegations contained in paragraph VII of the complaint, the Secretary admits the same except that he avers that the Denver & Rio Grande Western Railroad Company and the Union Pacific Railroad Company have numerous branch lines connecting with and extending from their respective main lines in Utah and Colorado.

VI

Answering the allegations contained in paragraph VIII of the complaint, the Secretary admits the statements contained in the first four sentences thereof but avers that the remaining allegations in the paragraph are argumentative in character and require no answer.

[fol. 82]

VII

Answering the allegations contained in paragraph IX of the complaint, the Secretary admits that the joint rates were cancelled but denies that such action was taken with approval of the Commission and denies the remaining allegations in the paragraph.

VIII

Answering the allegations contained in paragraph X of the complaint, the Secretary avers that he does not have sufficient knowledge and information to form a belief as to the truth of such allegations, and therefore denies the same and avers that the allegations are immaterial to any issues before this Court.

IX

Answering the allegations contained in paragraphs XI, XII and XIII of the complaint, the Secretary admits the same but respectfully refers the Court to the decision of the Commission in No. 30297—*Denver & Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, attached as Appendix B to the complaint, for a full statement of the conclusions and findings of the Commission.

X

Answering the allegations contained in paragraph XIV of the complaint, the Secretary denies that the order of the Commission is invalid for any of the reasons set forth in the said paragraph.

XI

Answering the allegations contained in paragraph XV of the complaint, the Secretary denies that the Commission's order, if permitted to become effective, would irreparably injure and damage the plaintiffs.

[fol. 83] Wherefore, having fully answered the allegations in the complaint, the Secretary prays that the relief sought be denied and that the said complaint be dismissed.

Respectfully submitted, by direction of the Secretary of Agriculture of the United States. Charles W. Bucy, Associate Solicitor; Henry A. Cockrum, Attorney, Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.

[fols. 84-85] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 86] CLERK'S CERTIFICATE OF SERVICE OF PETITION FOR LEAVE TO INTERVENE (omitted in printing)

[fol. 87] CLERK'S CERTIFICATE OF SERVICE OF NOTICE OF HEARING (omitted in printing)

[fol. 88] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE TO SECRETARY OF AGRICULTURE—Oct. 8, 1953

On this 8th day of October, 1953, this cause comes on for ruling on the petition for leave to intervene filed herein on October 2, 1953 by the Secretary of Agriculture of the United States.

On consideration of such application, the court finds that it should be granted and allowed.

It is, Therefore, Considered and Ordered:

1. That the Petition for Leave to Intervene filed herein by the Secretary of Agriculture of the United States be and it hereby is granted and allowed; that the Secretary of Agriculture of the United States be and he hereby is permitted to intervene in this action and to file herein his answer, copy of which is attached to his Petition for Leave to Intervene;

2. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehant Judge, U.S. District Court.

[fol. 89] CLERK'S CERTIFICATE OF SERVICE OF ORDER GRANTING LEAVE TO INTERVENE (Omitted in printing)

[fol. 90] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

MOTION OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL TO INTERVENE AS PLAINTIFFS UNDER RULE 24, AND NOTICE THEREOF—Filed Oct. 15, 1953

I.

This motion to intervene as plaintiffs in the above-entitled proceeding is filed pursuant to Rule 24 (a) and (c) (28 U.S.C.A., Federal Rules of Civil Procedure, Rules 17-51) by M. P. Caveny of Omaha, Nebraska, and the employees of the Union Pacific Railroad Company who are represented by the following standard railroad labor organizations:

Brotherhood of Locomotive Engineers,
Brotherhood of Locomotive Firemen and Enginemen,
Order of Railway Conductors,
Brotherhood of Railroad Trainmen,
American Train Dispatchers Association,
Railroad Yardmasters of America,
Order of Railroad Telegraphers,
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes,
Brotherhood of Railroad Signalmen of America,
Brotherhood of Maintenance of Way Employes,
American Railway Supervisors Association,
International Association of Machinists,
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America,
[fol. 91] International Brotherhood of Blacksmiths, Drop Forgers and Helpers,
Sheet Metal Workers International Association,
International Brotherhood of Electrical Workers,
Brotherhood Railway Carmen of America,
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

II.

Movants are duly constituted and recognized collective bargaining representatives of employees of Union Pacific Railroad Company, designated as such by the National Mediation Board under the provisions of the Railway Labor Act. The Congress has permitted them to intervene, in Section 17, (11) of the Interstate Commerce Act (49 U.S.C.A. § 17 (11)) reading as follows:

> *Intervention of representatives of employees.* (11) Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

The above right of intervention was held to be absolute, in *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519 (526-7). The movants have an interest in the above-entitled civil action because they are adversely affected by the order issued under date of January 12, 1953 by the Interstate Commerce Commission (hereinafter called the Commission) because the placing into effect of that order will result in the loss of employment by many of the movants, and the displacement and downgrading of others, and the necessity of removal of their families and homes by others to different localities of residence. The movants have an interest because this proceeding involves matters which embrace their wages and working conditions and will exercise a vital effect upon the movants, their families and dependents.

M. P. Caveny, of Omaha, Nebraska, is the General Chairman of the Brotherhood of Locomotive Engineers on the Union Pacific Railroad Company, and has been designated to speak for and represent in this action not only the locomotive engineers, but all Union Pacific employees who are represented by the standard railroad labor organizations named in this motion to intervene as plaintiffs. They were duly admitted by the Interstate Commerce Commission as interveners in the proceeding entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* vs. *Union Pacific Railroad Company, et al,* and were permitted to introduce testimony and evidence at the

hearings, and appeared in oral argument and briefs, as [fol. 92] parties in interest in the proceeding before the Commission, and therefore they have a statutory absolute right under the provisions of U.S.C. Title 28, § 45a to appear as parties in the Civil Action herein.

III.

The complaint in the above-entitled proceeding seeks to enjoin, suspend, annul and set aside an order issued under date January 12, 1953, by the Commission in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.* These railroads will be referred to below as the Rio Grande, and the Union Pacific. Because the demands of the Rio Grande in its complaint in said proceedings were proven to seriously jeopardize and harm the interests of the Union Pacific employees, as well as the shippers and the general public, movants intervened in said proceedings before the Commission and presented testimony, written evidence, and oral and written arguments in support of the contention by the Union Pacific employees that the Commission should deny the demands of the Rio Grande and dismiss the complaint. The order of the Commission, however, granted a large part of the Rio Grande's demands, thereby jeopardizing the employment, seniority rights, earnings, pension rights, and other working conditions of the Union Pacific employees because of potential reductions in train service and consequent abolishing of non-operating employment, resulting from the diversion of traffic from the Union Pacific to the Rio Grande.

IV.

Movants verily believe said order by the Commission is unlawful, null and void, and would result in deterioration of railroad service to shippers and citizens in the affected States without providing additional transportation service or substantial advantages to anyone in any fashion except the benefit to the financial position of the Rio Grande. Movants desire to intervene in the above-entitled proceeding and present to the Court on behalf of the approximately [fol. 93] 55,000 employees of the Union Pacific the grounds

upon which they contend that said order should be enjoined, annulled and set aside as referred to and shown in the attached pleading.

Respectfully submitted, M. P. Caveny of Omaha, Nebraska, Chairman of The Union Pacific General, Chairmen's Association on behalf of the employees of Union Pacific Railroad Company who are represented by the following labor organizations: 1. Brotherhood of Locomotive Engineers, 2. Brotherhood of Locomotive Firemen and Enginemen, 3. Order of Railway Conductors, 4. Brotherhood of Railroad Trainmen, 5. American Train Dispatchers Association, 6. Railroad Yardmasters of America, 7. Order of Railroad Telegraphers, 8. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, 9. Brotherhood of Railroad Signalmen of America, 10. Brotherhood of Maintenance of Way Employes, 11. American Railway Supervisors Association, 12. International Association of Machinists, 13. International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, 14. International Brotherhood of Blacksmiths, Drop Forgers and Helpers, 15. Sheet Metal Workers International Association, 16. International Brotherhood of Electrical Workers, 17. Brotherhood Railway Carmen of America, 18. International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, Justus R. Moll, 1001 Connecticut Avenue, Washington 6, D. C., J. D. Cranny, 412 Farnham Building, Omaha 2, Nebraska, J. P. Moore, 412 Farnham Building, Omaha 2, Nebraska, Attorneys for said Movants.

[fol. 94] NOTICE OF MOTION (omitted in printing)

[fol. 95] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

CLAIMS FOR WHICH INTERVENTION IS SOUGHT AS PLAINTIFFS BY BROTHERHOOD OF LOCOMOTIVE ENGINEERS—Filed Oct. 15, 1953

I.

M. P. Caveny of Omaha, Nebraska, chairman of the Union Pacific General Chairmen's Association, for himself and on behalf of the approximately 55,000 employees of the Union Pacific Railroad Company (hereinafter called the Union Pacific) who are represented by the following standard railroad labor oganizations:

Brotherhood of Locomotive Engineers,
Brotherhood of Locomotive Firemen and Enginemen,
Order of Railway Conductors,
Brotherhood of Railroad Trainmen,
American Train Dispatchers Association,
Railroad Yardmasters of America,
Order of Railroad Telegraphers,
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes,
Brotherhood of Railroad Signalmen of America,
Brotherhood of Maintenance of Way Employes,
American Railway Supervisors Association,
International Association of Machinists,
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America,
International Brotherhood of Blacksmiths, Drop Forgers and Helpers,
Sheet Metal Workers International Association,
[fol. 96] International Brotherhood of Electrical Workers,
Brotherhood Railway Carmen of America,
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers,

seek intervention in the above-entitled proceeding upon the claims, and grounds and for the reasons and the purposes set forth in the complaint therein, which are hereby adopted and made the claims, grounds and reasons of these movants, together with the matters hereinafter set forth, for enjoining, setting aside and annulling the order of the Interstate Commerce Commission (hereinafter called the Commission) dated January 12, 1953, in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* vs. *Union Pacific Railroad Company, et al.*

II.

Movants intervened in said proceedings before the Commission and presented testimony, evidence, written and oral arguments showing that the demands of the Denver and Rio Grande Western Railroad Company (hereinafter called the Rio Grande) in that proceeding were inconsistent with and contrary to the National Transportation Policy and other legislation enacted by the Congress of the United States, and that the granting of such demands or any portion of them would, through the diversion of traffic from the Union Pacific to the Rio Grande, result in the impairment and deterioration of railroad transportation service of the shippers and the public. It would jeopardize and impair the ability of the Union Pacific to continue rendition of its efficient and satisfactory transportation service, and result in curtailment of train service, and reduction of railroad employment in many cities and towns, causing drastic adverse effect upon the economic welfare of their citizens. The diversion of traffic from the Union Pacific to the Rio Grande would result in wasteful, uneconomic transportation on the longer, more mountainous routes of the Rio Grande.

III.

In the said proceeding before the Commission the evidence and showing required a finding and conclusion that no public need exists for through routes and joint rates as requested by the Rio Grande. The shippers, citizens, carrier employees and communities affected therein represent and constitute the public interest involved and controlling in this proceeding. The Rio Grande has no remedial in-

[fol. 97] terest in the claims of any shippers and cannot maintain this proceeding as a representative of any shipper or public interest and cannot obtain relief herein upon any claims of individual shippers. No complaints have been filed with the respective State commissions, and no demands have been made by any shipper or the public upon the State commissions. The only purpose served by granting any part of the Rio Grande's demands would be to improve the financial position of the Rio Grande to the harm and detriment of citizens, the employees of the Union Pacific and other carriers who are plaintiffs in this civil action, and the public.

IV.

The National Transportation Policy (49 U.S.C., preceding §§ 1) is the substantive law of the Interstate Commerce Act (hereinafter called the Act). All the provisions of the Act shall be administered within that declaration of policy by the Congress. The policy includes the phrase: "and to encourage fair wages and equitable working conditions;". Regularity of employment by means of seniority rights is an important working condition. Instead of preserving and encouraging regularity and continuity of employment, the Commission's order would destroy it for a large number of Union Pacific employees, thus creating employee wastage. In addition, a large number of other Union Pacific employees would be placed in adverse positions because of reductions in earnings, and being required to move to other localities in order to continue working for the Union Pacific. This would be contrary to the letter and spirit of the National Transportation Policy.

V.

The Commission in its report, January 12, 1953, outlined the disastrous adverse effect upon the conditions of employment of the Union Pacific employees but failed to include them in its General Discussion and Ultimate Fact Findings, or in its Conclusions. It left this problem hanging in the air, stating there is no specific provision in section 15 (3) or (4) requiring that conditions be imposed for the protection of employees who may be affected adversely by diversion of traffic from the Union Pacific to the Rio Grande. The

Commission had taken the same position regarding employee-protection under section 1 (18-20) of the Act, re- [fol. 98] fusing to impose conditions for employees adversely affected by abandonments, but after several years of such decisions, the matter went to the Supreme Court resulting in unanimous decision holding that specific power is not required in the statute and that the employees should be given full consideration under "public convenience and necessity" as well as "public interest." On the same date of the Commission's report and order, January 12, 1953, the Supreme Court upheld the doctrine of implied powers of the Commission in *American Trucking Associations, et al,* v. *United States and Interstate Commerce Commission,* 344 U.S. 298, 73 S. Ct. 307.

Movants believe the order of the Commission is unlawful, null and void, and should be enjoined by the Court, annulled and set aside. But in the alternative, if the Court should permit any part of the Commission's order to become effective, it should impose conditions for the protection of carrier-employees adversely affected pursuant to or as a result of the order, or the Court should remand the problem of employee-proteetion to the Commission with instructions that it shall impose suitable conditions for protection of carrier-employees.

VI.

Movants believe that the order of the Commission is unlawful also in that it failed to follow its own policy and practice in order proceedings which might adversely affect the carrier-employees involved. The practice provides: (1) if definitely shown that no employees will be affected, no condition is necessary; (2) if not definitely shown that no employees will be affected, jurisdiction is reserved for four years; (3) if shown that employees will be affected, conditions for their protection are prescribed (*Chicago & North Western Ry. Co. et al, merger,* 261 I.C.C. 672).

In the proceeding resulting in the Commission's report and order dated January 12, 1953, it was definitely shown that certain trains would be discontinued, and the total potential loss of employment was 5,144 persons. The Commission's order granted sufficient diversion of traffic to amount to 25% of the total potential, which would reduce

the loss in employment to 1,286 jobs. If the Rio Grande should succeed in getting only 20% of this potential traffic it would amount to loss of 257 jobs. The evidence proved that reduction in carloads of freight results in reduction of [fol. 99] carrier-employees. Freight trains are not operated unless there is sufficient freight to justify running a train.

The evidence is clear that under the Report and Order, there will be loss of employment and resulting adverse effects upon the Union Pacific's employees. Under the above-cited policy of the Commission, it should be required to make provisions for employee-protection. The Commission has found that it is not possible to estimate accurately how much traffic might be diverted, and therefore it cannot be said how many Union Pacific employees will be displaced, or to ascertain the names of the individual employees. Such has been true in cases under other sections of the Act, but the Commission has imposed conditions, or reserved jurisdiction therefor. The Court should enjoin the Report and Order, as null and void, or in the alternative, the Court should remand the proceeding to the Commission, instructing that employee-protection be provided.

VII

Although the Commission in its Report indicated that section 15 (3) and (4) do not specify protection for the employees, it is clear that the statutes give the Commission power to impose conditions. The Commission has given consideration to the adverse effect upon carrier-employees in previous orders, such as *Cancelation of Rates and Routes via Short Lines*, 245 I.C.C. 183. This proceeding involved five short line carriers. The through routes and joint rates were cancelled entirely on one of these small carriers, in which the employees made no protest, and the potential loss in revenue did not exceed $500 per year. In the other four carriers involved, cancelation was denied, in full or in part. The Commission stated: "The livelihood of these employees and their home investments are placed in jeopardy by the proposed cancelation, and their representatives appeared in opposition thereto." This is the situation of the Union Pacific employees in this civil action. Their livelihood and their home investments are placed in jeop-

ardy by the Commission's Report and Order dated January 12, 1953. The Order should be enjoined as null and void, or in the alternative, the Court should remand the proceeding and instruct the Commission to provide employee-protection.

VIII

The movants have requested employee-protection. The [fol. 100] measure of such protection has been spelled out by the Congress, in section 5 (2) (f) of the Act. The costs of such protection should be borne by the beneficiary of the Commission's order dated January 12, 1953, i.e., the Rio Grande. This principle is found in several decisions by the Commission, such as *Gulf, Mobile & Ohio R. Co., Purchase Securities*, 267 I.C.C. 145, 151; *Gulf, Mobile & Ohio R. Co., Abandonment*, 282 I.C.C. 311, 337; *International G. N. R. Co. Trustee Trackage Rights*, 282 I.C.C. 30, 37. It would be unjust and unreasonable to deprive the Union Pacific of hundreds of carloads of revenue freight by government order, and also require the Union Pacific to bear the expense of employee-wastage resulting from the order. The beneficiary should bear the expense, as the Commission has decreed in the cases cited. The expense will be reduced year by year through deaths, pensions, and the securing of other employment, and at the end of the protective period there will be no more expense.

Employee-protection is actually the charging of employee-wastage to operating expenses. When the carriers abandoned many steam locomotives which had been made obsolete by diesel power, they charged the steam locomotives to depreciation accounts built up from charges to operating expenses. If certain Union Pacific employees become unemployed because of the diversion of traffic to the Rio Grande, this employee-wastage should be compensated for the protective period from operating expenses of the beneficiary-carrier. It can reduce or eliminate the expense simply by giving employment to the adversely affected Union Pacific employees. The Commission's order will create no new traffic but will divert Union Pacific traffic to the Rio Grande. The Rio Grande will need more employees, and the Union Pacific will require less employees.

Employee-wastage is not a new idea. It has been before

the highest court. The Supreme Court held unanimously that a business may be required to carry the burden of employee-wastage in *United States and Interstate Commerce Commission* v. *Lowden et al*, 308 U.S. 225, 240, 60 S. Ct. 248, 256, 84 L.Ed. 208.

IX

The *Lowden* case was decided prior to the 1940 amendments to the Act. At the time it was decided, the only statutory grounds for employee-protection were "the public [fol. 101] interest" plus a statutory power by which the Commission may attach conditions to its order. In its unanimous decision, opinion by Mr. Justice Stone, the Court held the phrase "'public interest'" as used in the Transportation Act, 1920, includes the interests of the carrier-employees.

It is significant that section 15 (3) was added by the Transportation Act, 1920, and the "public interest" of section 15 (3) comes within the above definition by the Court. And section 15 (3 also includes the statutory power to attach conditions to the Commission's order. Here we find the same two factors which were present in the *Lowden case.*

Three years after the *Lowden* decision, the Supreme Court decided another case. In abandonments under section 1 (18-20) of the Act, the Commission had refused to impose conditions for employee-protection on the ground that section 1 (18-20) did not specifically make such provision, and this section was based upon "public convenience and necessity" rather than upon "public interest." Again the Supreme Court unanimously decided that employee-protection could be imposed, and the Commission has done so in many subsequent proceedings. (*Interstate Commerce Commission and Pacific Electric Ry. Co.* v. *Railway L.E.A. et al*, 315 U.S. 373, 378, 62 S. Ct. 717, 86 L.Ed. 904).

Section 15 (3) has these same factors, the basis for decision being the "public interest", and the power to impose conditions is given the Commission. In this proceeding the Commission has shown that employees of the Union Pacific will be affected adversely, but in its conclusions

it has left this problem unresolved. The Court should enjoin the Report and Order as null and void, or in the alternative, the Court should remand the proceeding to the Commission with directions that employee-protection be imposed.

X

Movants by this intervention request an opportunity to present to the Court their reasons and arguments as indicated above and in the allegations set forth in the com- [fol. 102] plaint in the above-entitled case upon which they believe the Commission's order dated January 12, 1953, should be enjoined and annulled.

Respectfully submitted,

M. P. Caveny of Omaha, Nebraska, Chairman of The Union Pacific General Chairmen's Association, for the employees of Union Pacific Railroad Company who are represented by the following labor organizations: Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, Brotherhood of Railroad Trainmen, American Train Dispatchers Association, Railroad Yardmasters of America, Order of Railroad Telegraphers, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Brotherhood of Railroad Signalmen of America, Brotherhood of Maintenance of Way Employes, American Railway Supervisors Association, International Association of Machinists, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, International Brotherhood of Blacksmiths, Drop Forgers and Helpers, Sheet-Metal Workers International Association, International Brotherhood of Electrical Workers, Brotherhood Railway Carmen of America, International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, Justus R. Moll, 1001 Connecticut Avenue, Washington 6, D. C., J. D. Cranny, 412 Farnham Building, Omaha 2, Nebraska, J. P. Moore, 412 Farnham

Building, Omaha 2, Nebraska, Attorneys for said Interveners.

October 15, 1953.

[fol. 103] Certificate of service (omitted in printing).

[fol. 104] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION UNDER RULE 24 OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.—October 19, 1953

On this 17th day of October, 1953 at 10 o'clock a.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein in behalf of M. P. Caveny, Chairman of The Union Pacific General Chairmen's Association, representing sundry labor organizations.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, therefore, considered and ordered:

1. That said motion for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehaut, Judge, U. S. District Court.

[fol. 105] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER SETTING ACTION FOR TRIAL—October 17, 1953

On this 17th day of October, 1953 at 10 o'clock a.m., the undersigned, one of the judges of this court, and counsel for sundry parties hereto confer upon the subject of an appropriate date for the trial of this action, after the giving of notice to counsel of such conference.

On consideration whereof, the court finds that an appropriate date for the trial of this action on its merits is Monday, November 23, 1953 commencing at 10 o'clock a.m.

It is, therefore, considered and ordered:

1. That this action be and it hereby is set for trial on its merits before the duly constituted court of three judges, heretofore designated for membership upon the court, commencing at 10 o'clock a.m. on November 23, 1953;

2. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehaut, Judge, U. S. District Court.

[fol. 106] Clerk's Certificate of Service of Order of Intervention and Order Setting Action for Trial (omitted in printing).

[fol. 107] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PETITION OF IDAHO FARM BUREAU FEDERATION FOR LEAVE TO INTERVENE—Filed Nov. 5, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division.

Comes now The Idaho Farm Bureau Federation and hereby moves the court for an order pursuant to Rules 24 (a) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as a defendant in the above-entitled proceeding.

1. That the Idaho Farm Bureau Federation represents 11,000 farm families who are residents of the State of Idaho and is an Idaho corporation, with offices in Pocatello, Idaho, and has an important and pecuniary interest in the issues involved in the instant proceeding.

[fol. 108] 2. That petitioner was an intervening complainant before the Interstate Commerce Commission in the proceeding in which the order of that Commission is here assailed, and therefore is authorized to intervene in this proceeding as of right under the provisions of Section of 2323 of the Judicial Code, 28 U.S.C. 2323.

3. Accompanied herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is the answer of the petitioner, which answer sets forth the defense for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled proceeding and to file the answer which is tendered herewith, with the right to have notice and to be treated in all

other respects as if it had been named as defendant, and for such other and further relief as the court shall determine.

Lloyd D. Browning, General Counsel Idaho Farm Bureau Fed., Raymond E. McGrath, Attorneys for Petitioner.

[fol. 109] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF THE IDAHO FARM BUREAU FEDERATION

Your petitioner, The Idaho Farm Bureau Federation, pursuant to leave granted by this court to become an intervening defendant herein, files this its answer to the complaint of the plaintiffs. The Idaho Farm Bureau Federation now and at all times hereinafter saving and reserving to itself all rights and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the complaint, for answer thereunto or unto so much of such parts thereof as it is advised that it is material for it to answer, answers and says:

I.

For its answer and to avoid reiteration and repetition, petitioner adopts as its own and as if pleaded herein the [fol. 110] answer, together with the reservations in the answer, filed in this court by The Denver and Rio Grande Western Railroad Company, an intervening defendant herein.

Wherefore, having answered the allegations in the complaint, The Idaho Farm Bureau Federation prays that the relief sought be denied, and that the complaint be dismissed with costs to the plaintiffs.

Lloyd D. Browning, General Counsel Idaho Farm Bureau Federation, Raymond E. McGrath, Attorneys for Petitioner.

[fol. 111] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION OF IDAHO FARM BUREAU FEDERATION UNDER RULE 24—November 5, 1953

On this 5th day of November, 1953, at 4:25 o'clock p.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein in behalf of The Idaho Farm Bureau Federation, which represents farm families who are residents of Idaho, and is an Idaho corporation with offices in Pocatello, Idaho.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, therefore, considered and ordered:

1. That said motion for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehaut, Judge, U.S. District Court.

[fols. 112-117] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 118] CLERK'S CERTIFICATE OF SERVICE OF ORDER OF INTERVENTION—(omitted in printing)

[fol. 119] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PETITION OF THE PUBLIC SERVICE COMMISSION OF UTAH FOR LEAVE TO INTERVENE—Filed November 9, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division:

Comes now The Public Service Commission of Utah and hereby moves the court for an order pursuant to Rules 24 (a) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as a defendant in the above-entitled proceeding.

1. That petitioner is an agency of the state of Utah, with offices in Salt Lake City, Utah. The citizens of the State of Utah have an important and pecuniary interest in the issues involved in the instant proceeding.

2. That petitioner was an intervening complainant before the Interstate Commerce Commission in the proceeding in which the order of that Commission is here assailed, and therefore is authorized to intervene in this proceeding as of right under the provisions of Section 2323 of the Judicial Code, 28 U.S.C. 2323.

[fol. 120] 3. Accompanied herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is the answer of the petitioner, which answer sets forth the defense for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled proceeding and to file the answer which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as defendant, and for such other and further relief as the court shall determine.

Public Service Commission of Utah, E. R. Callister, Jr., Attorney General, State of Utah, By Peter M. Lowe, Deputy Attorney General, Raymond E. McGrath, First National Bank Building, Omaha, Nebraska, Attorneys for Petitioner.

[fol. 121] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF THE PUBLIC SERVICE COMMISSION OF UTAH

Your petitioner, The Public Service Commission of Utah, pursuant to leave granted by this court to become an intervening defendant herein, files this its answer to the complaint of the plaintiffs. The Public Service Commission of Utah now and at all times hereinafter saving and reserving to itself all rights and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the complaint, for answer thereunto or unto so much of such parts thereof as it is advised that it is material for it to answer, answers and says:

I

For its answer and to avoid reiteration and repetition, petitioner adopts as its own and as if pleaded herein the answer, together with the reservations in the answer, filed in this court by The Denver and Rio Grande Western Railroad Company, an intervening defendant herein.

[fol. 122] Wherefore, having answered the allegations in the complaint, the Public Service Commission of Utah prays that the relief sought be denied, and that the complaint be dismissed with costs to the plaintiffs.

Public Service Commission of Utah, E. R. Callister, Jr., Attorney General, State of Utah, By Peter M. Lowe, Deputy Attorney General, Raymond E. McGrath, First National Bank Building, Omaha, Nebraska, *Attorneys for Petitioner.*

[fols. 123-125] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 126] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION UNDER RULE 24 OF PUBLIC SERVICE COMMISSION OF UTAH—NOV. 9, 1953

On this 9th day of November, 1953, at 2:58 o'clock p.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein in behalf of the Public Service Commission of Utah which is an agency of the State of Utah with offices in Salt Lake City, Utah.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, therefore, considered and ordered:

1. That said motion for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehant, Judge, U. S. District Court.

[fol 127] CLERK'S CERTIFICATE OF SERVICE OF ORDER OF INTERVENTION (omitted in printing)

[fol. 128] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

PETITION OF BROTHERHOOD COMMITTEES ON THE DENVER & RIO GRANDE WESTERN RAILROAD CO., FOR LEAVE TO INTERVENE—Filed November 13, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division:

Come now the following Brotherhood Committees on The Denver and Rio Grande Western Railroad Company, to-wit:

1. General Committee of Adjustment of Brotherhood of Locomotive Engineers;
2. General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen;
3. General Committee of Adjustment of Order of Railway Conductors;
4. General Grievance Committee of Brotherhood of Railroad Trainmen;
5. General System Committee of American Train Dispatchers Association;
6. General Grievance Committee of Railroad Yardmasters of America;
7. General Committee of System Division 49 of Order of Railroad Telegraphers;
8. System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees;

[fol. 129] 9. General Committee of Brotherhood of Railroad Signalmen of America;

10. Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees;
11. General Adjustment Committee of Switchmen's Union of North America;
12. District No. 20 of International Association of Machinists;
13. District No. 22 of International Brotherhood of

Boilermakers, Iron Ship Builders and Helpers of America;

14. System Council No. 27 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers;
15. District Council No. 10 of Sheet Metal Workers International Association;
16. System Council No. 21 of International Brotherhood of Electrical Workers;
17. Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America;
18. System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers;
19. Protective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, AF of L;
20. Local No. 383 of Hotel and Restaurant Employees International Alliance, AF of L;

and hereby move the Court for an order pursuant to Rules 24(a) and (c) of the Federal Rules of Civil Procedure permitting petitioners to intervene as defendants in the above entitled proceeding, and as ground therefor state:

1. That petitioners are all the functioning and carrier-wide Brotherhood Committees on The Denver and Rio Grande Western Railroad Company and represent all employees on The Denver and Rio Grande Western Railroad Company system under the Railway Labor Act and have an important interest in this proceeding and in the rights of Labor as these rights will be affected by a decision of the issues here involved;

2. That in the proceeding before the Interstate Commerce Commission in which was entered the order herein [fol. 130] assailed, petitioners were intervening complainants and under the provisions of Sec. 2323 of the Judicial Code 28 U.S.C.A. 2323, petitioners are authorized to intervene in this proceeding as of right;

3. That accompained herewith as required by the provisions of Rule 24(c) of the Federal Rules of Civil Pro-

cedure, 28 U.S.C.A., is the answer of petitioners which answer sets forth the defense for which intervention is sought;

Wherefore petitioners pray for an order granting them leave to intervene as defendants in the above entitled proceeding and permitting them to file the answer tendered herewith, with right to have notice and be treated in all respects as if named defendants, and for such other and further relief as the Court shall deem proper in the premises.

Raymond E. McGrath, First National Bank Building, Omaha, Nebraska; Alden T. Hill, Woolworth Building, Fort Collins, Colorado, Attorneys for Petitioners.

[fol. 131] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF INTERVENERS, BROTHERHOOD COMMITTEES ON THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Your petitioners, being all the Brotherhood Committees on the Denver and Rio Grande Western Railroad, those hereinafter named following the signature of their attorneys, pursuant to leave granted by this Court to become an intervening defendants herein, file their answer to the complaint of the plaintiffs as follows and say:

1. That these petitioners and intervening defendants save and reserve all rights and manner of benefits and advantage of exceptions to the errors and insufficiencies in the complaint herein;

2. For their answer and to avoid repetition, these petitioners and intervening defendants adopt as their own answer as if pleaded herein the answer, together with the reservations in the answer, filed in this Court by the Denver and Rio Grande Western Railroad Company, an intervening defendant herein, so that the allegations, admissions and denials, of such answer are the allegations,

[fol. 132]

admissions and denials, made by these intervening defendants.

Wherefore, these intervening defendants pray that the relief sought be denied, and that the complaint be dismissed at plaintiffs costs.

Raymond E. McGrath, First National Bank Building, Omaha, Nebraska; Alden T. Hill, Woolworth Building, Fort Collins, Colorado.

Attorneys for Intervening Defendants:

General Committee of Adjustment of Brotherhood of Locomotive Engineers;
General Grievance Committee of Brotherhood Locomotive Firemen and Enginemen;
General Committee of Adjustment or Order of Railway Conductors;
General Grievance Committee of Brotherhood of Railroad Trainmen;
General System Committee of American Train Dispatchers Association;
General Grievance Committee of Railroad Yardmasters of America;
General Committee of System Division 49 of Order of Railroad Telegraphers;
System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees;
General Committee of Brotherhood of Railroad Signalmen of America;
Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees;
General Adjustment Committee of Switchmen's Union of North America;
District No. 20 of International Association of Machinists;

[fol. 133] District No. 22 of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America;
System Council No. 27 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers;
District Council No. 10 of Sheet Metal Workers International Association;

System Council No. 21 of International Brotherhood of Electrical Workers;
Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America.
System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers;
Protective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, AF of L;
Local No. 383 of Hotel and Restaurant Employees International Alliance, AF of L;

On the Denver and Rio Grande Western Railroad.

[fols. 134-136] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 137] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION OF BROTHERHOOD COMMITTEES ON THE DENVER & RIO GRANDE WESTERN RAILROAD CO.,—Nov. 13, 1953

On this 13th day of November, 1953, at 4:04 o'clock, p.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein in behalf of the following Brotherhood Committees on The Denver and Rio Grande Western Railroad Company, to-wit:

General Committee of Adjustment of Brotherhood of Locomotive Engineers;
General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen;

General Committee of Adjustment of Order of Railway Conductors;
General Grievance Committee of Brotherhood of Railroad Trainmen;
General System Committee of American Train Dispatchers Association;
General Grievance Committee of Railroad Yardmasters of America;
General Committee of System Division 49 of Order of Railroad Telegraphers;
System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees;
General Committee of Brotherhood of Railroad Signalmen of America;
Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees;
General Adjustment Committee of Switchman's Union of North America;
District No. 20 of International Association of Machinists;
District No. 22 of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America;
[fols. 138-141] System Council No. 27 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers;
District Council No. 10 of Sheet Metal Workers International Association;
System Council No. 21 of International Brotherhood of Electrical Workers;
Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America;
System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers;
Protective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, AF of L;
Local No. 383 of Hotel and Restaurant Employees International Alliance, AF of L;

and petitioners represent employees on The Denver and Rio Grande Western Railroad Company system.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, therefore, considered and ordered:

1. That said motion for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehant, Judge, U.S. District Court.

[fol. 142] CLERK'S CERTIFICATE OF SERVICE OF ORDER OF INTERVENTION (omitted in printing)

[fol. 143] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PETITION OF NATIONAL LIVE STOCK PRODUCERS ASSOCIATION FOR LEAVE TO INTERVENE—Filed Nov. 19, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division.

Comes now the National Live Stock Producers Association, and hereby moves the court for an order pursuant to Rules 24 (a) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as a defendant in the above-entitled proceeding.

I

That petitioner is a cooperative organization composed of over 500,000 live stock growers and feeders throughout

the live stock producing areas of the country, and twenty-two cooperative live stock associations, with its principal offices at 139 North Clark Street, Chicago 2, Illinois; it is initially interested in the sale, purchase and transportation of live stock in interstate commerce and has an important and pecuniary interest in the issues involved in the above proceeding.

[fol. 144]

II

That petitioner was an intervening complainant before the Interstate Commerce Commission in the proceeding in which the order of that Commission is here assailed, and therefore is authorized to intervene in this proceeding as of right under the provisions of Section 2323 of the Judicial Code, 28 U.S.C. 2323.

III

That petitioner will receive certain benefits from the order of the Interstate Commerce Commission in Docket No. 30297 (287 I.C.C. 611), wherein the Commission found (interalia) that through routes and joint rates are necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with the Rio Grande, on ordinary live stock, in carloads, from origins in the Northwest to various destinations in the United States. The joint rates found necessary and desirable in the public interest are not to exceed the joint rates maintained on ordinary livestock from or to the same points over the Union Pacific routes.

IV

Accompanied herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is the answer of the petitioner, which answer sets forth the defense for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled proceeding and to file the answer which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as defendant, and

for such other and further relief as the court shall determine.

Raymond E. McGrath, First National Bank Building, Omaha, Nebraska., Lee J. Quasey, Suite 1507, 139 N. Clark St., Chicago 2, Illinois., Attorneys for Petitioner.

[fol. 145] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF NATIONAL LIVE STOCK PRODUCERS ASSOCIATION, INTERVENING DEFENDANT.

Your petitioner, National Live Stock Producers Association, pursuant to leave granted by this court to become an intervening defendant herein, files this its answer to the complaint of the plaintiffs. The National Live Stock Producers Association now and at all times hereinafter saving and reserving to itself all rights and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the complaint, for answer thereunto or unto so much of such parts thereof as it is advised that it is material for it to answer, answers and says:

I

That petitioner will receive certain benefits from the order of the Interstate Commerce Commission in Docket No. 30297 (287 I.C.C. 611), wherein the Commission found (interalia) that through routes and joint rates are necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with the Rio Grande, on ordinary live stock, in carloads, from origins in the North-
[fol. 146] west to various destinations in the United States. The joint rates found necessary and desirable in the public interest are not to exceed the joint rates maintained on ordinary live stock from or to the same points over the Union Pacific routes.

II

For its further answer and to avoid reiteration and repetition, petitioner, National Live Stock Producers Association, adopts as its own and as if pleaded herein the answer, together with the reservations in the answer, filed in this court by The Denver and Rio Grande Western Railroad Company, an intervening defendant herein.

Wherefore, having answered the allegations in the complaint, the petitioner, National Live Stock Producers Association, prays that the relief sought be denied, and that the complaint be dismissed with costs to the plaintiffs.

Raymond E. McGrath, First National Bank Building, Omaha, Nebraska., Lee J. Quasey, Suite 1507, 139 N. Clark St. Chicago 2, Illinois., Attorneys for Petitioner.

[fols. 147-149] CERTIFICATE OF SERVICE (omitted in printing)

[fols. 150-152] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION OF NATIONAL LIVE STOCK PRODUCERS ASSOCIATION—NOV. 23, 1953

On this 23rd day of November, 1953, at 10 o'clock, a.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein on behalf of the National Live Stock Producers Association, a cooperative organization composed of live stock growers and feeders throughout the live stock producing areas of the country and of cooperative live stock associations, with its principal offices at Chicago, Illinois.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, Therefore, Considered and Ordered:

1. That said action for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: Harvey M. Johnsen, J. C. Collet, John W. Delehant.

[fol. 153] Clerk's Certificate of Service of Order of Intervention—(Omitted in printing)

[fol. 154] In the District Court of the United States for the Division of Nebraska, Omaha Division

Civil Action No. 76-53

Union Pacific Railroad Company, et al., Plaintiffs,

v.

United States of America and Interstate Commerce Commission, Defendants

Opinion—October 22, 1954

Messrs. Elmer B. Collins, Asst. Western General Counsel, John J. Burchell and W. R. Rouse, Of Counsel, Omaha, Nebraska, for Union Pacific Railroad Company.

Mr. F. O. Steadry, Chicago, Illinois, for Chicago and North Western Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company.

Mr. Carson L. Taylor, Chicago, Illinois, for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Mr. Eugene S. Davis, St. Louis, Missouri, for Wabash Railroad Company.

Messrs. Robert E. Quirk, Washington, D.C., Harry L.

Welch, Omaha, Nebraska, and Herbert M. Boyle, Denver, Colorado, for Denver & Rio Grande Western Railroad Company.

Mr. L. E. Torinus, Jr., St. Paul, Minnesota, for Great Northern Railway Company.

Mr. Bert L. Overcash, Lincoln, Nebraska (Mr. Clarence S. Beck, Attorney General of Nebraska, was on the brief) for the State of Nebraska and Nebraska State Railway Commission.

Mr. Robert L. Simpson, Olympia, Washington (Mr. Don Eastvold, Attorney General of Washington, was on the brief) for Washington Public Service Commission.

Mr. John H. Carkin, Salem, Oregon (Mr. C. W. Ferguson was with him on the brief) for Public Utilities Commission of Oregon.

Mr. John H. Riskin, Helena, Montana, for Board of Railroad Commissioners of the State of Montana.

Mr. Howard B. Black, Attorney General of Wyoming, Cheyenne, Wyoming, for State Board of Equalization and Public Service Commission of Wyoming.

[fol. 155] Mr. Justice R. Moll, Washington, D. C., and Messrs. J. D. Cranny and J. P. Moore, Omaha, Nebraska, for M. P. Caveny of Omaha, chairman of the Union Pacific General Chairmen's Association.

Mr. Ray McGrath for Idaho Farm Bureau, Public Service Commission of Utah, Committees of the Railroad Brotherhoods who work for the D& RG, and National Livestock Producers Association.

Messrs. Warren H. Ploeger and Roland J. Lehman, on the brief, Mesrs. Nye F. Morehouse, M. L. Countryman, Jr. Edwin C. Matthias, J. C. Gibson, M. E. Bluhm, Joseph H. Miller, Of Counsel, for the plaintiffs.

Mr. Edward M. Reidy, Chief Counsel, and Mr. Samuel R. Howell, Asst. Chief Counsel, Of Counsel, for Interstate Commerce Commission.

Mr. Henry B. Cockrum, Acting Assoc. Solicitor, United States Department of Agriculture, Washington, D.C.; Mr. Charles W. Buey, Assoc. Solicitor, was with him on the brief for the Department of Agriculture.

Mr. E. Riggs McConnell, Special Asst. to the Attorney General, Washington, D.C.; Messrs. Stanley N. Barnes,

Asst. Attorney General, James E. Kilday, Special Asst. to the Attorney General, and Donald R. Ross, United States Attorney, were with him on the brief for the United States.

Before JOHNSEN and COLLET, Circuit Judges, and DELEHANT, District Judge.

COLLET, Circuit Judge.

The Denver and Rio Grande Western Railroad Company, hereafter referred to as the Rio Grande, filed a complaint with the Interstate Commerce Commission requesting the Commission to order the Union Pacific Railroad Company (and other lines comprising the Union Pacific System, together with connecting carriers comprising, in all, 221 railroads, which will be referred to as the Union Pacific) to file joint rates over through routes with the Rio Grande for the transportation of freight from and to certain areas. The Commission granted the request as to certain types of freight with substantial territorial limitations. The Union Pacific *Union Pacific* brings this action [fol. 156] to enjoin and set aside the order. A reference to a map of the United States will be helpful in understanding the following summarization of the facts.

The northern terminus of the Rio Grande is Ogden, Utah. From Ogden it runs south through Salt Lake City and Provo, Utah, then southeasterly and east, entering Colorado at about the south central part of that state, thence east and somewhat north through the central part of Colorado to Dotsero, west of Denver, where it divides, one branch going on east to Denver, the other swinging south and east to Pueblo, Colorado. From Denver the Rio Grande line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serve territory in southern Utah, northwestern New Mexico, and southern Colorado. These latter lines are not of special importance in this action. At Denver, Colorado Springs, Pueblo, and Trinidad the Rio Grande maintains joint rates and through routes with lines other than the Union Pacific to destinations east and south of those points.

The Union Pacific (including connecting lines which were defendants in the I.C.C. proceedings) serves the greater part of the east, south and midwestern sections of the United States. Traffic involved in this action from those

sections flowing westward over the Union Pacific and connecting lines converges at Denver and Cheyenne, Wyoming, then moves westwardly across the southern part of Wyoming to Ogden and Salt Lake City. One of its lines runs from Salt Lake City south to Provo, Utah, thence southwest to Los Angeles, California.

[fol. 157] The Union Pacific also serves the northwestern part of the United States, including that part of Utah north of Ogden, Montana, Oregon, and Washington. It is traffic from and to this latter territory, referred to herein as the northwest territory or area, which is the principal subject of the present controversy.

The Union Pacific maintains joint rates and through routes over its lines and with many connecting carriers from and to the northwest territory through Ogden and Salt Lake City, Cheyenne, Denver, and points east and south to the Atlantic Seaboard and the Gulf of Mexico. For a comparatively short distance, from Ogden through Salt Lake City to Provo, where the Los Angeles line swings southwest, the Union Pacific and the Rio Grande parallel and serve some common points. To and from these points, joint rates and through routes are maintained by the Union Pacific over its lines with the northwest territory and the area east of Cheyenne and Denver served by the Union Pacific. The Union Pacific does not maintain joint through rates with the Rio Grande, with certain exceptions not material in this proceeding. Freight moving from the northwest territory to points in southern Utah and Colorado on the Rio Grande, finally destined to points east of the eastern terminl of the Rio Grande, moves on the combination rate, consisting of the total of the Union Pacific rate to Ogden via Union Pacific and the Rio Grande rate from Ogden via Rio Grande to points on the Rio Grande. The same is true of the rates on shipments from points east of Denver to those points on the Rio Grande finally destined to the northwest territory. This combination of rates, or combination rate, as it is called, is considerably higher than a joint [fol. 158] through rate. Freight moving from and to the northwest territory from and to all points east of Denver [1]

[1] "All points east of Denver" will be used as the designation of all points included in the Commission's order to or

served by the Union Pacific and connecting carriers has the benefit of joint through rates via Union Pacific, with accompanying in-transit privileges en route, while freight originating on the Union Pacific in the northewest territory and moving to the area east of Denver, which is routed over the Rio Grande, pays the combination rate without in-transit privileges at points on the Rio Grande. The result is that practically all of the long-haul traffic originating in the northewest area and destined to the area east of [fol. 159] Denver goes over the Union Pacific all the way on the lower joint and through rates. Since the formal record before the Commission consists of 1,957 pages of

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from which through routes and joint rates were ordered established by the Union Pacific with the Rio Grande. The Commission's order in this respect was: (287 I.C.C. 611, 659)

"We conclude:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, then immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

testimony, 57 exhibits and 74 verified statements, the foregoing statement is obviously only a salient outline of the basis for the Rio Grande complaint. For a complete understanding of the intricacies of the case by one unfamiliar with the record, it will be necessary to refer to the extensive report and order of the Commission reported in 287 I.C.C. 611.

The Commission ordered the establishment of through routes and joint rates via Ogden or Salt Lake City by the Union Pacific with the Rio Grande for the transportation of granite and marble monuments in carloads from points of origin in Vermont and Georgia to destinations in the northwest area, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from points of origin in the northwest territory to destinations "east of Denver." The order is based upon three primary basic findings. First, that the through routes and joint rates are necessary and desirable in the public interest, in order to provide *adequate and more economic transportation*; second, that the existing joint rates maintained by the Union Pacific are and will be *unjust and unreasonable and unduly prejudicial* to shippers and receivers of freight using or desiring to use the Rio Grande and *unduly preferential to shippers and receivers of freight using the Union Pacific*; third, that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad between the northwest area and [fol. 160] points on the Bamberger line between Ogden and Salt Lake City, while refusing to establish joint rates with the Rio Grande to and from the same points on the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Sec. 3(4) of the Interstate Commerce Commission Act. Finding No. 1 has heretofore been quoted in footnote 1. Findings 2 and 3 are set out below.[2] To understand the import of these find-

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[2] "2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferen-

ings it is necessary to explain the factual theory upon which they are based.

First as to the finding that the rates ordered are necessary and desirable to provide adequate and more economic transportation. Located along the route of the Rio Grande, between Ogden on the west and Denver, Pueblo and Trinidad on the eastern termini, are a number of livestock feeders. Some of these are ranchers who graze and feed cattle and sheep. Others are operators of beet sugar plants which produce livestock feed as a by-product and feed the by-product to livestock. These livestock feeders buy cattle and sheep in the northwest area, which are ultimately destined for the market, and ship them to points on the [fol. 161] Rio Grande for feeding. Many of the principal livestock markets of the United States are located east of privileges which would permit these livestock feeders to ship from the northwest area to the feeding points on the Rio Grande and then reship on joint through rates to points east of Denver, Pueblo, and Trinidad, they are at a substantial rate disadvantage with similar livestock feeders following the same practice who are located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific, who reship to points east of Denver. They are also at a substantial rate disadvantage in purchasing livestock in the northwest area in competition with buyers located on the Union Pacific lines west of Denver and Cheyenne who have the benefit of joint through rates and in-transit privileges over the Union Pacific.

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tial of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act."

287 I.C.C. 611, 659-660.

Also located on the Rio Grande are a number of industries which clean, package, process, freeze, and store fresh fruits, vegetables, poultry, food products, butter, eggs and beans, and ship them on east to points beyond Denver, Pueblo and Trinidad. These industries are at a comparable rate disadvantage, without in-transit privileges, as livestock feeders, and for the same reasons.

Monument dealers obtaining or shipping granite and marble from Vermont and Georgia are unable to ship full carloads to the northwest territory and have the rate advantage of partially unloading cars at intermediate points on the Rio Grande under in-transit privileges of through routes [fol. 162] and joint rates which are available at points located on the Union Pacific.

This finding, which is finding No. 1 quoted in the footnote, is held by the Commission to justify ordering the establishment of through routes and joint rates under Secs. 15 (3) and 15 (4). Title 49 U.S.C.A. Secs. 15 (3) and 15 (4). Sec. 15(3) empowers the Commission to establish through routes and joint rates when necessary or desirable in the public interest,[3] but Sec. 15 (4) prohibits the Commission from ordering the establishment of through routes by a carrier under Sec. 15 (3) without the carrier's consent if the result would be to short-haul that carrier unless, as provided by Sec. 15 (4), the Commission finds that the through route is needed in order to provide (1) *adequate*, and (2) *more efficient* or *more economic* transportation.[4]

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[3] "Sec. 15 (3) The Commission may, and it shall whenever, deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by carriers subject to this part, * * *."

[4] "Sec. 15 (4) In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, * * * (b) unless the Commission finds that the through route

[fol. 163] The Commission accurately states the legal effect of Sec. 15 (4) in its report (Denver & R.G.W. R. Co. v. Union Pac. R. Co., 287 I.C.C. 611) at page 655 as follows:

"Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the 'through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation.' Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In Pennsylvania R. Co. v. United States, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in D. A. Stickell & Sons, Inc., v. Alton R. Co., supra, the supreme Court said that the expressions 'more efficient or more economic transportation, as used in section 15 (4), 'may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found.' These latter considerations are not determinative, however, unless the existing routes can be found not to provide 'adequate' transportation.

"In the proceeding just mentioned, the Supreme

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proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs, * * *"

Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests."

Was there evidence to support the finding of inadequacy? Only in the event there was inadequacy of transportation can the question of efficiency or economy be reached. It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order. There is no evidence to support a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are [fol. 164] inadequate. There is abundant support, however, for the finding that the service is inadequate to patrons of the Rio Grande, located on the Rio Grande between Ogden on the west and Denver, Pueblo, and Trinidad on the east (not served by the Union Pacific between Ogden and Provo), who do not have in-transit privileges with respect to freight moving from the northwest area which is to be reshipped to points east of Denver, if under the law the lack of in-transit privileges may constitute "inadequacy." That is also true as to the service to shippers of marble and granite from Vermont and Georgia to initial points on the Rio Grande who need the in-transit privileges of partial unloading or processing en route, incident to reshipment to final destination points beyond Ogden in the northwest area. The foregoing inadequacies are based upon the premise that the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15 (4). The Union Pacific vigorously contends that it does not. This question presents the crux of this case. If, as the Union Pacific contends, in-transit rights and privileges are matters over which the Commission under the law has no control, the existence or granting of which is subject only to managerial discretion of the carrier, and relate only to economy or efficiency of transportation to the exclusion of considerations of adequacy of transportation, then the lack of in-transit privileges will not suffice as a proper basis

for ordering "adequate" transportation. The argument is made to effect that since the transportation facilities are now available over the Union Pacific and the Rio Grande on the higher combination rates, the present nonexistence of in-transit privileges relates only to the cost or economy [fol. 165] of transportation. Reference is made to excerpts from opinions which it is said support the conclusion that the Commission may not under its general regulatory power force a carrier to provide or establish in-transit privileges. The question has many ramifications. We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. Pennsylvania R. Co., et al. v. United States, et al., 323 U. S. 588, 54 F. Supp. 381.

But the inadequacy established by the evidence does not extend to shipments from the northwest area to initial destinations east of Denver. The same is true of shipments of monuments from Vermont and Georgia to points of initial destination in the northwest territory. Transportation service is now adequate between those points. There is ample evidence to support the finding that the establishment of the through routes and joint rates between the northwest area and points on the Rio Grande (not also served by the Union Pacific between Ogden and Provo), as to shipments which require in-transit privileges at points on the Rio Grande for reshipment to points east of Denver, will result in more economical transportation. Differences in mileage and other comparative factors are for the Commission to weigh, evaluate and determine. Its ultimate factual conclusion may not be overturned when supported by the [fol. 166] evidence. But, again, there is no evidence that the service is inadequate or that more economical transportation service will result with respect to shipments from the northwest area to points between Odgen and Provo served by both the Union Pacific and the Rio Grande and to be

reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established. The evidence therefore sustains the finding of inadequacy and the need for more economical transportation only as to (1) carload shipments of commodities embraced in the Commission's order from points in the northwest territory destined to points of final destination east of Denver which require in-transit privileges at points on the Rio Grande; (2) shipments of granite and marble monuments from Vermont and Georgia to final destinations in the northwest territory which require in-transit privileges at points on the Rio Grande not also served by the Union Pacific. If the order had been so limited to the evidence it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15 (4).

[fol. 167] The second finding, that the combination rates maintained by the Union Pacific and the Rio Grande are unduly prejudicial to shippers using or desiring to use the Rio Grande and unduly preferential to shippers and receivers using the Union Pacific to the extent they exceed the joint and through rates available to shippers located on the Union Pacific, is made for the purpose of bringing the order within the authorization of Sec. 3(1). Title 49 U.S.C.A. Sec. 3 (1). That section is as follows:

> "Sec. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect

whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The situation which this finding seeks to correct, simply stated, is that the shippers and receivers of the designated commodities located on the Rio Grande who do not have in-transit privileges and joint and through rates are at an economic disadvantage compared to shippers and receivers located on the route of the Union Pacific who do have joint and through rates and in-transit privileges.

If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3 (1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15 (4) heretofore considered. But the prejudice and preference pro-
[fol. 168] hibited by Sec. 3 (1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3 (1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3 (1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this, where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in Central R. Co. of New Jersey v. United States, 257 U.S. 247, was different, the purpose of Sec. 3 (1) was there stated as follows: (Loc. cit. 259-260)

"What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same

carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of § 3."

If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3 (1) merely because a shipper entity described in Sec. 3 (1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15 (4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3 (1).

The third finding, heretofore quoted, to the effect that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad to and from points in the north- [fol. 169] west area and points on the Bamberger line from Ogden to Salt Lake City, inclusive, while refusing to maintain joint rates with the Rio Grande on shipments from the northwest area to the points served by both the Rio Grande and the Bamberger Railroad from Ogden to Salt Lake City, inclusive, discriminates against the Rio Grande, is based on Sec. 3 (4), which is as follows:

"Sec. 3 (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

The Bamberger Railroad is an electric line operating only from Ogden to Salt Lake City, serving those cities and

intermediate points. The Rio Grande serves all points served by the Bamberger. The criterion for determining unlawful discrimination under Sec. 3 (4) is stated by the Commission at page 658 of its order as follows:

> "A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred."

The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3 (4) clearly prohibits such discrimination. The Commission's order in this respect is valid under Sec. 3 (4).

[fol. 170] Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the Rio Grande's case before the Commission. We do not find justification for serious consideration of that question.

Findings of Fact

I

The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points.

II

The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific) between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from [fol. 171] the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.

III

The record supports the Commission's finding that present transportation service for granite and marble monuments, in carloads, originating in Vermont and Georgia, consigned to initial destination points on the Rio Grande, requiring unloading and in-transit privileges for continued movement to points in the northwest territory, is inadequate and uneconomical and that the establishment of joint rates and through service is necessary in order to provide adequate and more economic transportation for such shipments.

IV

The evidence supports the finding that as to designated items of traffic moving from the northwest area, shippers and receivers of freight located on the Rio Grande are at an economic disadvantage compared with shippers and receivers of freight from the northwest area who are located on the Union Pacific. But there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3 (1).

V

The evidence supports the finding of the Commission, referred to and quoted herein as Finding 3, that unlawful discrimination prohibited by Sec. 3 (4) is being practiced by the Union Pacific in refusing to establish through routes [fol. 172] and joint rates with the Rio Grande comparable to those existing between the Union Pacific and the Bam-

berger Line on traffic moving from the northwest area to points served by both the Bamberger Line and the Rio Grande between Ogden and Salt Lake City.

Conclusions of Law

I

The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4). The evidence therefore supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities in carloads originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities the order of the Commission is valid under Secs. 1, 15 (3) and 15 (4) of the Act and does not violate the direction of Sec. 15 (4) that reasonable preference be given the carrier which originates the traffic.

II

The evidence supports the finding of the Commission that it is necessary, in order to provide adequate and more economic transportation of shipments of marble and granite monuments in carloads from points in Vermont and Georgia [fol. 173] to points of final destination in the northwest territory, which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area, that through routes and joint rates be established between the Union Pacific and the Rio Grande as to such shipments.

III

To the extent that the order of the Commission requires the establishment of through routes and joint rates between

the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad, said order is not valid, because Sec. 15 (4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking.

[fol. 174]

IV

To the extent the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande at Ogden on carload traffic moving from the northwest area to points between Ogden and Salt Lake City, inclusive, served by both the Rio Grande and the Bamberger Line, the order is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act.

To the extent stated in the foregoing opinion, findings of fact, and conclusions of law, the order of the Commission will be enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings as it may deem appropriate, consistent herewith.

[File endorsement omitted.]

[fol. 175] Civil Action No. 76-53

UNION PACIFIC R. CO.

vs.

UNITED STATES

JOHNSEN, Circuit Judge, dissenting:

The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute. The majority opinion upholds in part the result which the Commission has so reached.

What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is "perishable food articles". Here, as taken from its Report, are the manner and perspective of its approach to the question.

"Growers [of perishable food articles in Idaho, located on the Union Pacific] * * * market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon and Washington] need as many markets and outlets as possible."[1] 287 I.C.C. at page 642. To comprehend or evaluate that need, says the Commission, "it is necessary to consider the nature, extent and functioning of our intricate and far-flung commodity marketing system." P. 655. The

[1] It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a "bridge" line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles.

importance, in our condition of growing population and national development, of having "a constantly expanding flow of diverse commodities" and "particularly articles of [fol. 176] food" is emphasized. The comment is made that "A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible," and the truism is expressed that "Adequate transportation facilities and services are required for the proper functioning of the system." P. 656.

Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

1. "Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible*. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process be permitted*." (Emphasis mine.) P. 656.

2. "A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities." In-transit privileges, "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit," are available at various points on the Union Pacific to through-shippers, on the basis of the joint rates applicable over that route, and similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates, by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these additional facilities would be able to enjoy them on the same basis as those on the Union Pacific. Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union [fol. 177] Pacific, "The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the wide-

spread system developed for the marketing of such commodities." P. 656.

3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them "from effective participation in the widespread system developed for the marketing of such commodities." In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given "as many routes as possible" and "as much flexibility as possible in the distribution process", because otherwise they will be "debarred from effective participation in * * * the marketing of such commodities."

In other words, whenever it is possible physically and practicably to open up a new or an additional through route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15 (4) of the Act, 49 U.S.C.A. § 15 (4), where the element of short-hauling another carrier is involved, as it is here, that such [fol. 178] an added through-route must also provide "more efficient or more economic transportation" than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15 (3) to prescribe joint rates and pointing out that joint rates necessarily in the situation will provide "more economic transportation", since they obviously are lower than the previous combination rates.

I have grave legal doubt whether the Commission's power to establish joint rates under section 15 (3) has any relationship to the term "more economic transportation" in section 15 (4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term "more economic transportation" in section 15 (4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportational comparison from the standpoint of the interests of both the public and the carriers—and that the Commission's power to establish joint rates under section 15 (3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15 (4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term "more economic transportation" under section 15 (4), in the addition of another carrier's route as a mere "bridge" line for such traffic. If that be not so, then there is not any situa-[fol. 179] tion in which the Commission can not make a finding of "more economic transportation" for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to "as many routes as possible" and "as much flexibility as possible in the distribution process," so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and further such new route can be declared to provide "more

economic transportation", because by placing joint rates in effect, the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15 (4) entirely as affording them any protection whatsoever against deprivation of their long hauls.

Here the opening up of a through route over the Rio Grande as a bridge carrier for the transcontinental freight involved will deprive the Union Pacific of a long haul of 975 miles upon such traffic as the Rio Grande is able to solicit away from it. But this is not the sole purport or effect of the Commission's order. If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessarily will reduce the cost of using the new through route as against the combination rate previously applicable.

[fol. 180] Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" is, as previously indicated, "perishable food articles". But it has, by means of some artificial classification, included ordinary livestock as a perishable food article (P. 656), saying merely, before doing so, that "We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway.". And it has further held that a little monument dealer, located on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and there in Colorado, on a through

rate basis, some individual monuments out of an estimated four-carload lot of monuments per year.[2]

All of this to me is but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that [fol. 181] end. But Congress has never been willing to accede to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All this is familiar history in the railroad world, and I shall not bother to go into it further here.

It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the

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[2] I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of "urgent need" (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of "as many routes as possible" and "as much flexibility as possible in the distribution process" for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country.

Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out.

I do not mean to make any implication, nor do I here assume to pass judgment, on whether the Ogden gateway is in other manner or to other extent subject to being opened up. All I say is that the philosophy and standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" can not be made the basis for overriding the short-hauling provisions of section 15 (4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term "more economic transportation" to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

The philos-phy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of [fol. 182] marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did.

I have previously referred to the fact that most of the traffic that is here involved originates on the branch lines of the Union Pacific, and that on such of this traffic as the Rio Grande is able to solicit to use its route, the Union Pacific will lose a line haul of 975 miles. The Report of the Commission admits that "the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves" is about 200 miles. Page 654. It also recognizes that the Rio Grande is a mountainous route, of higher grades, more circuity, and greater operational costs than the Union Pacific. "The total rise and fall in

feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific. Other data as to physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services." Page 648.

All of these matters, however, the Commission lightly brushes aside, as not having relationship to the question of "more economic transportation" in the situation, and so leaving it free to hold, as above indicated, that the new through route provides "more economic transportation", because its joint rates necessarily are lower than the previously applicable combination rates. All that the Commis- [fol. 183] sion says, in brushing aside the transportational differences which I have set out, as not requiring consideration on the question of "more economic transportation" in the situation, is that, when they are spread over hauls of such great lengths as are here involved, "they become relatively insignificant." Page 658.

The Report does not undertake to show what amount of traffic goes where. It merely says that "About 90 per cent of the traffic upon which joint rates are sought via Ogden and the Rio Grande moves to (Missouri River crossings and points east and southeast) and about 10 per cent to the Southwest." Page 626. How much terminates at the Missouri River crossing-points or at other midwestern destinations, the Report does not state. As to livestock, however, it certainly is a matter of common knowledge that the primary markets are Chicago, Omaha, Kansas City and some other Missouri River points. To each of these points, as well as to the Minneapolis and St. Louis markets, the record shows that a haul of 200 miles more, and a transportation time of at least 24 hours longer, as well as at least one or two more terminal-yard services, are involved over the Rio Grande route. I do not believe that without rational demonstration the Commission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1524 miles (Chicago), the elements of difference which I have set out

are so "relatively insignificant" as to be entitled to be ignored on the question of whether "more economic transportation" is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportational and service differences existing, as related to the question of "more economic transportation" under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without [fol. 184] establishment of the reality of that horizon for lumping purposes.

Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District Rates*, 176 I.C.C. 1, 190 I.C.C. 675, 190 I.C.C. 611, 200 I.C.C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations.

This dissent is being written hastily, in order not to delay the filing of the majority opinion, and I shall accordingly not take the time to go into detail on other matters. I [fol. 185] agree with the majority that the Commission had no right here to find a violation of section 3 (1) of the Act against the Union Pacific and its connecting through-route carriers, but the basis for my view is not that adopted by the majority, that a discrimination under this section cannot at all exist, unless the complaining person or entity is located upon the lines of the carrier or combination of carriers claimed to have committed the discrimination. I do not believe that this viewpoint is tenable on the language of section 3 (1), nor on the expressions contained in St. Louis Southwestern Ry. Co. v. United States, 245 U.S. 136, 144, as well as on the plain, contrary assumptions made in Texas & Pacific Ry. Co. v. United States, 289 U.S. 627. But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3 (1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3 (1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3 (1), I am certain that its action resting on this basis alone could not on these facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15 (4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through routes and joint rates in relation to the existing conditions.

[fol. 186] In the pattern of the Commission's apparent

attempt to strike at as much in the present situation as possible, the Commission further, as noted in the majority opinion, required the Union Pacific to establish joint rates with the Rio Grande to and from the same points where it maintained joint rates with the Bamberger Railroad. The Report says: "The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande." P. 659. The brief of the Union Pacific argues pointedly that "No evidence was submitted concerning or comparing transportation conditions on the Bamberger's electric line, between Ogden and Salt Lake City with conditions on the Rio Grande." The brief of the Commission makes no denial of the fact that no such evidence is contained in the record. The most that the Commission could properly have said, I think, was that it had not been made to appear by the evidence that there was any important dissimilarity in the conditions on the two roads. But the lack of any such evidence of dissimilarity could hardly afford a basis for a finding of similarity on the part of the Commisssion. This segment of the Commission's order is perhaps of relatively small importance in the present controversy. I refer to it simply as being characteristic or in the pattern of the loose and improper basis and manner in which it seems to me that the Commission has dealt with the entire situation.

I would strike down the Commission's order generally, on the basis and manner in which its result has been reached. In taking that position, however, I would again emphasize that I intend no implication that there may not exist some proper basis and some proper manner of reach as to some part of the Ogden gateway situation. I have not allowed my mind to look at that avenue, in either one direction or [fol. 187] the other. The pervading infirmities on which the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right there.

[File endorsement omitted.]

[fol. 188] Clerk's Certificate of Service of Opinion (Omitted in printing)

[fol. 189] [File endorsement omitted]

In the District Court of the United States for the District of Nebraska, Omaha Division

[Title omitted]

Motion of Intervening Defendant Denver and Rio Grande Western Railroad Company for New Trial—Filed November 1, 1954

Comes now the intervening defendant Denver and Rio Grande Western Railroad Company, and moves the Court to grant a new trial herein, or in the alternative to permit reargument of the above cause for the reasons that the Court erred in making certain findings of fact and certain conclusions of law, and erred in failing to sustain the decision of the Interstate Commerce Commission in its entirety insofar as it is attacked herein by the Union Pacific Railroad Company and other intervening plaintiffs.

Harry L. Welch, Harold W. Kauffman, of Gross, Welch, Vinardi & Kauffman, 730 Farm Credit Building, Omaha 2, Nebraska, Attorneys for the Denver and Rio Grande Western Railroad Company, Intervening Defendant.

Herbert M. Boyle, The Denver and Rio Grande Western Railroad Company, 1531 Stout Street, Denver Colorado. Robert E. Quirk, 1116 Investment Building, Washington 5, D. C., Of Counsel.

[fol. 190] Certificate of Service (Omitted in Printing)

[fol. 191] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

MOTION OF PLAINTIFFS AND INTERVENING PLAINTIFFS FOR A NEW TRIAL OR REARGUMENT AND RECONSIDERATION—Filed November 12, 1954

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, and intervening plaintiffs, Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, move the Court, pursuant to Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 59, to grant a new trial in the above-entitled cause, or in the alternative to permit reargument, and to reconsider this cause, for the reason that the majority opinion filed herein by the Court October 22, 1954 contains certain erroneous statements of fact which are vital to the conclusions reached, contains numerous errors of law, and also errs in failing to hold that the order of the Interstate Commerce Commission is null and void and should be enjoined in its entirety for the numerous reasons urged by plaintiffs and intervening plaintiffs.

[fol. 192] More specifically, these Movants respectfully urge in support of this motion that the majority opinion is erroneous in the following particulars:

I

The majority opinion errs in holding that the evidence of record supports the Commission's order to the extent indicated in the opinion, and the opinion clearly discloses that the majority has erred in failing to consider the whole record of evidence and the issues tendered herein, as required by the Administrative Procedure Act and the law of judicial review laid down by the Supreme Court of the United States. *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 487-488.

II

Although the majority opinion holds the order valid to the extent indicated therein, solely upon the belief that there are no transit privileges available for the involved traffic at points on the Rio Grande and that the absence of those privileges on the Rio Grande may be made the basis of a lawful order requiring the Union Pacific to short haul itself by making through routes and joint rates with the Rio Grande, the majority has erred in failing to consider and decide whether any of the numerous other grounds urged by these Movants render the order invalid in its entirety.

III

Upon its holding (page 10) that the Commission premised its order on its finding that Union Pacific routes are inadequate for the specified commodities when accorded transit privileges at points on the Rio Grande and that—

> "* * * the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande * * *",

the majority opinion errs in failing to hold that the order is entirely void, because, as alleged in the Rio Grande's complaint (pages 9-10) to the Commission and as clearly [fol. 193] shown without dispute in the evidence, and as plainly found and stated at page 634 of the Commission's report, there is no absence or lack of in-transit privileges on the Rio Grande but, instead, the fact is that the Rio Grande publishes and makes available to shippers using its line all transit privileges generally offered by other railroads, including the Union Pacific; hence, both the majority opinion and the Commission's order as construed by the majority are premised entirely upon a completely erroneous assumption of fact and, therefore, the order is necessarily null and void, and the majority opinion is fatally and fundamentally erroneous.

IV

As "transit privileges" are not "transportation" which railroads are required by the Interstate Commerce Act,

Section 1(3)(a) and (4), to provide or furnish, but are "commercial operations" as found by the Commission at page 634 of its report, the majority errs in holding that an absence or a lack of in-transit privileges incident to through joint rates via the Rio Grande supports the Commission's finding that transportation service furnished by Union Pacific routes are inadequate for shipments requiring transit privileges at points on the Rio Grande, and in failing to hold that such finding of inadequacy is arbitrary and capricious, and affords no legal basis for the order.

V

The majority opinion errs in relying upon the decision in *Pennsylvania R. Co., et al.* v. *United States, et al.*, 323 U.S. 588, 54 F. Supp. 381, as authority for its holding that the Commission has power to condemn as "inadequate" existing Union Pacific routes which offer all transit privileges and have been found by the Commission to furnish adequate and efficient service to shippers using those routes, and to order a new through route via the Rio Grande that short hauls existing Union Pacific routes merely to make transit [fol. 194] privileges available at points on the Rio Grande, for the Supreme Court's opinion and the Commission's report (255 I.C.C. 33) in the case cited clearly show that the shipper located at Hagerstown, Maryland, already had ample transit privileges and that Hagerstown was located on the line of the Pennsylvania Railroad and was not, as here, a point located upon and served exclusively by some railroad other than the Pennsylvania. The facts in that case are practically the complete reverse of the facts in this case.

VI

The majority opinion errs in failing to hold that the Commission's finding that the joint rates required via the Rio Grande are necessary and desirable "to provide adequate and more economic transportation" does not justify or support the order and is not the complete finding but is only a part of the full finding required under clause (b) of Sec. 15(4), which empowers the Commission to require

through routes that short haul existing routes only upon a finding that the through route proposed to be established—

> "is needed in order to provide adequate, and more efficient or more economic, transportation,"

for the Commission has not found that the Rio Grande route is "needed" or will be "more efficient or * more economic" [fol. 195] than Union Pacific routes, and its report clearly shows that the longer and more onerous Rio Grande route would be less efficient, and as the rates ordered are to be "the same" as the Union Pacific rates, the Commission's statement that the Rio Grande routes are necessary to provide "more economic" transportation is misleading, erroneous, and a complete nullity.

VII

The majority errs in failing to hold that the order is entirely null and void because it is premised on the erroneous and capricious theory that the statutory standards and limitations in Sec. 1(4) of the Act requiring carriers to establish only "reasonable through routes" and in Sec. 15(4) prohibiting the Commission from requiring through routes that short haul existing routes, except upon specific

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* *In D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I.C.C. 333, at page 343, the Commission said: "We interpret that exception to mean adequate and more efficient *and* more economic from the public's or shippers' as well as the participating carriers' standpoint." (Emphasis supplied.) That is to say, the Commission construes the word "or" just before the words "more economic" as meaning "and." That interpretation was sustained by the three-judge court in *Pennsylvania R. Co.* v. *United States*, 54 F. Supp. 381, in an opinion which was affirmed by the Supreme Court, *Pennsylvania R. Co.* v. *U.S.*, 323 U.S. 588, at page 593. The Commission has consistently adhered to that interpretation. *Richards Milling Co.* v. *Erie R. Co.*, 268 I.C.C. 237, 240; *General Mills, Inc.* v. *Great Northern Ry. Co.*, 269 I.C.C. 456, 465; *Borough of Edgewater, N. J.* v. *Arcade & A. R. Corp.*, 280 I.C.C. 121, 142, (order held valid in *Baltimore & O. R. Co.* v. *United States*, 100 F. Supp. 1002).

conditions stated therein, empower the Commission to condemn existing routes as inadequate and uneconomical and to order "as many routes as possible" for any commodity artificially classified and merely declared by the Commission as requiring "as much flexibility as possible in the distribution" of such commodity, and "as many markets and outlets as possible", because "a complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible." The majority erred in failing to hold that the order is void because the Commission has misconstrued or ignored the statutory standards and limitations upon its power to require through routes and joint rates, *U. S.* v. *Carolina Carriers Corp.*, 315 U.S. 475, 489, and has substituted and been guided by its conception of a need of the "complex but efficient marketing system"—not for "reasonable through routes" or a sufficient number of through routes adequate to haul the traffic efficiently and economically—but for "as many routes *as possible*", and "as much flexibility *as possible*" and "as many markets and outlets *as possible.*" (Emphasis supplied.)

[fol. 196] VIII

The majority opinion errs in failing to hold that the order is void because, in making it, the Commission not only failed to apply the statutory standards and, instead, created and substituted its own new philosophy and standards, namely, that it has power to require additional through routes with joint rates upon its own declaration (regardless of its findings that Union Pacific routes are shorter in mileage and require 24 hours less in transit time, and are adequate, and furnish as satisfactory service as any service the Rio Grande could provide) that perishable articles—

> "must be moved to market with expedition and care, and over as many routes as possible"

in order to permit—

> "as much flexibility as possible in the distribution process",

but the Commission has also ignored the very premise which it created for its order, for the report plainly shows that the indisputable purpose and effect of the order is to permit livestock and other specified articles to move—*not* "with expedition and care" *to markets* in "great consuming areas (which) in many instances are far distant from the points of production"—but to move at equal joint rates *to points on the Rio Grande* for transit privileges—

> "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande",

under which privileges the articles may be held for storage, feeding or grazing at points on the Rio Grande as long as twelve (12) months, before reshipment to distant markets in the "great consuming areas". Stoppage at points on the Rio Grande for storage until markets can be found for such products, stoppage for feeding or grazing cattle for 6 to 12 months until they are ready for market, are all the very antithesis of the premise that such articles require many routes so their perishable nature requires that they [fol. 197] move to consuming markets "with expedition and care."

IX

The majority errs in failing to hold that not only is the premise on which the order is based, namely, that food articles of a perishable nature "must be moved to market with expedition and care, and over as many routes as possible" to permit "as much flexibility as possible" in the distribution of food commodities", unsound, illogical and furnishes no support for the requirement that through routes and joint rates be established via the Rio Grande so that shippers may hold commodities as long as 12 months under transit privileges at points on the Rio Grande before reshipping to distant consuming markets, but also that the premise is wholly inapplicable to and is completely lacking in any support whatever for the requirement of through routes and joint rates via the Rio Grande for (4 carloads annually) *granite* and *marble monuments* westbound in carloads from Georgia and Vermont to stop off for partial unloading and reshipping the balance to destinations in the

northwest area, because such practically indestructible monuments obviously are not in the category of "perishable" food articles, and as the evidence and the report clearly show that the monument dealer's business along the Rio Grande is too small to require carload shipments, the Commission's only purpose in asserting (page 638) that there is an "urgent need", and (page 656) a "special need" for through routes and joint rates via the Rio Grande with the privilege to stop to partly unload at points on that line, is to give the small monument dealer the benefit of the lower carload rate on his less-than-carload business; and the Commission has no power to require through routes and joint rates to accomplish that purpose. The report shows (page 637) that this little monument dealer is located on the Union Pacific at Brigham City, Utah, and has joint rates with all transit privileges at all points on that line.

[fol. 198] X

The majority erred in failing to hold that the Commission's assertion (page 656) that Union Pacific routes "are inadequate and less economical than are the Rio Grande routes" because, on traffic from and to the northwest area accorded transit privileges at points on the Rio Grande—

> "* * * the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply."

is capricious, mere sophistry, based upon a misconception of law, and affords no support or justification whatever for the order. The sentence just quoted is an irrelevant truism, for it is wholly irrational to expect or imply that Union Pacific routes and rates through Wyoming should be available at points *not* located on those routes, but upon the Rio Grande's line in Utah and Colorado, and any informed person would necessarily expect the combination rates via the Rio Grande to be higher than the joint rates via the shorter Union Pacific routes, for a combination of local rates "is ordinarily, if not always, higher than the joint through rate." *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 396. And it is wholly illogical, fallacious and a complete

non-sequitur for the Commission, after stating the truism that the Union Pacific routes and rates are not available and higher rates apply on traffic transited at points on the Rio Grande, to add that—

> "On such traffic the defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes."

The intended implication that the Union Pacific is under some legal duty to make its existing routes and rates available at points not located on them, and that its failure to do so renders its own routes "inadequate and less economical" than the Rio Grande route on which such points are located and over which "higher rates apply," is contrary to the law governing a carrier's duty, contrary to fact and reason, and is demonstrative of the deceptive and irrational disguises by which the Commission attempts to justify its order.

[fol. 199] XI

The majority erred in failing to hold that the order is void because it is based on the Commission's erroneous view that it has the power to compel an additional through route and equal joint rates embracing another railroad to serve as a "bridge" line that short hauls existing routes wherever, by doing so, it is possible to make additional transit privileges available for perishable articles, at the same joint rates maintained over existing routes, and that the additional transit privileges and joint rates justify a "finding" that such new route will provide "more economic transportation" merely because the result of requiring equal joint rates via such new route is to make its transit privileges available for the same through traffic moving between the same origins and destinations at a cost which will be less than the cost at the combination rates via that route. In other words, the Commission, by compelling reduction of the Rio Grande's rates to equalize them with rates via Union Pacific routes, creates the very fact or circumstance on which it bases and attempts to justify the prerequisite jurisdictional finding, or assertion, at least in the words of clause (b), that the Rio Grande route will

provide "more economic transportation," regardless of the fact that the shippers' cost (rates) will be exactly the same as it is now via Union Pacific routes.

XII

The majority errs in failing to hold that the Commission acted arbitrarily and unlawfully in exerting its power to prescribe joint rates that would reduce the combination rates via the Rio Grande to the level of joint rates via Union Pacific routes in its efforts to create a factual situation which might justify a finding or declaration that the Rio Grande route with equal joint rates will provide "more economic transportation," and, by that arbitrary subterfuge, manufacture a case within the clause (b) exception to the prohibition in Section 15 (4) against compelling a [fol. 200] proposed through route that would short haul existing routes; and the majority further erred in failing to hold that the Commission's power to prescribe joint rates has no relationship to the term "more economic transportation" in Section 15 (4)(b), and that the Commission has exceeded its authority in attempting to use its joint rate powers to meet and satisfy a condition in Section 15(4) under which, upon a true set of facts, it would be justified in requiring a proposed route that would short haul existing through routes; and the majority erred also in failing to hold that the "more economic transportation" via the Rio Grande which would result from the Commission's reduction of the combination rates via that line to the level of the joint rates via Union Pacific routes, affords no support whatever for the order for the reason that the criterion, "more economic transportation," means that the proposed new route must provide "more economic transportation" than that provided by existing routes, and the criterion is not satisfied by a reduction in the Rio Grande's rates to make them lower than its previous combination rates, or by requiring equal joint rates over the respective routes, and the Commission's findings plainly show that, even with equal joint rates, the transportation over the "more onerous" Rio Grande line would be *less "economical"* than via the shorter, faster and more favorably located Union Pacific routes.

XIII

Under the holding in the majority opinion that absence of in-transit privileges may be made the basis of a finding that transportation service is "inadequate," and even if, as the majority opinion erroneously assumed, transit privileges were not available at points on the Rio Grande, then it would be only the transportation service of the Rio Grande that could be condemned and found to be inadequate, and not the service of the Union Pacific routes on which all transit privileges are admittedly available.

[fol. 201] XIV

Upon the Commission's findings, among others, that Union Pacific facilities—

> "* * * are adequate to move over its own direct routes the present volume of trafic and any additional volume that may be anticipated in the foreseeable future";

that the Union Pacific—

> "* * * has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line" (page 648);

that—

> "* * * through service over defendants' (Union Pacific) routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande * * *" (page 656);

that—

> "Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services" (page 648);

that because of physical and geographic facts recited in its report and its longer mileage—

> "* * * the Rio Grande line is less favorably situated than that of the Union Pacific" (page 648),

and that—

> "* * * as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein";

and upon the findings in the majority opinion (page 17) that for traffic moving between points in the northwest area and points of initial destination east of Denver—

> "* * * present transportation facilities over the Union Pacific between such points are adequate";

and that establishment of the joint rates via the Rio Grande between such points—

> "* * * would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points,"

the majority patently errs in finding (page 17) that the record supports the finding that transportation service via Union Pacific routes "is inadequate and also inefficient [fol. 202] and uneconomical" for shipments between the northwest area and final destinations east of Denver which require stoppage for transit purposes at points on the Rio Grande (not served by the Union Pacific), and in concluding (page 19) that the evidence supports the Commission's finding that establishment of the through routes and joint rates via the Rio Grande—

> "is necessary in order to provide adequate and more economic transportation"

for shipments requiring transit privileges at points on the Rio Grande.

XV

In holding (page 19) that—

> "The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4)"

and that, therefore, the evidence supports the order to the extent it compels through routes and joint rates for shipments requiring transit privileges at points on the Rio Grande, the majority opinion is fatally erroneous because (1) as held by the Commission at page 655 of its report and in the majority opinion at page 10, the Commission has no power to require establishment of an additional through route with joint rates that short hauls existing through routes "unless the existing routes can be found not to provide 'adequate' transportation", and (2) since there is no "absence of in-transit and other privileges" on the Union Pacific routes from *the* to the Northwest area, and (3) as the Commission finds unequivocally that the Union Pacific facilities "are adequate" to move all traffic to and from the northwest area that may be offered in the future, that it has surplus capacity, is efficiently operated, and that service via Union Pacific routes—

> "is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande",

there is completely lacking any possible factual basis for the [fol. 203] crucial and essential finding, namely, inadequacy of existing Union Pacific routes, which is prerequisite to an exercise of the authority under Sec. 15(4)(b) to order the Union Pacific to short haul itself by joining in a new through route with joint rates via the Rio Grande.

XVI

The majority opinion erroneously states on page 6 that the Commission found that—

> "* * * the existing joint rates maintained by the Union Pacific are and will be *unjust and unreasonable and unduly prejudicial* * * *"

etc., whereas the fact is that the Commission made no finding that the rates via Union Pacific routes were unreasonable or unlawful in any respect, but instead found that the combination rates via the Rio Grande were unreasonable, unduly prejudicial and unduly preferential, and the majority errs in holding that the Commission has power to require through routes and joint rates via the Rio Grande without having first decided whether, as urged by Movants upon briefs and in oral argument, there is any evidence to support or justify the Commission's finding that the combination rates via the Rio Grande are unjust or unreasonable.

XVII

The majority errs in failing to hold that, in view of the fact proved by abundant uncontradicted evidence that producers and shippers in the northwest area who are now using the Union Pacific routes, market their perishable products in all 48 states and several foreign countries and the Commission's own finding at page 642, that those producers and shippers "market such products throughout the United States", the Commission's assertion (page 656) that those shippers—

> "* * * are debarred from effective participation in the widespread system developed for the marketing of such commodities"

is contrary to the evidence, contradicted by the Commission's [fol. 204] own finding of fact, and is void and therefore furnishes no support whatever for the order.

XVIII

Having held (page 15) that—

> "* * * there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3(1).",

and that if the Commission could order through routes and joint rates because shippers located on one railroad have a transportation advantage over shippers located on another railroad "the prohibition of Sec. 15(4) would be practically emasculated", the majority erred in failing to hold, for the same reason, that the order does emasculate the prohibition in Sec. 15(4) and is void because its sole purpose and effect is—not to accomplish the objectives of the limited through route powers conferred by Sec. 15(3) and (4) to compel an additional route that short hauls existing routes when the latter are inadequate in fact and in truth—but to equalize rates and transit privileges of shippers located on or using the Rio Grande with shippers located on or using Union Pacific routes, and if equalization of rates and transit privileges via the Rio Grande with those on Union Pacific routes justifies compelling the Union Pacific to short haul itself by establishing a through route and joint rates with the Rio Grande for the involved traffic, then the short haul prohibition is completely emasculated.

XIX

The majority erred in failing to hold that the facts shown by the evidence and recited in the Commission's own correct findings of fact establishing vast physical and other dissimilarities between transportation conditions on the Rio Grande compared to those on the Union Pacific preclude any finding by the Commission of a violation of Sec. 3(1) of the Act; and in failing to hold that the Commission has acted arbitrarily and unlawfully in attempting to escape [fol. 205] the compelling legal effect of such dissimilarities (1) by its mere assertion that when "spread over hauls of great lengths * * * they become relatively insignificant", and that, therefore, for such hauls, "the transportation

conditions are substantially similar"; and (2) by resorting to it through routes powers under Sec. 15(3) and (4) and thereupon ignoring the vast differences it found in transportation conditions over the "more onerous" Rio Grande line compared to conditions on the "Union Pacific or any of the other transcontinental defendants herein," by treating such differences as unrelated to and requiring no consideration in determining whether the Rio Grande route would provide "more economic transportation" within the meaning of those words in Sec. 15 (4) (b), than the transportation furnished by existing Union Pacific routes.

XX

Upon its finding (page 18) that an "economic disadvantage" of shippers located on the Rio Grande compared to shippers located on the Union Pacific affords no basis for the Commission's finding of a violation of Sec. 3(1) of the Act because—

> "* * * there is no community of interest between the Union Pacific and the Rio Grande * * *",

the majority errs in holding, in effect, that there is a "community of interest" or some other undefined relationship between those two railroads which legally justifies requiring the Union Pacific to short haul itself 1000 miles, regardless of Sec. 15(4), by establishing joint rates with the Rio Grande to remove the claimed "economic disadvantage" of shippers located on the Rio Grande (so far as it consists of higher rates) by giving those shippers rates which, as correctly stated in the minority opinion, "would only equal the present rates via the Union Pacific" for the same through traffic between the same points of origin and the same final destinations.

[fol. 206]

XXI

The majority opinion errs in sustaining the order as if the Commission made it solely for the benefit of shippers located on the Rio Grande, whereas the Commission's report clearly shows that the order is for the principal purpose of enabling shippers not located on the Rio Grande

but on the Union Pacific and other lines northwest of Ogden, to enable them to route over the Rio Grande as a "bridge" line the traffic which they now ship over Union Pacific routes at the lowest joint rates with complete transit privileges, and as the majority opinion, to the extent it holds the order valid, is premised on the absence or lack of transit privileges, it fails to take into consideration the essential fact that shippers in the northwest area who are said by the Commission (page 656) to be "debarred from effective participation" in the marketing system, already have available to them on the Union Pacific routes the same transit privileges and the same joint rates they would have on the Rio Grande under the Commission's order, and in failing to decide whether, in view of these facts, the order is entirely void.

XXII

The majority opinion at page 8 states that shippers "located on the Rio Grande" are "without joint through rates with in-transit privileges" and, therefore, they "are at a substantial rate disadvantage" compared to shippers located on the Union Pacific who have "joint through rates and in-transit privileges over the Union Pacific". To the extent it sustains the validity of the order, the majority errs in holding that the Commission may use its power to compel through routes and joint rates to remedy a "rate disadvantage" of shippers located on the Rio Grande.

[fol. 207]

XXIII

Inasmuch as the transportation service which shippers located on or using the Rio Grande under the requirements of the Commission's order and as the transit privileges under the order would be identically the same transportation services and transit privileges now performed and offered by the Rio Grande, and since the only change effected by the order is to reduce the present rates via the Rio Grande to the level of rates via Union Pacific routes, the majority opinion errs in failing to hold that the order is void because (1), as shown by the evidence and the report, it will not result in any improvement or any change whatever in transportation services via the Rio

Grande or the Union Pacific but will only result in reducing the rates via the Rio Grande, and (2) because the Commission may not lawfully use its power to establish through routes and joint rates in order to compel a reduction or an equalization of rates.

XXIV

Having held (page 12) that service via the Union Pacific is adequate and as economic as service via the Rio Grande would be for shipments *not* requiring transit at points on the Rio Grande, the majority clearly errs in holding that the evidence supports the finding that establishment of joint rates and through routes for shipments requiring transit at points on the Rio Grande "will result in more economical transportation", because, as correctly found at page 17 of the majority opinion, the joint rates via the Rio Grande required by the order—

> "would only equal the present rates via the Union Pacific".

XXV

The majority erred in failing to hold that the Commission is without power to condemn, as it has done in this case, the Union Pacific routes, as "inadequate and less economical than are the Rio Grande routes", solely because—

> [fol. 208] "the Union Pacific routes and joint rates which apply over them are not available, and higher rates apply"

on traffic moving via the Rio Grande from and to the northwest area which is stopped for transit privileges at some point on the Rio Grande.

XXVI

The majority opinion errs in failing to hold that the inclusion of livestock in the order is without justification or support in the evidence or findings in the Commission's report which, without explanation or reason, treats ordinary livestock as a perishable food article, saying merely that—

> "We think however that the situation here as to livestock is no different from that portrayed as to certain

other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden Gateway."

The report shows there are joint rates via the Rio Grande and the Union Pacific on sheep and goats, established pursuant to the formula prescribed by the Commission in *Livestock, Western District Rates*, 176 I.C.C. 1, which formula resulted in higher rates over the Rio Grande because of its longer route. The report in the case at bar shows at page 641 that the Union Pacific expressed its willingness to establish rates via the Rio Grande in accordance with that formula and make them applicable to cattle as well as sheep and goats but that it has never been requested to do so. Without support of any evidence or finding of basic facts, the Commission's order here arbitrarily and irrationally upsets and departs from its own formula of many years standing by prescribing "the same" joint rates for livestock via the Rio Grande that are maintained via the shorter Union Pacific routes, and this it may not lawfully do. *Agriculture* v. *I.C.C.*, — U.S. —, 71 S. Ct. 326.

[fol. 209]

XXVII

The majority opinion is premised, in part, upon "the factual theory" (pages 7-8) that livestock feeders located on the Rio Grande are at a "substantial rate disadvantage" with similar livestock feeders—

> "* * * located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific * * *";

and that there "are a number of industries" on the Rio Grande that are "without in-transit privileges" for processing, freezing, storing articles specified in the order and reshipping them to points east of Denver, Pueblo and Trinidad. The majority erred in failing to hold that there is no evidence showing that any livestock feeders are located on the portion of the Union Pacific described in the opinion; and that the evidence and the Commission's report plainly show that there are only four "industries" that process, freeze or store articles on which the order requires

through routes and joint rates, one of which, a small "bean dealer", is located near Grand Junction, two storage plants at Pueblo, and one bean dealer at Colorado Springs, and that the latter three have through routes and joint rates to and from the northwest via the Union Pacific to Denver and railroads that connect with it, including the Rio Grande, to Pueblo and Colorado Springs with ample transit privileges to permit the processing, storing, freezing, etc. of their products and reshipping them from those points at the joint rates; and that the Commission's report at page 644 mentions the Utah Growers' Co-Operative with plants at Midvale, American Forks and Springville, Utah, all three of which points are served by both the Union Pacific and the Rio Grande, the Union Pacific's rate on commodities from the northwest being lower than the combination rates via the Rio Grande through Ogden or Salt Lake.

[fol. 210] XXVIII

The majority errs in failing to hold that the Commission's finding that the Union Pacific discriminates, in violation of Sec. 3(4) of the Act, against the Rio Grande by maintaining joint rates with the Bamberger Railroad at points on that railroad between Ogden and Salt Lake City (most of which points are also served by both the Union Pacific and the Rio Grande) while refusing to establish joint rates with the Rio Grande at those points, (1) is totally void because the record contains no evidence whatever comparing or concerning transportation conditions on the Bamberger, the Rio Grande and the Union Pacific between Ogden and Salt Lake City, and therefore the Commission's statement (page 659) that—

"* * * it appears that there is no important dissimilarity between the transportation conditions * * *"

is wholly lacking in any evidence to enable the Commission to make any finding on that alleged discrimination, and this lack of evidence, as pointed out in Circuit Judge Johnsen's dissenting opinion, was not denied by counsel for either the United States, the Commission in briefs or oral argument to this Court, and, as "a finding without evidence is

beyond the power of the Commission", *U.S. v. Abilene & So. Ry. Co.*, 265 U.S. 274, 288, the majority erred in refusing to hold that the finding is void; and the majority further erred in failing to hold that, even if there had been evidence to support the finding of discrimination in violation of Sec. 3(4), it would not afford any justification for the order requiring through routes and joint rates with the Rio Grande at points between Ogden and Salt Lake City, or any remote semblance of justification for the requirement of joint rates over the entire length of the Rio Grande's lines, and, as stated in the majority opinion, pages 14 and 15, in nullifying the Section 3(1) finding, the Commission has ample power to correct a violation of Section 3(4), and if it could [fol. 211] order through routes and joint rates as a remedy for such discrimination, "the prohibition of Sec. 15(4) would be practically emasculated."

XXIX

The majority erred in failing to hold that, upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and exceeded its power in refusing to dismiss the complaint, and in ordering through routes and joint rates on the theory that because shippers had intervened, the Rio Grande's complaint became a shipper complaint.

XXX

Upon its correct conclusion that Sec. 3(1) of the Act could not furnish any basis for the order, the majority erred in failing to hold that the order is entirely void, since the Rio Grande's complaint and the order also premised relief sought upon Section 3(1).

XXXI

Since the Commission made no findings to sustain any violation of the Act against the Rio Grande (except the trivial unsupported finding of discrimination along the Bamberger Railroad), and could find only a violation of Section 3 involving shippers' rights and relations, which finding the majority holds to be without evidential support and as furnishing no basis for the order, the majority errs

in failing to hold that the order is entirely void because there is no basis or support for it in the evidence or in the Commission's findings.

[fol. 212] XXXII

The majority erred in refusing to consider and decide whether the Commission acted arbitrarily in refusing to dismiss the proceeding upon the ground urged by these Movants that as the sole objective of the Rio Grande in filing the complaint and demanding through routes and joint rates was, as admitted by its President, improvement of its financial condition, the Commission is prohibited by Section 15(4) from ordering through routes and joint rates for that purpose.

XXXIII

The majority erred in failing to hold that the Rio Grande's admitted procurement of shippers and others to testify so as to help it win its case, and that the intrusion of Senator Johnson, while the case was pending before the Commission, vitiated and nullified the whole proceeding before the Commission.

XXXIV

The majority erred in failing to hold that the Commission acted arbitrarily in refusing to give any weight to abundant evidence showing that compelling the through routes and joint rates sought by the Rio Grande would result in wasteful transportation and economic waste, and in serious detriment to the Union Pacific and other railroads and their employees, and in refusing to require as a condition or part of its order that the Rio Grande compensate or protect Union Pacific employees for or against any adverse effect they might suffer in loss of wages, etc., resulting from loss of traffic to the Rio Grande under an order requiring through routes and joint rates via its line for the traffic it seeks.

XXXV

The majority erred in failing, so far as its decision discloses, to give consideration to most of the numerous contentions set forth and discussed in the briefs of the plain-

[fol. 213] tiffs and intervening plaintiffs, as reasons why the Commission's order is void and should be enjoined and annulled. Without repeating each of those contentions, we respectfully refer the Court to them, as set forth in the index of our briefs filed at the trial of this case, and request that each of them be carefully considered and decided, unless the Court, upon this Motion and that of the Rio Grande, decides to enjoin and annul the order in its entirety without the necessity of considering all of the grounds upon which the plaintiffs and intervening plaintiffs contend that the order is void.

Respectfully submitted, Elmer B. Collins, John J. Burchell, James C. Wilson, F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, Attorneys for Plaintiffs, 1416 Dodge Street, Omaha 2, Nebraska; Don Eastvold, Attorney General of Washington, Robert L. Simpson, Asst. Attorney General of Washington, Attorneys for Washington Public Service Commission, State Capitol, Olympia, Washington; C. W. Ferguson, Attorney for Public Utilities Commissioner of Oregon, Public Service Building, Salem, Oregon; James B. Patten, Attorney for Board of Railroad Commissioners of the State of Montana, Helena, Montana; Howard B. Black, Attorney General of Wyoming, Attorney for State Board of Equalization and Public Service Commission of Wyoming, Cheyenne, Wyoming; Clarence S. Beck, Attorney General of Nebraska; Bert L. Overcash, Assistant Attorney General of Nebraska, Attorneys for State of Nebraska and Nebraska State Railway Commission, State Capitol, Lincoln, Nebraska, Attorneys for Intervening Plaintiffs.

[fol. 214] I, Elmer B. Collins, certify that copies of the foregoing Motion are being sent by United States Mail this 12th day of November, 1954, to all interested parties through their counsel.

Elmer B. Collins, Of Counsel.

[fol. 215] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PLAINTIFFS' APPLICATION FOR ORDER STAYING, SUSPENDING THE OPERATION AND ENJOINING AND RESTRAINING ENFORCEMENT OF THE INTERSTATE COMMERCE COMMISSION'S ORDER PENDING FINAL DECISION AND DISPOSITION OF THE CASE BY THIS COURT—Filed November 17, 1954.

Plaintiffs,* Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, respectfully make this application to the specially constituted three-judge Court pursuant to 28 U.S.C.A., Sections 2284(3) and 2324, for an order staying, suspending the operation, and enjoining and restraining enforcement of the order of the Interstate Commerce Commission issued January 12, 1953, in its Docket No. 30297 (copy of which is attached as Appendix A to the complaint praying that said order be permanently enjoined and annulled in the above-entitled suit), pending final decision, determination and disposition of the case by this Court.

In support of this application plaintiffs respectfully show to the Court that said order, by its terms, requires that [fol. 216] 221 railroads, including plaintiffs herein, file tariffs with the Commission publishing rates as specified in the order originally to become effective April 7, 1953, upon 30 days' notice, but that, because of the filing of petitions for reconsideration with the Commission, and upon requests of a member of this Court made since the filing of

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*For reasons concerning it individually, Chicago, Milwaukee, St. Paul and Pacific Railroad Company has concluded that it can not consistently participate in further proceedings in this case.

the complaint herein on June 25, 1953, the Commission has several times postponed the effective date of said order, and that after the majority and the dissenting opinions were filed in this case on October 22, 1954, upon the request of counsel for the plaintiffs, the Commission, by order dated October 25, 1954, copy of which is attached hereto as Appendix A, further postponed the effective date of its said order of January 12, 1953, so as to become effective February 1, 1955 by filing the required tariffs with the Commission upon 30 days' notice, which means that the tariffs would have to be filed not later than January 2, 1955.

In their complaint filed June 25, 1953, in this suit plaintiffs pray, among other things:

> "That this Court, by temporary stay, preliminary or interlocutory injunction, stay, restrain and suspend the operation of the order of the Commission dated January 12, 1953, pending the final hearing and determination of this action."

Because of the Commission's voluntary postponements of the effective date of said order, the Court did not act upon the prayer just quoted for temporary and interlocutory relief from the order pending hearing and decision of the case by this Court, but now, since the Court has filed its decisions, the Commission will not, according to information of counsel for plaintiffs and their knowledge of the position taken by the Commission in other similar situations, be disposed voluntarily to further postpone the effective date of its said order, particularly in view of the fact that the Court has heard and reviewed the case upon the record before the Commission and has rendered and filed its decisions, in which the majority opinion sustains the validity of the order in part, and the further fact that the Court has ample authority to suspend the operation of the [fol. 217] order and to protect the plaintiffs and numerous other railroads against the penalties provided by Section 16 of the Interstate Commerce Act (49 U.S. Code, Sec. 16), in the amount of $5,000.00 per day for each of the plaintiffs and other railroads that fail to file and publish tariffs as required by the order and on the date therein specified.

The records in the Clerk's office of this Court show that,

although no decree or judgment has yet been entered in this suit, intervening defendant, The Denver and Rio Grande Western Railroad Company, on November 1, 1954, filed its motion for a new trial or in the alternative for reargument, and that on November 12, 1954, the plaintiffs also filed a motion for new trial or in the alternative for reargument and reconsideration by the Court, and that both of said motions are pending consideration, action and final disposition by the Court.

Plaintiffs hereby inform the Court that, unless the interlocutory relief herein sought is granted, relieving plaintiffs of the necessity of preparing and filing the required tariffs, numerous tariff compilers and experts of plaintiffs and other railroads would have to begin work shortly after December 1, 1954, in order to complete the preparation, compiling, printing and filing of the required tariffs by January 2, 1955 as now required by the Commission's order of October 25, 1954.

Plaintiffs further show to the Court that the compilation, preparation, printing and filing of the required tariffs is an unusually burdensome, time-consuming task, and would cost plaintiffs and the other railroads named as defendants in the proceedings before the Commission many thousands of dollars, all of which would be completely wasted and irreparably lost if the Commission's said order is finally annulled and enjoined.

Plaintiffs further show to the Court that, as indicated above, they and numerous other railroads, and each of them individually, will be subjected to the penalty of $5,000.00 [fol. 218] for each day of their failure, if any, to file and publish tariffs on the date and in conformity with the requirements of the Commission's said order, and that said penalties would accrue to the United States and could not be recovered but would be irreparably lost by the plaintiffs and other railroads, even though the Commission's order be finally held void and annulled and enjoined.

Plaintiffs further show to the Court that during the year 1952 there were moved between points in the northwest area and points east and south of Denver 54,664 carloads of the commodities on which the Commission's order requires through routes and joint rates via the Rio Grande, on which traffic the Union Pacific earned revenues esti-

mated at $18,827,148.00; that if this same number of carloads of that traffic were routed via the Rio Grande as permitted by the Commission's order, so as to deprive the Union Pacific of participation in the movement east of Ogden, Utah, Union Pacific would lose revenues estimated at $11,772,986.00; that at page 1,656 of the transcript of record before the Commission (introduced as Exhibit No. 1 before the Court in this case) witness F. C. Hogue, Vice President—Traffic of The Denver and Rio Grande Western Railroad Company, testified that he expected the Rio Grande to divert to its line from the Union Pacific routes approximately 10% of the traffic on which it sought through routes and joint rates in the Commission proceeding; that, based on the 1952 traffic, the diversion to the Rio Grande so estimated would be 5,466 carloads and a loss in revenues by the Union Pacific of $1,177,298.00 annually, or approximately $3,225.00 per day; that other plaintiffs would similarly suffer large losses of revenues, all of which losses would result in irreparable damage and injury to the Union Pacific and other plaintiffs, inasmuch as they would be without any legal remedy to recover such losses.

Plaintiffs further show to the Court that the validity of the Commission's order is unusually and extremely doubt-
[fol. 219] ful, as clearly indicated by the dissenting opinions of several of the Interstate Commerce Commissioners (287 I.C.C. 611), and by the majority opinion of this Court holding the order valid only in part as therein indicated, and by the dissenting opinion holding that the order should be stricken down in its entirety for the reasons therein stated, that present Union Pacific routes have existed for some 40 years, during which time the Rio Grande has never participated as a "bridge" line in through routes and joint rates for the involved traffic, and that justice and equity require that the *status quo* be maintained pending final determination and disposition of this case.

Plaintiffs allege that to subject them to the statutory penalty of 5,000.00 per day for failure to comply with the order, or in the alternative to comply with the order and suffer irreparable loss in revenues, while litigating the question whether the order is valid, would in effect nullify their statutory right to judicial review of the order, thus result-

ing in the taking of their property without due process of law and depriving them of their constitutional rights to equal protection from the law with owners of other kinds of property.

Wherefore, plaintiffs pray that, in view of the necessity of the relief herein prayed being granted as early as possible to avoid irreparable loss to plaintiffs resulting from the work and expense of compiling and preparing tariffs which they would have to begin about December 1, 1954, and to prevent other irreparable injury and damage as shown above, and for other reasons herein stated, the specially constituted three-judge Court reconvene at as early a date as possible to consider this application, and that the Court thereupon issue an order staying, suspending the operation and enjoying and restraining enforcement of the Commis-
[fol. 220] sion's said order pending consideration by the Court of the motions now on file for new trial, and pending final decision and entry of final decree or judgment herein by the Court.

Respectfully submitted, Elmer B. Collins, John J. Burchell, James C. Wilson, F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, Attorneys for Plaintiffs, 1416 Dodge Street, Omaha 2, Nebraska.

[fol. 221] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 222] APPENDIX "A" TO APPLICATION

Order

Interstate Commerce Commission

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

In the Matter of Request of Counsel for Postponement of the Effective Date of the Order.

Present: Charles D. Mahaffie, Acting Chairman, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding and upon consideration of the telegraphic request of Elmer B. Collins, Esq., Assistant Western General Counsel, Union Pacific Railroad Company, for postponement of the effective date of the Commission's order of January 12, 1953, as amended, to afford opportunity for counsel to study and analyze the majority and dissenting opinions of the United States District Court, District of Nebraska, rendered on October 23, 1954, in the suit filed in said Court to set aside the aforesaid order of the Commission in this proceeding, and to allow time for counsel to prepare and file application for stay of the Commission's order pending appeal to the United States Supreme Court; and Robert E. Quirk, Esq., Counsel for the Denver & Rio Grande Western Railroad Company having agreed to the requested postponement.

It is ordered, That the order entered in said proceeding on January 12, 1953, as amended, requiring the carriers to take certain action on 30 days' notice, which was subsequently modified to become effective on December 1, 1954, without change in the notice requirement, be, and it is

hereby, further modified to become effective February 1, 1955, with the same requirements as to notice.

Dated at Washington, D. C., this 25th day of October, A. D. 1954.

By the Commission, Acting Chairman Mahaffie.

George W. Laird, Secretary.

(Seal)

[fol. 223] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

RESPONSE OF INTERSTATE COMMERCE COMMISSION TO THE MOTIONS OF PLAINTIFFS AND INTERVENING DEFENDANT THE DENVER AND RIO GRANDE WESTERN RAILROAD FOR A NEW TRIAL OR REARGUMENT AND RECONSIDERATION—Filed November 24, 1954

In response to the motions of plaintiffs and intervening defendant Denver and Rio Grande Western Railroad Company, in the above-styled cause, for a new trial or reargument and reconsideration, the Interstate Commerce Commission, one of the defendants herein, submits that said motions present matters and controversies between the parties to said motions and the Court, which already has given full and mature consideration to the issues raised therein, with respect to which the Commission does not believe it appropriate to express any further opinion, as it has not filed any such motion for a new trial.

However, in taking this position the Commission does not waive any right it may have to file a cross appeal to that portion of the Court's opinion and final judgment that holds the Commission's decision and order invalid, or that it may not want to appear at the hearing on said motions and take such position and answer such inquiries as to the Court may appear proper.

[fol. 224] In view of the fact that plaintiffs have filed an application for an order staying, enjoying and restraining enforcement of the Commission's order pending final decision and disposition of the case by this Court, it is suggested that this application and the aforesaid motions for new trial or reargument and reconsideration be set for hearing at the same time if it meets the convenience of the Court, and if the Court determines that a hearing on such motions and application is necessary or desirable. It should be clearly understood, however, that in making this request, we are not requesting a hearing on either the motions or the application for a stay pending appeal.

Respectfully submitted, Edward M. Reidy, General Counsel. Samuel R. Howell, Assistant General Counsel, Of Counsel.

[fols. 225-226] Service (omitted in printing)

[fol. 227] Clerk's Certificate of Service of Response (omitted in printing)

[fol. 228] In the District Court of the United States for the District of Nebraska, Omaha Division

[Title omitted]

Final Judgment and Decree—December 20, 1954

The above-entitled action having come on for final hearing on November 23 and 24, 1953, before Circuit Judges Johnsen and Collet and District Judge Delehant, constituting a District Court of three judges, convened pursuant to Title 28 U.S.C., Sections 2284 and 2325, and all parties being represented by counsel and the Court having received the evidence offered by the parties and heard the arguments of counsel and having considered the pleadings, the evidence and the arguments and briefs of counsel, and

the Court being fully advised in the premises and having filed its opinions, findings of fact and conclusions of law herein on October 22, 1954, and the majority of the Court being of opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297, is valid and lawful in part and invalid and unlawful in the particulars set forth in the majority opinion;
[fol. 229] Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the majority opinion of the Court, heretofore filed; it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be granted and denied, consistent with said findings of fact, conclusions of law and the majority opinion of the Court filed herein;

It is further adjudged and decreed that this Court has no power under the Interstate Commerce Commission Act to determine whether it would be in the public interest and consistent with good transportation practices to put into effect only that part of the order of the Interstate Commerce Commission held to be lawful, without regard to and independent of that part of the order held to be unlawful, and, that question being one which should under the law be determined by the Interstate Commerce Commission in the exercise of its informed judgment in its specialized field;

It is ordered, adjudged, and decreed that this cause be and is hereby remanded to the Interstate Commerce Commission for such further proceedings and orders, consistent with the majority opinion, the findings of fact and conclusions of law, as the informed judgment of the Commission may dictate.

Dated this 20th day of December, 1954.

/S./ John C. Collet, Judge, United States Court of Appeals; /S./ John W. Delehant, Judge, United States District Court.

[File endorsement omitted.]

[fol. 230] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER DENYING MOTIONS FOR NEW TRIAL—December 20, 1954

Upon consideration of the separate motions for new trial,

It is considered and ordered:

1. That the motions be and they hereby are overruled and denied;

2. That the Clerk transmit forthwith copies of this Order to counsel in this case.

Dated this 20th day of December, 1954.

By the Court: /S./ Harvey M. Johnsen, Judge, United States Court of Appeals; /S./ John C. Collet, Judge, United States Court of Appeals; /S./ John W. Delehant, Judge, United States District Court.

[File endorsement omitted.]

[fol. 231] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PLAINTIFFS' APPLICATION FOR INJUNCTION PENDING APPEAL

Filed December 20, 1954

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, state to the Court that

they will perfect an appeal to the Supreme Court of the United States under Title 28, U.S. Code, Section 1253, from the final decree entered Dec. 20, 1954, by this Court in the above-entitled case, and, pursuant to the provisions of Rule 62(c) of Federal Rules of Civil Procedure (Title 28, U.S. Code), plaintiffs hereby apply for an injunction pending their appeal, staying, suspending the operation and restraining and enjoining the enforcement of the order of the Interstate Commerce Commission issued January 12, 1953, in a proceeding entitled "No. 30297, Denver & Rio Grande Western Railroad Company v. Union Pacific Railroad Company et al." (the validity of which order is the [fol. 232] subject of the above-entitled suit), and enjoining and restraining the defendants herein, United States of America and Interstate Commerce Commission, and each of their officers, agents and employees and any and every person acting under and by virtue of said order, from enforcing or attempting in any way to enforce the provisions of said order, and from taking any action to collect or enforce or attempting to enforce or collect the penalties provided by Title 49, U.S. Code, Section 16 (8) for failure of the railroads, including the plaintiffs herein, named as defendants in the proceeding before said Commission, to comply with the requirements of said order pending final determination of plaintiffs' appeal to the Supreme Court of the United States.

In support of this application and as grounds for the injunction pending appeal herein prayed, plaintiffs state and show to the Court:

I.

This Court has ample power in its discretion to issue an injunction staying and suspending operation and restraining and enjoining enforcement of the Commission's order pending final determination of plaintiffs' appeal to the Supreme Court of the United States.

As an incident of their jurisdiction, the Federal Courts have the power within their discretion to preserve the *status quo* pending appeals from their decisions, and in *Virginian Ry.* v. *United States*, 272 U.S. 658, 668-675, the Supreme Court held that it is within the power and discre-

tion of specially-constituted District Courts of three judges to suspend and restrain enforcement of orders of the Interstate Commerce Commission pending appeals to the Supreme Court. The power sustained in that decision was thereafter enacted by Congress as Rule 62(c) Federal Rules of Civil Procedure, Title 28, U.S. Code, as follows:

> "*Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment grant- [fol. 233] ing, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

In *Scripps-Howard Radio* v. *Comm'n.*, 316 U.S. 4, at page 10, the Supreme Court said:

> "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made. The existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review. 'A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.*, 147 U.S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case.' *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 672-73; see *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 513-14."

The facts and circumstances which justify the exercise of the power and discretion of specially-constituted three-judge District Courts to issue injunctions staying and restraining enforcement of orders such as the instant order of the Commission, pending appeals to the Supreme Court are found in many decisions. In *Virginian Ry.* v. *United States, supra*, the Supreme Court held, at page 673, that:

> "To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

In *Warehouse Co.* v. *United States*, 283 U.S. 501, the validity of an order of the Commission had been sustained by two members of the three-judge District Court, the third judge vigorously dissenting. A stay of the Com-[fol. 234] mission's order pending appeal to the Supreme Court was issued by the District Court under circumstances very similar to those in the case at bar. In disposing of cross-appeals from that action, the Supreme Court held at pages 513-514:

> "The court below was within the limits of its discretionary power in staying the Commission's order pending the appeal. The practice complained of was of long standing, entered into, so far as appears, in good faith, at a time when the discrimination, if it existed, was much less serious than at present, and before the present prohibitions against such discriminations. Its legality now is not free from doubt, as is indicated by the fact that the judges of the court below were not unanimous. The immediate enforcement of the order if the judgment below were not affirmed here would have resulted in a serious and unnecessary disturbance of a course of business, affecting not alone the parties to this litigation, but the patrons of the various ware-

houses, which the court below found would be irreparable. These considerations, taken together, were sufficient to call for the exercise of its discretion. Cf. *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 672."

In *State of North Carolina* v. *U. S.*, 56 F. Supp. 606, 621, a three-judge District Court sustained the validity of an order of the Commission and denied a stay of the order pending appeal, staing that the order was "clearly valid", but upon appeal the Supreme Court held the order invalid and reversed the lower court on the merits, 325 U.S. 507.

In *Radio Corp. of America* v. *United States*, 95 F. Supp. 660, a majority of a three-judge District Court, one judge dissenting, sustained the validity of an order of the Federal Communications Commission, but issued an injunction staying enforcement of the order pending appeal to the Supreme Court. At page 669, the Court said:

"Even though we propose to allow defendants' motion for a summary judgment, it does not follow that the temporary restraining order heretofore entered should not remain in effect. In fact, we are definitely of the view that it should, until such time as the controversy is before the Supreme Court. While there may appear to be some inconsistency in pursuing this course, we think such procedure is within our discretion. In National Broadcasting Co. v. United States, D.C., 44 F. Supp. 688, a statutory court under circumstances quite similar to those here held it was without jurisdiction to review an order of the Commission, [fol. 235] and dismissed the complaint. Even so, it granted a stay until the matter could be appealed to the Supreme Court. Holding that the District Court had jurisdiction the Supreme Court reversed. 316 U.S. 447, 62 S. Ct. 1214, 86 L. Ed. 1586. In doing so, it suggested, 316 U.S. at page 449, 62 S. Ct. at page 1215, 86 L. Ed. 1586, 'the stay now in effect will be continued, on terms to be settled by the court below.' Thereupon; the case was tried by the District Court on its merits, a summary judgment allowed in favor of the defendants and the complaint again dismissed. And again the Commission's order was stayed pending

appeal to the Supreme Court, and this time the judgment of the court below was affirmed. 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344. Insofar as we are able to discern from that opinion, the stay order allowed by the District Court remained in effect until the case was finally decided by the Supreme Court."

In that decision the Court pointed out that, if the order were permitted to become effective pending appeal, the resulting changes in the status of the television broadcasting industry would reach vast proportions at great expense to the public and to the great detriment of certain radio and television manufacturers and broadcasters.

The language just quoted from the decision in that case shows that administrative orders such as that of the Interstate Commerce Commission in this case have been stayed and prevented from becoming effective long enough for a case to be twice considered by a three-judge District Court and twice by the Supreme Court of the United States.

II.

Upon the facts and circumstances in this case, this Court should unhesitatingly grant this application for an injunction suspending and restraining enforcement of the Commission's order pending determination of plaintiffs' appeal to the Supreme Court.

In the light of facts and circumstances disclosed in cases cited above upon which the Federal Courts have exercised their discretion to issue orders staying and restraining enforcement of orders of the Interstate Commerce Commission and other administrative bodies pending appeals, we point to the following facts and circumstances in the instant case which we think should convince this Court that a grave mis-[fol. 236] carriage of justice will result if the Commission's order in this case is not stayed and its enforcement restrained pending plaintiffs' appeal to the Supreme Court:

1. Counsel for defendants and intervening defendants have expressly stated that they do not request opportunity to be heard in opposition to this application, and have thereby tacitly consented to the issuance of the injunction herein prayed.

2. There is no "public interest" requiring that the order become effective pending final determination by the Supreme Court of plaintiffs' appeal. The Denver and Rio Grande Western Railroad Company filed the complaint with the Commission which resulted in the order involved in this suit. It was not and is not a "public" complaint, for the record shows that there were no complaints of shippers or "public" representatives against Union Pacific routes, nor requests demanding through routes via the Rio Grande for the involved traffic, and that, to the contrary, the complaint was the result of a planned program of the Rio Grande to divert traffic from Union Pacific routes for a "bridge" haul over its lines in order "to improve the financial condition" of the Rio Grande (R. 23, 32-33). It clearly appears from the majority opinion, sustaining the Commission's order only insofar as it requires through routes and joint rates with in-transit privileges at points on the Rio Grande "not also served by the Union Pacific", and in the report of the Commission, that Union Pacific routes afford all transit privileges at joint rates to shippers located at points served by both Union Pacific and the Rio Grande, and that the only shippers indicating a desire for transit privilege under joint rates at points on the Rio Grande "not also served by the Union Pacific" routes, are one or two livestock feeders or grazers and a fruit freezing plant at Delta, and one small "bean dealer" near Grand Junction, Colorado, neither of whom made any complaint [fol. 237] but merely testified, after being agitated and persuaded by the Rio Grande to help it win its case, and there is no evidence whatever of any urgent or immediate need by those shippers or by the little monument dealer *located on the Union Pacific* at Brigham City, Utah, for the order to become effective pending appeal, particularly since the only result would be a reduction in their freight rates to the extent of the difference between the combination of local rates and the joint rates required by the order.

3. Unless the order is stayed and its enforcement restrained pending appeal to the Supreme Court, plaintiffs and all other of the 221 railroads named in the Rio Grande's complaint to the Commission will be subjected to the alternatives, (1) of penalties of 5,000.00 per day (49 U.S.

Code, Section 16(8)) by each of those carriers for each day of their failure or refusal to comply with the order, or (2) preparing, compiling, printing, publishing and filing tariffs in conformity with the order, at an expense of thousands of dollars, and disruption of their routes and the flow of traffic over them, and loss of large amounts of revenues on traffic that might be diverted from them to the Rio Grande, which is estimated at $1,177,298.00 annually, or $3,225.00 per day for the Union Pacific alone, based upon testimony of the Rio Grande's Vice President-Traffic (R. 1656). Thus, unless this Court stays and enjoins the order pending final determination of their appeal, plaintiffs will suffer inevitable and irreparable injury, loss and damage; either from the statutory penalties, or from the cost and expense of preparing and filing tariffs required by the order and loss of traffic and revenues which the Rio Grande expects to divert to its line, as plaintiffs would be without any legal remedy to recover either or any of such losses if the order is finally held to be entirely null and void.

[fol. 238] 4. There is exceptionally grave and serious doubt of the correctness of the majority opinion and of the validity of the Commission's order, as indicated:

(a) By the fact that the majority opinion holds the major portion of the order invalid, sustains the validity of the order only in part, and that part is sustained solely upon the *unprecedented* ground that Union Pacific routes are inadequate because shippers located at points on the Rio Grande not also served by the Union Pacific do not have transit privileges at joint rates equal to those available at points on Union Pacific routes;

(b) By Circuit Judge Johnsen's unusually strong and vigorous dissenting opinion, which would hold the order invalid and strike it down entirely because of the "pervading infirmities" on which it rests;

(c) By the contrariety and divergence of views expressed by individual Commissioners in the Commission's report;

(d) By the fact shown in plaintiffs' briefs to this Court that in the four decisions the Supreme Court has rendered concerning the Commission's orders which involved the prohibition in Section 15(4) of the Act against short hauling existing routes, that Court has enjoined and annulled

three such orders (*Interstate Comm. Comm.* v. *Nor. Pac. Ry.*, 216 U. S. 538; *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269; *Thompson* v. *United States*, 343 U. S. 549), and sustained the validity of only one (*Pennsylvania R. Co.* v. *U. S.*, 323 U. S. 588), and in that case the order was not [fol. 239] based upon a lack of in-transit privileges at equal joint rates at a point not on the lines of existing routes, for the Commission's report (255 I.C.C. 333) plainly shows that the shipper was located on a line of the Pennsylvania Railroad at Hagerstown, Md., and already had full transit privileges with through routes and equal joint rates, but that application of the rates was restricted so as to give the Pennsylvania its longest possible haul over a longer route than the route required by the order. The through routes required by the order in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing 90¢ per ton, and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the order would result in 200 additional miles of transportation over the most "onerous" operating conditions of any western railroad, two additional interchanges between carriers and at least one or two days' more time in transit, and would short haul existnig routes at least 975 miles, and would deprive some of the plaintiffs of their entire hauls;

(e) Neither the Supreme Court nor any of the District Courts have ever sustained the validity of an order requiring an additional longer route which short hauls shorter existing routes found expressly by the Commission, as in this case, to be efficiently operated, more favorably located than the proposed route, furnishing good service to shippers located on or using those routes, having surplus capacity, and "adequate to move over its own direct routes the present volume of traffic and any additional volume that [fol. 240] may be anticipated in the foreseeable future," and the Commission has in many cases definitely and positively laid down its own prevailing rule—which it completely ignored and practically reversed in the instant case—that there is no justification for requiring an additional through route which is *longer* than, and which short hauls existing routes that are capable of hauling the traffic, for

such longer routes would "encourage wasteful and uneconomic transportation", and "would not give reasonable preference to the originating carrier", *Adrian Grain Co.* v. *Ann Arbor R. Co.*, 276 I.C.C. 331, 333-334. Only last June the Supreme Court condemned such unexplained departure by the Commission from "the prevailing rule of its prior cases", saying, "the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision", *Agriculture* v. *I.C.C.*, 74 S. Ct. 826;

(f) The grave doubt of the valdiity of the part of the order sustained by the majority opinion is further indicated by the holding in the majority opinion at page 10 that——

> "It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order."

and the forthright and specific admissions in oral argument to this Court by counsel for the United States (Tr. 171-177) that the dominating consideration, if not the sole basis for the order, is in-transit privileges and the greater utilization of them at points on the Rio Grande, but that "it has never been decided" and "there is no case" holding that the Commission may use its through route powers to accomplish that purpose, and that "the Commission may [fol. 241] be entirely wrong" in requiring through routes and joint rates via the Rio Grande for the purpose of enabling the monument shipper located on the Union Pacific at Brigham City, Utah, to stop-to-partly-unload westbound carloads of monuments at points on the Rio Grande. Not only is there grave and serious doubt of the Commission's power, and no decision holding that the Commission has power, to require *any* through route for the purpose of providing more transit privileges or greater utilization of them on an additional route, even if the new route would *not* short haul existing routes, but the doubt of the power exerted by the Commission and sustained by the majority opinion in this case is increased immeasurably by the fact that, notwithstanding the express, though qualified, pro-

hibition in Section 15 (4) of the Act against short hauling existing routes, the Rio Grande route required by the order would short haul Union Pacific routes a minimum of 975 miles in every instance, leaving them hauls of a few miles in many instances, and would deprive some of the plaintiffs of their entire hauls as to practically all of the traffic the Rio Grande would divert to its line;

(g) The serious doubt of the validity of the order and of the correctness of the majority opinion insofar as it sustains the order, is further indicated by the fact that the majority opinion sustains the Commission's view that it has power to require through routes and joint rates with the Rio Grande, *not* because transportation service via Union Pacific routes is inadequate, inefficient or uneconomical, or because the Rio Grande will provide more adequate, more [fol. 242] efficient or more economic service than that provided by Union Pacific routes, but because, since the required joint rates are lower than the Rio Grande's combination rates, the order "will result in more economical transportation" via the Rio Grande than the same transportation service for which shippers over the Rio Grande must now pay the higher combination rates, whereas Section 15 (4) of the Act plainly prohibits the Commission from requiring a new route that short hauls existing routes unless the existing routes are incapable of providing adequate transportation service, and unless the new route will provide *more* efficient and *more* economic transportation service than that provided by the existing routes. As the term "more economic transportation" clearly is not met by merely reducing the Rio Grande's rates so as to equalize them with rates on Union Pacific routes, the doubt of the legality of the order and of the correctness of the majority opinion is made more serious by the fact that the required joint rates via the Rio Grande will be merely *equal* to, or "the same", as the rates via Union Pacific routes, and by the impossibility, in the face of the Commission's own correct finding that the 200-miles longer Rio Grande route has "more onerous" operating conditions than any other western line, that shipments could move *more* economically or efficiently over that line than over existing shorter Union Pacific routes.

5. The refusal of the Union Pacific and other participating carriers to short haul themselves by making through routes and equal joint rates with the Rio Grande for traffic to and from points located on their lines in the northwest has been continuous for three-quarters of a century without [fol. 243] interruption except when, as shown in the Commission's report (p. 621), the Union Pacific and the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company were in separate receiverships and the joint rates then established via the Rio Grande when those lines were in the hands of the receivership court were canceled in 1906 and 1912 upon termination of the receiverships, and the cancellation of the joint rates was without protest or with the approval of the Commission (*The Ogden Gateway Case*, 35 I.C.C. 131). To permit the order to become effective pending final determination of its validity by the Supreme Court will result in serious and unnecessary disturbance of the course of business and in the disruption of these century-old routes and channels of commerce, to the irreparable injury of the plaintiffs and to the serious detriment of shippers located upon or using Union Pacific routes. (See *Warehouse Co.* v. *United States*, 283 U. S. 501, 513-514.)

6. To subject plaintiffs and the numerous other carriers involved to the statutory penalty of $5,000.00 per day for failure to comply with the order or, in the alternative, to comply with the order pending appeal and suffer inescapable and irreparable loss while litigating the question whether the order is valid would, in effect, not only nullify and make "an idle ceremony" of their statutory right to judicial review of the order, *Scripps-Howard Radio* v. *Comm'n.*, *supra*, but would also result in the taking of their property without due process of law and deprive them of their constitutional rights to equal protection of the law with owners of other kinds of property, *Ex Parte Young*, 209 U. S. 123, 147-148.

7. Plaintiffs further state to the Court that, since any benefit which the Rio Grande or any shippers might realize from immediate enforcement and operation of the Commission's order pending appeal would be the direct loss in the [fol. 244] same amount by carriers participating in the

Union Pacific routes of traffic and revenues which they have enjoyed without complaint of shippers or the public for three-quarters of a century, and because of other facts recited and shown above, no bond of the plaintiffs is required or justfiied for the security of the rights of any of the parties to this suit, and that since Rule 10(4) of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954, abolishes bonds for costs on appeal in cases of this nature, no cost bond is required; however, if the Court considers that any bond of the plaintiffs is necessary or justified on this appeal or upon the injunction pending appeal, plaintiffs will give such bond in such amount as the Court may determine and order.

Wherefore, plaintiffs respectfully pray for an injunction staying and suspending the operation, enforcement and execution of the order of the Interstate Commerce Commission hereinbefore described pending final determination of plaintiffs' appeal to the Supreme Court of the United States from the final judgment and decree entered herein by this Court; and since, as shown in Appendix A hereto, said order is now scheduled to become effective February 1, 1955, upon 30 days' notice, plaintiffs further pray that the Court act upon this application and issue such injunction as early as its convenience may permit.

Respectfully submitted, Elmer B. Collins, John J. Burchell, James C. Wilson, F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, Attorneys for Plaintiffs, 1416 Dodge Street, Omaha 2, Nebraska.

[fol. 245] Certificate of Service (Omitted in printing)

[fol. 246] Appendix "A" to Application (Omitted. Printed side page 222 ante)

[fol. 247] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

INJUNCTION PENDING APPEAL—December 20, 1954

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, having filed their application stating that they will appeal to the Supreme Court of the United States from the final judgment and decree entered herein by this Court on December 20, 1954, and praying for an injunction, pursuant to Rule 62(c) of Federal Rules of Civil Procedure, staying and suspending the operation, enforcement and execution, pending final determination of their appeal to the Supreme Court, of the Interstate Commerce Commission's order which is sustained in [fol. 248] part by the majority opinion and final decree of this Court;

And it appearing to this Court that unless said order is stayed and its operation suspended and enjoined pending determination of their appeal, each of the plaintiffs and numerous other railroads may be subjected to a penalty of $5,000.00 per day if they do not comply with the requirements of the order, or to irreparable injury from loss of large sums of money in compiling and publishing the required rates and from loss of traffic and revenues, if they do comply with the order;

And the Court, finding no reason for permitting the order to become effective while its validity is being litigated, and being of opinion that the *status quo* should be preserved by staying and suspending the operation and enforcement of said order pending final determination of plaintiffs' appeal to the Supreme Court, it is hereby

Ordered, adjudged and decreed that the order of the Interstate Commerce Commission dated January 12, 1953,

in its Docket No. 30297, Denver & Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al., be and it is hereby stayed and suspended and the defendants and their officers, agents and employees are enjoined and restrained from enforcing or attempting in any way to enforce said order or any part thereof pending final determination of the plaintiffs' appeal to the Su-
[fol. 249] preme Court of the United States.

Dated December 20, 1954.

Harvey M. Johnsen, Judge, United States Court of Appeals; John C. Collet, Judge, United States Court of Appeals; John W. Delehant, Judge, United States District Court.

[fols. 250-256] Clerk's Certificate of Service of Final Judgment and Decree, Order denying Motions for New Trial and Injunction Pending Appeal—(Omitted in printing)

[fol. 257] [File endorsement omitted]

In the District Court of the United States for the District of Nebraska, Omaha Division

[Title omitted]

Notice of Appeal by Denver and Rio Grande Western Railroad Co., to the Supreme Court of the United States—Filed February 3, 1955

I.

Notice is hereby given that the Denver and Rio Grande Western Railroad Company, an intervening defendant in the above-entitled cause, hereinafter called the Rio Grande, hereby appeals to the Supreme Court of the United States from the Final Judgment and Decree entered in this cause on December 20, 1954, which set aside and enjoined, in part, the order of the Interstate Commerce Commission of January 12, 1953, in Docket No. 30297, *Denver & R. G. W. R.*

Co. v. *Union Pac. R. Co., et al.*, 287 I.C.C. 611, and remanded the cause to the Commission for such further proceedings consistent therewith as the Commission may deem appropriate.

This appeal is taken pursuant to Title 28 U.S.C. § 1253.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme [fol. 258] Court of the United States, and include in that transcript the same record as is designated by the Union Pacific Railroad Company, et al., plaintiffs in the above-entitled cause, from that part of the decision and judgment of the Court as to which said plaintiffs appeal.

III

The following questions are presented by this appeal:

1. Whether the Court erred in disregarding and overruling the findings of fact and conclusions of law of the Interstate Commerce Commission.

2. Whether the Court erred in holding in paragraph III of its Conclusions of Law that there is no substantial evidence to support the findings and order of the Commission which required the establishment of through routes and joint competitive rates between the Union Pacific Railroad Company, the Rio Grande and other railroads with respect to the commodities and the areas specified in the order, and in substituting its own findings by which the Court modified and restricted the relief granted by the Commission to shipments consigned in the first instance to points on the Rio Grande, are there subject to in-transit privileges, and are later reshipped to points beyond the Rio Grande.

3. Whether the Court erred in interpreting and in applying to the evidence of the case, the provisions of Section 3(1), 15(3) and 15(4) of the Interstate Commerce Act. (49 U.S.C. §§ 3(1), 15(3) and 15(4)).

4. Whether the Court erred in granting an injunction enjoining and in setting aside, in part, the order of the Commission already described, which requires the Union Pacific Railroad Company and the other defendants before the Commission to participate with the Rio Grande in the es-

[fol. 259] tablishment and the maintenance of through routes and joint rates on the commodities described by the Commission to and from the northwest restricted area and the designated area east of Denver, Pueblo and Trinidad, Colorado.

5. Whether the Court erred in ruling, contrary to the findings of the Interstate Commerce Commission and the evidence, that on the commodities specified by the Commission the establishment of through routes and joint rates via the Rio Grande to and from the northwest area and a designated area east of Denver, Pueblo and Trinidad, Colorado, are not needed in order to provide adequate and more economic transportation.

6. Whether the Court erred in ruling, contrary to the findings of the Interstate Commerce Commission and the evidence, that on the commodities specified by the Commission the present transportation services and facilities were inadequate and uneconomical between the northwest area and points of destination in a designated area east of Denver, Pueblo and Trinidad and in substituting its own finding that the present transportation facilities over the Union Pacific Railroad Company are adequate.

7. Whether the Court erred in overruling the findings and conclusions of the Interstate Commerce Commission that the existing rates assailed are and will be unjust and unreasonable, and duly prejudicial to shippers and receivers using or desiring to use the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes in and to the extent that such rates exceed, [fol. 260] or may exceed, the joint rates maintained on the specified commodities from and to the same points over the Union Pacific routes.

Dated this 1st day of February, 1955.

Harry L. Welch, Farm Credit Building, Omaha, Nebraska, Harold W. Kauffman, Farm Credit Bldg., Omaha, Neb., Dennis McCarthy, Walker Bank Building, Salt Lake City 1, Utah, Robert E. Quirk, 1116 Investment Building, Washington 5, D. C., Attorneys for The Denver and Rio Grande Western Railroad Company, Intervening Defendant.

[fols. 261-263] PROOF OF SERVICE (omitted in printing)

[fol. 264] CLERK'S CERTIFICATE OF SERVICE OF NOTICE OF APPEAL—(Omitted in Printing)

[fol. 265] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

NOTICE OF APPEAL BY THE UNITED STATES OF AMERICA TO THE SUPREME COURT OF THE UNITED STATES—Filed February 17, 1955

I. Notice is hereby given that the United States of America, a defendant in the above-entitled action, hereby appeals to the Supreme Court of the United States from that portion of the final judgment and decree setting aside in part the order of the Interstate Commerce Commission, entered in this action on December 20, 1954.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record before the district court.

III. The following questions are presented by this appeal:

1. Whether there was substantial evidence to support the Commission's finding that establishment of through routes and joint rates between the Union Pacific Railroad and the [fol. 266] Rio Grande Western Railroad with respect to the commodities and the areas specified in such findings was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation."

2. Whether the prohibitions in Section 3(1) of the Interstate Commerce Act against any carrier giving any undue or unreasonable preference or advantage to any particular

person, locality, etc., or subjecting any person, locality, etc. to any undue or unreasonable prejudice or disadvantage, apply even though the persons or localities subjected to such preference or prejudice are located on the lines of two different carriers.

3. Whether the district court erred in holding that the through routes and joint rates prescribed by the Commission should be limited to shipments which are stopped for in-transit service on the line of the Rio Grande Western Railroad.

Daniel M. Friedman, E. Riggs McConnell, Special Assistants to the Attorney General, Attorneys for the United States, Address: Department of Justice, Washington 25, D. C.

[fols. 267-269] Proof of Service (Omitted in Printing)

[fol. 270] In the District Court of the United States for the District of Nebraska, Omaha Division

Notice of Appeal by Union Pacific Co., et al., to the Supreme Court of the United States—February 18, 1955

I

Notice is hereby given that Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, plaintiffs in the above-entitled cause, and Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, intervening plaintiffs therein, hereby

appeal to the Supreme Court of the United States from that part of the final judgment and decree entered in this cause December 20, 1954, which orders, adjudges and decrees that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297, *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co. et al.*, 287 I.C.C. 611, "is valid and lawful in part", and that the injunction and [fol. 271] other relief prayed for in the complaint be denied, "consistent with said findings of fact, conclusions of law and the majority opinion of the Court filed herein". This appeal is taken pursuant to 28 U.S. Code, Section 1253.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of the proceedings before the specially constituted three-judge Court, including all of the record of proceedings before the Interstate Commerce Commission introduced in evidence before the Court and marked Exhibits Nos. 1-A to 1-I inclusive.

III

The following questions are presented by this appeal:

(1) Whether the Court erred in refusing to hold that, in this proceeding, brought by the Rio Grande for the admitted purposes of enhancing its financial position by diverting for a "bridge" haul over its line transcontinental through traffic now and for some 50 years moved over Union Pacific routes between points on those routes in the far northwest and points in the eastern and southern parts of the United States, the Commission was prohibited from issuing the order in this case by the provision of Section 15(4) of the Interstate Commerce Act that, "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs", and that this prohibition may not be evaded or circumvented by the Commission's assertion that in making the order

"no consideration has been given to financial needs" of the Rio Grande.

(2) Whether the Court erred in refusing to hold that, in view of the provisions of Section 15(4) of the Interstate Commerce Act (49 U.S.C., § 15(4)), the Commission acted [fol. 272] arbitrarily and unlawfully in issuing the order short hauling Union Pacific routes at least 975 miles, since the Commission found:

(a) That Union Pacific routes have lower rates than the Rio Grande and are shorter, faster, efficiently operated, adequate and have surplus capacity to haul any foreseeable volume of the through traffic involved;

(b) That movement of the same through traffic via the Rio Grande would require over 200 miles additional transportation, at least 24 hours more time in transit, and one or two additional interchange services; and that the Rio Grande maintains higher rates, is less favorably located and has more onerous operating conditions than the Union Pacific or any of the other Western lines.

(3) Whether the Court erred in failing to hold that the entire order is void because the Commission misconstrued, departed from and failed to observe the rule and norm of its previous decisions and the controlling statutory standards and criteria of Sections 1(4), 3(1) and (4) and 15(3) and (4), in basing its order:

(a) Upon the premise that the standards and conditions of Section 15(4)(b) [which permit establishment of a proposed route short hauling existing routes of other railroads, *only* if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation"] are lawfully observed and applied by the Commission's findings here:

1. of a need for "more" adequate and economic service than that afforded by Union Pacific routes, and

2. that the Rio Grande route is "necessary and desirable" to provide "adequate and more economic transportation",

without any finding by the Commission that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes for the involved through traffic between the same origins and the same ultimate destinations;

(b) Upon the premise that the conditions which permit short hauling other carriers under Section 15(4)(b) can be met and satisfied by merely substituting the lower joint rates applicable over Union Pacific routes for the higher combination rates via the proposed Rio Grande route;

[fol. 273] (c) upon the premise that, under Section 15(4)(b), service over Union Pacific routes may lawfully be condemned and found "inadequate and less economical" than the Rio Grande route for through traffic because, *at points located on and served only by the Rio Grande,* "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply";

(d) Upon the premise that the Commission may invoke its power under Section 15(3) and (4)(b) for the purpose of making additional transit privileges available by equalizing rates via the Rio Grande with rates applicable over Union Pacific routes;

(e) Upon the criteria that the marketing system for food articles of a perishable nature requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible", although Section 1 (4) and the prevailing rule of the Commission's prior decisions require carriers to establish only "reasonable" through routes;

(f) Upon the inconsistent criteria that:

1. food articles of a perishable nature must move to markets "with expedition and care" and "without unnecessary interruptions";

2. the longer Rio Grande route is necessary to permit the through transportation of such articles to be interrupted so that the articles may be held as long as 12 months at points on the Rio Grande for

"commercial operations" called transit privileges, and

3. ordinary livestock to stop for grazing or feeding, and marble and granite monuments to stop for partial unloading at points on the Rio Grande fall within the category of perishable food articles found by the Commission to require expeditious, careful and uninterrupted transportation;

(g) Upon the premise that the Commission may lawfully invoke its powers under Section 15(3) and (4) to obtain the remedy it desires for rates found violative of Sections 1 and 3, and that findings of violations of the latter sections afford a lawful basis for ordering the through routes and joint rates.

(4) Whether the Commission may require Union Pacific routes to short haul themselves by establishing through routes and joint rates with the Rio Grande for the sole purpose of permitting through traffic to be stopped at points on the Rio Grande, not served by the Union Pacific, for "commercial operations" (known as transit privileges), such as storing, processing and cattle grazing, at the same [fol. 274] rates the same shippers have when using Union Pacific routes between the same points of origin and the same ultimate destinations.

(5) Whether the Court's finding that transportation service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" for through shipments requiring transit at points on the Rio Grande and re-shipment to final destinations beyond its termini, affords a lawful basis for the order short hauling Union Pacific routes under Section 15(4)(b), which permits short hauling other railroads only if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

(6) Whether the Court erred in failing to review and consider the whole record of evidence and all the issues tendered by the pleadings and arguments of the parties,

and in failing to hold that the order is entirely null and void, because:

(a) The order is based upon erroneous interpretations of law, and there is no rational basis or support for the order or any part of it, in the evidence or in the findings made by the Commission;

(b) The Commission did not make, and the evidence does not justify or support findings essential to the validity of the order, among others:

1. that the Rio Grande route is "needed", and that it will provide "more efficient" transportation service than Union Pacific routes (Section 15(4)(b)),

2. that diverting traffic and revenues from Union Pacific routes to the Rio Grande would serve such beneficial purpose as maintaining good service or improving it,

3. that the Rio Grande is efficiently operated, furnishes satisfactory service or has surplus capacity or ability to haul any additional volume of traffic,

4. that diverting the traffic to the Rio Grande's longer route will speed up its movement,

5. that the Rio Grande will generate new or additional traffic or contribute additional transportation facilities in the northwest area, or that existing routes [fol. 275] are insufficient or incapable of moving the traffic to and from that area,

6. that by including the Rio Grande route shippers to and from the northwest area will have lower rates than they have via Union Pacific routes,

7. that the overall transportation system or shippers using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line,

8. that shippers have ever made complaint against service rendered by Union Pacific routes for the traffic involved, or demanded that the Rio Grande be included in present through routes;

(c) The evidence does not support or justify the Commission's findings—

1. that the combination of local rates via the Rio Grande are unjust and unreasonable,

2. that the joint rates which now apply over Union Pacific's shorter and more direct routes are reasonable for application via the longer and more onerous Rio Grande route,

3. that the combination rates via the Rio Grande are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande route or unduly preferential of shippers and receivers using the Union Pacific routes,

4. that the Union Pacific and other railroads discriminate against the Rio Grande in violation of Section 3(4) in maintaining through routes with the Bamberger Railroad at points on its line between Ogden and Salt Lake City, while refusing to make like joint rates with the Rio Grande at the same points,

5. that through routes and joint rates with the Rio Grande are "necessary and desirable" in the public interest to provide "adequate and more economic transportation",

6. that shippers in the northwest producing area (who testified that they sell their products in all markets in all the 48 states and 5 foreign countries) "are debarred from effective participation" in the marketing system, because they must pay higher rates if they ship through traffic via the Rio Grande than the joint rates available to them via Union Pacific routes for the same through traffic moving between the same origins and the same destinations;

[fol. 276] (d) The Commission arbitrarily refused to give effect to the requirement in Section 15(4) that reasonable preference be given the originating carriers;

(e) The Commission refused to consider or give effect to the National Transportation Policy and to the evidence showing that diversion to the Rio Grande of any substantial part of the traffic would result in waste-

ful transportation and economic waste and in serious detriment to Union Pacific service and its employees, to certain other railroads and their employees and would inflict serious economic injury to numerous communities and the public served by Union Pacific routes;

(f) The Commission arbitrarily commingled and misused its authority under, and the remedies for violations of the separate and independent provisions of Sections 1(4), 3(1) and (4) and Section 15(3) and (4), and its order is vague, uncertain, indefinite and conflicting in its requirements;

(g) Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint and in ordering through routes and joint rates on the theory that because shippers had intervened and testified, that Rio Grande's complaint became a shipper complaint;

(h) The Commission acted arbitrarily and unlawfully in refusing to dismiss the entire proceeding on the ground that it was vitiated and nullified by the fact that shipper witnesses on whose testimony the order is based were admittedly solicited and procured by the Rio Grande for the purpose of helping it win its case.

(S.) Don Eastvold, Robert L. Simpson, C. W. Ferguson, Jas. B. Patten, Howard B. Black, Clarence S. Beck, Bert L. Overcash, F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, James C. Wilson, Elmer B. Collins. Attorneys for Plaintiffs and Intervening Plaintiffs, 1416 Dodge Street, Omaha 2, Nebraska.

[fols. 277-280] Proof of Service (Omitted in printing)

[fol. 281] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

MOTION TO HAVE CERTAIN ORIGINAL RECORDS IN THIS COURT TRANSMITTED TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES—Filed February 18, 1955

Plaintiffs-Appellants in the above-entitled cause petition the Court, pursuant to Rule 12, Paragraph 4, of the Rules of the Supreme Court of the United States, to authorize and instruct the Clerk of this District Court to transmit as a part of the record on appeal to be filed in the Supreme Court of the United States:

> Original Exhibits Nos. 1-A to 1-I, inclusive, being the certified transcript of the record of proceedings before the Interstate Commerce Commission introduced and received in evidence by the Court at the trial of the above-entitled case beginning November 23, 1953.

As grounds for this motion, Plaintiffs-Appellants represent to the Court that said exhibits consist of numerous documents, many of which are quite voluminous, including a number of exhibits which would be very difficult and ex-[fol. 282] pensive to copy or reproduce. Such expense and the unusual burden and work which would be imposed upon the office of the Clerk of this Court to reproduce or prepare copies of said exhibits will be obviated by the granting of this motion.

Wherefore, Plaintiffs-Appellants pray that the Court grant this motion and issue the accompanying order directing that the originals of the above-described exhibits, in lieu of copies thereof, be forwarded to the Clerk of the Supreme Court of the United States, as a part of the transcript of record on the appeal herein.

Elmer B. Collins, Attorneys for Plaintiffs-Appellants.

[fol. 283] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER DIRECTING THAT CERTAIN ORIGINAL RECORDS BE FORWARDED TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES IN LIEU OF COPIES THEREOF—February 18, 1955

In accordance with the motion of Plaintiffs-Appellants in the above cause to transmit the original in lieu of copies of the documents hereinafter described to the Clerk of the Supreme Court of the United States:

It is Hereby Ordered, That original exhibits numbered 1-A to 1-I, inclusive, received in evidence in this Court at the trial of this cause on November 23, 1953, may all be forwarded in lieu of copies thereof to the Clerk of the Supreme Court of the United States as a part of the transcript of the record on the appeal herein.

Dated this 17th day of February, 1955.

(S.) Harvey M. Johnsen, United States Circuit Judge.

[File endorsement omitted.]

[fol. 284] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

NOTICE OF APPEAL BY INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—February 18, 1955

I. Notice is hereby given that the Interstate Commerce Commission, defendant in the above-entitled action, hereby appeals to the Supreme Court of the United States from the final judgment setting aside the order of the Interstate Commerce Commission in part and remanding the case to

the Commission for further consideration. The judgment was entered on December 20, 1954.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

The same record as designated by the Union Pacific Railroad Company, et al., plaintiffs in the above suit, from that portion of the court's decision and judgment as to which said plaintiffs appeal.

III. The following questions are presented by this appeal:

[fol. 285] 1. Was the Court in error in holding in Paragraph III of the Conclusions of Law filed with its opinion that there was no substantial evidence to support the Commission's findings that through routes and joint competitive rates should be established between the Union Pacific Railroad Company and the Denver and Rio Grande Western Railroad Company with respect to the commodities and the areas specified in the order, and in substituting its own findings by which it modified and limited the relief granted by the Commission to shipments initially consigned to points on the Rio Grande, which are there incident to in-transit privileges, and later reshipped to points east of Denver?

2. Did the Court err in construing Section 15(4) of the Interstate Commerce Act (49 U.S.C. § 15(4)) and in holding that the Commission's finding that certain through routes should be established "in order to provide adequate, and more efficient or more economic, transportation," is jurisdictionally defective because the Commission did not first find that existing transportation is inadequate?

3. Did the Court err in substituting its judgment for that of the Commission in resolving the question whether the through routes between the Northwest area and the designated territory east of Denver, Pueblo and Trinidad, via the Rio Grande, are needed under Section 15(4) of the Interstate Commerce Act (49 U.S.C. § 15(4)) in order to provide adequate and more efficient or more economic transportation?

4. Did the Court err in enjoining and setting aside, in part, the Commission's order which requires the Union Pacific to establish and maintain, in connection with the Rio Grande, through routes and joint rates on the commodities named in the order and to and from the Northwest area and that designated east of Denver, Pueblo and Trinidad, Colo.?

[fol. 286] 5. Did the Court err in holding, contrary to the Commission's finding and the evidence, that as to the commodities specified in the Commission's order the establishment of through routes and joint rates via the Rio Grande are not needed in order to provide adequate and more economic transportation to and from the Northwest area and the area described in the order east of Denver, Pueblo, and Trinidad?

6. Did the Court err in holding, contrary to the findings of the Commission and the evidence, that, with respect to the commodities named in the order and the territory designated therein (between the Northwest area and points of destination east of Denver, Pueblo and Trinidad) the present transportation services and facilities via the Union Pacific route are inadequate and uneconomical, and in substituting for the finding made by the Commission its own finding that such services and facilities via the Union Pacific route are adequate?

7. Did the Court err in failing to sustain the Commission's finding that the assailed combination of local rates on the commodities and from and to the areas described in the order "are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes"? (287 I.C.C. 611, 659-660.)

(S.) Edward M Reidy, General Counsel, (S.) Samuel R. Howell, Assistant General Counsel, Attorneys for Interstate Commerce Commission.

[fols. 287-290] Proof of Service (Omitted in Printing)

[fol. 291] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

NOTICE OF APPEAL BY SECRETARY OF AGRICULTURE TO THE SUPREME COURT OF THE UNITED STATES—Filed February 18, 1955

I. Notice is hereby given that the Secretary of Agriculture of the United States, an intervenor-defendant in the above-entitled action, hereby appeals to the Supreme Court of the United States from the final judgment setting aside the order of the Interstate Commerce Commission in part and remanding the case to the Commission for further consideration. The judgment was entered on December 20, 1954. The Secretary of Agriculture intervened, as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure, in the action in the District Court. The right of the Secretary of Agriculture to intervene in the proceeding before the Commission, and in the review in the District Court, and to appeal from the judgment of the District Court is conferred by § 201 of the Agriculture Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U. S. C. 1952 ed. § 1291), in which it is provided, *inter alia*, that the Secretary may, as a matter of right, intervene in a proceeding before the Interstate Commerce Commission relative to the regulation of the transportation of agricultural commodities and products and in "such case the Sec-
[fol. 292] retary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (7 U. S. C. 1952 ed. § 1291 (b)). The Secretary's participation in this case is also authorized by § 203 (j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088-1089, 7 U. S. C. 1952 ed. § 1622 (j)), by § 17 (9) of the Interstate Commerce Act (54 Stat. 916, 49 U. S. C. § 17 (9)), by 28 U. S. C. 1952 ed. §§ 1253 and 2323, and by § 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1952 ed. § 1009).

II. The Secretary of Agriculture of the United States designates, as the record on appeal, for transmission to the Clerk of the Supreme Court of the United States the entire record in this cause in the District Court, including all the pleadings, evidence, and proceedings.

III. The following questions are presented by this appeal:

1. Did the District Court err in holding that under § 15 (4) of the Interstate Commerce Act (49 U. S. C. 1952 ed. § 15 (4)), the Commission cannot require the establishment of through routes—based upon a finding that such routes are needed in order to provide "adequate, and more efficient or more economic, transportation"—unless the Commission first finds that existing transportation is inadequate?

2. Did the Court err in substituting its judgment for that of the Commission in resolving the question whether the through routes between the northwest area and the designated territory east of Denver, Pueblo, and Trinidad, via the Rio Grande, are needed under section 15 (4) of the Interstate Commerce Act (49 U. S. C. 1952 ed. § 15 (4)) in order to provide adequate and more efficient or more economic transportation?

3. Did the Court err in holding that the undue or unreasonable prejudice or preference prohibited by § 3 (1) of the Interstate Commerce Act (49 U.S.C. 1952 ed. § 3 (1)) applies only to prejudice and preference shown [fol. 293] by one carrier or a combination of carriers between the entities named in § 3 (1) of the Act which are served by the one carrier or the combination acting as one?

4. Did the District Court err in holding that there is no substantial evidence to support the Commission's finding that establishment of through routes and joint rates between the Union Pacific Railroad and the Rio Grande Western Railroad with respect to the commodities and the areas specified in such finding was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation"?

5. Did the District Court err in holding that the through routes and joint rates prescribed by the Commission should be limited to shipments which are stopped for in-transit service on the line of the Rio Grande Western Railroad?

6. Did the District Court err in the respects enumerated in the questions presented by the appeals of the United States and the Interstate Commerce Commission, which are adopted by reference?

Neil Brooks, Associate Solicitor, Carl R. Bullock, Henry A. Cockrum, Donald A. Campbell, Attorneys, U. S. Department of Agriculture, Attorneys for the Secretary of Agriculture of the United States.

Dated February 17, 1955.

[fols. 294-297] Proof of Service (Omitted in Printing)

[fol. 298] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 299] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 117, 118 & 119

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, et al.

UNION PACIFIC RAILROAD COMPANY, et al., Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., and

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, Appellants,

vs.

THE UNION PACIFIC RAILROAD COMPANY, et al.

ORDER NOTING PROBABLE JURISDICTION—October 24, 1955

Appeals from the United States District Court for the District of Nebraska.

The statements of jurisdiction in these cases having been submited and considered by the Court, probable jurisdiction is noted. The cases are consolidated with Nos. 332, 333, and 334 and a total of 3 hours allowed for oral argument.

October 24, 1955.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., APPELLANTS,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

FILED AUGUST 19, 1955

PROBABLE JURISDICTION NOTED OCTOBER 24, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., APPELLANTS,

vs.

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[fol. 1] [File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT—Filed October 22, 1953

I

Plaintiff, The Denver and Rio Grande Western Railroad Company, hereinafter called the Rio Grande, brings this suit against the United States of America, to enjoin, annul and set aside in part, as hereinafter more particularly described, the order of the Interstate Commerce Commission of January 12, 1953, made and entered upon the complaint of the Rio Grande against the Union Pacific Railroad Company and 217 other railroad companies. Plaintiff has a pecuniary interest in the issues and the matter and things involved in this suit. The findings, conclusions and decision of the Interstate Commerce Commission are reported in *Denver & R. G. W. R. Co. v. Union Pac. R. Co.*, 287 I. C. C. 611. Printed copies of that report, as well as the record on which it is based, will be made available to the members of the Court. For the convenience of the Court, there is reproduced as Appendix "A" the pertinent provisions of the Interstate Commerce Act.

A copy of the order of the Commission of January 12, 1953, is attached hereto and made a part hereof as Appendix [fol. 2] "B". The essential requirements of that order are set forth below:

> "*It is ordered*, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required

to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

"*It is further ordered;* That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

"*It is further ordered*, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

"*And it is further ordered*, That this order shall continue in force until the further order of the Commission."

II

Plaintiff, a corporation organized and existing under the laws of the State of Delaware, is a common carrier by rail-[fol. 3] road engaged in the transportation of persons and property in intrastate, interstate and foreign commerce, and as such, is subject to the provisions of the Interstate Commerce Act. Plaintiff owns and operates approximately 2400 miles of railroad in the states of Colorado, New Mexico and Utah. Its principal eastern terminals are at Denver, Colorado Springs, and Pueblo, Colorado, and its principal western terminals are Ogden, Salt Lake City, and Provo, Utah. Plaintiff has interchange track connections and interchanges traffic with the Union Pacific Railroad Company at Denver, Colorado and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific Company at Ogden, Utah, and with the Western Pacific Railroad Company at Salt Lake City, Utah. It also has interchange track connections and interchanges traffic at Denver, Colorado with the Chicago, Rock Island and Pacific Railroad Company, the Chicago, Burlington & Quincy Railroad Company, and The Atchison, Topeka and Santa Fe Railway Company, and The Colorado and Southern Railway Company, which is a part of the Burlington System. At Colorado Springs the Rio Grande interchanges traffic with The Atchison, Topeka and Santa Fe Railway Company and the Chicago, Rock Island and Pacific Railroad Company. At Pueblo, Colorado, it interchanges traffic with The Atchison, Topeka and Santa

Fe Railway Company, The Colorado and Southern Railway Company, and the Missouri Pacific Railroad Company. At Walsenburg, Colorado it interchanges traffic with The Colorado and Southern Railway Company; and at Trinidad, Colorado, with The Atchison, Topeka and Santa Fe Railway Company and The Colorado and Southern Railway Company. Plaintiff is an important and necessary part of the railroad transportation system of the United States.

[fol. 4] In 1934 the Rio Grande established a new through route between Denver, Colo., Salt Lake City and Ogden, Utah, via Dotsero, Colorado. The distance between Denver and Ogden via that route is 175 miles shorter than the distance of plaintiff through Pueblo and the Royal Gorge route, and is 43 miles shorter than the route of any other railroad between Denver and Salt Lake City. The route via Dotsero cut-off has enabled plaintiff to establish greatly improved local and through freight and passenger service not only between Denver, Salt Lake City and Ogden, but also on interline traffic between points west and east of those points. Since 1935 the main line of plaintiff has been virtually rebuilt.

III

The principal office of plaintiff is at 1531 Stout Street, Denver, Colorado, which establishes venue of this action in this court pursuant to Title 28, U. S. Code, Section 1398. [fol. 5] Jurisdiction of this court over this cause of action is provided by Title 28, U. S. Code, sections 1336, 2284 and 2321-2325 inclusive, which authorizes suits to be brought in the District Court of the United States against the United States of America to enjoin, annul, suspend and set aside in whole or in part, orders of the Interstate Commerce Commission.

IV

August 1, 1949, plaintiff filed a complaint with the Interstate Commerce Commission which alleged inter alia that the failure and the refusal of the Union Pacific Railroad Company, and some 217 other railroad companies, to establish joint competitive rates and charges via the Ogden gateway and the Rio Grande on domestic, interstate and foreign freight traffic in carload or trainload quantities, in any

quantity lots, or in less-than-carload lots resulted in through rates which were excessive, unjust, unreasonable and discriminatory in violation of section 1, section 3 and section 15 of the Interstate Commerce Act, and was and is contrary to the national transportation policy since it deprives the public, shippers, and the Rio Grande of the use of available and reasonable through routes and rail facilities at just, reasonable and non-discriminatory through joint rates which were and are necessary and desirable in the public interest.

Plaintiff requested the Interstate Commerce Commission to enter an order requiring the Union Pacific Railroad Company and other railroad defendants to establish and maintain for the future just, reasonable, and non-discriminatory joint rates on freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific Railroad Company and its connections in Utah north of Ogden, Utah, and in Idaho, Montana, Oregon, Washington and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colorado and points east [fol. 6] thereof; and between Utah common points and the northwest territory served by the Union Pacific railroad and its connections heretofore described.

V

Answers to the complaint were filed by the Union Pacific Railroad Company and 48 other railroads. Only the Union Pacific and eleven other railroads appeared at the hearings, and only five railroads presented testimony, namely, the Union Pacific, which assumed the burden of the defense, and the Chicago and North Western, the Great Northern, and Northern Pacific, and the Wabash railroads.

VI

The following shippers and commercial interests intervened in the proceedings before the Interstate Commerce Commission in support of the complaint of the Rio Grande:

American National Live Stock Association.
Colorado Cattlemen's Association.

Idaho Cattlemen's Association.
National Live Stock Producers Association.
Utah Cattle and Horse Growers Association.
The Arkansas Valley Stock Feeders Association.
The Arnold Milling Company.
The Buhler Mill & Elevator Company.
The Consolidated Flour Mills Company.
Dixie Portland Flour Company.
The Arkansas City Flour Mill.
The Kansas Milling Company.
The William Kelly Milling Company.
Lawrence Milling Company, Inc., d/b/a Moundridge Mill & Elevator Co.
Light Grain and Milling Company.
The New Era Milling Company.
The Wall Rogalsky Milling Company.
The Walnut Creek Milling Company.
Colorado Wool Growers' Association.
Executive Committee Utah State Farm Bureau Federation.
The Grand Junction Chamber of Commerce.
Holly Sugar Corporation.
Idaho State Farm Bureau.
Producers Live Stock Marketing Association.
Idaho Wool Growers Association.
The Pueblo Chamber of Commerce.
Western Forest Industries Association.

Intervening also were the Secretary of Agriculture of the United States, the Public Utilities Commissions of the [fol. 7] States of Colorado and Utah, organizations representing employees of the Rio Grande, and the American Short Line Railroad Association. The Public Utilities Commissions of the States of Idaho and Kansas supported the Rio Grande in part.

The interveners and the 57 witnesses who testified for interveners and for plaintiff represent more than 300,000 persons engaged in various activities.

VII

The complaint alleged that joint competitive freight rates with the Rio Grande via Ogden and Salt Lake City, Utah, were established in 1897 by the Oregon Short Line Railroad Company and the Oregon Railroad and Navigation Company on practically all freight traffic moving eastbound and westbound. The joint rates to and from points on the Oregon Short Line and the Oregon Railroad and Navigation Company applicable on freight traffic moving eastbound and westbound between practically all points were maintained via the Rio Grande until August 25, 1906. By that time the Union Pacific Railroad Company had again acquired dominance over the Oregon Short Line and the Oregon Railroad and Navigation Company, and between August 1906 and December 1912 the Union Pacific Railroad Company caused to be cancelled the joint freight rates via the Rio Grande, which had been established in 1897; but no action was taken by the Union Pacific or other defendants then or later to cancel the through routes. Through routes now exist and have existed for many years for the interchange of freight traffic by the Rio Grande with the Union Pacific Railroad at Provo, Ogden and Salt Lake City, Utah, and the Union Pacific Railroad Company and other railroads heretofore named at Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colorado as to freight traffic.

[fol. 8] (a) between points on or via the Union Pacific Railroad in Utah, north of Ogden, Utah, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof, and

(b) as to freight traffic between Utah common points on the one hand and points on or via the Union Pacific in Utah, north of Ogden, Utah, Idaho, Montana, Oregon, Washington and British Columbia, on the other hand.

The complaint also alleged that the present through rates and charges applicable to such traffic between the points described via such through routes were and are based upon the combination of the intermediate, local or other rates, which rates and charges in the aggregate were and are substantially higher than the joint through rates maintained

by defendant railroads on similar freight traffic between the same origin and destination places and territories which moves via the Union Pacific and the other defendant railroads; that the combination rates applicable on the traffic and between the territories described via said through routes of the Rio Grande and defendant railroads were and are unjust, unreasonable, and discriminatory and unduly prejudicial as compared with the competitive joint rates maintained by the Union Pacific railroad or via the Union Pacific and other defendant railroads on like freight traffic via other competitive routes.

VIII

Hearings on the complaint were conducted by Examiner Frank E. Mullen at Salt Lake City, Utah, Boise, Idaho, and Cheyenne, Wyoming. In his report the examiner found for the complainants. If the findings and conclusions of the examiner had been sustained by the Interstate Commerce Commission, the Rio Grande and the intervening complainants would have been granted all of the relief sought by them. For the convenience of the court, the ultimate findings of the examiner are set forth below:

[fol. 9] "The Commission should find:

1. That the routes via Salt Lake City or Ogden in connection with the Rio Grande over which joint rates are sought in this proceeding are not unreasonably long or unduly circuitous.

2. That the failure and refusal of the Union Pacific and the other defendants, to the extent they participate in the traffic, to join with the Rio Grande in joint rates over such routes from and to the Northwest territory, described herein, via Salt Lake City or Ogden in connection with the Rio Grande to and from Utah common points and to and from Colorado common points and points each thereof, result in undue disadvantage and undue prejudice to shippers and receivers of freight and to the localities and districts in Utah and Colorado served by the Rio Grande.

3. That in the exercise of the Commission's authority under section 15 (1) of the Act the establishment

of joint rates upon the same level as those concurrently maintained over the Union Pacific and its connecting lines, defendants herein, from and to the described territories should be required in order to remove the undue disadvantage and undue prejudice to shippers and receivers of freight on the Rio Grande and to the localities and districts in Utah and Colorado served by that railroad, which result from the refusal and failure of defendants to join in and maintain such joint rates over the said routes.

4. That it is necessary and desirable in the public interest that such joint rates over through routes over the Union Pacific and its connecting railroads, defendants herein, via Salt Lake City or Ogden in connection with the Rio Grande from and to points in Utah north of Ogden, Idaho, Montana, Oregon and Washington to and from Utah common points and to and from Colorado common points and points east thereof should be established and maintained.

5. That such joint rates over the through routes via Salt Lake City or Ogden in connection with the Rio Grande are needed to provide adequate and more efficient and more economic transportation for the shippers and receivers of freight on the Rio Grande in Utah and Colorado and for the localities and districts in those States served by that railroad.

6. That such joint rates over said routes are needed to provide adequate and more efficient and more economic transportation to the shippers and receivers of freight and localities and districts in the Northwest in order that they may ship over those routes at the joint rates, livestock, agricultural commodities, lumber and lumber products and other commodities, to points on the Rio Grande under marketing and transit arrangements with right to reship beyond to Colorado points and points east thereof.

[fol. 10] 7. That the joint rates now in effect over the Union Pacific and its connecting lines, defendant herein, from and to the territories described are just and reasonable for application to traffic that may be routed from and to the same origins and destinations in said territories over the Union Pacific and its con-

necting lines, defendants herein, via Salt Lake City or Ogden in connection with the Rio Grande."

IX

The Commission substantially modified the findings and conclusions of the examiner (287 I.C.C. 611, 659). The conclusions of the Commisison are set forth below:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the lower peninsula of Michigan and in Oklahoma and Texas.

"2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and

other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

"4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

[fol. 11] The minutes of the Commission record that its entire membership of eleven commissioners were present when the case was disposed of, but that one Commissioner did not vote. The minutes also show that six of the ten members approved and adopted the report and order as made. The report itself, 287 I.C.C. 611, at page 665, shows that Commissioner Arpaia is of the opinion that through routes did exist as claimed and that Commissioner Patterson, at page 664, stated that the findings of the Commission were inconsistent and incomplete in that they failed to include lumber in the relief granted. Since Commissioners Lee, Mahaffie, Splawn and Cross by separate opinions found that through routes existed and that the Rio Grande is entitled to the competitive joint rates sought via Ogden and Salt Lake on all of the traffic and between all of the points involved, it will seem that on the question of the existence of through routes and of the inclusion of lumber in the relief granted, there is an even division of views among the ten commissioners who participated in the disposition of the case which was not resolved.

X

That part of the order of the Commission here assailed as invalid was unsatisfactory to the Rio Grande and to the interveners who supported the Rio Grande. In other respects the order was also unsatisfactory to certain defendants and the interveners who supported them. For these reasons, petitions were filed with the Commission by the Rio Grande and intervening complainants and by the Union Pacific Railroad and other defendants for reconsideration, reargument and modification of the order of the Commis-

sion. By its order of June 10, 1953, attached hereto as Appendix "C" the Commission denied all of the petitions for reconsideration, etc.

[fol. 12]

XI

The order of the Commission dated January 12, 1953, (Appendix "B") required that the joint rates prescribed become effective April 7, 1953, by publishing and filing tariffs with the interstate Commerce Commission on not less than 30 days' notice. Further orders of the Interstate Commerce Commission dated February 13, April 15 and June 24, 1953, modified the order of January 12, 1953, so that the joint rates prescribed now are to become effective on January 7, 1954, by publishing and filing tariffs on at least 30 days' notice, unless that effective date is further postponed by the Commission.

XII

The Commission prescribed joint competitive rates and through routes applicable to fruits and vegetables, livestock and certain other commodities for eastbound movement, and on tombstones from points in Vermont and Georgia to the destination territory involved, on the finding, *inter alia,* that such joint rates and through routes are necessary and desirable in the public interest, in order to provide adequate and more economic transportation. Plaintiff alleges that the part of the order of the Commission here assailed is unlawful, arbitrary, capricious and contrary to the evidence and the statute, in that the Commission failed and refused to treat the evidence of record as typical and representative of all of the traffic and the territory involved, and failed and refused to prescribe joint competitive rates and through routes on all of the traffic eastbound and westbound and between all of the points involved. Plaintiff further alleges that the order of the Commission is unlawful, arbitrary, capricious and contrary to the evidence and the statute, in that in prescribing joint competitive rates and through routes on fruits and veg-

[fol. 13] etables, livestock and certain other commodities for eastbound movement, the Commission imposed a restricted intermediate territory, including points in eastern

Colorado, such as Denver, Colorado Springs, Pueblo, Trinidad, served by plaintiff, and points in Nebraska, Kansas, northern Iowa, Minnesota and the Dakotas, to which the prescribed rates do not apply.

The order of the Commission is also unlawful, arbitrary and capricious, and is contrary to the evidence and to the statutes in the following additional respects:

1. In failing and refusing to give serious or any real consideration to the findings and conclusions of the examiner, the only officer of the Commission who heard all of the testimony and saw all of the witnesses, and in that respect acting contrary to the spirit if not the letter of the Administrative Procedure Act. 5 U.S.C.A. § 1001, et seq., § 1009 (e). *United Camera Corp.* v. *National Labor Rel. Bd.*, 340 U.S. 474, 496.

2. In failing and refusing to find that through routes exist on the traffic involved via the Union Pacific through Ogden and the Rio Grande between Colorado common points and points east thereof, on the one hand and points in the closed door territory in northern Utah, Idaho, Montana, Oregon and Washington on the other hand; and in finding that because such routes are not open on a commercial basis at competitive joint rates, they may not be considered through routes under the Interstate Commerce Act because that would give them "a character which they do not now possess."

3. In failing and refusing to find that the refusal of the Union Pacific and the other defendant railroads to establish joint competitive rates on the traffic and between the territories involved in this case via the Ogden Gateway and the Rio Grande on the same level that are now maintained by the Union Pacific with other defendant railroads via numerous other routes via which the distance is as great, and in some instances substantially greater, than are the distances via the Ogden Gateway and the Rio Grande constitutes a violation of Section 3 (4) of the Interstate Commerce Act.

4. In finding that a violation of Section 3 (4) exists by virtue of the maintenance by the Union Pacific and the other defendants of joint rates between points in the

closed door territory on the traffic involved and points, [fol. 14] on the Bamberger Railroad south of Ogden while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, the Commission erred in restricting that finding to and from points between Salt Lake City and Ogden since the Rio Grande serves many other shippers in Utah south of South Lake City, at such points as American Fork, Springville and Midvale, which are vitally interested in the competitive rates sought.

5. In finding on pages 656-659 of its printed report (287 I.C.C. 611) that the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental railroads and to support that finding by relying on *Livestock-Western District Rates*, 176 I.C.C. 1, decided in June, 1931, and 190 I.C.C. 175, decided in December, 1932, and in *W. H. Bintz Co.* v. *A. & S. Ry. Co.*, 216 I.C.C. 481, 486, decided in June, 1936, which decisions merely leaned for support on the older cases cited, as the record shows that the operating conditions, including distances of the Rio Grande, have been substantially improved and shortened since the date of the decisions cited. In fact, the record shows that the main line of the Rio Grande which would be used in connection with the traffic involved has been practically rebuilt since the period covered by the decisions cited.

6. In failing and refusing to find that the through rates based on the combination of intermediate rates via Ogden and the Rio Grande on the traffic and between the territories involved are unjust and unreasonable to the extent they exceed the joint competitive rates of the other railroads and the Union Pacific which apply via routes other than the Rio Grande generally on transcontinental traffic and other traffic, and which also apply via the route of the Rio Grande through Salt Lake and Ogden and on traffic to and from points in California and certain western Pacific coast points in Oregon and Washington.

XIII

Wherefore, plaintiff, being without adequate remedy at law, respectfully prays:

First. That process may issue against the defendants, the United States of America and the Interstate Commerce Commission.

Second. That upon the filing of this complaint the presiding judge of this court shall call to his assistance in the hearing and determination thereof two other judges, of whom at least one shall be a circuit judge, and the court thus constituted and convened shall hear this complaint upon due and legal notice to the defendants. 28 U.S.C.A. § 2284 and 2321-2325.

[fol. 15] Third. That the court, upon final hearing of this case of action, enter a decree which shall adjudge that the order of the Interstate Commerce Commission of January 12, 1953, in the respects hereinbefore described is unlawful, null and void, and that in these respects it be set aside and their enforcement forever enjoined.

Fourth. That the plaintiff have recovery of the defendants' proper costs of this cause of action; and

Fifth. That plaintiff have such other and further relief in the premises as this court may deem fit, appropriate and proper.

Respectfully submitted, The Denver and Rio Grande Western Railroad Company, Herbert M. Boyle, 1531 Stout Street, Denver, Colorado, Robert E. Quirk, 1116 Investment Building, Washington, D. C., Attorneys for Plaintiff.

[fol. 16] APPENDIX A TO COMPLAINT

Section 1 (4) of the Interstate Commerce Act, reads as follows:

"'(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifica-

tions applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3 (1) of the Interstate Commerce Act, reads as follows:

"(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3 (4) of the Interstate Commerce Act, reads as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and de-

livering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15 (1) of the Interstate Commerce Act, reads as follows:

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and [fol. 17] hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for

such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3) of the Interstate Commerce Act, reads as follows:

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Section 15 (4) of the Interstate Commerce Act, reads as follows:

"(4) In establishing any such through route the Commission shall not (Except as provided in section 3, and except where one of the carriers is a water line)

require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire [fol. 18] length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

[fol. 19] APPENDIX B TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 12th Day of January, A. D. 1953

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, et al.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which ex-

ceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the des-ribed excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points [fol. 20] on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue

prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

George W. Laird, Acting Secretary. (Seal.)

[fol. 21] APPENDIX TO COMPLAINT

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of June, A.D. 1953.

No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petitions for reconsideration, and for modification of the findings and order filed by complainant, defendants and various interveners, and the several replies to the petitions, and it appearing that none of the petitions presents matters that are materially different from those of record in the proceeding, or offers new or additional contentions or arguments that vary substantially from those previously advanced and considered by the Commission in disposing of the issues;

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

George W. Laird, Acting Secretary. (Seal)

[fol. 22] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Title omitted]

ORDER CONVENING THREE-JUDGE COURT—October 26, 1953

Honorable William Lee Knous, United States District Judge for the District of Colorado, having notified me that an application for injunction has been filed in the above matter, and that it is an action required by Act of Congress to be heard and determined by a District Court of three judges:

Now, therefore, it is ordered that said Court shall be constituted as follows: Honorable Orie L. Phillips, Chief Judge of the United States Court of Appeals, Tenth Circuit; Honorable Royce H. Savage, United States District Judge, and Honorable William Lee Knous, United States District Judge.

Dated at Denver, Colorado, October 26, 1953.

Orie L. Phillips, Chief Judge, United States Court of Appeals, Tenth Circuit.

[fol. 23] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS AND RETURN—Filed October 27, 1953

To the above named Defendants:

You are hereby summoned and required to serve upon Herbert M. Boyle plaintiff's attorney, whose is 1531 Stout Street, Denver, Colorado, and file with the Clerk of the United States District Court for the District of Colorado, at Denver, Colorado, an answer to the complaint which herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

G. Walter Bowman, Clerk of Court; William Graf, Deputy Clerk. (Seal of Court.)

Date: October 22nd, A.D. 1953.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 23a] RETURN ON SERVICE OF WRIT

DISTRICT OF COLORADO, ss:

I hereby certify and return, that on the 22nd day of October 1953, I received this summons and served it together with the complaint herein as follows: upon the therein named United States of America by handing to and leaving true and correct copies thereof with Charles S. Vigil, United States Attorney for the District of Colorado, At Denver, in said District, on the 22nd day of October, A. D. 1953.

Upon the therein named Interstate Commerce Commission by mailing by Registered Mail, return receipt requested, to said Commission, Washington, D. C., on the 22nd day of October, A. D. 1953.

I further certify and return that I mailed two true and correct copies thereof by registered mail, return receipt requested, to The Attorney General of the United States, at Washington, D. C., on the 22nd day of October, A. D. 1953.

Maurice T. Smith, United States Marshal, By Oscar A. Crist, Deputy Unite States Marshal.

Marshal's Fee: Service, $2.00.

[fol. 24] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF UNION PACIFIC RAILROAD CO., ET AL., TO INTERVENE AS DEFENDANTS UNDER RULE 24, AND NOTICE THEREOF—Filed November 12, 1953

I

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, file this motion pursuant to Rule 24(a) and (c), (28 U. S. C. A., Federal Rules of Civil Procedure, Rules 17-51), to intervene as defendants in the above-entitled proceeding in which complaint was filed October 22, 1953.

II

Movants are corporation common carriers by railroad, and each of them is engaged in transportation of property and passengers in interstate and intrastate commerce over their respective lines of railroad in and between several states in the Midwestern and Western part of the United States. Union Pacific Railroad Company, and The Atchison, Topeka and Santa Fe Railway Company operate and conduct business in the District of Colorado. In the order named in the preceding paragraph they were incorporated, [fol. 25] respectively, in the States of Utah, Wisconsin, Wisconsin, Wisconsin, Minnesota, Kansas, Wisconsin and Ohio.

III

As shown by the allegations therein, the complaint of The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande" or "Plaintiff") seeks to enjoin, annul and set aside, "in part", the order issued January 12, 1953, by the Interstate Commerce Commission

in a proceeding entitled "No. 30297, *Denver & Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al.*"

Movants were defendants, along with some 200 other railroads in that proceeding before the Commission, and, therefore, are entitled to intervene in this suit as of right, pursuant to the provisions of 28 U. S. C. A., section 2323.

IV

Further demonstrating their interests in this suit, Movants show that in the proceeding before the Commission the Rio Grande demanded that the Commission issue an order which would enable it to divert to its line from the lines of these Movants as much as possible of more than 157,000 carloads of transcontinental freight traffic consisting of all commodities originated and terminated, principally on the lines of Union Pacific Railroad Company and certain others of these Movants in the States of Utah, north of Ogden, Idaho, Montana, Oregon and Washington, and transported by them and other carriers, except the Rio Grande, to or from points located principally in the eastern part of the United States.

The order issued by the Commission (Appendix B to the complaint) requires these Movants and other railroads to establish on the several commodities named therein the through routes and joint rates demanded by the Rio Grande via its line. As the commodities named in the order constitute approximately one-third of the total traffic which the Rio Grande seeks to divert to its line and as such diversion would deprive or threaten to deprive the Union Pacific and [fol. 26] others of these Movants of many millions of dollars annually in earnings and revenues from that traffic which is now transported by them, they filed suit on June 25, 1953, to enjoin, annul and set the order aside, in the District Court of the United States for the District of Nebraska, Omaha Division. The suit is entitled "*Union Pacific Railroad Company, et al., Plaintiffs v. United States of America, and Interstate Commerce Commission, Defendants*, Civil Action No. 76-53." Trial of that suit is set for November 23, 1953, before United States Circuit Judges Collet and Johnsen and United States District Judge Delehant. Copy

of the complaint in that suit is attached hereto as Appendix A.

By petition filed August 17, 1953, the Rio Grande sought and has been permitted to intervene as a defendant in that suit and has thus voluntarily submitted itself to the jurisdiction of that Court. Having done so, the Rio Grande was and is under obligation pursuant to the intendment and purpose of Rule 13 of Federal Rules of Civil Procedure to avoid multiplicity of suits and to dispose of all questions concerning the validity of the Commission's order in one action, to present its claims and contentions in the suit to which it has become a party in the District of Nebraska. The issues tendered by the complaint which the Rio Grande has filed in this Court could conveniently be presented to and decided by the Nebraska District Court along with the issues raised by the complaint these Movants have filed in that Court. As that Court has jurisdiction to review and decide all issues concerning the validity of the Commission's order, and as all necessary parties are now before that Court, these Movants suggest that this Court, in the exercise of its authority under 28 U. S. Code, section 1404(a), transfer this suit to the United States District Court for the District of Nebraska. Such cases are tried upon the record of evidence heard by the Interstate Commerce Commission, and no witnesses are required in presenting the cases to the Courts.

V

The Commission's order does not require establishment of through routes and joint rates, nor does it have any effect on approximately two-thirds of the traffic and revenues that [fol. 27] the Rio Grande seeks to divert to its line. It is that additional part of the traffic on which the Commission does not require through routes and joint rates that the Rio Grande seeks to compel through routes and joint rates via its line.

If the Rio Grande should succeed in accomplishing its full objectives to divert to its line all of the traffic and revenues it seeks, the Union Pacific would be threatened with a total possible loss of earnings and revenues of approximately $50,000,000 annually, and its loss of the part of the traffic involved in this suit would be more than $30,000,000

annually, and others of these Movants would lose relatively large portions of the revenues they now earn from the traffic sought by the Rio Grande. It is to protect themselves from such potential financial loss, or any part thereof, and to safeguard their future financial ability to provide and render adequate and efficient transportation service to the public that these Movants desire to intervene as defendants in this suit.

Wherefore, these Movants pray for an order of this Court permitting them to intervene as defendants in this suit, to file the motion to dismiss and answer to the complaint tendered with the attached Statement of Claims for Which Intervention is Sought as Defendants, to submit oral arguments and briefs, and to be treated in all respects as defendants in this suit.

Respectfully submitted, Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, 300 International Trust Bldg., Denver, Colorado, Attorneys for Movant Railroads.

[fol. 28] NOTICE OF MOTION (omitted in printing)

[fol. 29] [Stamp:] Filed United States District Court, Denver, Colorado, Nov. 20, 1953. G. Walter Bowman, Clerk.

APPENDIX "A" TO MOTION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

UNION PACIFIC RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, Plaintiffs,

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants

(Filed June 25, 1953 2:30 p. m.)

COMPLAINT

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, bring this suit to enjoin, annul, suspend and set aside the order issued by the Interstate Commerce Commission (hereinafter called the "Commission") on January 12, 1953, in a proceeding entitled Docket No. 30297, The Denver and Rio Grande Western Railroad Company vs. Union Pacific Railroad Company, et al. The order, copy of which is attached and made a part hereof as Appendix A, requires:

[fol. 30] "*It is ordered*, That the defendants named in the complaint, according as they participate in the

transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

"*It is further ordered*, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the

lines of the Union Pacific Railroad Company through Wyoming.

"*It is further ordered*, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

"*And it is further ordered*, That this order shall continue in force until the further order of the Commission."

II

Union Pacific Railroad Company (hereinafter called "Union Pacific") is a corporation under the laws of the State of Utah, and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the State of Nebraska and other states hereinafter mentioned.

[fol. 31] Chicago and North Western Railway Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Wisconsin, Illinois, Minnesota, Iowa, South Dakota, Nebraska and other states.

Chicago, St. Paul, Minneapolis & Omaha Railway Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Nebraska, Iowa, Minnesota, and other states.

Northern Pacific Railway Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Minnesota, North Dakota, Montana, Idaho, Washington and other states.

Great Northern Railway Company is a corporation under the laws of the State of Minnesota and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon, California and other states.

The Atchison, Topeka and Santa Fe Railway Company is a corporation under the laws of the State of Kansas and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Illinois, Missouri, Kansas, New Mexico, Arizona, California, and other states.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Illinois, Indiana, Wisconsin, Minnesota, North Dakota, South Dakota, Montana, Idaho, Washington and other states.

Wabash Railroad Company is a corporation under the [fol. 32] laws of the State of Ohio and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Michigan, Indiana, Illinois, Missouri and other states.

III

Jurisdiction of this Court over this cause of action is provided by Title 28 U. S. Code, Sections 1336, 2284 and 2321-2325, inclusive, which authorizes suits to be brought in the District Courts of the United States against the United States of America to enjoin, annul, suspend and set aside orders of the Interstate Commerce Commission. Venue of this action is in this Court pursuant to Title 28 U. S. Code, Section 1398, because of the fact that the principal office of the Union Pacific is at 1416 Dodge Street, Omaha, Nebraska.

IV

The proceeding before the Commission in said Docket No. 30297 was initiated by a complaint filed August 1, 1949, by The Denver and Rio Grande Western Railroad Company, as complainant (hereinafter called "Rio Grande") against

the Union Pacific and some 200 other railroads, including the plaintiffs herein, alleging, among other things, that the Union Pacific and other railroads, or some of them, failed and refused—

> "* * * to join with complainant in establishing competitive joint rates for the transportation of the freight traffic involved between
>
> "(a) points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof,
>
> "and
>
> "(b) on freight traffic between Utah common points on the one hand, and places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia, on the other hand,
>
> "which failure and refusal by the defendants constitute violations of Section 1(4), Section 3, Section 15(1) and Section 15(3) of the Interstate Commerce Act, and is contrary to the National Transportation Policy."

The complaint also alleged that freight rates and charges via the Rio Grande on traffic to and from the territories [fol. 33] described were so much greater than rates and charges via routes of the Union Pacific and other defendants as to prevent the Rio Grande from obtaining a haul "on an unknown volume of competitive traffic" because shippers will not route their traffic via the Rio Grande at the higher rates and charges.

V

Answers to the complaint were filed by the Union Pacific and numerous other defendant railroads denying the allegations of the complaint. The complaint did not allege that through routes via the Rio Grande are necessary or desirable in the public interest, or that existing routes of the Union Pacific and other railroads are unreasonably long compared to routes via the Rio Grande, or that through routes and joint rates via the Rio Grande to and from the described territories are needed to provide adequate and more efficient or more economic transportation.

[fol. 34]

VI

Intervenors opposing the complaint and supporting the Union Pacific and other defendants named in the complaint include the State of Nebraska, City of Cheyenne, Wyoming, the Public Service Commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska and Kansas, chambers of commerce and other associations, certain industrial employe groups in Wyoming, and employe groups of the Union Pacific, the Chicago and North Western Railway Company and the Wabash Railroad Company.

Intervenors in support of the Rio Grande's complaint include the Secretary of Agriculture of the United States, the Public Utilities Commissions of Colorado and Utah, which intervened as their interests might appear, but later fully supported the complaint, the American National Live Stock Association, other live stock and stock feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce and certain groups of employes of the Rio Grande. The Public Utilities Commission of Idaho intervened without stating its position, but later took the position that the demands of the Rio Grande's complaint should be denied except with respect to live stock and fruits and vegetables.

VII

Union Pacific owns and operates nearly 10,000 miles of railroad serving more than 1,700 cities, towns and stations in the States of Iowa, Missouri, Nebraska, Kansas, Colorado, Wyoming, Utah, Nevada, California, Idaho, Montana, Oregon and Washington. Its eastern termini are at Council Bluffs, Iowa, and Kansas City, Missouri, and its western termini are at Los Angeles, California, Portland, Oregon, and Seattle, Washington, and at Ogden, Utah, where it made connection with what is now the Southern Pacific Company on May 10, 1869, to form the first transcontinental railroad in the United States. Beginning in 1878 the Union Pacific constructed and acquired railroad lines north of Ogden in Utah, Idaho, Montana, Oregon and Washington and now owns and operates 5,606.7 miles of railroad in the states just named of which 2,913.19 miles, or over .50

[fol. 35] per cent, consist of numerous branch lines connected with and extending from its main lines in those states.

The standard gauge lines of the Rio Grande, completed in 1890, extend from Ogden through Utah and Colorado to Denver, approximately 600 miles, and to Pueblo and Trinidad, Colorado. The Rio Grande connects with the Union Pacific at Denver, and interchange of traffic between the two railroads can be made at Ogden through the facilities of the Ogden Union Railway & Depot Company, a terminal facility owned and maintained by the Southern Pacific company and the Union Pacific for the interchange between them of eastbound and westbound transcontinental and other traffic.

VIII

In the States of Utah north of Ogden, Idaho, Montana, Oregon and Washington (designated by the Commission as the "northwest area" or "excluded territory"), more than 157,000 carloads of freight originate and terminate annually at stations on the main and branch lines of the Union Pacific. Most of this traffic now moves and for many years has moved over the lines of the Union Pacific through Pocatello, Idaho, and Granger, Wyoming, to or from the termini of the Union Pacific at Council Bluffs, Iowa, or Kansas City, Missouri, and the lines of connecting railroads at those two points. A portion of the traffic is moved by the Union Pacific to junctions with other railroads in Oregon, Washington and Montana, and by those railroads to points on their lines or to connections with still other railroads. By far the greater portion of the traffic moves between the northwest area and the area east of Missouri River and north of the Ohio River. It is this traffic and the revenue derived from it, or as much thereof as possible, which the Rio Grande seeks through its complaint to the Commission to divert to its line for a "bridge" haul over the entire length of its line between Ogden and Denver for the purpose, as testified by its president, of improving the financial condition and position of the Rio Grande. Routes via the Rio Grande are from 33 to 219 [fol. 36] miles longer than Union Pacific routes and division of the traffic to the Rio Grande would short haul or deprive

the Union Pacific of its present haul to the extent of about 1,000 miles and would deprive other railroad plaintiffs herein of their entire haul on many thousand carloads of such traffic annually.

[fol. 37] IX

Union Pacific and other railroads have never established or maintained any through routes and joint rates with the Rio Grande via Ogden on traffic from and to the described territories, except on eastbound sheep or goats and except during a period when the Union Pacific and the Oregon Short Line Railway Company, which is wholly owned by the Union Pacific, were in separate receiverships, at the conclusion of which period, the through routes and joint rates with the Rio Grande were cancelled in 1906 and 1912 with approval of the Commission. No complaints have been filed by shippers or the public or by any state public service commission demanding the through routes and joint rates which the Rio Grande seeks to compel via its line as a result of its complaint to the Commission.

X

Concurrently with the filing of the complaint August 1, 1949, and thereafter, officials of the Rio Grande conducted a vigorous and wide-spread campaign in Colorado, Utah, Idaho, Oregon and other northwestern states in which it solicited, agitated and sought to persuade and procure shippers located upon and served by the Union Pacific and public service commissions of those states to joint with the Rio Grande by intervention and testimony of such nature as to help it win its case. In that campaign, the Rio Grande condemned and vilified the Union Pacific, accused it of violations of law and of the rights of shippers served by it and urged upon shippers that they would benefit by joining with the Rio Grande in supporting its case. Some evidence of that campaign was received by the Commission at hearings hereinafter mentioned, but the Commission excluded and refused to receive most of the evidence offered by the Union Pacific disclosing and portraying the nature, vigor and extent of the Rio Grande's efforts to procure testimony of shippers to help it win its case before the Commission.

After the Examiner's proposed report and recommendations were issued November 20, 1950, U. S. Senator Edwin [fol. 38] C. Johnson of Colorado, then Chairman of the Senate Committee on Interstate and Foreign Commerce which approves or disapproves appointments and reappointments of persons nominated by the President of the United States for positions as Interstate Commerce Commissioners, made radio broadcasts on January 27 and February 2, 1951, over radio station KFEL at Denver, Colorado, in which he praised the Examiner's recommendations as "a great victory for Colorado shippers," denounced the desire of the Union Pacific to retain to its shorter route the traffic originated and terminated on its main line and numerous branch lines in the northwest as "the selfish interests of the Union Pacific" and announced that "I am, and will continue to do all that I can to rid my people of such economic tyranny." Again, on October 28, 1952, immediately following reargument of the case before the Commission on October 15 and 16, 1952, and while the case was under consideration and pending decision by the Commission, Senator Johnson caused or permitted to be published over his signature in the newspaper, Wichita Beacon, Wichita, Kansas, an "editorial" in which he charged Union Pacific with discrimination against shippers located on its own railroad, with maintaining a "transportation monopoly" by refusing to voluntarily deprive itself of revenues from traffic originated and terminated on its own railroad and refusing to join in the Rio Grande's plan to divert the traffic to its line for its financial improvement, asserted that he had "investigated" the case then pending before the Commission and concluded "that the public interest was on the side of the Rio Grande."

The Commission rejected the Union Pacific's petition to reopen the record and receive copies of the radio broadcasts and "editorial" in evidence.

XI

Hearings upon the complaint were conducted by an Examiner of the Commission at Salt Lake City, Utah, Boise, Idaho, and Cheyenne, Wyoming, after which a proposed report of the Examiner was served upon the parties No-

vember 20, 1950, recommending that the Commission grant the full demands of the Rio Grande's complaint. Except-
[fol. 39] tions to the proposed report of the Examiner were filed by the Rio Grande with respect to one feature of the proposed report and by the Union Pacific, other railroad defendants, the six state commissions, and other parties supporting the defendants. Oral arguments upon the exceptions were heard by the entire Commission October 11 and 12, 1951, and reargument ordered by the Commission was heard October 15 and 16, 1952.

XII

On January 12, 1953, a majority of the Commission, with certain of the Commissioners dissenting, issued the report and decision attached and made a part hereof as Appendix B hereto in which it announced the following "Conclusions":

"1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the lower peninsula of Michigan and in Oklahoma and Texas.

"2. That the assailed rates on the commodities and from and to the points described in the foregoing find-

ing are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act.

"4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

Upon the same date the Commission entered its order [fol. 40] mentioned above and attached as Appendix A to this complaint.

XIII

Petitions for reopening, reargument and reconsideration of its decision and order were filed with the Commission by the Union Pacific and several other railroads, by the public service commissions of Nebraska, Wyoming, Idaho, Montana, Oregon and Washington, and by Union Pacific employees. In those petitions, the Commission was urged to reverse its findings and order and to dismiss the complaint. Petitions for reconsideration were also filed with the Commission by the Rio Grande and a number of shippers and others. On June 22, 1953, the Commission issued and made public its order dated June 10, 1953, denying all the petitions for reconsideration. Copy of that order is attached hereto as Appendix C and made a part hereof.

XIV

Plaintiffs allege that said order of the Commission dated January 12, 1953, is based upon errors of law, is not sup-

ported by evidence or adequate findings, exceeds the statutory power of the Commission, and is unlawful, arbitrary, null and void and should be set aside for the following reasons:

1. In rejecting testimony timely offered to prove that the Rio Grande agitated, solicited and procured shippers and others as witnesses to intervene and testify in such manner as to help it win its case and in rejecting transcripts of radio broadcasts over station KFEL at Denver, and an "editorial" by Senator Ed. C. Johnson, published in the Wichita Beacon, the Commission acted arbitrarily, unreasonably and unlawfully.

2. The Commission acted arbitrarily, unreasonably and unlawfully in refusing to accept and consider court decisions and other authorities offered by the Union Pacific in support of the contention that the Rio Grande's solicitation and procurement of shippers to intervene and testify so as to help it win its case, and that the intrusion of and utterances by Senator Johnson vitiated and nullified the proceeding requiring its dismissal by the Commission.

[fol. 41] 3. The Commission acted arbitrarily, erroneously and contrary to law in overruling plaintiffs' motion to dismiss the complaint on the ground that the Rio Grande seeks only to obtain additional revenues to improve its financial position and that the Commission is prohibited by section 15(4) of the Interstate Commerce Act from compelling through routes for that purpose.

4. In holding that, despite the fact that the Rio Grande's complaint did not and could not raise an issue of undue preference and prejudice among shippers under section 3(1) of the Interstate Commerce Act, such issue nevertheless was tendered for decision because of testimony submitted by shippers, the Commission acted arbitrarily, erroneously and contrary to law.

5. In finding that the combination rates via the Rio Grande are unjust and unreasonable and that joint rates applicable via the Union Pacific and other defendants are reasonable for application via the Rio Grande, the Commission acted arbitrarily, unreasonably and unlawfully in that there was no evidence before it to justify or support such findings.

6. The Commission acted arbitrarily, erroneously and contrary to law in failing to find and hold that the refusal of the Union Pacific and other defendants named in the complaint to equalize shippers in the matter of transit privileges offered by the Rio Grande by joining in lower rates via the Rio Grande does not and cannot violate section 3(1) of the Interstate Commerce Act.

7. The Commission's finding that the combination rates applicable via the Rio Grande on traffic from and to the northwest area or "excluded territory" are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande's routes and unduly preferential of shippers and receivers using the Union Pacific's routes, is arbitrary, capricious, erroneous and contrary to law in that shippers in said northwest area using or desiring to use the Rio Grande's routes are the same shippers who were found by the Commission to be unduly preferred because they have available and make use of Union Pacific routes at lower joint rates.

8. After correctly finding that there are substantial differences and dissimilarities in transportation conditions [fol. 42] over the Union Pacific compared with those over the Rio Grande, the Commission acted arbitrarily, erroneously, contrary to and without support of evidence in finding that those substantial differences and dissimilarities in transportation conditions "become relatively insignificant" and that "transportation conditions are substantially similar" for the longer hauls and greater distance between points in the northwest area and points in the southern and eastern part of the United States.

9. The finding that through routes and joint rates via the Rio Grande are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" is contrary to the overwhelming preponderance of the evidence, contrary to and inconsistent with facts clearly found and stated in the Commission's report and is based upon an erroneous interpretation of the words "needed in order to provide adequate, and more efficient or more economic, transportation" used in section 15(4) of the Interstate Commerce Act.

10. The finding that, regardless of the fact that there is

no allegation or contention by the Rio Grande that through routes and joint rates via its line for the involved traffic are needed to provide adequate and more efficient or more economic transportation, or that routes of the Union Pacific and other railroads are not adequate, testimony of shippers raises "a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities" is arbitrary, erroneous in law and is not supported by evidence.

11. The basic facts found by the Commission are inconsistent with and do not justify or support, but are contrary to its ultimate conclusions and the order based thereon is arbitrary, erroneous and void.

12. The finding that the commodities specified in the order must be moved over as many routes as possible is arbitrary, erroneous and in conflict with and contrary to the provisions of sections 1(4) and 15(4) of the Interstate Commerce Act.

13. The Commission acted arbitrarily, capriciously, er- [fol. 43] roneously, and contrary to the evidence of record in finding that because of the refusal of the Union Pacific and other railroads to join with the Rio Grande in through routes and equal joint rates so that the specified commodities may move over the Rio Grande instead of routes of the Union Pacific and other railroads "the shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the wide-spread system developed for the marketing of such commodities."

14. The finding that for traffic reconsigned or accorded transit privileges at points on the Rio Grande "defendants' routes are inadequate and less economical than are the Rio Grande routes" because higher rates apply via the Rio Grande and "the Union Pacific routes and the joint rates which apply over them are not available" at such points on the Rio Grande, is arbitrary, capricious, erroneous and is based upon a misinterpretation of law.

15. The finding that the situaiton as to the commodities specified in the order is similar to that in *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I. C. C. 333, is erroneous, contrary to the facts stated in the decision in that case and contrary to the evidence of record in this case.

16. In view of the facts correctly found that there are substantial dissimilar transportation conditions over the Rio Grande compared with those over the Union Pacific, that operating conditions on the Rio Grande are "more onerous" than those on the Union Pacific, that Union Pacific routes are shorter, that the line of the Rio Grande is less favorably situated than that of the Union Pacific and that traffic diverted to the Rio Grande would require at least 24 hours more time in transit and two more terminal yard or interchange services than presently required for movement of traffic over the Union Pacific, the further finding that those substantially different transportation conditions become relatively insignificant when spread over long hauls between the northwest area and the eastern and southern part of the United States, is arbitrary, erroneous, capricious, contrary to law and without any evidence to support or justify it, and is based on an erroneous assumption that the Commission [fol. 44] may lawfully ignore the substantial differences and more onerous transportation conditions of the Rio Grande for longer hauls.

17. The Commission acted arbitrarily, unlawfully and contrary to the evidence in refusing to find and hold that the joint rates via the Union Pacific and other railroads are too low for application via the longer route of the Rio Grande and that such application of the joint rates would result in wasteful and uneconomic transportation which the Interstate Commerce Act intends to prevent.

18. The findings that the combination rates via the Rio Grande are unreasonable because they are higher than the joint rates applicable via Union Pacific routes and that said joint rates are reasonable for application via the longer routes of the Rio Grande because although depressed and sub-normal the joint rates are the "going rates", and have been in effect for many years, are arbitrary, erroneous, capricious and contrary to law and the evidence of record.

19. The finding that "there is no claim that any of those (joint) rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates" is arbitrary, capricious, erroneous in law and contrary to the evidence.

20. The Commission acted arbitrarily and unlawfully in failing and refusing to give effect to the requirement in section 15(4) of the Interstate Commerce Act that reasonable preference be given the originating carrier.

21. The Commission misconstrued and misapplied section 15(4) of the Interstate Commerce Act and exceeded its power in finding and requiring that the shorter Union Pacific routes may be short hauled because routes not more than 37 per cent longer could be made via the Rio Grande and because the Union Pacific would still retain a substantial haul after being short hauled approximately 1,000 miles.

[fol. 45] 22. The Commission acted arbitrarily, erroneously and contrary to the evidence in finding that the additional traffic which will be diverted to the Rio Grande under the order can be interchanged through present terminal facilities at Ogden or Salt Lake City without serious detriment to operating efficiency, and in ignoring evidence portraying obstacles of interchange of traffic between the Union Pacific and the Rio Grande at Denver.

23. The Commission acted arbitrarily, capriciously and erroneously in failing to consider the probable injurious effect that any substantial diversion of traffic and revenues from the Union Pacific to the Rio Grande would have upon the Union Pacific, its employes and its service on cities, towns and communities served by it and in failing to find that the probable diversion of traffic to the Rio Grande would impair and deteriorate service required by shippers and a large segment of the commerce of the country and the national defense.

24. The finding that maintenance by the Union Pacific of joint rates with the Bamberger Railroad at points between Ogden and Salt Lake City, Utah, while refusing to participate in like rates with the Rio Grande discriminates against the latter in violation of section 3(4) of the Interstate Commerce Act is without support of any evidence.

XV

Plaintiffs will be irreparably injured and damaged if the Commission's said order of January 12, 1953, is not re-

strained, suspended, enjoined, set aside and annulled. Plaintiffs would have no remedy at law to recover such loss or damage.

Said order of January 12, 1953, was originally made to become effective on April 7, 1953, by publishing and filing tariffs with the Commission on not less than 30 days' notice. [fol. 46] Further orders of the Commission dated February 13, April 15, and June 24, 1953, modified the order of January 12, 1953, so that it will become effective on October 7, 1953, by publishing and filing tariffs on September 7, 1953, unless the effective date thereof is further postponed by the Commission, or unless this Court restrains, enjoins, suspends and prevents said order from becoming effective.

If said order becomes effective and plaintiffs have not complied with its requirements, they and each of them will be subject to a penalty of $5,000.00 provided by Title 49, U. S. Code, Section 16(8) for each day they fail to comply with the order.

XVI

Wherefore, Plaintiffs pray:

1. That process may issue against the United States of America and Interstate Commerce Commission;

2. That this Court, by temporary stay, preliminary or interlocutory injunction, stay, restrain and suspend the operation of the order of the Commission dated January 12, 1953, pending the final hearing and determination of this action;

3. That a Court constituted as required by U. S. Code, Title 28, Sections 2284, and 2321-2325, consisting of three Judges, of whom at least one shall be a Circuit Judge, be convened, and that said Court so constituted and convened shall hear this petition upon due and legal notice to defendants;

4. That said Court, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside and annulling the said order of the Commission;

5. That Plaintiffs have recovery of the defendants of the proper costs of this suit; and

[fol. 47] 6. That the Plaintiffs have such other and further

relief in the premises as to equity may pertain and as may be deemed by this Court fit and proper.

Respectfully submitted, Elmer B. Collins, Attorney for Union Pacific Railroad Company, Plaintiff, 1416 Dodge Street, Omaha 2, Nebraska; F. O. Steadry, Attorney for Chicago and North Western Railway Company, and Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiffs, 400 West Madison Street, Chicago 6, Illinois; Conrad Olson, Attorney for Northern Pacific Railway Company, Plaintiff, 5th & Jackson Streets, St. Paul 1, Minnesota; L. E. Torinus, Jr., Attorney for Great Northern Railway Company, Plaintiff, 175 East 4th Street, St. Paul 1, Minnesota; Roland J. Lehman, Attorney for The Atchison, Topeka and Santa Fe Railway Company, Plaintiff, 80 East Jackson Blvd., Chicago 4, Illinois; Carson L. Taylor, Attorney for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Plaintiff, 516 West Jackson Blvd., Chicago 6, Illinois; Eugene S. Davis, Attorney for Wabash Railroad Company, Plaintiff, Railway Exchange Building, St. Louis 1, Missouri.

Of Counsel: W. R. Rouse, 1416 Dodge Street, Omaha 2, Nebraska, for Union Pacific Railroad Company; Nye F. [fol. 48] Morehouse, 400 West Madison Street, Chicago 6, Illinois, for Chicago and North Western Railway Company, and Chicago, St. Paul, Minneapolis & Omaha Railway Company; M. L. Countryman, Jr., 5th & Jackson Streets, St. Paul 1, Minnesota, for Northern Pacific Railway Company; Edwin C. Matthias, 175 East 4th Street, St. Paul 1, Minnesota, for Great Northern Railway Company; J. C. Gibson, 80 East Jackson Blvd., Chicago 4, Illinois, for The Atchison Topeka and Santa Fe Railway Company; M. L. Bluhm, 516 West Jackson Blvd., Chicago 6, Illinois, for Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Joseph H. Miller, Railway Exchange Building, St. Louis 1, Missouri, for Wabash Railroad Company.

[fols. 49-50] APPENDIX "A" TO APPENDIX "A"

Omitted. Printed side page 19, ante.

[fol. 51] NOTE RE APPENDIX B, TO APPENDIX "A" TO MOTION REPORT AND ORDER OF THE INTERSTATE COMMERCE COMMISSION DATED JANUARY 12, 1953, IN DOCKET NO. 30297, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY VS. UNION PACIFIC RAILROAD COMPANY, ET AL., 287 I. C. C. 611, OMITTED.

[fol. 52] APPENDIX "C" TO APPENDIX "A"

Omitted. Printed side page 21, ante.

[fol. 53] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

CLAIMS FOR WHICH INTERVENTION IS SOUGHT AS DEFENDANTS BY UNION PACIFIC RAILROAD CO., ET AL.—Filed November 12, 1953

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, Movants herein, if permitted to intervene as defendants in this suit, will file the Motion to Dismiss and Answer tendered herewith, and will claim and show to the Court:

I

That the complainant, The Denver and Rio Grande Western Railroad Company (herein called "Rio Grande"),

has no legal right or standing to maintain this suit, and for that reason the suit should be dismissed.

II

The Rio Grande's complaint presents nothing that is reviewable by this Court or any other Court.

III

The decree prayed in the complaint would be futile and this Court is without power to issue any decree that would [fol. 54] be effective to aid the Rio Grande in accomplishing its desire for through routes and joint rates via its line on commodities not included in the Interstate Commerce Commission's said order of January 12, 1953.

IV

That this suit should be dismissed by this Court and transferred under 28 U. S. Code, section 1404(a) to the District Court of the United States for the District of Nebraska, Omaha Division, in which there is pending a suit, in which the Rio Grande is an intervening defendant, by these Movants to enjoin and annul the same order of the Interstate Commerce Commission which the Rio Grande assails, "in part" in this suit.

V

That, if the suit is not dismissed for the reasons stated above, this Court should not proceed to hear and determine the merits of the suit, but should stay proceedings therein, pending final decision in the above-mentioned suit now pending in the District Court of the United States for the District of Nebraska, Omaha Division.

VI

That "the part" of the Commission's said order of January 12, 1953, assailed by the complaint is not unlawful or invalid for the reasons alleged in the complaint.

VI

Movants by this intervention seek an opportunity to present their reasons and arguments in support of these [fol. 55] claims.

Respectfully submitted, Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, 300 International Trust Building, Denver, Colorado, Attorneys for Movant Railroads.

[fol. 56] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF INTERVENORS, UNION PACIFIC RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; AND WABASH RAILROAD COMPANY, TO DISMISS, OR IN THE ALTERNATIVE TO STAY PROCEEDINGS HEREIN—Filed November 12, 1953

These intervenors respectfully file this motion to dismiss the complaint herein on the following grounds, or in the alternative, to stay proceedings herein until after final decision in the suit described in their Motion to Intervene. In support of this motion, these intervenors show:

I

The Rio Grande Has No Right or Standing to Maintain this Suit

This suit to enjoin and annul, "in part", the order of the Commission "is a plenary suit in equity", and it "cannot be maintained unless" the complaint "states a cause of

action in equity", *Columbia System v. U. S.*, 316 U. S. 407, 415.

The complaint must be dismissed for lack of merit if it fails to set forth "the various elements which enter into or qualify the plaintiff's right to the relief sought" for "there may be jurisdiction and yet an absence of merits * * * as [fol. 57] where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, either because it will not injure him" or for some other reason, and "whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, * * *", *General Inv. Co. v. N. Y. Central R. R.*, 271 U. S. 228, 230-231.

The Act invoked by and cited in the complaint requires "that the petition [complaint] shall set forth 'the facts constituting petitioner's cause of action,' and by other provisions shows that for failure so to do the suit shall be dismissed. * * * Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order," *Moffat Tunnel League v. U. S.*, 289 U. S. 113, 119.

While the complaint alleges that the Rio Grande has a "pecuniary interest" in the matters involved in this suit, the allegations of the complaint and the statements and recitals in the Commission's report, 287 I. C. C. 611, copy of which is attached hereto as Appendix A, show that the alleged "pecuniary interest" of the Rio Grande consists only of its desire and purpose to improve its financial position by diverting traffic and revenues to its line from the lines of these intervenors, but the complaint fails to show or allege any legal right of the Rio Grande to demand through routes and joint rates, or to divert traffic and revenues to its line from other railroads, or that it represents others who have any legal right that would be affected by the order.

The complaint further fails to allege or show that the Commission's order results in "actual or threatened legal injury" to the Rio Grande, *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486; or that because of the order the Rio Grande is "subjected to or threatened with any legal wrong", *Sprunt & Son v. United States*, 281 U. S. 249, 257, or "to any liability, civil or criminal," *United States v. Los*

Angeles R. R., 273 U. S. 299, 310. The Rio Grande cannot maintain this suit merely by showing, even if it were true, that the Commission acted erroneously or contrary to law, or committed errors of law in making the order, *Schenley* [fol. 58] *Distillers Corporation v. United States*, 326 U. S. 432, 435. To maintain the suit it "must show also that the order alleged to be void subjects them (it) to legal injury, actual or threatened," *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 148. "* * * [J]udicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order" of the Commission, but not for the purpose of rendering what the Rio Grande here seeks, in substance and effect, a declaratory judgment, *Piedmont & Nor. Ry. v. United States*, 280 U. S. 469, 478; *Boston Tow Boat Co. v. United States*, 321 U. S. 632; or an advisory opinion, or a futile judgment, which the Courts will not issue, *C. & S. Air Lines v. Waterman Corp.*, 333 U. S. 103, 113-114. As the Rio Grande has no legal right to improve its financial position by through routes and joint rates diverting traffic and revenues to its line from the lines of these intervenors, it has no basis upon which to maintain this suit, *U. S. v. American Ry. Exp. Co.*, 265 U. S. 425.

The fact that the Rio Grande was a party to the proceeding before the Commission as complainant "or otherwise" has no bearing on the question whether it has a right to maintain this suit, *Sprunt & Son v. United States*, 281 U. S. 249, 255; for that fact "does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it," *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 487, as in *Chicago Junction Case*, 264 U. S. 258, 266, where the plaintiffs were not only parties to the Commission proceeding but suffered irreparable loss of $10,000,000 annually from the diversion of traffic from their lines as a result of the Commission's order.

The Rio Grande's lack of a right to maintain this suit is not overcome, cured or aided by the fact alleged in paragraph VI of the complaint, that shippers and their organizations, the Secretary of Agriculture of the United States and the public utilities commissions of Utah and Colorado, and others intervened, appeared and were heard in the proceed-

ings before the Commission in support of the Rio Grande, nor would its lack of such right be cured even if those groups or parties should intervene in this suit, for "the right so [fol. 59] to appear and be heard" before the Commission "or so to intervene in a suit brought by another is to be distinguished from an authorization to bring suit," *Moffat Tunnel League v. U. S.*, 289 U. S. 113, 120. Those shippers and other parties have no "independent right" to maintain their own suit to annul and enjoin the order for it does not affect any legal right of theirs or threaten to inflict injury upon them, and their intervention before the Commission gave them no legal right to maintain a suit to enjoin the order, *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 487; *Sprunt & Son v. United States*, 281 U. S. 249, 254-255; *Edward Hines Trustees v. United States*, 263 U. S. 143. Even if they should intervene in this suit the parties that intervened in the Commission proceeding could not carry on this litigation in the absence of a right in the Rio Grande to maintain its suit, *Boston Tow Boat Co. v. United States*, 321 U. S. 632.

The absolute necessity of alleging and showing that the order will, or threatens to, inflict legal injury upon the Rio Grande by violation of some legal right of its own is not modified or affected by the decision in *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, which merely holds that a party having such right to maintain a suit may do so even though the Commission's order is "negative", but under that decision such party may not be heard to urge alleged errors of law committed in issuing a "negative" order, without first making the showing that such errors threaten violation of a legal right of his own of which he has a right to complain.

II

The Rio Grande's Complaint Presents Nothing That Is Reviewable by or Subject to Injunctive Decree of any Court

The complaint says it seeks to enjoin the Commission's order "in part", and that "the part of the order of the Commission here assailed is unlawful" etc., but it does not specify the "part" assailed, nor does it point to any lan-

guage in the order that directs or requires enforcement of or compliance with the matters set out in the allegations of the complaint. The order, *in toto*, is entirely favorable to [fol. 60] the Rio Grande. The order does not, *in terms*, dismiss any part of the Rio Grande's complaint. All the order does is to grant a part of the Rio Grande's demands. It requires through routes and joint rates on some of the commodities the Rio Grande seeks to divert to its line, but it says nothing nor does it make any commitment concerning commodities not specified in the order.

The Rio Grande's complaint seeks to enjoin and annul something that does not exist,—namely, an order of the Commission dismissing its complaint in part, or as to commodities *not* named in the order the Commission has issued. What the Rio Grande complains of is not embraced or touched upon in the order.

In reality, the Rio Grande complains of certain "conclusions" stated in the report, among them, the conclusion at page 619, that "there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned"; the conclusion at page 656, that "the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein"; the conclusion at page 657, that "the differences in transportation conditions" over the Union Pacific routes and over the Rio Grande routes "are substantial for hauls" between the northwest area and points in the area described on that page of the report; and the conclusion at page 660, "That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

As these "conclusions" make no requirement of the Rio Grande, infringe none of its legal rights, nor subject it "to any liability, civil or criminal" they are not subject to judicial review or to injunction, *United States v. Los Angeles R. R.*, 273 U. S. 299, 310, 314, *Virginian Ry. v. United States*, 272 U. S. 658, 665-666. In such conclusions "there is nothing for a court of equity to enjoin," *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 412, 414.

[fol. 8] III

The Decree Prayed Would Be Futile, and the Court is Without Power to Issue Any Decree That Would be Effective to Accomplish the Rio Grande's Objective.

The prayer of the complaint is that the Court adjudge that the Commission's order "in the respects hereinbefore described is unlawful, null and void, and that in these respects it be set aside and their enforcement forever enjoined." The "respects hereinbefore described" are not embraced or touched upon in the order. They are mere utterances or conclusions in the report, and the order makes no requirement of the Rio Grande or anyone else concerning them. They are "not susceptible of violation and cannot call for enforcement," *Piedmont & Nor. Ry.* v. *United States*, 280 U.S. 469, 477.

The Rio Grande seeks to compel through routes and joint rates via its line on *all* commodities. The power to grant the Rio Grande's demands lies exclusively in the Commission under section 15(3) and (4) of the Interstate Commerce Act, 49 U. S. Code, section 15(3) and (4). The Court has no such power, and as it has no power to compel the Commission to order establishment of through routes and joint rates, a decree in conformity with the prayer of the complaint "would be futile", *Sprunt & Son* v. *United States*, 281 U.S. 249, 258. "Congress did not confer upon the courts power either to direct what" the Commission "shall find, or to annul the report, because of errors committed in making it" and the "mere existence of error" in the report "is not a wrong for which Congress provides a remedy under the Urgent Deficiencies Act", *United States* v. *Los Angeles R. R.*, 273 U.S. 299, 311, 313. A court has no more power to direct or control the Commission's administrative judgment and discretion in a suit to enjoin an order than it has "to compel an adjudication in a particular way" by mandamus, and this it has no power to do. *I.C.C.* v. *United States*, 289 U.S. 385, 394; *United States Ex Rel.* v. *I.C.C.*, 294 U.S. 50, 61. In effect the complaint seeks merely an advisory opinion but the statute invoked by the complaint empowers the courts only to enjoin, set aside, annul or suspend in whole or in part any order of the Commission, and the

[fol. 62] Federal Courts will issue no advisory opinions, and will "render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action," *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 113-114.

As the Commission is the only tribunal having authority to require through routes and joint rates and as it has, in the exercise of its administrative discretion, declined to do so to the extent indicated in the complaint herein, the decree prayed would leave the Rio Grande's situation precisely where it now stands. Its only chance of obtaining the through routes and joint rates it desires lies with the Commission and it may pursue its efforts with the Commission as well without the decree prayed as with it.

IV

On June 25, 1953, these intervenors filed suit in the District Court of the United States for the District of Nebraska, Omaha Division, to enjoin, annul and set aside the same order of the Commission which is assailed by the Rio Grande in this suit. The complaint in that case is entitled "*Union Pacific Railroad Company, et al.* v. *United States of America, and Interstate Commerce Commission*", Civil Action No. 76-53. Copy of the complaint is attached to Motion to Intervene as Appendix A. The court of three judges has been designated and trial has been set for November 23, 1953, at Omaha, before Circuit Judges Collet and Johnsen, and District Judge Delehant. By petition filed August 17, 1953, the Rio Grande has been permitted to intervene as a defendant in that suit, and, having voluntarily submitted itself to the jurisdiction of that Court, the Rio Grande was and is under obligation, pursuant to Rule 13, Federal Rules of Civil Procedure, to present to that Court all its claims and contentions concerning the validity of the Commission's order, instead of filing an additional and independent suit in this Court. These Intervenors request that this Court dismiss the Rio Grande's suit and direct that it present its claims and contentions in the above-mentioned suit, to which it is a party, in the United States District Court for the District of Nebraska, Omaha Division.

The complaint in that case having been filed nearly four

[fol. 63]–months before the Rio Grande filed its complaint attacking the same order in this Court, it is respectfully requested, if this Court declines to grant the foregoing motion to dismiss, that it stay further proceedings in this case pending final decision in the suit of these Intervenors now pending in the District of Nebraska, in accordance with procedure outlined by the Supreme Court in *Kansas City Southern Ry.* v. *U. S.*, 282 U.S. 760.

WHEREFORE, these Intervenors pray that the complaint be dismissed or, in the alternative, that proceedings in this suit be stayed until after final decision is reached in the above-mentioned suit of these Intervenors.

Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, 300 International Trust Building, Denver, Colorado, Attorneys for Intervening Railroads.

November 12, 1953.

APPENDIX A TO MOTION

26423

INTERSTATE COMMERCE COMMISSION

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY v. UNION PACIFIC RAILROAD COMPANY ET AL.

Submitted October 16, 1952. Decided January 12, 1953

1. Through routes and joint rates found necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with complainant, on certain commodities from and to points in the excluded territory in the northwest area as described in the report, to and from points in official, southern, and southwestern territories, including Missouri and a portion of Iowa.
2. Rates on the same commodities from and to the same points over complainant's routes via Ogden or Salt Lake City, found unreasonable and unduly prejudicial to and preferential of shippers and receivers.
3. Maintenance by defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the line of complainant south of Ogden, found to subject complainant to unlawful discrimination.
4. Order entered requiring removal of unlawfulness found to exist and establishment of through routes and joint rates found reasonable.

Robert E. Quirk, *Otis J. Gibson*, and *H. L. Mulliner* for complainant.

Elmer B. Collins, *L. H. Anderson*, *John B. Burchell*, *Robert H. Bierma*, *L. E. Clarahan*, *F. H. Cole*, *Jr.*, *Eugene S. Davis*, *Lee S. Davis*, *P. H. Draver*, *F. G. Fitzpatrick*, *P. F. Gault*, *R. J. Hagman*, *L. W. Hobbs*, *Roland J. Lehman*, *B. P. Leverich*, *James E. Lyons*, *E. F. McGuire*, *F. J. Melia*, *Conrad Olson*, *W. R. Rouse*, *James S. Souby*, *Jr.*, *Carson L. Taylor*, and *L. E. Torinus*, *Jr.*, for defendants.

C. A. Miller for a railroad association; *Chas. B. Bowling*, *Carl R. Bullock*, *Henry A. Cockrum*, and *J. L. Pease* for Secretary of Agriculture; *Ralph C. Horton*, *John H. Winchell*, *Joseph W. Hawley*, *T. S. Wood*, and *Ralph Sargent*, *Jr.*, for Public Utilities Commission of the State of Colorado; *W. B. Joy*, *H. N. Beamer*, *B. Auger* and *L. F. Purvis* for Public Utilities Commission of Idaho; *Byron M. Gray* for State Corporation Commission of the State of Kansas; *Edwin S. Booth* and *Sidney T. Smith* for Board of Railroad Commissioners of the State of Montana; *Clarence S. Beck*, *Harold A. Palmer*, *Bert L. Overcash*, and *Harry C. King* for State of Nebraska and Nebraska State Railway Commission; *John H. Carkin* and *Thomas W. Dench*

for Public Utilities Commissioner of Oregon; *Smith Troy*, *Phil H. Gallagher*, *Joseph Starin*, and *Bartlett Burns* for Washington Public Service Commission; *Norman B. Gray* and *Jefferson C. Church* for the State Board of Equalization and Public Service Commission of Wyoming; *Hal S. Bennett*, *Donald Hacking*, *W. R. McEntire*, and *Chas. A. Root* for Public Service Commission of Utah; and *George F. Guy* for the city of Cheyenne, Wyo., interveners.

Calvin L. Blaine, *Chas. E. Blaine*, *Maurice H. Greene*, *Alden T. Hill*, *E. K. Kohlwes*, *Lowe P. Siddons*, *Reginald T. Titus*, and *Lee J. Quasey* for other interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the complainants, the defendants, and certain interveners and the issues were twice argued orally. Our conclusions differ in part from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant, sometimes called the Rio Grande, a common carrier by railroad operating in interstate commerce within the States of Colorado, Utah, and New Mexico, requests us to order the Union Pacific Railroad Company, which with its leased lines is referred to as the Union Pacific system or the Union Pacific, and the other defendants to establish and maintain for the future just, reasonable, and nondiscriminatory competitive joint through rates[1] and charges for the transportation of freight in connection with the complainant through Salt Lake City or Ogden, Utah, referred to as the Ogden gateway. More particularly, we are asked to require the defendants to establish such joint rates on freight traffic in connection with the complainant through its Colorado and Utah gateways, (1) between (*a*) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington,[2] and British Columbia, Canada, and (*b*) Colorado common points and points east thereof; and (2) between Utah common points and the northwest territory specified in 1 (*a*).

No evidence was submitted with respect to rates from or to British Columbia, and such rates will not be considered.

Interveners in support of the complaint include the Secretary of Agriculture of the United States, the public utility commissions of the States of Colorado and Utah, the American National Live Stock Asso-

[1] Rates and rate differences named herein are per 100 pounds and are those in effect at the time of the hearing herein.

[2] This area is referred to in this report as the northwest area or territory.

ciation, other livestock and stock-feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce, and certain groups of employees of the complainant.

Interveners in support of the defendants include the State of Nebraska, city of Cheyenne, Wyo., the public utility commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska, and Kansas, various chambers of commerce and other associations, certain employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago and North Western Railway Company, and the Wabash Railroad Company.

In its exceptions to the proposed report, the State Corporation Commission of the State of Kansas took the position that the recommended finding that joint rates should be established over the existing through routes by way of Ogden and the Rio Grande is amply sustained by the evidence with respect to the rates on wheat and livestock but not otherwise, and that the recommended findings as to commodities generally are too broad in scope.

The Public Utility Commission of the State of Idaho intervened but presented no evidence. It filed a brief in which it took the position that the relief sought by the complainant should be denied, except that joint through competitive rates should be required to be established via Ogden and the Rio Grande on livestock and fruits and vegetables.

We granted a petition for leave to intervene filed by the American Short Line Railroad Association. That association appeared in support of the complaint and was represented at the hearing and the oral argument, but offered no evidence. The defendants filed a petition for reconsideration of the order permitting intervention. The request was denied at the hearing, but it is renewed on brief. It appears that 44 of the defendants named in the complaint are members of the association and that 8 defendant members are subsidiaries under common control and management with other defendants. Additional facts were developed at the hearing with respect to the relation of certain members of the association as defendants and indicating that they, as well as some others, opposed the complaint. The association filed a brief from which it appears that it has a current membership of 314 common carriers by railroad and that the association as such and many of its members are interested in the issues presented in the complaint. The intervention sought and granted was by the association as such, and not by or in behalf of the respective members thereof named herein as defendants. The petition of intervention was properly granted, and the petition for reconsideration is denied.

Immediately prior to the oral argument, counsel for the defendants submitted a memorandum of additional authorities and discussion

relating to certain exceptions filed by the Union Pacific to the proposed report of the examiner. The complainant and certain interveners objected to the receipt of the document. Our rules of practice do not permit the submission of such a document so late in the proceeding. Permission to file it was not requested in time to permit opposing parties to examine it and to make reply thereto prior to the oral argument when the proceeding was finally submitted. The objection to its receipt in the proceeding is sustained.

The complainant alleges that the defendant's failure and refusal to join with it in establishing joint rates to and from the territories described on transcontinental and other traffic through the gateways referred to result in violations of sections 1 (4) and 3 of the Interstate Commerce Act, and is contrary to the national transportation policy as declared by the Congress. We are asked to prescribe just and reasonable rates over the Rio Grande routes to remove the alleged unlawfulness.

Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions. The principal ones of importance in this proceeding are those under which the Union Pacific for the most part restricts routing on traffic to and from points in Utah north of Ogden and in Idaho, Montana, Oregon, and Washington over its lines so that it may obtain the long haul from and to the Missouri River. On transcontinental traffic that moves over its lines to and from California, Nevada, and portions of Utah, the Union Pacific participates in through routes and joint rates with other lines, including the Rio Grande. On that traffic interchange is made with the Rio Grande at Salt Lake City and Provo, Utah.

As hereinafter explained, the Rio Grande participates in joint rates on transcontinental traffic with all of its connections at its Utah junctions, except the Union Pacific, from and to the western portions of the northwest area. Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect,

close the Ogden gateway in a commercial sense. We are asked to exercise our authority under section 15 (3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest.

The power to establish through routes and joint rates is limited by the provisions of section 15 (4), which declares that, except as provided in section 3 of the act, and except where one of the carriers is a water line, we may not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (*a*) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (*b*) unless we find that the through route proposed is needed in order to provide "adequate, and more efficient or more economic, transportation." The foregoing provisions are subject to the further proviso that in prescribing through routes, we shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (*a*) and (*b*), give reasonable preference to the carrier by railroad which originates the traffic. The section further provides that no through route and joint rates applicable thereto shall be established by us for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15 (4) are not applicable and need not be considered. It further contends that the principal task here is to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such through routes are unjust, unreasonable, or discriminatory, in violation of sections 1 and 3 of the act, and contrary to the national transportation policy. The complainant argues that there is public need for joint rates via the Ogden gateway equal to the joint rates now maintained by the defendants over the competitive routes, and that the public interest as well as the national transporation policy will be served by the establishment of such rates.

THROUGH ROUTES

The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute "through routes" as that term is used in section 15 (3) and (4) of the

act. As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.

In *Thompson* v. *United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the content of the term "through route" as used in the act, upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr.* v. *Missouri Pac. R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15 (1) of the act. The Court held:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. * * * Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route.

The Court cited with approval *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, wherein the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, "that one shipment was not representative of the carriers' course of business." It thus becomes necessary to determine whether the carriers in this proceeding "hold themselves out as offering through transportation service" from and to the points here concerned via the Ogden gateway as indicated by their "course of business" in respect of traffic over the routes in question.

The evidence shows that 37 carload shipments were made in 1948, which may be accepted as a representative year, on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment, paper bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

West-bound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destination so as to avoid paying the applicable combination rates on Ogden.

In that same year, 21 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint

through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly used routes to the routes here sought to be opened commercially. For example, in February 1949, when the main line of the Union Pacific in Wyoming was blocked by snowstorms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute "through routes" within the meaning of that term as used in the act.

So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads east-bound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the

same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, *supra*, cited with approval by the Supreme Court in *Thompson* v. *United States, supra.* Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15 (3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15 (4) made in 1940 (see *D. A. Stickell & Sons, Inc.*, v. *Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson* v. *United States, supra.*

We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic [3] here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15 (3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together.

Before proceeding to a discussion of the evidence relating to the foregoing issues, we shall give consideration to a procedural contention and a motion made by the defendants. The contention is that an allegation of undue prejudice and preference under section 3 (1) of the act is not properly before us. As stated, the complaint embodies an allegation, among other things, of violation of section 3, without specifying any particular paragraph or paragraphs of that section. We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3 (1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con, was received on this issue and we think it has been fairly tendered here for decision.

[3] Except on east-bound shipments of sheep or goats, to which reference is made later in this report.

The motion is that the complaint be dismissed on the ground that the request of the complainant for joint rates over the Rio Grande via the Ogden gateway is for the purpose of assisting that carrier to meet its financial needs. As stated, section 15 (4) of the act forbids us to require the establishment of any through route and joint rate applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs. Consistently throughout the proceeding, the complainant disclaimed any intent to prosecute the complaint with the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion is overruled.

PROPONENTS' TESTIMONY

Joint rates now apply via the Ogden gateway over the Rio Grande on traffic from and to Colorado common points and points east thereof to and from California and certain Pacific coast points in connection with the Union Pacific, the Southern Pacific Company, The Western Pacific Railroad Company, and The Great Northern Railway Company, as more particularly described later.

The Union Pacific with its leased lines has operated since January 1936 as a single system. It consists of the Union Pacific Railroad Company operating from Omaha, Nebr., and Kansas City, Mo., to Ogden via Julesburg, Colo., Cheyenne and Granger, Wyo., and via Limon and Denver, Colo., and Cheyenne; the Oregon Short Line Railroad Company operating in Utah north of Ogden, and in Wyoming, Idaho, Oregon, Montana, and Nevada, extending from Salt Lake City to Butte, Mont., and Huntington, Oreg.; the Oregon-Washington Railroad and Navigation Company operating in Idaho, Oregon, and Washington north and west of Huntington to Spokane, Wash., Portland, Oreg., and Seattle, Wash.; the Los Angeles & Salt Lake Railroad Company from Salt Lake City to Los Angeles, Calif.; and the St. Joseph & Grand Island Railroad Company in Kansas, Nebraska, and Missouri from St. Joseph, Mo., and Grand Island, Nebr. Lease of the properties of the foregoing roads, which had been operated with the Union Pacific under common control and management, was considered and approved in *Union Pac. R. Co. Unification*, 189 I. C. C. 357 (1933) and 207 I. C. C. 543 (1935).

The railroad now operated by the complainant was originally the Denver, Rio Grande Railway organized in 1870 as a narrow-gage line. After passing through various hands and receiverships, the Denver and Rio Grande Railroad Company was organized in 1886 to operate the property. When the main line was converted to standard gage

in 1890, the railroad was opened for through traffic between Denver and Ogden by way of Pueblo, Rio Grande, and Tennessee Pass, Colo. Prior to that date, the Rio Grande could participate in transcontinental traffic only by transferring the lading to its narrow-gage cars. In 1901, it acquired the Rio Grande Western Railroad Company operating between Grand Junction, Colo., and Ogden via Provo and Salt Lake City.

Although opened for through business, the line was handicapped by the fact, among others, that traffic originated at or destined to its Colorado gateways or east thereof could not be interchanged at joint through rates at Ogden or Salt Lake City with its connections, the Oregon Short Line, to or from points on that line in Utah north of Ogden and through southern Idaho to Butte and Huntington. Also, traffic from and to Oregon over the Southern Pacific, to or from Colorado common points and east, could not be transported over the Rio Grande at joint rates equal to those over competitive routes. In 1897, however, the Union Pacific and its controlled lines, the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company operating north and west of Huntington, were in separate receiverships. In that year the two lines last named established joint through rates to and from points in the northwest area with the Rio Grande via Ogden and thus opened that gateway at rates equal to the rates then in effect over the Wyoming line of the Union Pacific through Cheyenne and Granger. Those rates applied on traffic between the Pacific coast terminals, including Portland, Tacoma, and Seattle, and Missouri and Mississippi River points and numerous points east thereof.

In the same year, the Oregon-Washington Railroad and Navigation Company established joint through rates between its Oregon and Washington stations and points on, or reached by, the lines of the Great Northern and Northern Pacific Railway Company through Spokane and Wallula, Wash. Joint rates through those junctions from and to Union Pacific stations have been continued in effect.

Ogden remained as an open gateway through which joint rates over the Rio Grande applied until 1906, when such rates were canceled by the Union Pacific from and to Colorado common points and east, to and from points in Montana, Idaho, and Oregon on the Oregon Short Line and its connections. In 1912, transcontinental freight rates to and from points on the Oregon-Washington Railroad and Navigation Company (resulting from reorganizations in the interval) over the Rio Grande and its Utah junctions were also canceled. During this period the Southern Pacific was controlled by the Union Pacific and that circumstance greatly influenced the routing of freight and passenger traffic over the Union Pacific to and from

Oregon and California. As a result of competitive stresses, as well as for other reasons, the Rio Grande financed the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast. The Western Pacific was opened in July 1911 and participates in through routes and joint rates on transcontinental traffic via Salt Lake City with the Rio Grande and the Union Pacific, its two connections at that point. In 1912, the Union Pacific was required to divest itself of control of the Southern Pacific. *United States* v. *Union Pac. R. Co.*, 226 U. S. 61.

Through passenger fares also were in effect over the lines of the Union Pacific and the Rio Grande via the latter's Colorado and Utah junctions from 1897 to 1915, when they were canceled by the Union Pacific. *Ogden Gateway Case*, 35 I. C. C. 131.

In 1915, the Western Pacific and, in 1918, the Rio Grande, went into receivership. After various changes, the latter was reorganized on April 11, 1947, as The Denver and Rio Grande Western Railroad Company. *Denver & R. G. W. R. Co. Reorganization*, 267 I. C. C. 862. As a part of its reorganization on that date, the Rio Grande merged with the Denver and Salt Lake Railway Company, and thereby acquired the Moffat tunnel line of that carrier. By that line and the Dotsero cut-off, completed in 1934, from Orestod, Colo., on the Denver & Salt Lake to Dotsero, Colo., on its own line, the Rio Grande obtained a route from Denver to Ogden 175 miles shorter than its route through Pueblo.

The Rio Grande now operates between Denver and Ogden over the two routes. By way of the Moffat tunnel the distance is 607 miles, and the other route through Pueblo is 782 miles. These two are the main lines and constitute 951 miles, or 51 percent, of the Rio Grande standard-gage tracks. In addition, there are 1,452 miles of branch lines, of which 527 miles are narrow gage serving western Colorado and northwestern New Mexico in areas of small population and light traffic. In all, it operates about 2,400 miles of road.

Eastern connections of the Rio Grande are in Colorado at Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad. At Denver, it connects and interchanges traffic with the Union Pacific, the Chicago, Burlington & Quincy Railroad Company, called the Burlington, the Chicago, Rock Island and Pacific Railroad Company, called the Rock Island, The Atchison, Topeka and Santa Fe Railway Company, called the Santa Fe, and The Colorado and Southern Railway Company, of the Burlington system. At Colorado Springs, 75 miles south of Denver, it interchanges with the Rock Island and the Santa Fe. At Pueblo, 119 miles south of Denver, it interchanges with the Missouri Pacific Railroad Company (Guy A. Thompson, trustee), the Santa Fe, and the Colorado & Southern. At Walsenburg, 51

miles farther south, it interchanges with the Colorado & Southern. At Trinidad, a short distance from the Colorado-New Mexico State line and 92 miles south of Pueblo, it interchanges with the Colorado & Southern and the Santa Fe.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City, and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City, 37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line.

Since 1890, when its standard-gage line was completed between Denver and Ogden via Pueblo, the Rio Grande, through its eastern and western connections, has been a part of several transcontinental routes. It now participates in through routes and joint rates on equal terms with other carriers on transcontinental traffic between (1) points in an area generally described as west of a line beginning at Vancouver, British Columbia, thence south, just east of Seattle and Portland, and southeasterly to a point west of Ogden and Salt Lake City, crossing the line of the Union Pacific at Lynndyl, Utah, 118 miles west of Salt Lake City, and thence southwesterly, east of the Union Pacific's Los Angeles line, to a point south of San Diego, Calif., and (2) all points in the United States east of a line beginning at the Canadian border and extending southward along the Montana-North Dakota State line and the western border of South Dakota, thence southwesterly through the extreme southeastern portion of Wyoming, west of Cheyenne, and the eastern part of Colorado just west of Denver, Pueblo, and Trinidad, thence southwest and south through the central or western part of New Mexico to a point just west of El Paso. However, joint rates generally do not apply in connection with the Rio Grande on transcontinental traffic originating at or destined to points in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington east of the line first described. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande such traffic would move at higher combinations of rates to and from Ogden or Salt Lake City.

The area in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington, to and from which joint rates generally do not apply in connection with the Union Pacific and the Rio Grande, will be referred to as the excluded territory. Transcontinental traffic to or from such territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than over the Rio Grande route, because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande route. The Rio Grande desires to participate as a bridge line on such traffic via

its Colorado gateways and Ogden at the joint through rates. This also would include traffic to or from points in the excluded territory on lines which join with the Union Pacific in joint rates.

Representative origins, destinations, commodities, rates, distances, average loadings per car, and revenues per car-mile are shown in an appendix to this report, for east-bound and west-bound movements, compiled from exhibits of record. The distances shown are those over existing routes over the Union Pacific and its connections by which joint through rates apply, and over the Rio Grande and its connections over which combination rates apply. Revenues per car-mile are computed for such rates and distances and, in addition, for the distances over the Rio Grande at joint rates on the same basis as those over the Union Pacific routes, as sought herein.

Traffic between the excluded territory and Colorado common-point territory (points in eastern Colorado from Denver south to Trinidad and west to Canon City) generally must move over the Union Pacific through Denver to get the lowest rate. Similarly, traffic between the excluded territory and Utah common-point territory (points in Utah from Ogden south to Provo and Payson) generally must move over the Union Pacific to get the lowest rate. There are some exceptions, however, with respect to rates between Utah common points on the Rio Grande and the northwest area on livestock, lumber, grain, and other commodities.

An analysis of distances from and to 5 representative points[4] on the Union Pacific in Utah north of Ogden, and in Idaho and Washington, to 14 destinations, Denver and east, over restricted routes of the Union Pacific for distances, computed over the short routes, ranging from 649 miles to Denver to 3,279 to Boston, Mass., shows that routes via Ogden and the Rio Grande to the same points are longer by from 1 percent (from Spokane to New Orleans, La.) to 16 percent (from Idaho Falls to Kansas City). To the same destinations from nine other representative points[5] on the Union Pacific, from which through routes and joint rates are available in connection with the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, referred to as the Milwaukee, the Great Northern, the Northern Pacific, or the Southern Pacific, the routes via Ogden and the Rio Grande would be longer than the short workable and service routes by from 1 percent (from Seattle to Fort Worth, Tex., and Oklahoma City, Okla.) to 37.5 percent (from Yakima to Minneapolis, Minn.). To Minneapolis from seven of the nine origin points, the routes via the Great Northern form the short workable and service routes.

[4] Logan, Utah; Boise, Idaho Falls, and Twin Falls, Idaho; and Spokane, Wash.

[5] Hood River, Milton, Pendleton, Portland, Elgin, and Redmond, Oreg., and Yakima, Kent, and Seattle, Wash.

The Ogden-gateway routes of the Union Pacific consist of two lines. The Los Angeles line runs southwesterly through Salt Lake City, Provo, and Delta, Utah, Caliente and Las Vegas, Nev., and Barstow, Calif., to Los Angeles. Through routes with joint rates are maintained over that route in connection with the Rio Grande, as hereinbefore described. The other line of the Union Pacific runs north from Ogden, 111 miles to McCammon in southeastern Idaho. At that point it meets the Wyoming line of the Union Pacific leading west 186 miles from Granger, the junction point with the main line through Cheyenne to Ogden from the east. From McCammon the line extends north to Pocatello, Idaho, 22 miles, and from that point the main line runs in a northwesterly direction across Idaho into Oregon and Washington. From Pocatello another line extends northerly to Butte. From Cheyenne, the main line extends east across Nebraska to Omaha, 507 miles, and south to Denver, 109 miles. From Ogden through Granger to Cheyenne the distance is 483 miles.

All shipments to or from points in Idaho, Montana, Oregon, and Washington north or west of McCammon over present Union Pacific routes, or over routes through Ogden and the Rio Grande, must pass through McCammon. That point therefore, is used as the point of divergence in computing distances over the Union Pacific routes and the routes over the Rio Grande by way of Ogden. A shipment from McCammon over the Union Pacific to Cheyenne would move 529 miles; and to the Denver gateway, also over the Union Pacific, 623 miles. But over the Union Pacific to Ogden, thence the Rio Grande to the Denver gateway, the shipment would move 718 miles, or 198 miles farther than over the Union Pacific route to Cheyenne and 95 miles farther than over its route to Denver. On shipments carried through to the Missouri River and points east, the Union Pacific route through Cheyenne also has the advantage in distance.

From Cheyenne to Kansas City a shipment would move 624 miles, as compared with 636 miles for a movement off the Rio Grande from Denver to Kansas City over the Rock Island, its short-line connection. A through shipment, therefore, from McCammon to Kansas City over the direct line of the Union Pacific through Granger and Cheyenne would move 1,153 miles, as compared with 1,352 miles, 199 miles longer, via Ogden and the Rio Grande to Denver, thence the Rock Island. The latter route on such a shipment would be 17.2 percent circuitous. To points east of Kansas City the maximum excess mileage from McCammon over the Rio Grande route is on a haul to Pittsburgh, Pa. Over the Union Pacific to Omaha, thence the Chicago & North Western to Chicago, Ill., and The Pennsylvania Railroad Company beyond, the haul would be 1,991 miles, and over the Union Pacific to Ogden, the Rio Grande to Denver, the Burlington to Chi-

cago, thence the Pennsylvania, the haul would be 2,203 miles, 212 miles longer, or a circuity of 10.7 percent.

In the following table are shown representative destinations and the distances from McCammon over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming. Joint through rates apply over the latter routes. Over routes that include the Rio Grande higher combination rates apply. The table does not contain complete routing, except over the Union Pacific direct to Omaha and Kansas City. The last column of the table shows the percentages by which the Rio Grande routes are longer, or the circuity, from the point of divergence, McCammon, to the points shown.

From McCammon, Idaho to—	Via Union Pacific	Distance	Via Rio Grande	Distance	Difference	Circuity via Rio Grande
		Miles		*Miles*	*Miles*	*Percent*
Omaha, Nebr	(1)	1,036	(2)	1,255	219	21.1
Kansas City, Mo	(3)	1,153	(2)	1,352	199	17.2
Minneapolis, Minn	(3)	1,396	(2)	1,593	197	14.1
St. Louis, Mo	(3)	1,428	(2)	1,627	199	13.9
Chicago, Ill	(1)	1,524	(2)	1,735	211	13.8
Pittsburgh, Pa	(1)	1,991	(2)	2,203	212	10.7
Charleston, W. Va	(3)	2,018	(2)	2,218	200	10.0
Columbia, S. C	(3)	2,274	(2)	2,473	199	8.8
Baltimore, Md	(1)	2,319	(2)	2,521	202	8.7
Norfolk, Va	(3)	2,438	(2)	2,637	199	8.2
New York, N. Y	(1)	2,477	(2)	2,674	197	8.0
Tulsa, Okla	(4)	1,377	(5)	1,427	50	3.6
Dallas, Tex	(6)	1,456	(5)	1,489	33	2.3
Fort Smith, Ark	(4)	1,458	(5)	1,538	80	5.5
Memphis, Tenn	(3)	1,593	(5)	1,786	193	12.1
New Orleans, La	(6)	1,970	(5)	2,003	33	1.7
Atlanta, Ga	(3)	2,044	(3)	2,204	160	7.8
Savannah, Ga	(3)	2,327	(3)	2,486	159	6.8

(1) Union Pacific through Wyoming to Omaha.
(2) Union Pacific to Ogden, Rio Grande to Denver.
(3) Union Pacific through Wyoming to Kansas City.
(4) Union Pacific to Pacific Junction, Kans.
(5) Union Pacific to Ogden, Rio Grande to Pueblo.
(6) Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

The differences in the distances to destinations in the Southwest over routes including the Rio Grande from points in the excluded territory, as compared with the Union Pacific routes through Wyoming, are much less than they are to Missouri River crossings and points east and southeast. About 90 percent of the traffic upon which joint through rates are sought via Ogden and the Rio Grande moves to the latter areas, and about 10 percent to the Southwest.

Over its routes through Wyoming, the Union Pacific gets its long haul from McCammon to Omaha, 1,036 miles, and to Kansas City, 1,153 miles. If joint rates were prescribed over the Union Pacific to Ogden and the Rio Grande to Denver, the Union Pacific's haul from McCammon to Ogden on traffic to Omaha or Kansas City and beyond would be 111 miles. However, if such traffic were routed beyond Denver over the Union Pacific, the latter would get a further

haul of 560 miles to Omaha via Julesburg, or 640 miles to Kansas City via Salina, Kans., a total haul from McCammon of 671 miles to Omaha or 751 miles to Kansas City. Joint through rates are in effect over that route on sheep from Union Pacific origins in southern Idaho and eastern Oregon, but are 19 cents higher to the Missouri River and east (20 cents to Chicago) than rates over more direct routes of the Union Pacific. That railroad would establish a similar basis on cattle if requested. Over the route in connection with the Rio Grande, it would lose its haul of 529 miles from McCammon to Cheyenne, or 623 miles to Denver. On traffic routed via Ogden, the Rio Grande, and Pueblo to destinations east thereof, the Union Pacific would not be in a position to get any additional haul.

All of the foregoing distances, as stated, are computed from McCammon as the point of divergence. The great bulk of the traffic, however, from the excluded territory in Idaho, Montana, Oregon, and Washington originates or terminates on the Union Pacific or its connections west and north of that junction. On such traffic the Union Pacific would have a substantial haul in addition to that of 111 miles from McCammon to Ogden.

The hauls to Ogden would be, for example, from Lewiston, Idaho, 847 miles; from Centralia, Wash., 937 miles; and from Seattle, 1,029 miles. Over the Union Pacific direct from those respective origins to Omaha, the hauls would be 1,772, 1,862, and 1,954 miles. Those figures show the extent to which the Union Pacific would lose its long haul, the loss in mileage being 925 miles in each instance.

From and to points in the excluded territory in Oregon and Washington, and on the Burke and Headquarters branches of the Union Pacific in northern Idaho, the Union Pacific and certain other defendants have arrangements for the interchange of traffic in various commodities at junctions or gateways in Oregon, Washington, and Idaho, under joint rates. On traffic through such gateways moving under the joint rates, the Union Pacific in many instances foregoes its long haul. The gateways through which the rates are in effect, with certain limitations upon their application specified in the tariffs, are: Portland, in connection with the Southern Pacific; Marengo, Wash., and Plummer, Idaho, in connection with the Milwaukee; Spokane, in connection with the Great Northern; Wallula, Wash., and Spokane, in connection with the Northern Pacific; and Spokane, in connection with the Spokane International Railroad Company connecting with the Canadian Pacific Railway Company at Eastport, Idaho, at the Canadian border.

Illustrative of the hauls over the Union Pacific on traffic routed through these gateways are the following: From Lewiston, 132 miles via Marengo or 193 miles via Spokane; from Centralia, 393 miles

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on a route through Marengo; from Seattle, 184 miles through Portland; and from Pendleton, Oreg., 165 miles via Marengo, 227 miles via Spokane, or 70 miles via Wallula, Wash., on traffic routed over its connections at such points. If joint rates were established from the same origin points to Omaha and beyond via Ogden and the Rio Grande, the hauls of the Union Pacific to Ogden would be substantially greater than many of its hauls via other junctions with its connections, as illustrated.

For example, from Pendleton, a representative point, on traffic to Chicago the Union Pacific has a haul of 1,560 miles on its route through Omaha, but only 70 miles over an established through route via Wallula and the Northern Pacific and connections. The rates are the same over both routes. Over a route via Ogden and the Rio Grande to Denver, thence the Burlington, the distance is 2,257 miles, or 6.4 percent longer than the route via Wallula and 10.4 percent longer than the Union Pacific route through Omaha. The Union Pacific's haul over the Rio Grande route would be 633 miles. From Pendleton to St. Louis, the Rio Grande route sought would be shorter by 168 miles than a through route now available via Spokane and the Spokane International and its connections, and would be 201 miles, or 10.3 percent, longer than the Union Pacific route through Kansas City. To Oklahoma City, Okla., the haul of the Union Pacific would be increased from 227 miles, over the present route via Wallula and the Northern Pacific and connections, to 633 miles via Ogden and the Rio Grande to Pueblo and the Santa Fe beyond. The distance over the latter route is 1,910 miles, or only 34 miles, 1.3 percent, longer than the route which gives the Union Pacific its long haul, and 692 miles, or 36.2 percent, shorter than the foregoing route through Wallula.

The foregoing are illustrative of numerous established through routes in which the Union Pacific participates from points in the excluded territory which short haul that carrier. Many of such routes are longer than those here sought via Ogden and the Rio Grande, and this is true to all sections of the country east of the Rocky Mountains, except western trunk-line territory. To the latter territory the short-hauling routes are generally shorter than the routes by which the Union Pacific retains its long haul, and considerably shorter, for example, by 37.5 percent from Yakima to Minneapolis, than the routes sought via Ogden and the Rio Grande. As indicated, the portion of the excluded territory from and to which this short hauling of the Union Pacific occurs does not include points in Utah nor points in Idaho, except on the Burke and Headquarters branches of the Union Pacific in the northern portion of that State.

These short-hauling routes have been in effect for many years. Most of them were established prior to the dates when the Union

Pacific assumed control of the portions of its line west of Huntington and south of Salt Lake City. Joint rates with the Southern Pacific through Portland have been in effect since about 1910, with the Milwaukee through Marengo and Plummer since about 1902, with the Great Northern through Spokane since about 1894, with the Northern Pacific through Wallula since about 1883, and with the Spokane International through Spokane since about 1907.

On some of the traffic interchanged at these gateways the Union Pacific obtains a short haul, as compared with its connections, and on other traffic a long haul. East-bound traffic through the specified Washington and Idaho gateways consists of apples, pears, lumber and other forest products, some steel products, and miscellaneous commodities. A large portion of the traffic, particularly lumber, moves to North and South Dakota, Minnesota, and Wisconsin over the northern routes. Traffic over such routes moves also to Midwestern States and to States east of the Mississippi River. West-bound traffic through the same gateways consists of manufactured products and miscellaneous commodities from the Middle West and from eastern and southern territories.

These interchange arrangements are warranted and in the public interest, according to the defendants, because each carrier shares in long hauls on some traffic as well as short hauls on other traffic, and because the arrangements make it possible for the carriers to handle traffic over shorter routes in many instances. This latter statement, however, applies only, except to an insignificant extent, to such routes to and from points in western trunk-line territory.

As indicated, through routes and joint rates apply in connection with the Rio Grande through Provo on traffic to or from points on the Los Angeles line of the Union Pacific. Such routes generally are shorter than routes over the Union Pacific direct to or from Omaha, Kansas City, or Denver. The following is illustrative:

From Los Angeles, Calif., to—	Via Union Pacific	Distance	Via Rio Grande	Distance
		Miles		*Miles*
Omaha, Nebr.	(1)	1,808	(2)	1,813
Minneapolis, Minn.	(1)	2,168	(2)	2,152
Kansas City, Mo.	(3)	1,925	(2)	1,911
St. Louis, Mo.	(3)	2,200	(2)	2,185
Denver, Colo.	(4)	1,395	(2)	1,276
Chicago, Ill.	(1)	2,296	(2)	2,293
Atlanta, Ga.	(3)	2,816	(5)	2,762
Little Rock, Ark.	(3)	2,430	(5)	2,272
Dallas, Tex.	(4)	2,226	(5)	2,045

[1] Union Pacific to Omaha.
[2] Union Pacific to Provo and Rio Grande to Denver.
[3] Union Pacific to Kansas City.
[4] Union Pacific to Denver.
[5] Union Pacific to Provo and Rio Grande to Pueblo.

Other defendants also participate in through routes with joint rates on traffic moving to or from points on the Union Pacific in the excluded territory from and to eastern points and voluntarily forego their long hauls. For example, the Burlington, the Rock Island, the Santa Fe, and the Missouri Pacific participate in joint rates with the Union Pacific through Kansas City and Omaha. The railroads named could haul the traffic for longer distances over their own rails to Pueblo, Denver, or Cheyenne, instead of permitting shippers to route through Kansas City and Omaha in connection with the Union Pacific.

The total amount of traffic moving between the four Northwestern States and points east of the Colorado common points is substantial. According to figures computed by the Union Pacific, transcontinental carload traffic from the East in the year 1948 over the Union Pacific through Wyoming to those Northwestern States totaled 55,631 cars. of these, (1) 81.7 percent originated in eastern Colorado, Kansas, Missouri, Kentucky, Virginia and all States north thereof, (2) 10.8 percent in Texas, Oklahoma, Arkansas, and Louisiana, and (3) 7.5 percent in Tennessee, Mississippi, Alabama, Georgia, Florida, North Carolina, and South Carolina. About 62 percent of the total consisted of manufactures and miscellaneous traffic, most of which originated in group (1). East-bound traffic from the four States to the same three groups in the same year totaled 116,278 carloads, of which 84.1 percent went to group (1), 10.5 percent to group (2), and 5.4 percent to group (3). About 75 percent of that total consisted of agricultural and forest products.

Of the total carloads, 171,909 in both directions, 121,909 originated or terminated in the excluded territory and the remainder, 50,000, originated or terminated at points in Oregon and Washington west of that territory. The Rio Grande is in a position to solicit movements of the latter traffic over its line at competitive joint through rates in connection with longer routes over the Southern Pacific from Portland to Odgen or over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City. These joint rates are the same as the rates which apply over the direct routes of the Union Pacific from origins on that road in the same area west of the excluded territory. For example, from Seattle to Denver the distance is 1,538 miles over the Union Pacific direct and 1,894 miles over the Union Pacific to Portland, the Southern Pacific to Odgen, and the Rio Grande beyond. In addition to the joint rates sought via the Ogden gateway from the excluded territory, the complainant is also seeking joint rates from the northwest area west of the excluded territory, the same as those in effect over the Union Pacific, Southern Pacific, and Great Northern-Western Pacific routes, for application in connection with the Union Pacific via the Ogden gateway.

A substantial volume of traffic is handled by the Rio Grande in connection with the described routes over which it participates in competitive joint through rates to and from Oregon, Washington, and British Columbia. For example, in 1948 the Rio Grande handled 30,486 carloads in connection with the Southern Pacific and 7,152 carloads in connection with the Western Pacific-Great Northern. In 1947, the volume was 22,722 and 8,909 carloads over the respective routes. Most of this consisted of lumber from Southern Pacific origins south of Portland.[6]

The complainant's estimate of the traffic in carloads that would be potentially available to and from the excluded territory for solicitation by the Rio Grande, in the event competitive joint rates were established over its line via Ogden, from Idaho, Montana, Oregon, and Washington is about 29 percent greater than the volume of traffic, according to the Union Pacific, that moved in 1948 over its Wyoming lines. The estimate was based upon the total carload traffic originated and terminated by the Union Pacific in the years 1944 to 1948, inclusive. It included commodities within the description of products of agriculture, animals and animal products, products of mines, products of forests, and manufactures and miscellaneous commodities. The total carloads estimated as originated by the Union Pacific annually in the area specified was 101,476 and the number terminated 56,286, a total "potential" of 157,762 carloads.

This estimate did not include any shipments that might originate or terminate off the line of the Union Pacific and mover over that carrier as part of a longer haul. Although stated to be a conservative estimate of potential traffic, it was computed from a substantial number of reliable sources, and represents the complainant's best analysis of the traffic considered available for solicitation. No attempt was made to estimate the amount of traffic that the Rio Grande might actually obtain from these potential sources other than a statement that there was no probability that it would get more than 10 percent and that the amount probably would be less than 10 percent because of the vigorous competition of the Union Pacific. This figure of 10 percent as a maximum was derived from the experience of the Rio Grande in obtaining other transcontinental traffic now moving at joint rates in competition with the Santa Fe, Southern Pacific, Union Pacific, Great Northern, Northern Pacific, and Milwaukee. If the Ogden gateway were opened to traffic to and from the four States named, there would be active

[6] Prior to February 1, 1949, joint rates applied over the Bieber route in connection with the Rio Grande to competitive territory in Colorado and east thereof on lumber from certain origins in Oregon and Washington on the Oregon Trunk Railway and the Spokane, Portland and Seattle Railway Company (subsidiaries of the Great Northern and Northern Pacific). Those rates were canceled on February 1, 1949, in connection with the Rio Grande; there is no indication that the cancellation was protested.

competition with the Union Pacific, the Wabash, the Chicago & North Western, and the Missouri River connections that favor Union Pacific routing. At the present time the Rio Grande gets less than 5 percent of the traffic to and from California over the available through routes, with joint rates in connection with its line, because of competition with other routes.

A transportation specialist of the United States Department of Agriulture testified that the Rio Grande would be doing well if it obtained 1,000 cars additional annually from this traffic, an amount that is less than 1 percent of the estimated potential total traffic.

Whatever the amount, it would be the result mainly of (*a*) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (*b*) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it.

Since 1934, when the Dotsero cut-off was constructed, affording a shorter route by the Rio Grande between Denver and the Utah gateways, there has been a marked increase in the traffic carried over that railroad. For the 2 years prior thereto, the total tons carried were less than 6,000,000 although the tons carried exceeded that figure in each year before that, back to 1924. Beginning in 1934, the traffic gradually increased and reached a maximum of 18,517,000 tons in the war year of 1944. In 1945 it dropped to 14,213,000 tons, but increased in 1947 to 18,331,000 tons and in 1948 to 18,473,000 tons. This tonnage has shown a considerable increase percentagewise in traffic received from connecting lines and a decrease in traffic originated. In 1924, 23.2 percent was received from connections and 76.8 percent originated. In 1934, the respective percentages were 39.3 and 60.7. In 1947, they were 49.8 and 50.2, and in 1948 they were 52.3 and 47.7 percent. This traffic in 1948 did not differ markedly from the traffic handled in the four war years 1942–45, when the percentages of traffic received from connections ranged from 52.6 percent in 1942 to 58.2 percent in 1945.

Of the traffic received from connections in the 15-year period 1934 to 1948, inclusive, the percentage terminated on the line of the Rio Grande has ranged from 16.4 percent in 1941 to 20.7 percent in

1948. In the war years the percentages were 16.7 to 19.9 percent. In the same 15-year period, of the traffic received from connections, the amount delivered to connections, that is, bridge traffic, ranged from 20.7 percent in 1935 to 39.6 percent in the war year of 1945. Excluding the war years, the percentage of traffic received from connections that was delivered to connections was 30.1 percent in 1947 and 31.6 percent in 1948. In 1934, the corresponding percentage was 21.7 percent and in 1924 it was 9 percent. These percentages show the increasing importance of the Rio Grande as a bridge line. In tons of freight carried in 1947, such traffic accounted for 5,519,239 tons out of a total of 18,331,176 tons, and in 1948 accounted for 5,846,793 tons of a total of 18,473,356 tons carried. In revenue, the Rio Grande received in 1947 from its bridge traffic $22,894,412, which was 43.3 percent of its total revenue of $52,883,339; and in 1948, $27,654,086 or 44.2 percent of its total revenue of $62,505,951.

Although the percentage relation of the traffic originated on the Rio Grande to the total traffic of that carrier has decreased, such traffic both in tonnage and revenue has increased in the same 15-year period. In 1934, the tons originated were 3,826,049 and the revenue received therefrom was $8,311,254; in 1947, the tons originated were 9,202,867 and the revenue therefrom $20,190,318; and in 1948, the corresponding figures were 8,804,334 tons and $22,018,519. The 1947 and 1948 figures exceeded those of the war years. The volume of strictly local traffic; that is, traffic both originated and terminated on the line, also increased; this traffic in 1934, for example, accounted for 2,048,544 tons and $4,351,807 in revenue, and in 1948, for 3,307,374 tons and $7,630,587. Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

The reasons given for the decline or lack of proportionate growth in traffic originated are (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many sawmills; and (4) loss of local traffic to other forms of transportation.

The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from connecting lines and terminated. Such traffic affords a measure of the increasing importance of the Rio Grande to the shippers and receivers of freight in the localities and areas in the States of Colorado and Utah served by it. Although percentagewise, bridge traffic in relation to the total was greater in 1948 than in 1934,

and increased by over 326 percent in the 15-year period, traffic originated or terminated also increased by substantial amounts, or over 155 percent. In terms of revenue, however, less was received from bridge traffic than from the other traffic. In 1934, for example, the Rio Grande received from bridge traffic $5,648,891, and in 1948 it received $27,654,086; from the other traffic, it received $11,519,335 in 1934 and $34,851,865 in 1948.

The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled "20 Questions" as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representatives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimulated in any questionable manner.

Transit.—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. West-bound traffic to that territory is made up for the most part of manufactures and partially manufactured articles, some of

which are stopped for storage, partial unloading at a number of points, and fabrication in transit.

On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the stoppage-in-transit arrangements offered by that railroad at such Rio Grande points. Pueblo has a population of about 75,000; Colorado Springs, 50,000; Grand Junction, 17,500; and Price, 5,000. All of these are distributing points for surrounding areas. A shipper at Chicago, for example, may have a carload containing shipments for consignees at Pueblo and Boise, Idaho. If the car is partially unloaded at Pueblo, it cannot be reshipped over the Rio Grande to Boise at a joint through rate; but the car can be moved to Boise via Pueblo and Denver, thence the Union Pacific, at a joint through rate. If stops are desired on the Rio Grande at Grand Junction, Price, or Provo, for example, joint through rates would not be available.

A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows.

Building materials.—A dealer in and distributor of general building materials in Salt Lake City, who handles from 400 to 500 carloads annually, obtains from 150 to 200 cars from points east of Colorado common points, including cellotex from Marrero, La., roofing from Cincinnati, Ohio, doors from Louisville, Ky., hardwoods and plywoods from Algoma, Wis., and Orangeburg, N. C., asbestos products from St. Louis, and asphalt siding from Minneapolis. Distribution is made in carloads, from pool cars, and from warehouses to customers located on the Rio Grande on the western slope of Colorado, such as Glenwood Springs and Grand Junction, Colo., and in Utah, such as Price, Helper, Ephraim, and Manti; and also on the Union Pacific in northern Utah; in Wyoming, Rock Springs and west; and in southern Idaho northward to and including Ashton on the West Yellowstone branch and westward to and including Magic, Shoshone, and Buhl. This dealer cannot now serve these customers from shipments made in through cars at joint rates over the Rio Grande when such cars also carry shipments for points on the Union Pacific beyond Ogden. Ephraim and Manti are on a branch line about 52 and 59 miles, respectively, south of Thistle, Utah.

In some instances this shipper has had to forego business east of Salt Lake City at points as far as Glenwood Springs because of the rate situation. If joint through rates were established, this distribu-

tor could give customers at a number of intermediate points on the Rio Grande, who generally are small dealers and can take only less-than-carload quantities, better service through partial unloading in transit and more efficient service by frequent deliveries under more flexible schedules, instead of being limited, as at present, to furnishing service in connection with pool cars consigned to Salt Lake City as the ultimate destination. Pool cars with partial loads for that point or Ogden and points on the Union Pacific beyond do not now move over the Rio Grande, but are routed over the Union Pacific to get the benefit of joint rates.

Of the 150 or more cars annually from the east, this distributor estimated that he would have stopped for partial unloading about 25 percent. Witness made no mention of commercial competition, but indicated that his chief concern was better service to his customers and a saving in cost to his company if such carloads could be stopped for partial unloading at intermediate points on the Rio Grande while moving at the through rates to Union Pacific destinations in the area served by him.

Farm machinery.—A distributor of farm machinery and equipment at Salt Lake City receives carloads of these commodities from eastern origins, including farm tractors from Detroit, Mich., and distributes them by his own motor vehicles to points in Utah and Idaho. This business was established in 1947, at which time the production of these commodities was insufficient to meet all demands, and a system of allocations based on prior needs was introduced. While the system of allocations was in effect, it was found to be more convenient and efficient to bring all shipments to Salt Lake City and distribute them by truck. This distributor is located on the Rio Grande at Salt Lake City and all shipments move over that line. He expressed a desire for joint through rates from eastern origins to points in Utah and Idaho in connection with the Rio Grande, but admitted that no attempt was being made to partially unload shipments at points on the Rio Grande south of Salt Lake City when carloads are consigned to the latter point, or to ship over the Union Pacific to Salt Lake City where carloads could be partially unloaded or stored and later shipped to Union Pacific destinations in Utah and Idaho at joint through rates. The witness for this distributor stated that he preferred to ship in-bound over the Rio Grande and forego the stopping-in-transit provisions that are now in effect at Salt Lake City and other points on the Union Pacific when traffic is routed over that line.

A factory branch of a large manufacturer of farm machinery and equipment which distributes in the intermountain area is located on the Rio Grande at Salt Lake City. In 1949 it received 369 carloads

from its eastern manufacturing points. Of these, 70 percent were sold at points north of Salt Lake City, mostly at points served by the Union Pacific as far as Ontario, Oreg., and the remainder in Utah and western Colorado. About one-half of the shipments to Salt Lake City moved over the Rio Grande route and one-half over the Union Pacific. Shipments which move in over the Union Pacific may be stopped at Salt Lake City for partial unloading or storage in transit at the joint through rates when the ultimate destinations are on the lines of that carrier, but combinations of rates to and from Salt Lake City apply when such shipments move into that point over the Rio Grande. The manager of this branch testified that it would be desirable to establish joint through rates over the Rio Grande so that shipments moving over that line could be stored in transit at Salt Lake City and later reshipped, or partially unloaded thereat and the remainder forwarded, to points on the Union Pacific at charges no greater than apply on similar shipments moving over the Union Pacific. However, he did not know what effect this would have on the parent company, as some shipments have been routed over the Rio Grande when Union Pacific routing was requested. To indicate a need for joint through rates, reference was made to a shipment of tractors which were routed over the Rio Grande to Salt Lake City. At that time a customer at Ontario needed two tractors, and it cost about $50 each to ship them from Salt Lake City by motor carrier. If joint through rates had been in effect, the car could have been partially unloaded at Salt Lake City and the two tractors could have been forwarded to Ontario at the joint rate from origin to Ontario. The record fails to show the difference in the joint rates to Salt Lake City and to Ontario. On a 34,000-pound shipment of tractors from Chicago, the joint through rate is $2.68 to Ogden and $2.98 to Boise, which is southeast of Ontario, representing a difference of $102 in charges.

Monuments.—A fabricator and wholesaler of granite and marble monuments at Brigham City, Utah, on the Union Pacific 21 miles north of Ogden, obtains his stone from Vermont, Georgia, Wisconsin, and Minnesota and sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington. This dealer has keen competition with dealers in like articles in Salt Lake City. Its business is such that straight carloads rarely can be shipped to retailers. If joint through rates were established over the Rio Grande through Ogden, cars could be stopped in transit at Colorado points, such as Grand Junction. A retailer at the latter point testified that he finds it impracticable, except in unusual instances, to purchase the various kinds of monuments needed in the trade in carloads, and that the keen

competition cannot be met when shipments are made in less than carloads. There is thus an urgent need for the establishment of joint through rates on this traffic to destinations in the excluded territory with stop-off privileges at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

Livestock.—Large volumes of traffic are involved in connection with the livestock industry and with the processing and marketing of agricultural products. With respect to livestock, evidence was submitted by producers, feeders, and marketers. A number of producers in the northwest area, particularly in Idaho at such points as Pocatello, Burley, Soda Springs, and Blackfoot, desire joint rates via Ogden and the Rio Grande to markets in Denver, Pueblo, and east thereof on the same basis that applies on shipments moved over the Union Pacific through Cheyenne. Much of the evidence dealt with the advantages from such joint rates when applied on livestock shipped to grazing and feeding areas in Utah and Colorado on the Rio Grande for reshipment beyond under transit arrangements. In the areas in Utah and Colorado served by the Rio Grande are good pasture lands for grazing livestock. In addition to livestock produced locally in those areas, substantial quantities are shipped in the summer season from other sections in Colorado, Utah, and surrounding States, both for feeding in feed lots and pastures and for grazing on the livestock ranges. Movements of livestock, both sheep and cattle, into and out of Colorado are substantial in volume.

Evidence as to the needs of raisers of livestock and operators engaged in fattening livestock for markets was submitted by persons engaged in those pursuits, individually and as representatives of livestock and feeder associations. These came from several representative points or districts served by the Rio Grande, such as Heber City and La Sal, Utah, and Burns, Lamar, and Las Animas, Colo. Those served only by the Rio Grande generally buy from areas from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit on feeder stock when the fattened animals are shipped to Denver or markets east thereof. The evidence shows that such operators have to absorb the difference in transportation costs and are not able to purchase cattle or sheep economically in the northwest area in competition with buyers from Iowa, Wyoming, Nebraska, Colorado, and Kansas that have the benefit of competitive joint rates from the excluded territory over Union Pacific routes with grazing or feeding in transit arrangements.

Due to the curtailment of the use of grazing lands in national forests in Colorado, as part of a general policy for all such forest

lands, livestock raisers in Colorado have curtailed their operations in raising livestock, and have engaged more in fattening stock by grazing in private pastures or feeding in feed lots. They purchase most of their feeder stock in Colorado and surrounding areas, but for supply, quality, and price reasons they have been seeking some feeder stock from more distant origins, and the need for doing so, particularly by reason of the curtailment of the pasture area, has been increasing. Livestock produced in the northwest area, particularly in Idaho, Montana, and Oregon, is of excellent grade, does well on the range, and is considered very desirable for feeding and breeding purposes. About 90 percent of the sheep produced in Colorado are produced in the area served by the Rio Grande, and the operators in this territory purchase replacement or breeding ewes in the excluded territory for summer grazing and the production of white-faced or mutton-type lambs. One witness indicated that in-bound billing on breeding ewes is used under the feeding-in-transit arrangements, when available, at points on the Rio Grande when the newborn, fattened lambs are shipped to markets, but the feeding-in-transit arrangements apparently do not apply for breeding in transit.

Operators on the Rio Grande in western Colorado and those in the eastern Arkansas Valley sections (in southeastern Colorado east of Pueblo and in southwestern Kansas) feel that they cannot now profitably purchase stock in the excluded territory for feeding in transit in competition with similar operators on the Union Pacific in Wyoming, Colorado, Nebraska, and Kansas, due to the rate situation. For example, from Dillon, Mont., to Kansas City the rate on sheep or goats in double-deck cars is $1.21 over the Union Pacific direct and $1.40 over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond, a difference of 19 cents. The 19-cent differential over the latter route applies generally on sheep and goats from Union Pacific origins in the excluded territory to Missouri River markets and points east thereof. These rates are published as joint rates over through routes via Ogden and the Rio Grande. On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to all of the territory Colorado common points and east theref, via Ogden and the Rio Grande, the rates are on a combination basis. Cattle and sheep may be shipped from the excluded territory over the Union Pacific to Denver and connecting lines beyond to points in the Arkansas Valley, such as Lamar, for feeding in transit and subsequent reshipment to Missouri River markets, or markets east thereof, at the rates applicable over the Union Pacific direct to the Missouri River markets, plus an arbitrary of 8.5 cents per 100 pounds. Feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are

now able to overbid the Arkansas Valley feeders on northwest stock when destined to the Missouri River and east thereof, and the latter are thus unable to compete successfully because of their unfavorable rate situation. The northern Colorado-Nebraska operators feed a majority of the lambs fattened for market in the United States.

A packing plant at Pueblo purchases lambs at the Ogden market, some of which originate at points on the Union Pacific in Idaho and Oregon. These shipments are routed over the Rio Grande from Ogden even though it costs from $70 to $80 per car more than the total charges would be if the shipments were routed over the Union Pacific to Denver at the transit balance of the through rate. The Rio Grande is used from Ogden because shipments do not have to be stopped for feed and water en route to Pueblo, whereas shipments routed from Ogden over the Union Pacific usually require feed and water at Denver. There is less shrinkage on shipments moved over the Rio Grande, but not enough to offset the additional freight charges.

The rates on livestock in western territory were prescribed in *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535. Generally, the rates are predicated on the shortest routes over which carload traffic can be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the act. The rates on stocker or feeder livestock were prescribed on a basis not in excess of 85 percent of the rates prescribed on the same kind of stock when fit for slaughter, and the carriers were authorized to establish tariff provisions which allow stock moving toward a market to be fed in transit at intermediate points on the basis of the through rates plus a reasonable charge for such privilege. On December 6, 1932, the Rio Grande was authorized (190 I. C. C. 175) to add certain arbitraries to the rates prescribed for mountain-Pacific territory for hauls over its standard-gage lines between Pueblo and Walsenburg on the east, and Provo on the west, including branch lines connecting with the main lines between those points. For hauls of 500 miles or more, the arbitrary authorized at that time was 6 cents on cattle and on hogs and sheep, double deck. Later, these same arbitraries were authorized for application between Denver and Provo over the Dotsero cut-off (200 I. C. C. 535).

In establishing the prescribed rates on livestock, the carriers appear to have limited their application over routes which do not result in short hauling, and over other and longer routes to have provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the dis-

tance involved. As indicated, operators in the Arkansas Valley may now obtain cattle and sheep in the excluded territory for feeding in transit at an arbitrary of 8.5 cents, and this same arbitrary applies when the stock originates on the Burlington in Montana and Wyoming. On the other hand, such operators may obtain feeder stock in other areas, such as Texas and New Mexico, for feeding in transit and reshipment to the Missouri River markets or markets east thereof, at lower rates than would apply if the same stock were fed in transit by operators on the Union Pacific in Colorado, Nebraska, or Kansas. For example, the rate on cattle from Las Vegas, N. Mex., to Chicago is $1.13 when stopped for feeding at Lamar, but if the same cattle were fed at Barton, Nebr., just east of Julesburg on the Union Pacific, the rate would be $1.26, of 13 cents higher. On cattle from Raton, N. Mex., fed in transit at Lamar, the rates are $1.07 to Chicago and 76 cents to Kansas City, but if the same cattle were fed in transit at Barton the rates would be $1.21 and 89 cents, respectively. Many other examples of a similar nature are shown.

The arbitrary of 19 cents, originally 13 cents, applicable on lambs from the northwest area and moving over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond was established prior to the opening of the Dotsero cut-off, and was based in part on the mileage over the Rio Grande via Pueblo. The evidence indicates that this arbitrary was based on the difference between the prescribed scale rates for the average distance from 12 representative origins, on the line of the Union Pacific from Pocatello north to Butte and west to Pendleton, to the several Missouri River markets over the Union Pacific direct and over that road to Ogden, the Rio Grande to Denver via Pueblo, and the Union Pacific beyond. Using the same formula, but giving consideration to the shorter distance over the Rio Grande's Dotsero cut-off, the Union Pacific states that the arbitraries on traffic routed over the Rio Grande should be 5 cents to Denver and Pueblo and 15 cents to the Missouri River markets, and it is willing to establish these arbitraries and make them applicable to cattle as well as sheep. The arbitrary of 8.5 cents on cattle and sheep from origins on the Union Pacific and the Burlington when fed in transit at points in the Arkansas Valley and reshipped to the Missouri River and beyond apparently is based on a similar formula. Reasonable groupings were authorized in *Livestock, Western District Rates*, *supra*.

In seeking to have the rates on livestock which apply over the Union Pacific made applicable over its lines from Ogden, the Rio Grande indicates a desire to waive the arbitraries which were authorized over its line from Provo to Denver and Pueblo and, in addition, to have estab-

lished over its routes lower rates than would result from the application of the prescribed scales for the distances over its routes. On shipments moving over the Union Pacific-Ogden-Rio Grande route, this would result in short hauling the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City, which are the differences in the Union Pacific distances from McCammon to Ogden and from McCammon to Denver and Kansas City.

Reference is made to *Crouch* v. *Nevada N. Ry. Co.*, 208 I. C. C. 586, which concerned the rates on feeder cattle moved from East Ely, Nev., to Davis, Calif., over the lines of the Nevada Northern Railway Company to Shafter, Nev., thence the Western Pacific to Sacramento, Calif., and the Southern Pacific beyond, 760.4 miles. A rate of 47.5 cents was applicable over the Nevada Northern to Shafter and the Southern Pacific beyond, 705 miles. This rate was collected, but the defendants later sought to collect a rate of 58 cents, which was the combination rate based on Sacramento. Division 4 found that the combination rate was applicable but unreasonable to the extent that it exceeded 49.5 cents, which was the prescribed scale rate for distances of 775 miles and over 750 miles. See also *Routing Livestock to and from Oregon Points*, 209 I. C. C. 349. We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden gateway.

Agricultural commodities.—Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific, and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.

In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.

The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the Central, Southwestern, and Southeastern States. Carloads moved over the Union Pacific to the

Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

Wichita and Liberal, Kans., are described as pocket markets on potatoes and other vegetables originating in Idaho because they cannot be diverted or reconsigned therefrom to points east of the Missouri River at joint through rates. However, the record indicates that shipments refused at these two points may be diverted or reconsigned to destinations in the Southwest at the joint through rates. Wichita is not located on the direct line of any carrier operating between the Colorado common points and the Missouri River gateways, and Liberal is located in the southwestern part of Kansas near the Oklahoma border. Shipments to Kansas City and east thereof would require an out-of-line haul via Wichita and a substantial back haul via Liberal.

Storage facilities are available at Pueblo for the storage of perishables, including potatoes, onions, apples, pears, frozen poultry, frozen foods, butter, and eggs. Joint through rates are applicable from the excluded territory via Pueblo on shipments routed over the Union Pacific to Denver and connecting lines beyond to destinations in the Southwest and to points west of the Missouri River. The route of the Rio Grande from Ogden would be used if joint through rates were available over that route to additional destinations with storage in transit at Pueblo. Storage operators at Pueblo are now handicapped, in relation to two competitors at Denver, because the through rates do not apply via Pueblo to Denver and other northern destinations where a back haul would be required on shipments routed to Pueblo via Denver, whereas the competitors can ship at the through rates in all directions, except westward. The application of the through rates via Ogden and the Rio Grande is sought so that these shippers may have available the same distribution markets as their competitors.

A shipper who deals in dried beans from Idaho and other Western States is located at Colorado Springs. His principal markets are in southeastern territory. Beans which originate in California, Colorado, and Wyoming may be stopped at Colorado Springs for cleaning and packaging and reshipped at the balance of the joint through rates.

Beans which originate in Idaho may be shipped over the Union Pacific to Denver and the Rio Grande or other connections to Pueblo and reshipped therefrom at the balance of the through rates, except to points east of the Missouri River. The route of the Rio Grande from Ogden would be used on Idaho beans if it would result in the application of joint through rates to points east of the Missouri River on the same competitive basis as is now applicable when such beans are transited at points on the Union Pacific. Another bean dealer at Fruita, Colo., on the Rio Grande about 10 miles west of Grand Junction, would like to transit Idaho beans on the same competitive basis as is applicable at Union Pacific points. This dealer is now engaged primarily in buying pinto beans from growers in the vicinity of Fruita and shipping them in carload lots to others, including the shipper at Colorado Springs. These dealers in dried beans are in competition with like dealers at points on the Union Pacific who have the benefit of transit at the through rates to destinations, among others, east of the Missouri River.

A company which is engaged in the purchase and sale of dried beans and peas maintains plants in Nebraska at Morrill on the Burlington and at Gering on the Union Pacific. Carloads of dried beans and peas originating in California, Utah, Oregon, Washington, Idaho, Colorado, Wyoming, Montana, and Nebraska are shipped to Morrill and Gering where they are cleaned, sorted, and packaged, and reshipped generally eastward and to Oklahoma and Texas. This company can obtain Idaho beans and reship them from Gering to eastern and southern destinations at the joint through rates. It was stated, however, that a substantial amount of pinto beans (about 6,000,000 pounds per year) are obtained from Colorado, mostly on the Rio Grande, on which an out-of-line charge of 7 cents per 100 pounds is applicable in addition to the joint through rates over direct routes when such beans are processed at Gering and reshipped to the Missouri River and points east thereof; also that when such beans are processed at Gering and reshipped to destinations west of the Missouri River, combinations of rates to and from Gering are applicable.

The Utah Growers' Cooperative operates throughout Utah in the production and shipment of vegetables, including potatoes and onions. It has two branches on the Union Pacific and three on the Rio Grande in Utah, the latter at Midvale, American Fork, and Springville, all south of Salt Lake City. These three points are served by the Union Pacific and the Rio Grande, but track connections exist only at Midvale. Shipments of box shooks and of seed potatoes from Idaho and of fertilizer from Montana may move into American Fork and Springville over the Union Pacific at lower rates than when they are

interchanged with the Rio Grande at Ogden or Salt Lake City, but when they are received over the Union Pacific they must be trucked to the plants on the Rio Grande. The differences in the rates are not shown.

Various flour mills at southern Kansas points, such as Moundridge and Wichita, support the complaint because they cannot at present purchase wheat at points on the Union Pacific in Idaho, Oregon, and Washington, mill it in transit, and reship to the Missouri River and points east thereof at the same rates that are applicable when similar wheat is milled at points on the Union Pacific. A specific instance was shown where nine carloads of wheat moved from Ogden to Moundridge on which the Ogden shipper applied in-bound transit billing on wheat originating at Idaho Falls. The shipments moved from Ogden over the Union Pacific to Denver, the Rio Grande to Pueblo, and the Missouri Pacific beyond. Moundridge is a local point on a branch line of the latter carrier north of Eldorado, Kans. After the wheat was milled at Moundridge the in-bound billing thereon was applied against an out-bound movement of flour to New Cumberland, Pa. The rate on flour from Idaho Falls to New Cumberland over the route of movement through Denver and Moundridge was $1.335, or 12.5 cents higher than the rate would have been if the same wheat had been milled at a point on the Union Pacific. The distances over the route of movement through Denver and Moundridge and the more direct route of the Union Pacific are not shown.

The rate restrictions complained of by shippers of and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from the excluded territory to Colorado common points and east thereof have placed these shippers and dealers at a serious disadvantage in marketing their products, as compared with competing shippers and dealers located on the Union Pacific and having the benefit of the lower joint through rates from and to the same points. Some of these restrictions complained of, such as those by operators of flour mills in southern Kansas, could be remedied by the establishment of additional joint through rates from the excluded territory over routes of the Union Pacific to Denver and connecting lines beyond. From McCammon and points north thereof such routes would in all instances be shorter than the routes over the Union Pacific to Ogden, the Rio Grande to Denver or Pueblo, and connecting lines beyond. The Union Pacific states that it has not been requested to establish additional joint through rates via Denver. Its position with respect thereto is that the rates on agricultural commodities are on a low basis and, therefore, the carriers should be permitted to limit their application to more direct routes, thereby maintaining their long

hauls and preventing undue circuity. For example, it believes that if competitive joint through rates were established on grain for milling at Wichita and other southern Kansas points and reshipment beyond to the Missouri River and east, other and longer routes probably would be demanded on the same basis at points in Oklahoma and Texas where competing mills are located.

The establishment of additional routes and rates by way of the Union Pacific, however, would not remedy the disadvantage complained of by the shippers of and dealers in these products in the excluded territory who are compelled to pay combination rates on shipments diverted or reconsigned at intermediate points on the Rio Grande, including those stored at Pueblo or Colorado Springs on that road, and reshipped to Colorado common points and east thereof. The only effective remedy in those instances would appear to be the establishment of through rates, the same as those over the Union Pacific routes, over Rio Grande routes via Ogden or Salt Lake City.

Lumber.—A number of lumber dealers and lumber mills are located at Grand Junction and other points, and a wood-treatment or preserving plant is located at Salida, Colo., all on the Rio Grande. Generally, the complaints of these parties relate to their inability to ship lumber and millwork from the excluded territory on competitive joint rates via Ogden and the Rio Grande with stoppage in transit for partial unloading, storage, milling, or treatment and reshipment beyond to Colorado common points and east thereof at the balance of the joint rates. Mention also was made of a handicap in diverting or reconsigning at the joint rates to such points carloads originally shipped to local stations on the Rio Grande via Ogden. As previously indicated, joint through rates apply on lumber and millwork from points in California and in Oregon and Washington west of the excluded territory, including areas around Seattle, Tacoma, and Portland, over the Southern Pacific or the Western Pacific and the Rio Grande through the Utah gateways to points on the Rio Grande and east thereof, with storage, milling, and treatment under transit arrangements. Lumber may also be shipped at joint through rates from the excluded territory when the final destinations are local points on the Rio Grande, but such rates are not applicable from that territory over the Union Pacific to Ogden and the Rio Grande when the final destinations are Colorado common points or points east thereof, whether the shipments move direct or are stopped for milling or other transit purposes.

A lumber company with a wholesale yard, a box factory, a mill, and a storage and drying yard is located at Grand Junction. This company buys most of its lumber, both rough and dressed, and plywood and doors at points west of the excluded territory and sells in Colorado

and points east and south thereof. This company also has a financial interest in a wholesale lumber company at Colorado Springs. It has purchased some lumber at points in the excluded territory, such as Cascade and Winchester, Idaho, Burns, Oreg., and Metaline Falls, Wash. Lumber shipped from Cascade, Winchester, and other points in the excluded territory over the Union Pacific to Ogden and the Rio Grande to Grand Junction could not be stored in transit at the latter point and later reshipped to Colorado common points or points east thereof at the joint through rates as those rates apply only over the Union Pacific routes.

Another lumber company on the Rio Grande at Military Junction, Colo., about 10 miles south of Denver, purchases lumber in California and Oregon; also a small amount in Washington, for milling in transit and reshipment beyond. Lumber from the excluded territory can now be milled in transit at Military Junction and reshipped to Colorado points south thereof and to points in the Southwest at the joint through rates to final destination, but this is not true to other destinations east of the Rocky Mountains. Military Junction is about 1 mile outside of the Rio Grande's switching limits at Denver.

The wood-treatment plant at Salida purchases some lumber, poles, piling, and cross ties in Colorado, Utah, and New Mexico, but most is obtained from points in Oregon and Washington west of the excluded territory. This plant has a contract for treating cross ties for the Rio Grande, but about 60 percent of the forest products which it treats are reshipped to points outside of Colorado. It has not purchased products in the excluded territory, but probably would do so if the joint through rates to eastern and southern destinations were made applicable over the Union Pacific to Ogden and the Rio Grande through Salida. The company which owns the plant at Salida has a similar plant at Denver and 22 others scattered throughout the country. The plant at Denver can perform treatment in transit at the joint through rates from the excluded territory to final destinations in the East, South, and Southwest, and apparently joint through rates apply on about 40 percent of the business at Salida which does not move outside of Colorado.

OPPOSITION TESTIMONY

The Union Pacific operates about 9,724 miles of railroad serving over 1,700 points in 13 States.[7] It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte,

[7] Iowa, Nebraska, Wyoming, Idaho, Oregon, Washington, Missouri, Kansas, Colorado, Montana, Utah, New Mexico, and California.

Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 percent and westbound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grand is 66.3 percent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services.

The Union Pacific objects to the establishment of joint through rates to points beyond Denver or Pueblo via Salt Lake City or Ogden over the Rio Grande upon the principal grounds that such routes would short haul the Union Pacific and that the diversion of traffic over such route from the Union Pacific routes now available would curtail the service and growth of the Union Pacific in the territories it alone serves and in which it pioneered in railroad construction. Such diversion, it fears, would adversely affect the operation of its numerous branch lines in Idaho, Montana, Oregon, and Washington, which are feeders for its main line and are not self-sustaining. In those States the Union Pacific operates a total of 5,606 miles of railroad, with 2,913 miles of branch lines upon which about 46 percent of the total traffic in that territory originates or terminates. It contends that unless it has a substantial main-line haul on branch-line traffic, the operation of many, if not most, of such branches would not long be justified.

Another objection is that yard facilities of the Ogden Union Railway and Depot Company, referred to as the Depot Company, jointly owned by the Southern Pacific and the Union Pacific, at Ogden terminal are inadequate to interchange any additional volume of traffic with the Rio Grande that may be routed to or from the northwest area through Ogden, and that expansion of facilities there is not possible. Several instances of delays to trains, particularly in the fall when traffic is heavy, are shown. The record describes in detail the yard and track lay-out at this terminal and interchange point. At present the Union Pacific finds it necessary to bypass the Ogden terminal as much as possible by taking its trains for Pocatello, Salt Lake City, or Green River over an outside wye track which avoids the terminal proper. In addition to these deficiencies, icing facilities now maintained at Ogden for east-bound and west-bound traffic are not considered adequate for icing perishable commodities from Idaho and the Pacific Northwest for delivery to the Rio Grande. The Depot Company estimated that the cost of interchanging cars between the Rio Grande and the Union Pacific and Southern Pacific is at least twice the average cost of cars in the terminal because of the additional handling required.

The largest volume of traffic was moved through the Ogden terminal in the war year 1945, when a total of 2,847,277 cars were handled. In July, the peak month in that year, the total was 284,741 cars in 2,966 trains, an average of 96 trains daily, which required an average of 70 switching shifts a day. Of that number in July, 894 were solid trains that moved through the terminal without switching. The handling of such a large volume caused considerable congestion and delays to trains. In 1949, the total number of cars handled was 1,955,219. In the peak month of that year, 2,359 trains were handled, an average of 76 trains per day, requiring about 59 switching shifts daily. These figures show that 892,058 fewer cars were handled in 1949 than in the peak year of 1945.

To show that the Union Pacific cannot afford to lose any part of its haul on traffic, attention is directed to the large deficits which the Union Pacific incurred in its passenger service. In 1948, that deficit amounted to $28,462,000, equivalent to $4,291 per mile of road operated, as compared with a passenger deficit incurred by the Rio Grande of $4,954,000, equivalent to $3,127 per mile of road. In the last 20 years the Union Pacific in only 6 years, principally in the war years, has had railway operating income sufficient to pay fixed charges plus declared dividends, and in 1949 it had a net railway operating income of $21,707,437, which was not sufficient by $10,269,865 to pay declared dividends and interest on funded debt. This is contrasted with the

results on the Rio Grande, which in 1948 had a net railway operating income of $12,156,284, out of which it provided for all fixed charges, paid a declared dividend, provided for sinking-fund requirements, and had left for its surplus account $5,167,148.

The Wabash and the Chicago & North Western, important eastern connections of the Union Pacific, furnished estimates of the possible loss of traffic to those roads, and its effect upon train service and employment on their lines in the event that the volume of traffic embraced in the Rio Grande estimate of potential traffic were diverted over the Rio Grande route.

The Wabash in 1948 participated in 9.07 percent of the total traffic handled by the Union Pacific from the Northwest and about one-half of that on west-bound traffic to that area. It estimates the value to it of the potential traffic which it might lose at $1,602,000.

The revenue derived by the Chicago & North Western from the traffic to and from the northwest territory handled in connection with the Union Pacific in 1948 was about $4,000,000. Based on the loss of the potential traffic as estimated by the Rio Grande, it urges that it will lose that amount of revenue if the joint through rates sought in this proceeding are established.

The Great Northern, Northern Pacific, Santa Fe, and Milwaukee oppose granting the Rio Grande's request for the establishment of competitive joint through rates via Ogden. Neither of these defendants, except the Santa Fe, connects with the Rio Grande. They participate, however, in joint rates with the Union Pacific on traffic between the northwest area and eastern points, but there are numerous exceptions. For example, from origins on the Great Northern joint rates are not applicable via Spokane and the Union Pacific on wool, livestock, ores, concentrates, or smelter products, and the joint rates east-bound on fruits and vegetables over that route are limited to destinations reached by the Union Pacific. These restrictions became effective on September 15, 1932, although they were protested by various shipping interests. On lumber from origins on the Great Northern, joint rates apply over that line to Spokane and the Union Pacific only when the traffic is destined to points on and west of the Missouri River, Council Bluffs to Kansas City, thence the line of The Kansas City Southern Railway Company to the Gulf of Mexico. Reference is made also to *Transcontinental Traffic Routed via Bieber, Calif.*, 213 I. C. C. 487, wherein the Great Northern was permitted to cancel joint rates via Bieber and Salt Lake City on transcontinental traffic originating at or destined to various points on the Great Northern in Idaho and Washington.

The Milwaukee, the Santa Fe, and the Wabash, in a joint brief, contend, as does the Great Northern, that upon the evidence submit-

ted the establishment of joint rates which would short haul the defendants is not warranted.

A large number of shippers and representatives of communities served by the Union Pacific, and traffic associations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock.

It is not practicable to deal with all of this evidence in detail, but the testimony and position of the parties have been considered. Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four Northwestern States, a total of 157,762, that number was used as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to $49,880,000 yearly.

Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (*a*) the discontinuance of four trains daily east-bound and four trains daily west-bound between Pocatello and North Platte; (*b*) three trains east-bound and three west-bound daily between North Platte and Council Bluffs; and (*c*) one train east-bound and one west-bound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of $5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300. Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on

these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed as 5,144, with a total loss of wages of $21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real-estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect such employees from loss, as conditions upon the establishment of the joint rates and through routes.

There is no specific provision in section 15 (3) or (4) requiring that such conditions be imposed, but it is argued that in finding joint rates and through routes necessary and desirable in the public interest, as required by section 15 (3), the interests of employees must be considered as they are in proceedings involving consolidations, mergers, and abandonments. Reference is made to the decision in *Cancelation of Rates and Routes via Short Lines*, 245 I. C. C. 183. In that proceeding certain carriers sought to cancel their joint rates over through routes with specified short lines. It was found that cancellation of the rates and routes would result in abandonment of the short lines with resulting inconvenience and loss to shippers and to carrier employees. Permission to cancel certain of the routes was denied.

Upon the record before us it is impossible to find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made. Shippers have a right to route their own traffic, and where traffic is not routed

by the shipper, the originating carrier has the right to control the routing within certain limitations.

GENERAL DISCUSSION AND ULTIMATE FACT FINDINGS

In support of its contention that the assailed rates over its line are unreasonable, the Rio Grande submitted a large number of comparisons showing the differences in such rates and the competitive joint through rates on various commodities, together with the car-mile and ton-mile revenue under the respective rates and what the revenue would be if the lower joint rates were made applicable over its line. Neither factor of the combination rates is assailed, but the aggregates of such factors are alleged to be unreasonable to the extent that they exceed the competitive joint rates.

Many of the present joint rates on the transcontinental traffic here affected are commodity rates which were established originally on particular commodities to meet water competition. Others, such as those applicable on agricultural commodities, were established from producing areas in the excluded territory to enable growers and shippers to market such commodities in eastern and midwestern territories. For these reasons, and others, the defendants contend that it would be unreasonable to require the application of the joint rates over the Rio Grande, as it would result in depleting their revenues and in wasteful transportation over circuitous routes, as well as in short hauling the defendants, especially the Union Pacific. For example, the rates on potatoes to Chicago are 96 cents from Monte Vista and Greeley, Colo., and $1.14 from Idaho Falls, Idaho, a difference of 18 cents, although the distance from Idaho Falls to Chicago, 1,597 miles, is 315 miles greater than from Monte Vista and 590 miles greater than from Greeley. Computations were submitted which indicate that on a carload of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of $1.14 would yield a net profit of $1.97 per car when moved over the Union Pacific to Omaha and the Chicago & North Western beyond, and a net loss of $62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington beyond, 1,809 miles. The computed costs were based on general cost scales compiled by our Bureau of Accounts and Cost Finding and were not based on studies of particular movements of traffic over the respective routes. Many other examples of this nature were submitted.

With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and

the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates.

With respect to the issue under section 15, the facts before us here are in some respects similar to those considered in *United States* v. *Union Pac. R. Co.*, 28 I. C. C. 518, and *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I. C. C. 127, in both of which the complaints were dismissed. In the first, the complainant sought through routes and joint rates over the Rio Grande, among others, in connection with the Santa Fe at Pueblo or Denver on the east and the Oregon Short Line at Salt Lake City or Ogden on the west, on traffic moving between Chicago and certain Mississippi and Missouri River points, on the one hand, and stations on the Oregon Short Line, on the other. The joint rates sought were the same as those then in effect over generally shorter routes of the Union Pacific and other defendants. The short-hauling provision of the statute was held to be a bar to the establishment of the routes and rates sought.

In the second proceeding, the Western Pacific alleged that the failure of the defendants to join with it in the establishment and maintenance of joint rates between points in California on the Northwestern Pacific Railroad Company, controlled by the Southern Pacific, on the one hand, and eastern defined groups, on the other hand, over routes in which the Western Pacific would be an intermediate participating carrier, was discriminatory and prejudicial, and that the combination rates between such points over such routes were unreasonable. Therein, division 2 said, at pages 136 and 137:

> In requesting the application of the joint rates over its line complainant is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic which, under the act, belongs, in the absence of emergency, to the Northwestern Pacific and Southern Pacific.

The instant complainant likewise is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul. In that proceeding, the distance over the Southern Pacific route to Ogden was about 200 miles shorter than the route sought, which is substantially the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves. Again, the short-hauling provision was held to be a bar to the relief sought.

Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons., Inc.*, v. *Alton R. Co.*, *supra*, the Supreme Court said that the expressions "more efficient or more economic" transportation, as used in section 15 (4), "may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found." These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.

In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

There is no contention here by complainant that the present routes of the defendants are not adequate for the traffic hauled, and no finding is sought by complainant to that effect. The absence of such a request may well be due to complainant's contention, not sustained herein except as to sheep and goats to points on the Missouri River and east thereof, that through routes via Ogden and the Rio Grande already exist within the meaning of section 15(3) of the act. Testimony on behalf of shippers, however, does raise a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities.

In order properly to evaluate the testimony of shippers it is necessary to consider the nature, extent, and functioning of our intricate and far-flung commodity marketing system. The growth of our population and the development of the country have required a constantly expanding flow of diverse commodities. Great consuming areas in many instances are far distant from the points of production of the necessities of every-day life, particularly articles of food. Movements of transcontinental proportions are involved in important instances. That is true here. A complex but efficient marketing

system has been evolved to provide as orderly a distribution of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and over as many routes as possible. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities. *Southeastern Vegetable Case*, 200 I. C. C. 273, and *Routing Lumber and Fruits, South to C. F. A. Territory*, 256 I. C. C. 223.

While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes.

In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established.

The situation as to the commodities above named, as to which the defendants' routes are inadequate, is largely similar to that considered in *D. A. Stickell & Sons, Inc.*, v. *Alton R. Co.*, *supra*. There is one point of difference. There, the operating conditions, mile for mile, on the respective routes were substantially similar. Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recog-

nized by the Commission in prior proceedings. See *Livestock, Western District Rates, supra*, and *W. H. Bintz Co.* v. *Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486. There is before us no data from which the exact differences in the costs over the Union Pacific routes and the Rio Grande routes can be determined. Several estimates were made by witnesses for both the Rio Grande and the defendants, but the estimates vary so widely and are so obviously incomplete as to be practically useless. The record is sufficiently complete, however, to enable us to make a rough approximation of the differences in the operating conditions and to appraise the weight which should be given to those differences, as well as to the differences in the distances over the respective routes, in determining the issues before us.

The differences in the distances between the Union Pacific routes through Wyoming, on the one hand, and the Rio Grande routes sought, on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles, or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls between the excluded territory, on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United

States east and south of the points and territory above described, the differences in the transportation conditions are, in general, spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments west-bound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs east-bound, who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3 (4) of the act.

As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. No such a showing has here been made.

The situation is different with respect to traffiic between Utah common points, on the one hand, and the northwest area, on the other. On such traffic the Union Pacific interchanges with the Bamberger Railroad Company at Ogden at joint through rates to and from

points on that line, including Salt Lake City. There is no apparent reason why similar arrangements should not apply on like traffic interchanged with the Rio Grande. The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande.

The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points, embraced within the findings of unlawfulness herein made.

The testimony dealing with the terminal facilities at Ogden has been carefully considered. We are persuaded that the additional traffic over the Rio Grande routes which will result under the findings herein made can be interchanged at that point or at Salt Lake City by the use of the present facilities and without serious detriment to the operating efficiency of the railroads concerned.

CONCLUSIONS.

We conclude:

1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and

unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

An appropriate order will be entered.

LEE, *Commissioner*, concurring in part:

I concur in the conclusions of the majority that joint rates the same as apply over the Union Pacific and its connecting lines should be established via Ogden or Salt Lake City, in connection with the Rio Grande, on the commodities and from and to the origins and destinations specified by the majority; that the rates assailed on such commodities from and to such origins and destinations are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes; and that the maintenance by the Union Pacific and other defendants of joint rates from and to points on the Bamberger Railroad south of Ogden, while refusing to participate in like rates from and to the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act. The decision in this case will correct in part, a long-standing, unlawful rate adjustment, an adjustment which has discriminated against the industries and people of Washington, Oregon, Idaho, Montana, and Utah, the area from and to which such unlawful adjustment applies being referred to in the report as the "excluded territory." However, I am of the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment. On the facts shown in the record, the act requires that the rates on all commodities, between points in the excluded territory and Colorado common points and points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes. The act contemplates that there shall be no excluded territory with respect to any commodity or persons.

Transcontinental joint rates on freight traffic were established in 1897, from and to the territory here considered, applicable over the Rio Grande routes via Ogden. These joint rates were in effect for many years, until 1906 from and to some points and until 1912 from and to other points, when they were canceled by the Union Pacific and higher combination rates became effective. However, the through routes were not closed. Numerous shippers testified that these routes are open and available and that they can route traffic over them. This testimony was not challenged or contradicted. On the contrary, a responsible traffic official of the Union Pacific testified that the Rio Grande routes are "actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon, and Washington." That these routes are open and used is proved by evidence in the record (1) of east-bound shipments of various commodities made in 1948 from points on the Union Pacific in the excluded territory to Colorado common points, and which moved over the Rio Grande routes, including the entire length of the Rio Grande line, on through bills of lading issued by the Union Pacific, (2) of west-bound shipments of various commodities made in the same year from various eastern points to points in the so-called excluded territory, and which moved on through bills of lading over carriers east of Colorado junctions to the Rio Grande at such junctions and thence over the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond, and (3) of numerous shipments moved over the Rio Grande routes between eastern points and the excluded territory during World War II and in 1949 when the Union Pacific main line in Wyoming was blocked by snow. The year 1948, the calendar year immediately preceding the hearing, was selected as typical of the situation which prevailed in the prior years and which continued up to the time of the hearing.

I am unable to agree with the majority that the shipments referred to above must be regarded as of an isolated nature and as falling in the same category as the single shipment considered in the *Beaman Elevator case*, 155 I. C. C. 313, referred to in a footnote to the opinion of the United States Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. In the *Beaman* case a single carload shipment of grain moved over the lines of two connecting railroads from Beaman, Iowa, via Clinton, Iowa, to St. Louis, Mo. The evidence plainly showed that the bill of lading covering this shipment was issued and recognized by these railroads through error. There was no evidence "of any like movement before or since." Adequate service was available over nine other routes. A wholly different situation is before us in this proceeding. Numerous shipments of a variety of commodi-

ties have been transported in both directions over the Rio Grande routes on through bills of lading deliberately issued and recognized by the Union Pacific and the other participating carriers. The situation here before us is similar to that considered by the Supreme Court in *Virginia Ry.* v. *United States*, 272 U. S. 658, also referred to in a footnote to the decision in *Thompson* v. *United States*, *supra*, in which, in referring to the route over which the Commission there prescribed reasonable and nondiscriminatory rates, the Court stated that "that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive." The Court held however, that even though the route was closed commercially, open through routes to the West were in existence.

In the *Thompson* case the court pointed out that "there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line" or that the carriers have ever offered through service over the Missouri Pacific-Burlington route. Thus, the facts before the Court in that case likewise were wholly different from those before us in this proceeding. I think that the Court's opinion in that case supports the conclusion that through routes on freight traffic over the Rio Grande routes have existed for many years and now exist and that the short-hauling provision of section 15 (4) is not applicable.

If, however, the Rio Grande routes were actually closed, the short-hauling provision of section 15 (4) of the act would not be a bar to the correction in full of the present discriminatory rate adjustment. The discrimination in violation of section 3 of the act, shown by the evidence, makes that provision of section 15 (4) inapplicable. In any event, the Rio Grande routes are shown to be needed in order to provide adequate, and more efficient and more economic transportation, and, if they were not already open through routes, we could and should require that they be opened.

As stated in the report of the majority, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments, livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, who reconsign shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific. The evidence is equally impressive with respect to the disadvantage or handicap to shippers

or receivers of lumber, building materials, farm machinery, and other commodities. For instance, the lumber company at Military Junction, Colo., referred to in the majority report, is handicapped in its efforts to compete with mills at Denver and Kansas City because it cannot obtain lumber from the excluded territory for milling in transit on the same basis as these competing mills. A representative of that company testified that it would purchase several million feet of lumber annually from points in the excluded territory if it had available reasonable and nonprejudicial joint rates over the Rio Grande routes. By reason of the rate situation complained of, the lumber dealer at Grand Junction, Colo., who is also referred to in the majority report, has lost business to competitors who have the benefit of transit at the joint rates applicable over the Union Pacific routes. This evidence is only typical; it was presented as representative of the prevailing situation.

Shippers and receivers of freight at points in eastern Oregon and southern Idaho, on the line of the Union Pacific, have been, and are, excluded from additional markets that would be available to them if reasonable and nonprejudicial joint rates were in effect over the Rio Grande routes. Some of these shippers express the belief that the establishment of such joint rates would provide them with a better car supply, in that the Rio Grande would furnish additional cars to move out shipments routed over its line. It is common knowledge that a better supply of cars is available to shippers who have competitive routes to the consuming markets. The record clearly establishes that the present rate adjustment results in a substantial disadvantage to the industries, shippers, and receivers located in the considered territory, and in undue prejudice to them.

Likewise, the evidence establishes that the defendant railroads discriminate against the Rio Grande, in that from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections, its long haul, while refusing to establish the same joint rates over the Rio Grande routes. The routes by which defendants short haul themselves are generally as long as, and in many instances substantially longer than, the Rio Grande routes, and the hauls of the Union Pacific and of other defendants are shorter over such established routes than over the Rio Grande. The evidence does not establish that transportation conditions are more favorable over these routes

than over the Rio Grande routes which are discriminated against by defendants. On the contrary, the record, in my opinion, warrants finding that the transportation conditions over such routes are, in general, no more favorable than over the Rio Grande routes. The Union Pacific and the other defendants are, and for the future will be, violating section 3 (4) of the act by failing and refusing to participate in joint rates with the Rio Grande, from and to points in the excluded territory, to and from points in official, southern, and southwestern territories, while participating with each other in joint rates from and to the same points, over routes over which the Union Pacific and other defendants short haul themselves.

The Union Pacific is a strong and progressive railroad. It is ably managed and efficiently and economically operated. Being the only railroad in southern Idaho, every shipper in that area is dependent on it for rail service. I am persuaded that, instead of being allowed to continue to maintain an "excluded territory," it should be required to provide these shippers with joint rates which will enable them to buy and sell in all markets on an equality with other shippers, and that such joint rates will not result in any substantial diversion of the traffic now moved over its lines.

The joint rates now in effect on freight traffic over the Union Pacific routes are shown by the record to be reasonable for application over the Rio Grande routes. We should require that these rates be maintained over the latter routes.

PATTERSON, *Commissioner*, concurring in part:

I concur in the relief granted to the Rio Grande and transit operators thereon who are handicapped by the lack of through routes and joint rates the same as those over the Union Pacific routes. It seems to me, however, that the findings of unlawfulness are inconsistent in that they fail to include lumber and articles taking lumber rates in the relief granted.

The showing made of a need for such through routes and joint rates, in my opinion, is more persuasive as to lumber and articles taking lumber rates than as to any of the commodities included in the foregoing findings, with the possible exception of livestock. The record shows that at least one lumber dealer at Grand Junction, another at Military Junction, near Denver, and a wood-treatment plant at Salida, all on the Rio Grande, are handicapped in their efforts to compete with like dealers on the Union Pacific routes, and that at least the dealer at Grand Junction has lost business, by reason of the rate situation complained of, to competitors who have the benefit of transit at the joint rates over the Union Pacific routes. I

believe this evidence is adequate support for the inclusion of this commodity group in the findings of unlawfulness made.

The order entered in connection with this report requires the establishment on particular commodities, in connection with the Rio Grande, of through routes and joint rates the same as those now in effect over the Union Pacific routes. The formation of those through routes is appropriately left, in large measure, to the carriers. I want to make it clear that in my view, on traffic to or from the area east of the Colorado common points, where the provisions of the order so permit, these new routes should be formed in such a manner as to short haul the Union Pacific only to the extent necessary to afford the Rio Grande its line haul and avoid unduly circuitous routes.

ARPAIA, *Commissioner*, concurring:

In my opinion there are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of section 15 (4) of the Interstate Commerce Act is not required.

The evidence of record shows that these routes presently are open and available to shippers on combination rates. The history of the relationship between these carriers leaves no doubt as to that fact.

When joint rates over these routes, which were in effect from 1897 to 1906 and 1912, were canceled by the Union Pacific, no specific cancellation was made of the through routes over which the joint rates applied. To my mind it would be necessary for the Union Pacific to have shown affirmatively that it refused traffic on through billing over the Ogden Gateway in order to negative the existence of such through routes. Instead, the record shows information elicited from an official of the Union Pacific to the effect that routes via Ogden were available subject to the application of combinations of local rates.

The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.

We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires.

MAHAFFIE, *Commissioner*, dissenting in part:

I dissent from the majority report insofar as it fails to find that the existing routes to and from the northwest territory, described in

the report, via the Rio Grande through the Ogden gateway are effective through routes and that the failure of the Union Pacific and other defendant railroads to establish joint rates with the Rio Grande via Ogden unjustly discriminates against that carrier. I disagree also because the report does not find that it is necessary and desirable in the public interest that joint rates on commodities generally, in addition to those specified, should be established over such through routes.

We are not called upon in this proceeding to exercise our authority, under section 15 (4) of the Interstate Commerce Act, to establish new through routes via that gateway. Therefore, the conditions in that paragraph are not applicable. We are free to exercise our power under section 15 (3) to establish joint rates unhampered by those restrictions.

A finding that these routes are open and freely available to shippers today is fully supported by the evidence. It was acknowledged by a freight traffic official of the Union Pacific that a shipper has the right under the act (section 15 (8)), to specify such routes for the carriage of his shipments. That right, it should be noted, can be availed of only when two or more through routes and through rates are actually established and in existence.

The record shows that some joint through rates, as distinguished from combination rates, are in fact now published in a Union Pacific tariff for application through Ogden over the entire length of the Rio Grande to Denver and the Union Pacific beyond. These apply on shipments of sheep or goats originating on the Union Pacific in southern Idaho and eastern Oregon, billed to destinations on the Missouri and Mississippi Rivers and to Chicago and other points. The joint rates are higher than rates on like livestock moved over the direct route of the Union Pacific and, therefore, retard use of the Rio Grande route. But the publication of such joint rates in connection with transportation over the whole length of the Rio Grande is proof of the consent of the Union Pacific for the use of that rail line as part of a through route at joint rates. And it was further stated by the same witness that the Union Pacific has no objection to publishing the same joint rate arrangement on shipments of cattle.

In 1941–42 mixed military trains with troops in passenger cars and military supplies in freight service were transported over this route on through billing. Four examples of such trains are described in the record. These moved from Fort Sill, Okla., and Camp Claiborne, La., to Fort Lewis, Wash., in December 1941 and February 1942. The trains were routed and moved to Colorado junctions of the Rio Grande, thence over that railroad to Ogden and the Union Pacific

beyond. Unlike certain other movements to and from the northwest area via Ogden in the war period in connection with these two lines, the military trains were not routed under service orders issued by us or the Office of Defense Transportation. Arrangements for the through movements were made with the railroads and the rates charged were settled on the basis of the joint rates applicable in connection with the Union Pacific routes through Wyoming.

The existence of the route as an established through route was undoubtedly an important consideration for its use in February 1949, when the line of the Union Pacific was blocked by snow. In that emergency, freight cars, passenger cars, express and mail were promptly diverted by the Union Pacific through Denver over the Rio Grande to Salt Lake City and to Ogden for movement beyond. Of the freight cars diverted, 1,493 were for destinations in Idaho on the Union Pacific and in the northwest area.

Actual and continuous use of the Rio Grande route at through rates made by combinations of separate rate factors via Ogden to and from the Northwest without opposition or objection by the Union Pacific or other participating railroads is amply shown by the evidence of typical movements of numerous commodities. The calendar year 1948 was used by the Rio Grande as a representative year. In that year 16 carloads of various commodities were shipped from the northwest territory over the Union Pacific to Ogden and the Rio Grande beyond to Denver, Louviers, Pueblo and Trinidad, Colo., over the entire length of the Rio Grande. They originated on the Union Pacific and moved on through bills of lading. Some of the cars were partly unloaded at Rio Grande points and then continued through to their destinations. Seventeen carloads of various commodities moved, from late in December 1947, and in the year 1948, from various eastern points on through bills of lading at through combinations of rates over rail lines east of the Colorado junctions to the Rio Grande at such junctions thence over that line to Salt Lake City or Ogden and the Union Pacific beyond. Some of the cars were stopped for partial unloading at stations on the Rio Grande or the Union Pacific.

The same kinds of movements as those exhibited in 1948 prevailed to about the same extent in years prior to 1948 and continued into 1949 at the time of the hearings.

All of this evidence clearly supports a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for a finding that

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they are established through routes announced by the United States Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. In that case, the Court said "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the Court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit and, therefore, no through routes existed between those points.

The situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole inevitably leads to that conclusion. To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.

Even if a finding that no through routes exist over this line be sustained, there is substantial evidence that the rate situation results in undue prejudice and undue disadvantage to shippers and to districts and localities in Utah and Colorado dependent upon the Rio Grande for rail service, in violation of section 3 (1) of the act. Such violation removes the restrictions imposed in section 15 (4) upon our authority to establish through routes. That undue prejudice and undue disadvantage exist is fully supported by the testimony of numerous witnesses. Briefly, the testimony shows that livestock producers in Utah and Colorado, in areas served by the Rio Grande, are not able, due to the combination through rates via Ogden, to buy on a reasonably competitive basis, cattle and sheep in Idaho, Montana, Oregon, and Washington for grazing and feeding in transit on the ranges in Utah and Colorado, in competition with buyers and stock feeders in northern Colorado, Nebraska, and northern Kansas. The same undue prejudice and undue disadvantage is experienced by buyers and feeders in southeastern Colorado east of Pueblo, Colo., and

in southwestern Kansas served by the Santa Fe and the Missouri Pacific railroads. Their failure to obtain joint through rates from the producing areas in the Northwest over the Union Pacific to Ogden, Rio Grande to Pueblo and its connections beyond places them at an undue disadvantage.

The record contains convincing evidence by representatives of large groups of shippers that there is undue prejudice and undue disadvantage to wool producers, as well as to livestock operators in Colorado served by the Rio Grande; also to lumber dealers and processors; dealers in farm machinery and other commodities, and to a cold storage warehouse operator in Pueblo. There is substantial evidence from producers and shippers of agricultural commodities in the Northwest, particularly in Idaho, to support findings that the refusal of the defendant railroads to join in joint through rates via Ogden and the Rio Grande to and from points beyond the Colorado gateways of that carrier exclude them from additional markets needed for their products. All of that evidence sustains and fully supports the finding that there is a violation of section 3 (1) of the act and justifies a general finding that joint through rates via the Ogden gateway should be established on commodities generally. The findings should not be limited, as are the findings of the majority, to particular commodities as to which evidence was offered but should be broadened to include all commodities.

We are fully warranted in dealing with this situation broadly, in considering what is necessary and desirable in the public interest, with respect to joint rates over these established through routes. We are not limited to consideration of proof as to every rate on every commodity from every origin to every destination. Such a view of our authority is too narrow and is not justified by the law or the evidence.

In other types of proceedings where we found it necessary to deal generally with a comprehensive rate situation, the Supreme Court has held that we may properly make general findings upon typical evidence representative of the situation as a whole.

In exercising authority under section 13 (4) as to the lawfulness of rail rates on intrastate traffic in a State and under section 15 (6) as to divisions of joint rates of rail carriers we may make general findings when the evidence is shown in numerous and representative instances that are typical of the rate situation as a whole. Similarly we need not attempt the impracticable, if not impossible, task of examining every rate on every commodity and class of commodities, from every origin to every destination in the large areas and territories under scrutiny here. We can adjust the remedy to the evil and make our order as broad as the discrimination and undue prejudice. See *Illinois*

Central R. Co. v. *Public Utilities Commission*, 245 U. S. 493, 507. In *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579, a proceeding dealing with intrastate rates on a State-wide basis, the Court stated that "any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute." In *Georgia Public Service Comm.* v. *United States*, 283 U. S. 765, 774, the Court said that "when an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings." That case also arose under section 13 (4) of the act with respect to intrastate rates. There the order related to a few commodities but the rates prescribed were State-wide in operation and applied to shipments between hundreds of points of origin and destination. Under those circumstances the Court held that "To require specific evidence and separate adjudication in respect of each would be tantamount to denying the possibility of granting relief."

To the same effect is the holding of the Court in *New England Divisions Case*, 261 U. S. 184, 197. There the Court had under consideration contentions with respect to the nature of the evidence in support of our order as to divisions of joint rates between groups of rail carriers. The Court pointed out that our order was based on evidence which we assumed was "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." That method of proof was found to be our common practice in adjudicating comprehensively upon substantially all rates in a large territory, and that the actual necessities of procedure and administration had led to the adoption of that method also in passing upon the reasonableness of proposed rate increases. That method was found equally appropriate in passing upon multitudes of divisions of joint rates. That it has similar application in a comprehensive case such as we have here where we are called upon to establish joint rates via a gateway through which substantially all joint rates have been refused, is equally clear. In the case cited, the Court said that there was no constitutional obstacle to the adoption of the method pursued and that only in the way could the task be performed.

The same rule should be applied in the instant case, in order to carry out effectievly our authority to prescribe, in the public interest, joint rates by way of the Ogden gateway. The report of the majority finds it necessary in the public interest that joint rates via that gateway be established on particular commodities as specified in the report. The same evidence is, and should be concluded to be typical of the rate situation as a whole. In accordance with our practice in other types of comprehensive proceedings which has been found lawful and neces-

sary under principles announced in the Supreme Court cases cited, that evidence should be found adequate to support an order that joint rates be established via that gateway on commodities generally.

I am authorized to state that COMMISSIONERS SPLAWN and CROSS join in this expression.

COMMISSIONER KNUDSON did no participate in the disposition of this proceeding.

APPENDIX

From—	To—	Commodity	Rates [1]		Distances [2]		Revenues per car-mile			Average carload weight
			Via Union Pacific routes	Via D&RGW routes	Via Union Pacific routes	Via D&RGW routes	Via Union Pacific joint rates	Via D&RGW combination rates	Via D&RGW joint rates [3]	
			Cents	*Cents*	*Miles*	*Miles*	*Cents*	*Cents*	*Cents*	*Pounds*
Pendleton, Oreg	North Salt Lake, Utah	Cattle	58	90	342	342	37.99	58.95	37.99	22,400
Logan, Utah	Denver, Colo	do	83	111	649	679	28.65	36.62	27.38	22,400
Huntington, Oreg	Chicago, Ill	do	168	213	1,872	2,083	20.10	22.91	18.07	22,400
Idaho Falls, Idaho	Oklahoma City, Okla	Potatoes	90	128	1,428	1,462	28.44	39.50	27.78	45,120
Redmond, Oreg	Atlanta, Ga	do	163	203	2,808	3,008	26.19	30.45	24.45	45,120
Armstead, Mont	Oklahoma City, Okla	Dry beans and peas	93	203	1,550	1,584	50.89	108.70	49.80	84,820
Twin Falls, Idaho	Atlanta, Ga	do	148	187	2,172	2,372	57.80	66.87	52.92	84,820
Nampa, Idaho	Detroit, Mich	Lettuce	175	217	2,074	2,286	20.96	23.58	19.02	24,840
Hood River, Oreg	Pittsburgh, Pa	Apples	192	252	2,666	2,877	29.99	36.47	27.79	41,640
Spokane, Wash	Kansas City, Mo	Wheat	86.5	132	1,901	2,101	47.40	65.45	42.89	104,180
Pocatello, Idaho	Wichita, Kans	do	68.5	96	1,206	1,240	59.17	80.66	57.55	104,180
Spokane, Wash	Omaha, Nebr	Lumber	92	143.5	1,784	2,003	35.76	49.68	31.85	69,340
Kellogg-Wardner, Idaho	Fort Worth, Tex	do	104	143.5	2,237	2,271	32.24	43.81	31.75	69,340
Portland, Oreg	Provo, Utah	Canned goods	84	116	943	930	53.82	75.36	54.57	60,420
Do	New Orleans, La	do	143	209	2,762	2,728	31.28	46.29	31.67	60,420
St. Louis, Mo	Logan, Utah	Roofing	153	196	1,453	1,588	64.76	75.91	59.25	61,500
Chicago, Ill	Spokane, Wash	do	161	250	2,272	2,483	43.58	61.92	39.88	61,500
Geneva, Utah	Boise, Idaho	Iron and steel articles	63	78.55	447	440	109.76	139.03	111.51	77,880
Do	Portland, Oreg	do	63	78.55	928	921	52.87	66.42	53.27	77,880
Pittsburgh, Pa	do	do	167	205	2,729	2,941	47.50	54.10	44.08	77,880
Salt Lake City, Utah	Butte, Mont	Agricultural implements	141	173	433	434	98.67	120.78	98.44	30,300
Detroit, Mich	Malad, Idaho	do	295	333	1,836	1,982	49.17	51.41	45.54	30,300
Denver, Colo	Spokane, Wash	Vehicle parts	251	370	1,371	1,466	79.16	109.13	74.03	43,240
Fort Worth, Tex	Seattle, Wash	Animal and poultry feed	119	278	2,338	2,372	31.48	72.48	31.02	61,840
Denver, Colo	Butte, Mont	Tires and tubes	179	294	908	1,004	73.41	109.05	66.39	37,240
Atlanta, Ga	do	Furniture	396	596	2,318	2,518	28.63	39.67	26.36	16,760
Kansas City, Mo	Seattle, Wash	Paper	154	373	2,069	2,269	31.72	70.06	28.93	42,630
Oklahoma City, Okla	Boise, Idaho	Petroleum and petroleum products	141	188	1,612	1,645	48.09	62.83	47.13	54,980
Kansas City, Mo	Portland, Oreg	Paint and paint material	170	364	1,891	2,091	52.84	102.32	47.79	58,780

[1] In cents per 100 pounds; in effect September 1, 1949.
[2] Over existing routes of Union Pacific and connections; and over Denver & Rio Grande Western routes.
[3] At joint rates applicable over competitive routes of Union Pacific and connections.

U. S. GOVERNMENT PRINTING OFFICE: 1953.

[fols. 126-127] AFFIDAVIT OF SERVICE OF MOTION TO INTERVENE, ETC., (omitted in printing)

[fol. 128] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PUEBLO CHAMBER OF COMMERCE, ET AL., FOR LEAVE TO INTERVENE—Filed November 13, 1953

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now the Pueblo Chamber of Commerce, the Arkansas Valley Stock Feeders Association, and the Colorado Wool Growers Association, and hereby move this Honorable Court for an order pursuant to Rules 24(a) and (c) of the Federal Rules of Civil Procedure permitting petitioners to intervene as plaintiffs in the above entitled proceeding.

I

A. That petitioner Pueblo Chamber of Commerce is a Colorado corporation, with its principal place of business at Pueblo, Colorado, whose members are concerned with the economic advancement of the City of Pueblo as well as the general welfare and betterment of the community, and, as such, have an important and pecuniary interest in the issues involved in the instant proceeding.

B. That the Arkansas Valley Stock Feeders Association is an association of stock feeders in southeastern Colorado and western Kansas., It is located in the valley of the Arkansas River and its principal office is at Lamar, Colorado. Its purpose is to aid, and assist fellow members in the feeding, sale and transportation in interstate commerce of livestock and who have an important and pecuniary interest [fol. 129] in the issues involved in the instant proceeding.

C. The Colorado State Wool Growers Association is a Colorado corporation, whose purposes and objects is to assist its members in the production, marketing and transportation of sheep, lambs and wool, and its principal office is

at 1408 East 47th Avenue, Denver, Colorado. The members and the association have an important and pecuniary interest in the issues involved in the instant proceeding.

II.

That the petitioners were intervening complainants before the Interstate Commerce Commission in the proceeding in which the order of that Commission is here assailed, and therefore are authorized to intervene in this proceeding as a right under the provisions of Section 2323 of the Judicial Code (28 U.S.C.A., Section 2323).

III

Accompanied herewith, pursuant to the provisions of Rule 24(c) of the Federal Rules of Civil Procedure (28 U.S.C.A., Rule 24) is the Complaint of the petitioners, which complaint sets forth the claim for which intervention is sought.

Wherefore, Petitioners pray for an order granting them leave to intervene as plaintiffs in the above entitled proceeding and to file the complaint which is tendered herewith with the right to have notice and to be treated in all other respects as if they had been named as plaintiff, and for such other and further relief as the Court may deem requisite in the premises.

Barry and Hupp, Attorneys at Law, 738 Majestic Building, Denver 2, Colorado, By John R. Burry, Attorneys for Petitioners, Arkansas Valley Stock Feeders Association, Colorado State Wool Growers Association, Pueblo Chamber of Commerce.

[fol. 130] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT OF COMPLAINT UNDER RULE 15—Filed November 17, 1953

Plaintiff, The Denver and Rio Grande Western Railroad Company, hereby amends the complaint in the above-entitled proceeding, as of course, under Rule 15(a) (28 U.S.C.A. Federal Rules of Civil Procedure) by adding thereto a paragraph designated as Paragraph XII (a) on page 13 of the complaint as follows:

XII (a)

Plaintiff represents and alleges that it has a pecuniary interest, which exceeds the sum of $3,000, in the rates, through routes, charges, practices and issues which are concerned with, and affected by, the order of the Interstate Commerce Commission hereinbefore described; and that unless that order is restrained, enjoined, annulled or set aside by this Court in the respects herein requested the resulting and existing rates and charges on the traffic and between the territories involved are and will continue to be unjust, unreasonable, and unjustly discriminatory to plaintiff and to intervening shippers who desire to use the route and services of plaintiff, contrary to the national transportation policy, and will cause plaintiff irreparable injury and damage in that such unjust, unreasonable and unjustly discriminatory rates, charges, and practices violate the [fol.131] statutory right of plaintiff to participate on equal terms in the revenues from through traffic to which it is entitled under just, reasonable, non-discriminatory and non-prejudicial competitive joint rates and competitive through routes under the provisions of the Interstate Commerce Act, and that upon adjudication of the issues herein this Court remand the proceedings to the Interstate Commerce

Commission for such action as the Court may direct that Commission to take in the premises.

Dated November 17, 1953.

Respectfully submitted, the Denver and Rio Grande Western Railroad Company, Herbert M. Boyle, 1531 Stout Street, Denver, Colorado; Robert E. Quirk, 1116 Investment Building, Washington, D. C., Attorneys for Plaintiff.

[fols. 132-153] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 154] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF INTERSTATE COMMERCE COMMISSION TO TRANSFER SUIT—Filed November 17, 1953

Comes now the Interstate Commerce Commission and moves the Court for an order transferring the above-entitled cause from the United States District Court for the District of Colorado to the United States District Court for the District of Nebraska, Omaha Division, for the reason said cause involves the same order of the Interstate Commerce Commission, the same parties, and, in part, the same issues as are involved in a suit now pending in said United States District Court for the District of Nebraska, Omaha Division, entitled *Union Pacific Railroad Company et al.* v. *United States of America and Interstate Commerce Commission*, Civil Action No. 76-53, which is now set for hearing on November 23, 1953, before three judges under the provisions of Sections 1336, 2284, and 2321-2325, Title 28 U. S. Code.

Interstate Commerce Commission, by Edward M. Reidy, Chief Counsel; Samuel R. Howell, Assistant Chief Counsel.

[fol. 155] IN UNITED STATES DISTRICT COURT

[Title omitted]

POINTS AND AUTHORITIES

The Interstate Commerce Commission relies upon the following in support of its foregoing motion:

Title 28, U. S. Code, Section 1404 (a);
Rule 13 (g), Federal Rules of Civil Procedure;
Kansas City Southern Ry. v. *United States*, 282 U.S. 760.

Interstate Commerce Commission, by Edward M. Reidy, Chief Counsel; Samuel R. Howell, Assistant Chief Counsel.

[fol. 156] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 157] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PUBLIC UTILITIES COMMISSION OF COLORADO TO INTERVENE—Filed November 17, 1953

Comes now The Public Utilities Commission of the State of Colorado (hereinafter referred to as the Colorado Commission), by its counsel, under Rule 24 (a) and (c) (28 U. S. C. A. Federal Rules of Civil Procedure Rule 17-31) and petitions this Honorable Court to allow the Colorado Commission to intervene as a Plaintiff in the above entitled matter and for reasons therefor state:

1. Under Section 66, Chapter 137, 1935 Colorado Statutes Annotated, the Colorado Commission is authorized and empowered to appear and represent the interests and welfare of the people of the State of Colorado in all matters and proceedings involving any public utility or carrier pending before any Court, officer, department, board, com-

mission, or Court of the United States and to intervene in, protest, resist, or advocate the granting or denial of any petition, application, or complaint, or other proceeding affecting the people of the State of Colorado or some portion thereof as the public interest, convenience, or necessity may appear.

2. The Colorado Commission appeared and participated in the proceeding under Docket No. 30297 before the Interstate Commerce Commission as an intervener in support of the position of the Denver and Rio Grande Western Railroad Company, and in which the order of the Interstate Commerce Commission, in the above Docket Number, is here assailed and, therefore, the Colorado Commission is authorized to intervene in this proceeding as a right under the provisions of Section 2323 of the Judicial Code (28 [fol. 158] U. S. C. A., Section 2323).

3. The within proceeding will affect the people of the State of Colorado, or some portion thereof.

Wherefore, The Colorado Commission, as a State regulatory body of the State of Colorado, having jurisdiction to regulate intrastate railroad freight rates and charges within the State of Colorado, respectfully petitions this Court to allow the Colorado Commission to intervene in the above entitled action as a Plaintiff and to be permitted to file a Complaint, which is tendered herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure (28 U. S. C. A. Rule 24), with the right to have notice and to be treated in all other respects as if they had been named as Plaintiff, and for such other and further relief as the Court may deem proper.

Respectfully submitted, Duke W. Dunbar, Attorney General; William T. Secor, Assistant Attorney General, on behalf of The Public Utilities Commission of the State of Colorado and the individual members thereof.

[fol. 159] Certificate of Service (omitted in printing)

[fol. 160] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF WESTERN FOREST INDUSTRIES ASSOCIATION FOR LEAVE TO INTERVENE—Filed November 19, 1953

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now the Western Forest Industries Association, and hereby moves this Honorable Court for an order pursuant to Rules 24(a) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as party plaintiff in the above entitled proceeding.

I

That petitioner Western Forest Industries Association is an Oregon corporation with its principal place of business at 704 U. S. National Bank Building, Portland, Oregon. Its purpose is to aid and assist fellow members in the production, processing, marketing, and transportation in interstate and foreign commerce of lumber and lumber products and has an important and pecuniary interest in the issues involved in the instant proceeding.

II

That the petitioner was an intervening complainant before the Interstate Commerce Commission in the proceeding in which the order of that Commission is here assailed, and therefore is authorized to intervene in this proceeding as a matter of right under the provisions of Section 2323 of the Judicial Code (28 U. S. C. A., Section 2323).

[fol. 161] III

Accompanied herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure (28 U. S. C. A., Rule 24) is the Complaint of the petitioner, which complaint sets forth the claim for which intervention is sought.

Wherefore, Petitioner prays for an order granting it leave to intervene as plaintiff in the above entitled proceeding and to file the complaint which is tendered herewith with the right to have notice and to be treated in all other respects as if it had been named as plaintiff, and for such other and further relief as the Court may deem requisite in the premises.

Barry and Hupp, Attorneys at Law, 738 Majestic Building, Denver 2, Colorado, by John R. Barry, Attorneys for Petitioner, Western Forest Industries Association, 704 U. S. National Bank Building, Portland, Oregon.

[fol. 162] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF KOPPERS COMPANY, INC. FOR LEAVE TO INTERVENE—Filed November 19, 1953

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now Koppers Company, Inc., and hereby moves this Honorable Court for an order pursuant to Rule 24(b) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as party plaintiff in the above entitled proceedings.

I

That petitioner, Koppers Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in the City of Pittsburgh, Pennsylvania; that petitioner is, among other things, engaged in the business of processing wood and wood products at various points throughout the United States and maintains a plant at Salida, Colorado for this purpose; and that petitioner is engaged in the processing, marketing, and transportation

of wood and wood products in interstate commerce and foreign commerce, and has an important and pecuniary interest in the issues involved in the instant proceeding.

II

That petitioner, through its District Manager, Robert C. Johnson, of Denver, Colorado, entered testimony in Docket [fol. 163] No. 30297, the proceeding in which the order of the Interstate Commerce Commission is here assailed, and by such testimony duly showed that petitioner is vitally interested in the above proceedings; that petitioner has a wood-treating plant at Salida, Colorado, which is served exclusively by The Denver and Rio Grande Western Railroad; that a major source of supply of lumber for treatment at petitioner's Salida plant is in the states of Idaho, Oregon and Washington; that petitioner is unable to secure lumber in the above states for movement on or via the Union Pacific Railroad and the Denver and Rio Grande Western Railroad, through its Salida plant, at competitive joint rates, which situation unduly discriminates against petitioner's operation of its Salida plant, and unduly prefers petitioner's competitors located at points served by the Union Pacific Railroad, in the States of Colorado, Wyoming, Nebraska, Kansas and Missouri, in violation of Section 3(1) of the Interstate Commerce Act; that petitioner's plant at Salida, Colorado, was built in the year 1925 at an estimated cost of one-half million dollars and that the full benefits of this investment have never been and cannot be fully realized until such time as the source of lumber along the lines of the Union Pacific Railroad, in the states of Idaho, Oregon and Washington, is made available to petitioner at its Salida plant at joint competitive through rates; that 60% of the wood and wood products processed at petitioner's Salida plant moves to points beyond, and east and south of the State of Colorado; that the Chief Examiner of the Interstate Commerce Commission, in his proposed report in Docket No. 30297, realized the handicap under which petitioner operates, and would remove the unlawful discrimination by relief in the form of joint competitive through rates via Salida, Colorado; that The Interstate Commerce Commission failed to grant the relief recom-

mended by its Chief Examiner and continued the undue [fol. 164] discrimination against petitioner, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that petitioner will be bound by a judgment in this action and that its interest and the main action have questions of law and fact in common, and that petitioner's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

III

That pursuant to Rule 24(c) of the Rules of Civil Procedure (28 U. S. C. A., Rule 24) there is attached hereto the complaint of petitioner, which complaint sets forth the claim for which intervention is sought.

Wherefore, Petitioner prays for an order granting leave to intervene as plaintiff in the above entitled proceedings, and to file its complaint which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as plaintiff, and for such other and further relief as the Court may deem requisite in the premises.

Respectfully submitted, Barry and Hupp, by John R. Barry, Attorneys for Petitioner, 738 Majestic Building, Denver 2, Colorado.

Address of Petitioner: Pittsburgh, Pennsylvania.

[fol. 165] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING MOTIONS FOR LEAVE TO INTERVENE—November 20, 1953

The above-entitled cause came before this statutory Court, convened pursuant to the provisions of applicable statutes for a hearing of this suit wherein certain motions

and petitions were filed and heard this day, and the Court being fully advised in the premises, it is

Ordered:

1. That the motion of the Union Pacific Railroad Company; Chicago and Northwestern Railway Company; Chicago, St. Paul, Minneapolis and Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Wabash Railroad Company to intervene as defendants under Rule 24 be granted, and they are herewith made parties to the actions and their motions and answer shall be filed.

2. That the petition of the Pueblo Chamber of Commerce, the Arkansas Valley Stock Feeders Association and the Colorado Wool Growers' Association for leave to intervene as plaintiffs be granted and they are herewith joined as parties plaintiff and their complaint shall be filed.

3. That the petition of The Public Utilities Commission of the State of Colorado to intervene as a plaintiff be granted and they are herewith joined as party plaintiff and their complaint shall be filed.

[fol. 166] 4. That the petition of Western Forest Industries Association for leave to intervene as a plaintiff be granted and it is herewith joined as a party plaintiff and its complaint shall be filed.

5. That the petition of Koppers Company, Inc., for leave to intervene as a plaintiff be granted and it is herewith joined as a party plaintiff and its complaint shall be filed.

Dated at Denver, Colorado, this twentieth day of November, 1953.

Orie L. Phillips, Chief Judge, Tenth Circuit, United States Court of Appeals; Walter A. Huxman, Judge, Tenth Circuit, United States Court of Appeals; William Lee Knous, United States District Judge.

Approved as to Form: H. M. Boyle, Attorney D. & R. G. W.; Elmer B. Collins, Counsel for U. P. R. R. Co. and Other Railroads Intervening; Barry & Hupp, by Paul M.

Hupp, Counsel for Western Forest Industries, Koppers Company, Inc., Pueblo Chamber of Commerce, Arkansas Valley Stock Feeders Assn., Colorado State Wool Growers Assn., Intervenors, Interstate Commerce Commission; Geo. Howard, Atty.; Charles S. Vigil, U. S. Attorney, Colorado.

[fol. 167]. [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ORDER CONSTITUTING THREE-JUDGE COURT—November 19, 1953

Heretofore, on October 26, 1953, I made an order constituting a three-judge court to hear the above matter and designated Honorable Royce H. Savage, United States District Judge, as one member of such court. It appearing that Judge Savage will be unable to sit as a member of such court in certain matters in the above case, coming on for hearing at Denver, Colorado, on Friday, November 20, 1953.

Now, therefore, I designate Honorable Walter A. Huxman, a Judge of the United States Court of Appeals, Tenth Circuit, as a member of such three-judge court in the place of Honorable Royce H. Savage, to sit and hear the matters coming on for hearing on Friday, November 20, 1953.

Dated at Denver, Colorado, November 19, 1953.

Orie L. Phillips, Chief Judge, United States Court of Appeals, Tenth Circuit.

[fol. 168] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF WESTERN FOREST INDUSTRIES ASSOCIATION—Filed November 20, 1953

Pursuant to leave granted by this Court to become intervening plaintiff herein, the Western Forest Industries Association files its complaint.

I

For its complaint and to avoid reiteration and repetition, petitioner adopts as its own and as if pleaded herein, the complaint filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, Plaintiff prays that the relief requested in the complaint be granted.

Respectfully submitted, Barry and Hupp, 738 Majestic Building, Denver, Colorado, by John R. Barry, Attorneys for Petitioner, Western Forest Industries Association, 704 U. S. National Bank Building, Portland, Oregon.

[fol. 169] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF KOPPERS COMPANY, INC.—Filed November 20, 1953

Pursuant to leave granted by this Honorable Court to become intervening plaintiff herein, Koppers Company, Inc., files its complaint:

I

That plaintiff herein, Koppers Company, Inc., is a corporation duly organized and existing under and by virtue

of the laws of the State of Delaware, with its principal place of business in the City of Pittsburgh, Pennsylvania; that plaintiff is, among other things, engaged in the business of processing wood and wood products at various points throughout the United States and maintains a plant at Salida, Colorado, for that purpose; and that plaintiff is engaged in the processing, marketing and transportation of wood and wood products in interstate and foreign commerce, and has an important and pecuniary interest in the issues involved in the instant proceeding.

II

That plaintiff, through its District Manager, Robert C. Johnson, of Denver, Colorado, entered testimony in Docket No. 30297, the proceeding in which the order of the Interstate Commerce Commission is here assailed, and by such testimony duly showed that plaintiff is vitally interested in the above proceeding; that plaintiff has a wood-treating plant at Salida, Colorado, which is served exclusively by [fol. 170] The Denver and Rio Grande Western Railroad; that a major source of supply of lumber for treatment at plaintiff's Salida, Colorado plant is in the states of Idaho, Oregon and Washington; that plaintiff is unable to secure lumber in the above states for movement on or via the Union Pacific Railroad and the Denver and Rio Grande Western Railroad through its Salida plant at competitive joint rates, which situation unduly discriminates against plaintiff's operation of its Salida plant, and unduly prefers plaintiff's competitors located at points served by the Union Pacific Railroad in the states of Colorado, Wyoming, Nebraska, Kansas and Missouri, in violation of Section 3(1) of the Interstate Commerce Act; that plaintiff's plant at Salida was built in the year 1925 at an estimated cost of one-half million dollars and that the full benefits of this investment have never been and cannot be fully realized until such time as the source of lumber along the lines of the Union Pacific Railroad, in the states of Idaho, Oregon and Washington, is made available to plaintiff at its Salida plant at joint competitive through rates; that 60% of the wood and wood products processed at plaintiff's Salida plant moves to point beyond, and east and south

of Colorado; that the Chief Examiner of the Interstate Commerce Commission, in his proposed report in Docket No. 30297, realized the handicap upder which plaintiff operates and would remove the unlawful discrimination by relief in the form of joint competitive through rates via Salida, Colorado; that the Interstate Commerce Commission failed to grant the relief recommended by its Chief Examiner and continued the undue discrimination against plaintiff, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that plaintiff will be bound by a judgment in this action and that its interest and the main action have questions of law and fact in [fol. 171] common, and that plaintiff's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

III

To avoid reiteration and repetition, plaintiff adopts as its own, and as if pleaded herein, the complaint, as amended, filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, plaintiff prays that the relief requested in the complaint be granted.

Respectfully submitted, Barry and Hupp, by John R. Barry, Attorneys for Plaintiff, Koppers Company, Inc., 738 Majestic Building, Denver, Colorado.

Address of Plaintiff: Koppers Company, Inc.; Pittsburgh, Pennsylvania.

[fol. 172] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF PUEBLO CHAMBER OF COMMERCE, ET AL.—Filed November 20, 1953

Pursuant to leave granted by this Court to become intervening plaintiffs herein, the Pueblo Chamber of Commerce, the Arkansas Valley Stock Feeders Association and the Colorado State Wool Growers Association, file their complaint.

I

For its complaint and to avoid reiteration and repetition, petitioner adopts as its own and as if pleaded herein the complaint filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, Petitioner prays that the relief requested in the complaint be granted.

Respectfully submitted, Barry and Hupp, Attorneys at Law, 738 Majestic Building, Denver 2, Colorado, by John R. Barry, Attorneys for Petitioners, Arkansas Valley Stock Feeders Association, Colorado State Wool Growers Association, Pueblo Chamber of Commerce.

[fol. 173] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO—Filed November 20, 1953

Pursuant to leave granted by this Honorable Court to become an intervening Plaintiff herein, The Public Utilities Commission of the State of Colorado files its Complaint:

1. Under Section 66, Chapter 137, 1935 Colorado Statutes Annotated, the Colorado Commission is authorized and em-

powered to appear and represent the interests and welfare of the people of the State of Colorado in all matters and proceedings involving any public utility or carrier pending before any Court, officer, department, board, commission, or Court of the United States and to intervene in, protest, resist, or advocate the granting or denial of any petition, application, or complaint, or other proceeding affecting the people of the State of Colorado or some portion thereof as the public interest, convenience, or necessity may appear.

2. To avoid repetition, Petitioner adopts as its own and as pleadings herein the Complaint, as amended, filed in this Court by the Denver and Rio Grande Western Railroad Company, Plaintiff herein.

[fol. 174] Wherefore, Petitioner prays that the relief requested in the Complaint be granted.

Respectfully submitted, Duke W. Dunbar, Attorney General, Frank W. Wachob, Deputy Attorney General, William T. Secor, Assistant Attorney General, on behalf of The Public Utilities Commission of the State of Colorado and the individual members thereof.

[fol. 175] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNION PACIFIC RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, ST PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; AND WABASH RAILROAD COMPANY, INTERVENING DEFENDANTS.—Filed November 20, 1953

The above-named Intervening Defendants, for answer to the complaint filed herein, say:

I

These intervenors admit the allegations of paragraph I of the complaint, except that they deny that the plaintiff

(hereinafter called "Rio Grande") has any such "pecuniary" or other legal interest or legal right as to entitle it to maintain this suit; and they further deny that any "part" of or language in the Commission's said order of January 12, 1953, denies any right or makes any requirement of the Rio Grande, or embraces or makes any commitment concerning the grievances alleged in the complaint.

II

These intervenors admit the allegations of paragraph II of the complaint, except that they deny the allegation therein that "Plaintiff is an important and necessary part of the railroad transportation system of the United States;" [fol. 176] deny that the Rio Grande is either important or necessary for the transportation of the traffic it seeks to divert to its lines from the lines of these intervenors; and deny that the statements in the last paragraph of said paragraph II are either relevant or material to the issues which the complaint attempts to raise.

III

These intervenors admit the allegations of paragraphs III and IV of the complaint.

IV

These intervenors deny that the allegations of paragraphs V and VI of the complaint are either relevant or material to any issue which the complaint attempts to raise.

V

These intervenors admit the allegations of paragraph VII of the complaint, except that they deny that Union Pacific Railroad Company "or other defendants" did not cancel the through routes and joint rates therein mentioned; deny that through routes now exist or have existed for many years between the points indicated in "(a)" and "(b)" of said paragraph; and deny that the Rio Grande's complaint to the Commission alleged that said combination of rates via its line were "unduly prejudicial".

VI

These intervenors admit the allegations of paragraph VIII of the complaint, but deny that said allegations are either relevant or material to any issue which the complaint attempts to raise.

VII

Answering the allegations of paragraph IX, these intervenors admit that the Commission stated the "conclusions" set forth in said paragraph, but deny that the allegations in the last sub-paragraph of said paragraph IX are either relevant or material to any issue which the complaint attempts [fol. 177] to raise.

VIII

Answering paragraph X, these intervenors admit that petitions for reconsideration of various parties to the Commission proceding were filed with and denied by the Commission.

IX

These intervenors admit the allegations of paragraph XI, of the complaint.

X

These intervenors deny that the Commission's said order is unlawful for any of the reasons alleged in paragraph XII of the complaint, deny that said allegations correctly describe the Commission's action concerning the matters therein alleged, and deny that any "part" of the order embraces, or makes any requirement of the Rio Grande concerning, any of the matters with respect to which the complaint alleges the order to be unlawful. These intervenors admit that the Commission prescribed through routes and joint rates applicable to the commodities specified in the order (Appendix B to the complaint) but deny that it acted lawfully in doing so.

XI

Except as herein expressly admitted, these intervenors deny each and every allegation made in the complaint.

Wherefore, having fully answered the allegations of the complaint, these intervenors pray that the relief sought be

denied and that the complaint be dismissed with costs to the plaintiff.

Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, 300 International Trust Building, Denver, Colorado, Attorneys for Intervening Railroads.

[fol. 178] CERTIFICATE AS TO SERVING OF COPIES OF BRIEF OF UNION PACIFIC RAILROAD COMPANY, ET AL.

(Omitted in printing)

[fol. 179] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

STATEMENT OF UNITED STATES IN RESPONSE TO THE COURT'S REQUESTS AT THE HEARING ON THE MOTIONS TO TRANSFER THE ABOVE-ENTITLED CASE TO THE DISTRICT COURT IN NEBRASKA—Filed December 7, 1953

At the hearing held at Denver on Friday, November 20, 1953, to transfer this case to the district court of Nebraska, the Court reserved its ruling and asked the various counsel to prepare briefs or statements of views with respect to three questions:

1. Whether or not the provisions of section 1398 of the Judicial Code are jurisdictional or relate only to venue.

2. If section 1398 is a venue section, does the Court have the power to transfer the action without the consent of those opposed to transfer?

3. Does the intervention of the Rio Grande in the suit brought by the Union Pacific in the district court of Nebraska, attacking the same order of the Interstate Commerce Commission, constitute a submission to the jurisdiction of the Nebraska court, or in any way affect venue under section 1398?

The Interstate Commerce Commission has filed a brief dealing with these three questions, and the United States has expressly adopted this brief in so far as it relates to the power of the Court. In accordance with the Court's further request, this memorandum is submitted as a brief supplemental statement of the considerations which have led the United States to its views with respect to the questions. Since the cases are collected in the brief of the [fol. 180] Commission and the other briefs filed, no effort will be made to compile the authority. The questions will be taken up in order.

1. Is section 1398 a jurisdictional or venue section?

Although it is possible to argue plausibly from a strict interpretation of the words used in this section and in related sections that the requirements of the section are jurisdictional,[1] it is our very definite opinion that the sec-

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[1] It will be noted that section 1398 provides that the actions "*shall* be brought *only*" in the judicial district of the plaintiff's place of business. Thus the section uses the mandatory "shall," and grammatically emphasizes the mandatory quality by the adverb "only." It will be noted that all other sections in chapter 87 use the permissive term "may," except section 1403, which relates to eminent domain, of necessity a local action. Likewise, the only other section in the chapter which uses the word "only" is section 1402, which relates to suits against the United States. Under a strict application of the maxim of construction, *ut res magis valeat quam pereat*, it is certainly logical to contend that section 1398 localizes an action to set aside an order of the Interstate Commerce Commission in a jurisdictional sense. This position would seem to be further strengthened by the fact that section 43 of the 1940 edition of the Judicial Code, from which the present action was drawn, provided that "venue . . . shall be" in the district of the residence or principal place of business. Thus the revision of 1948 deleted the word "venue" and added the word "only" in re-enacting the parent section of the Code. Under the doctrine of *In re Collett*, 337 U.S. 55, and *National City Lines* v. *United States*, 337 U.S. 78, changes of

tion relates to venue only. The following considerations lead to this conclusion:

(a) Strong force should be given to the fact that chapter 87 of the Judicial Code relates expressly to venue, and all of the other sections in the chapter, with the possible exception of the section relating to eminent domain, are clearly venue provisions. The maximum *ejusdem generis* is certainly peculiarly applicable to a close-knit statutory chapter of the type involved.

(b) The revisers' notes clearly indicate that it was the intention of the revisers of 1948 to re-enact and rewrite the provisions of section 43 of the Code of 1940. This was expressly a venue section. Of course, it is established that the revisers' notes are authoritative in so far as interpretation is concerned.

[fol. 181] (c) It will be noted that section 1398 was originally proposed by the Judicial Conference in a form different from that finally enacted. The proposal of the Judicial Conference expressly stated that the provision was one of "venue." The deletion of the term "venue" from the proposal is without explanation in the legislative history, and undoubtedly took place at that phase of the legislative process where the technical staff employed to draft the Code reworked the various sections. Thus at the heart of the legislative process there seems to have been no doubt in the mind of anybody concerned that the section related to venue.[2]

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this character in the revision of 1948 are to be given their logical and plain effect, the theory being that the revision was a carefully worked out, scientific piece of legislation, and that the changes were not accidental or thoughtless. As an illustration of the difficulty of interpreting the words "shall" and "may" in a venue statute, see *Mosley* v. *Sunshine Biscuits*, 107 F. Supp. 164.

[2] In *Spiegel, Inc.* v. *United States et al.*, Civil Action No. 2785-51, decided in the district court for the District of Columbia in 1951, a Chicago corporation brought an action in the district court of the District of Columbia invoking the jurisdiction to set aside orders of the Interstate Commerce Commission. The particular case involved a suit

(d) Where a statute is ambiguous with respect to the question of jurisdiction or venue, the courts usually construe the provisions liberally as relating to venue. Although no Federal cases have been found which make a clear statement of this rule, it is accepted doctrine in the State courts and seems implicit in the Federal decisions of the type cited in the brief of the Union Pacific.

(e) There seems to be no valid reason why an action to set aside an order of the Interstate Commerce Commission should be mandatorily localized. For many years the statute providing for the place for such a suit was clearly one of venue. An intentional change of this long-established policy would certainly have been noted by someone in the process of the enactment of the revision.

2. If section 1398 is properly a venue section, could the Court transfer the action without the consent of those opposed to transfer?

[fol. 182] We take it to be clear that the consent of the intervening defendants is not necessary. Since both the United States and the Interstate Commerce Commission, the two primary defendants, expressly consent to the transfer, it seems that the question is academic. Of course, the question was expressly left open by Judge Biggs in *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, and has never been unequivocally answered by the courts. Under these circumstances, the Department would prefer not to express a categorical opinion with respect to the question, since of course it cannot completely predict the position it may be called upon to take in the future. We do call the Court's attention to *Wiren* v. *Laws*, 194 F. 2d 873. In this case Judge Laws, the Chief Judge of the District Court for the

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to set aside joint action by the Interstate Commerce Commission and the Postmaster General promulgating parcel-post rates. At this time consideration was given to whether or not section 1398 was jurisdictional, even to the point of inquiring about the change in the language from persons who were intimately connected with the final drafting. No explanation of the change was found, and the Department proceeded on the theory that the section related to venue. The case was finally disposed of in the District of Columbia.

District of Columbia, ordered the transfer of a case to a district court in New York under section 1404 (a) "sua sponte," apparently without the consent of either party. On petition for writ of mandamus, the Court of Appeals held that under the peculiar circumstances of the case the order of transferral was improper. It was expressly recognized in the opinion, however, that transfers could be made under section 1404 (a) without the consent of the parties. See opinion, page 875.[3] A removal under the section without consent seems reasonable, because the defendants' right to plead venue would seem to have no more weight in reason than the plaintiff's right to select venue, and section 1404 (a) of course overrides the latter.

3. Does the intervention of the Rio Grande in the suit brought by the Union Pacific in the district court of Nebraska, attacking the order of the Interstate Commerce Commission involved in the instant case, constitute a submission to the jurisdiction of the Nebraska court, or in any way constitute a relinquishment of its right to claim venue under section 1398?

[fol. 183] Since it is the Department's view that section 1398 is a venue section, the question with respect to the submission to jurisdiction seems moot. With respect to the effect of intervention in Nebraska on the plaintiff's right to claim venue in Colorado in a separate case and rely on the attendant doctrines in its favor on the motion to transfer, it is our opinion that the intervention does not affect the plaintiff's position on the motion. Although the two cases involve the same order of the Commission, the actions are quite distinct and are in reality at opposite poles with respect to theory, gravamen, and relief sought. The Rio Grande was of course the railroad primarily con-

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[3] It should be noted that *Wiren* v. *Laws* was a well-considered case by a court made up of judges who have shown a particular interest in matters of procedural form. Likewise, the court had the advantage of very able counsel on both sides: one was a former dean of Harvard Law School, and the other a leading trial lawyer at the Washington Bar, assisted by the professor of federal procedure at Georgetown University.

cerned with the attack on the Commission's order in Nebraska, and certainly it was entitled to make its position clear in that case, and the Nebraska court was entitled to a full presentation of its position. A doctrine which would require the Rio Grande to waive its right to claim venue in its separate action, when out of practical necessity it joined in the Nebraska case, would seem clearly inequitable. No authority has been found on this point.

Respectfully submitted, E. Riggs McConnell, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.

December 4, 1953.

[fol. 184] [File endorsement omitted]

EVIDENCE OF SERVICE OF MEMORANDUM OF PLAINTIFF ON MOTION TO TRANSFER—Filed December 14, 1953

Law Offices of Norman & Quirk, Investment Building, Washington 5, D. C.

Honorable Orie L. Phillips,
Circuit Court of Appeals,
Denver, Colorado.

Dear Sir:

There is enclosed herewith a copy of a Memorandum Brief for the plaintiff, The Denver and Rio Grande Western Railroad Company, in Civil Action No. 4492, filed in response to the request of the three-judge court, composed of the Honorable Walter A. Huxman, of Topeka, Kans., of the Hon. William Lee Knous, of Denver, Colo., and yourself, which was made during the oral hearing at Denver, Colo., November 20, 1953, on the motion of the Interstate Commerce Commission to transfer the suit to the District Court of Nebraska, Omaha Division.

A copy of the enclosed brief has been sent to Judge Huxman at Topeka, Kans., and to Judge Knous at Denver. A

copy has also been sent to the Clerk of the United States District Court at Denver and to each of the interest parties.

Very truly yours, Robert E. Quirk, Attorney for the Plaintiff.

[fol. 185] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES—Filed December 21, 1953

Now comes the United States of America, defendant, and answering the amended complaint filed in this action admits, denies, and avers as follows:

1. Answering the allegations contained in paragraphs I, II, III, IV, V, and VI of the amended complaint, the United States admits the same, except that the United States respectfully refers the Court to the order of the Commission of January 12, 1953, which is attached to the original complaint as appendix B, for a complete and accurate statement of the matters contained therein.

2. Answering the allegations contained in paragraph VII of the amended complaint, the United States admits that the complaint of The Denver and Rio Grande Western Railroad Company, filed with the Commission as alleged, contained the various allegations stated in said paragraph, but denies any implication that through routes now exist and have existed between the points indicated in subparagraphs (a) and (b) of paragraph VII.

3. Answering the allegations contained in paragraphs VIII, IX, X, and XI of the amended complaint, the United States admits the same.

4. Answering the allegations contained in paragraph XII of the amended complaint, the United States admits that the order of the Commission which is the subject of [fol. 186] this action prescribed through routes and joint routes with respect to certain commodities, but respectfully refers the Court to the order itself for a full and complete

statement of the matters contained therein. Further answering the allegations contained in paragraph XII of the amended complaint, the United States denies each and every allegation contained therein.

Wherefore, having fully answered the amended complaint, the United States prays that the relief therein sought be denied and the complaint dismissed, with costs to the plaintiff.

Respectfully submitted, James E. Kilday, E. Riggs McConnell, Special Assistants to the Attorney General, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

Stanley N. Barnes, Assistant Attorney General. Donald E. Kelley, United States Attorney.

Certificate of Service (omitted in printing)

[fol. 187] [File endorsement omitted]

In United States District Court

[Title omitted]

Answer of Interstate Commerce Commission—Filed December 21, 1953

The Interstate Commerce Commission, one of the defendants in the above-entitled case, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint and amended complaint contained, for answer thereunto or unto so much or such parts, thereof as it is advised that it is material for it to answer, answers and says:

First Defense

Plaintiff is without right or standing to maintain this suit in that the complaint and amended complaint fail to allege and state a cause of action. *Columbia Broadcasting System*

v. *United States*, 316 U. S. 407, 415; *General Investment Co.* v. *New York Central R. R.*, 271 U. S. 228, 230-231; *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119; *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486; *Sprunt & Son* v. *United States*, 281 U. S. 249, 257; *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 148.

[fol. 188] Second Defense

Without waiving the first defense, the Commission answers the complaint as amended filed herein as follows:

I

Answering the allegations of paragraph I of the complaint, the Commission admits the same, except that it denies that plaintiff has any right or standing to maintain this suit as alleged in its first defense stated above. Further answering paragraph I, the Commission denies that any part of, or language in, its said order of January 12, 1953, contravenes any right of plaintiff.

II

Answering the allegations of paragraphs II, III, IV, V and VI of the complaint, the Commission admits the same.

III

Answering the allegations of paragraph VII of the complaint, the Commission admits that the complaint of The Denver and Rio Grande Western Railroad Company filed in the Commission proceedings contained the allegations stated in said paragraph, except it denies any implication that through routes now exist and have existed between the points indicated in subparagraphs (a) and (b) of said paragraph VII.

IV

Answering the allegations of paragraphs VIII, IX, X and XI of the complaint, the Commission admits the same.

V

Answering the allegations of paragraph XII of the complaint and the amendment thereto, the Commission admits that in its order here under attack through routes and joint

rates were prescribed as alleged but respectfully refers the [fol. 189] Court to the order for a full, true and accurate description of the commodities involved in the territory covered by said order. Further answering said paragraph, the Commission denies that its order of January 12, 1953, is unlawful, arbitrary, capricious or contrary to the evidence and the law for any of the reasons stated in said paragraph, or for any other reason or reasons and denies the allegations contained in the amended complaint designated as "Paragraph XII (a)."

VI

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint and amended complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint and the amended complaint be dismissed.

Interstate Commerce Commission, by Edward M. Reidy, Chief Counsel; Samuel R. Howell, Assistant Chief Counsel.

[fol. 190] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF WESTERN FOREST INDUSTRIES ASSOCIATION—Filed December 21, 1953

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of the Western Forest Industries Association, intervening plaintiff herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and

Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II

Answering paragraph 1 of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII, inclusive, of said plaintiff's complaint as amended.

[fol. 191] Wherefore, having fully answered the allegations of the intervening complaint herein, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel. Samuel R. Howell, Assistant Chief Counsel.

[fol. 192] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO—Filed December 21, 1953

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of The Public Utilities Commission of the State of Colorado, intervening plaintiff herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II

Answering paragraph 1 of the intervening complaint, the Commission admits that the Colorado Commission has au-

thority "to appear and represent the interests and welfare of the people of the State of Colorado in all matters and proceedings involving any public utility or carrier pending before any Court," and to intervene in such proceedings "as the public interest" may require, in all cases wherein it has a legal right or standing to do so, but it is denied that it [fol. 193] has such a right or standing in this case. Therefore, in respect to the question of the right or standing to maintain this suit, the Commission relies on its aforesaid "First Defense."

III

Answering paragraph 2 of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII, inclusive, of said plaintiff's complaint as amended.

Wherefore, having fully answered the allegations of the intervening complaint herein, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel. Samuel R. Howell, Assistant Chief Counsel.

[fol. 194] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF KOPPERS COMPANY, INC.—Filed December 21, 1953

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of the

Koppers Company, Inc., intervening plaintiff herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II

Answering paragraph I of the intervening complaint, the Commission admits the same, except that it denies that the intervening plaintiff has any standing to intervene in this suit, and it, therefore, relies on its aforesaid "First Defense."

III

Answering paragraph II of the intervening complaint, the Commission admits that intervening plaintiff entered testi- [fol. 195] mony in the proceedings in Docket No. 30829, out of which this suit arises; that it has a wood-treating plant at Salida, Colo., which is served by the Rio Grande Railroad; that a source of its supply of lumber is in Idaho, Oregon and Washington, and that it does not have joint rates applicable to the movement of lumber via the Union Pacific and the Rio Grande, from origins on the Union Pacific in the aforesaid States, through Salida, Colo., to destination points east of the Missouri River; that the Commission did not approve the recommendation of its Chief Examiner to authorize through rates on many of the commodities involved in the proceeding in Docket No. 30829, including lumber, but the Commission denies that the absence of joint rates on lumber from origins on the Union Pacific in the States of Idaho, Oregon and Washington via the Union Pacific and the Rio Grande through Salida unduly discriminates against intervening plaintiff's operations at that point and unduly prefers its competitors located at points served by the Union Pacific in the States of Colorado, Wyoming, Nebraska, Kansas, and Missouri in violation of Section 3(1) of the Act; and further denies that the results of the Commission's action herein causes, or will cause, undue discrimination against intervening plaintiff.

IV

Answering paragraph III of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII of said plaintiff's complaint as amended.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the intervening complaint, insofar as they conflict with the allegations herein.

[fol. 196] All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said intervening complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel. Samuel R. Howell, Assistant Chief Counsel.

[fol. 197] CERTIFICATE OF SERVICE OF AMENDMENT TO ORIGINAL COMPLAINT AND TO INTERVENING COMPLAINTS—(Omitted in Printing)

[fol. 198] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENING RAILROADS TO AMENDMENT TO ORIGINAL COMPLAINT AND TO INTERVENING COMPLAINTS—Filed January 8, 1954

Now come Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company;

Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, intervening defendants in the above-entitled case, and for their answers to the amendment to the original complaint herein and to the intervening complaints of the Public Utilities Commission of the State of Colorado, Western Forest Industries Association, Koppers Company, Inc., Pueblo Chamber of Commerce, Arkansas Valley Stock Feeders Association, and Colorado State Wool Growers Association, these intervening defendants respectfully adopt and rely upon their Motion to Dismiss and their Answer to the original complain in this case.

Wherefore, having fully answered, these intervening defendants pray that the original complaint as amended [fol. 199] and the intervening complaints herein be dismissed with costs to the plaintiff and to the intervening plaintiffs.

Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, 300 International Trust Bldg., Denver, Colorado, Telephone MAin 0196, Attorneys for Intervening Railroads

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[fol. 200] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF HOLLY SUGAR CORPORATION—Filed January 18, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of the Holly Sugar Corporation, intervening plaintiff herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver

and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II

Answering paragraph I of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII, inclusive, of said plaintiff's complaint as amended.

[fol. 201] Wherefore, having fully answered the allegations of the intervening complaint herein, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, Edward M. Reidy, Chief Counsel, Samuel R. Howell, Assistant Chief Counsel.

[fol. 202] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENING RAILROADS TO INTERVENING COMPLAINT OF HOLLY SUGAR CORPORATION—Filed January 22, 1954

Now come Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railroad Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, intervening defendants in the above-entitled case, and for their answer to the intervening complaint of Holly Sugar Corporation, these intervening defendants respectfully adopt and rely upon their Motion to Dismiss and their Answer to the original complaint in this case.

Wherefore, having fully answered, these intervening defendants pray that the original complaint as amended [fol. 203] and the intervening complaint of said Holly Sugar Corporation be dismissed with costs to the plaintiff and to said intervening plaintiff.

Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, International Trust Bldg., Denver, Colorado, Telephone MAin 0196, Attorneys for Intervening Railroads.

[fol. 204] Certificate of Service of Answer—(Omitted in Printing)

[fol. 205] [File endorsement omitted]

In United States District Court

[Title omitted]

Order Denying Motion of Interstate Commerce Commission to Transfer Suit—January 28, 1954

This matter having heretofore been heard by the Court on the Motion of the Interstate Commerce Commission to Transfer Suit, which was taken under advisement, and after due consideration by the Court, it is

Ordered that the Motion of the Interstate Commerce Commission to Transfer Suit be denied.

Dated at Denver, Colorado, this 28th day of January, A. D. 1954.

By the Court: Orie L. Phillips, Chief Judge, Tenth Circuit, United States Court of Appeals; Walter A. Huxman, Judge, Tenth Circuit, United States Court of Appeals; William Lee Knous, United States District Judge.

[fol. 206] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF HOLLY SUGAR CORPORATION FOR LEAVE TO INTERVENE—Filed January 7, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now Holly Sugar Corporation and hereby moves this honorable Court for an order pursuant to Rule 24(a) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as a party plaintiff in the above entitled proceedings.

1. Petitioner is a corporation organized under the corporate laws of the State of New York. Petitioner is authorized to and does engage in, among other things, the buying, selling and shipping of livestock in interstate commerce and therefore has an important and pecuniary interest in the issues involved in the instant proceeding.

2. Petitioner was an intervener before the Interstate Commerce Commission in the proceeding in which the order of that Commission is here assailed; and therefore is authorized to intervene in this proceeding as a matter of right under the provisions of Section 2323 of the Judicial Code (28 U.S.C. Section 2323).

[fol. 207] 3. Accompanying this petition, pursuant to the provisions of Rule 24(c) of the Federal Rules of Civil Procedure (28 U.S.C. Rule 24), is the complaint of petitioner, which complaint sets forth the claim for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as plaintiff in the above entitled proceeding and to file the complaint which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as plaintiff, and for such other and further relief as the Court may deem requisite in the premises.

Lowe P. Siddons, Dennis O'Rourke, Attorneys for Petitioner, Colorado Springs, Colorado.

[fol. 208] CERTIFICATE OF SERVICE—(Omitted in Printing)

[fol. 209] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF HOLLY SUGAR CORPORATION—Filed April 12, 1954

Pursuant to leave granted by this Court to become an intervening plaintiff herein, Holly Sugar Corporation files its complaint.

I

For its complaint and to avoid reiteration and repetition, plaintiff Holly Sugar Corporation adopts as its own and as if pleaded herein the complaint filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, Plaintiff Holly Sugar Corporation prays that the relief requested in the complaint be granted.

Respectfully submitted, Lowe P. Siddons, Dennis O'Rourke, Attorneys, Holly Sugar Building, Colorado Springs, Colorado, Attorneys for Plaintiff, Holly Sugar Corporation.

[fol. 210] CERTIFICATE OF SERVICE—(Omitted in Printing)

[fol. 211] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF IDAHO FARM BUREAU FEDERATION FOR LEAVE TO INTERVENE—Filed March 5, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now The Idaho Farm Bureau Federation and hereby moves this Honorable Court for an order pursuant to Rule 24(a) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as party plaintiff in the above entitled proceeding.

1. Petitioner, The Idaho Farm Bureau Federation, represents 11,000 farm families who are residents of the State of Idaho, and is an Idaho corporation, with offices in Pocatello, Idaho. Petitioner has an important and pecuniary interest in the issues involved in the instant proceeding.

2. Petitioner was an intervening complainant before the Interstate Commerce Commission in the proceedings in which the order of that Commission is here assailed and therefore is authorized to intervene in this proceeding as of right under the provisions of Section 2323 of the Judicial Code (28 U.S.C.A., Section 2323).

3. Accompanied herewith, pursuant to provisions of Rule 24(c) of the Federal Rules of Civil Procedure (28 U.S.C.A.) is the complaint of the petitioner, which complaint sets forth [fol. 212] the claim for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as plaintiff in the above entitled proceeding, and to file the complaint which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as plaintiff, and for such other and further relief as the court may deem requisite in the premises.

Respectfully submitted, Lloyd D. Browning, Atty., Idaho Farm Bureau Fed., Hub Bldg., Pocatello, Idaho; Barry & Hupp, by Paul M. Hupp, Attorneys for Petitioner, 738 Majestic Building, Denver 2, Colorado.

[fol. 213] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF THE IDAHO FARM BUREAU FEDERATION—Filed April 12, 1954

Pursuant to leave granted by this court to become intervening plaintiff herein, The Idaho Farm Bureau Federation files its complaint:

I

For its complaint and to avoid reiteration and repetition, Plaintiff adopts as its own and as if pleaded herein, the complaint as amended, filed in this court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, plaintiff prays that the relief requested in the complaint be granted.

Lloyd D. Browning, Attorney, Idaho Farm Bureau Fed., Hub Bldg., Pocatello, Idaho; Barry & Hupp, by Paul M. Hupp, Attorneys for Petitioner, 738 Majestic Building, Denver 2, Colorado.

[fol. 214] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF KNUDSEN BUILDERS SUPPLY CO., INC., FOR LEAVE TO INTERVENE—Filed March 5, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now Knudsen Builders Supply Company, Inc., and hereby moves this Honorable Court for an order pursuant to Rule 24(b) and (c) of the Federal Rules of Civil Pro-

cedure to intervene as party plaintiff in the above entitled proceedings.

1. Your petitioner, Knudsen Builders Supply Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business in Salt Lake City, Utah; that petitioner is, among other things, engaged in the business of selling a full line of building materials, which building materials are consigned to various dealers and branches of its company located in western Colorado, Utah and Idaho; that petitioner transports building materials in interstate commerce and has an important and pecuniary interest in the issues involved in the instant proceeding.

2. That petitioner, through its President and General Manager, Mr. J. Arthur Knudsen, of Salt Lake City, Utah, entered testimony in Docket No. 30297, in which proceeding the order of the Interstate Commerce Commission is here assailed, and by such testimony showed that petitioner is vitally interested in the above proceeding; that petitioner receives from four hundred to five hundred cars of supplies and building materials per year in the conduct of its busi- [fol. 215] ness and that one hundred fifty to two hundred of these cars move from the eastern part of the United States. These cars contain roofing, insulation, wall board and a full line of building materials and originate at various points in the United States, from the Missouri River on the west to the Atlantic Seaboard on the East and from Minnesota on the north to the Gulf of Mexico on the south, and are consigned to various dealers and branches of petitioner in western Colorado, Utah and Idaho. Frequently these are pool cars, as in the case of Celotex which moves from Louisiana. Such pool cars contain about 56,000 feet of Celotex and are stopped four or five times enroute for partial unloading. Petitioner cannot always time its shipments for its western Colorado customers (Grand Junction, Colorado, for example) with cars that are consigned north of Ogden, Utah. In view of this fact petitioner is precluded from the possibility of serving its Colorado customers from such cars since there are no joint rates between The Denver and Rio Grande Western Railroad Company and the Union Pacific Railroad Company covering movements north of Og-

den. If joint through rates were established for shipments moving to points north of Ogden, between the Union Pacific and the Denver and Rio Grande Western Railroad, petitioner would be able to give better service to its customers in the western part of Colorado and effect savings for them which would build up their financial capacity, increase their efficiency, and enable petitioner to do more business with them. By the same token petitioner is precluded from aggressively soliciting business of certain customers in western Colorado because the cars which petitioner knows will terminate in Salt Lake City are so few that it does not include the Denver and Rio Grande Western Railroad in the routing of said cars. Petitioner's shipments must remain flexible so as to permit diversion or placement of its cars on original routing so they will end up at its Pocatello, Idaho, warehouse. This situation unduly discriminates against petitioner's dealers and branches located in western Colorado, Utah and Idaho, and unduly prefers petitioner's competitors located at points served by the Union Pacific Railroad [fol. 216] in the States of Colorado, Idaho, Utah, Wyoming, Nebraska, Kansas and Missouri, in violation of Section 3(1) of the Interstate Commerce Act. The order of the Interstate Commerce Commission, here assailed, failed to grant the relief requested by The Denver and Rio Grande Western Railroad Company and continued the undue discrimination against petitioner which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that petitioner will be bound by a judgment in this action and that its interests and the main action have questions of law and fact in common; and that petitioner's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

3. That pursuant to Rule 24(c) of the Rules of Civil Procedure (28 U.S.C.A., Rule 24) there is attached hereto the complaint of petitioner, which complaint sets forth the claim for which intervention is sought.

Wherefore, Petitioner prays for an order granting leave to intervene as plaintiff in the above entitled proceeding, and to file its complaint which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as plaintiff, and for such other and

further relief as the Court may deem requisite in the premises.

Respectfully submitted, Barry and Hupp, by Paul M. Hupp, Attorneys for Petitioners, 738 Majestic Building, Denver 2, Colorado.

Address of Petitioner: Salt Lake City, Utah.

[fol. 217] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF KNUDSEN BUILDERS SUPPLY CO., INC.—Filed April 12, 1954

Pursuant to leave granted by this Honorable Court to become intervening plaintiff herein, Knudsen Builders Supply Company, Inc., files its complaint.

I

That plaintiff, Knudsen Builders Supply Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business in Salt Lake City, Utah; that plaintiff is, among other things, engaged in the business of selling a full line of building materials, which building materials are consigned to various dealers and branches of its company located in western Colorado, Utah and Idaho; that plaintiff transports building materials in interstate commerce and has an important and pecuniary interest in the issues involved in the instant proceeding.

II

That plaintiff, through its President and General Manager, Mr. J. Arthur Knudsen, of Salt Lake City, Utah, entered testimony in Docket No. 30297, in which proceeding the order of the Interstate Commerce Commission is here assailed, and by such testimony showed that plaintiff is vitally interested in the above proceeding; that plaintiff re-

ceives from 400 to 500 cars of supplies and building materials per year in the conduct of its business and that 150 to 200 of these cars move from the eastern part of the United States. These cars contain roofing, insulation, wall [fol. 218] board and a full line of building materials and originate at various points in the United States, from the Missouri River on the west to the Atlantic Seaboard on the east, and from Minnesota on the north to the Gulf of Mexico on the south, and are consigned to various dealers and branches of plaintiff in western Colorado, Utah and Idaho. Frequently these are pool cars, as in the case of Celotex, which moves from Louisiana. Such pool cars contain about 56,000 feet of Celotex and are stopped four or five times enroute for partial unloading. Plaintiff cannot always time its shipments for its western Colorado customers (Grand Junction, Colorado, for example) with cars that are not consigned north of Ogden, Utah. In view of this fact plaintiff is precluded from the possibility of serving its Colorado customers from such cars since there are no joint rates between The Denver and Rio Grande Western Railroad Company and the Union Pacific Railroad Company covering movements north of Ogden. If joint through rates were established for shipments moving to points north of Ogden, between the Union Pacific and The Denver and Rio Grande Western Railroad, plaintiff would be unable to give better service to its customers in the western part of Colorado and effect savings for them which would build up their financial capacity, increase their efficiency, and enable plaintiff to do more business with them. By the same token plaintiff is precluded from aggressively soliciting business of certain customers in western Colorado because the cars which plaintiff knows will terminate in Salt Lake City are so few that it does not include the Denver and Rio Grande Western Railroad in the routing of said cars. Plaintiff's shipments must remain flexible so as to permit diversion or placement of its cars on original routing so they will end up at plaintiff's Pocatello, Idaho, warehouse. This situation unduly discriminates against plaintiff's dealers and branches located in western Colorado, Utah and Idaho, and unduly prefers plaintiff's competitors located at points served by the Union Pacific Railroad in the States of Col-

orado, Idaho, Utah, Wyoming, Nebraska, Kansas and Mis-
[fol. 219] souri, in violation of Section 3(1) of the Interstate Commerce Act. The order of the Interstate Commerce Commission, here assailed, failed to grant the relief requested by The Denver and Rio Grande Western Railroad Company and continued the undue discrimination against plaintiff which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that plaintiff will be bound by a judgment in this action and that its interests and the main action have questions of law and fact in common; and that plaintiff's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

III

To avoid reiteration and repetition, plaintiff adopts as its own, and as if pleaded herein, the complaint, as amended, filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, plaintiff prays that the relief requested in the complaint be granted.

Respectfully submitted, Barry and Hupp, by Paul M. Hupp, Attorneys for Plaintiff, Knudsen Builders Supply Company, Inc., 738 Majestic Building, Denver, Colorado.

Address of Plaintiff: Salt Lake City, Utah.

[fol. 220] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PUBLIC SERVICE COMMISSION OF UTAH FOR LEAVE TO INTERVENE—Filed March 5, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now the Public Service Commission of Utah and hereby moves the court for an order pursuant to Rule 24(a) and (c) of the Federal Rules of Civil Procedure permitting

petitioner to intervene as party plaintiff in the above entitled proceeding.

1. Petitioner is an agency of the State of Utah, with offices in Salt Lake City, Utah. The citizens of the State of Utah have an important and pecuniary interest in the issues involved in the instant proceedings.

2. Petitioner was an intervening complainant before the Interstate Commerce Commission in the proceedings in which the order of that Commission is here assailed and therefore is authorized to intervene in this proceeding as of right under the provisions of Section 2323 of the Judicial Code (28 U.S.C.A. 2323).

3. Accompanied herewith, pursuant to the provisions of Rule 24(c) of the Federal Rules of Civil Procedure (28 U.S.C.A.) is the complaint of the petitioner, which com- [fol. 221] plaint sets forth the claim for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as plaintiff in the above entitled proceeding, and to file the complaint which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as plaintiff, and for such other and further relief as the court may deem requisite in the premises.

Respectfully submitted, Public Service Commission of Utah, E. R. Callister, Jr., Attorney General, State of Utah, by Peter M. Lowe, Deputy Attorney General. Barry & Hupp, by John R. Barry, Attorneys for Petitioner, 738 Majestic Building, Denver 2, Colorado.

[fol. 222] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF PUBLIC SERVICE COMMISSION OF UTAH—Filed April 12, 1954

Pursuant to leave granted by this court to become intervening plaintiff herein, the Public Service Commission of Utah files its complaint:

I

Public Service Commission of Utah, for its complaint and to avoid reiteration and repetition, adopts as its own and as if pleaded herein, the complaint as amended, filed in this court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, plaintiff prays that the relief requested in the complaint be granted.

Public Service Commission of Utah, E. R. Callister, Jr., Attorney General, State of Utah, by Peter M. Lowe, Deputy Attorney General. Barry & Hupp, by John R. Barry, Attorneys for Petitioner, 738 Majestic Building, Denver 2, Colorado.

[fol. 223] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF STRUCTURAL STEEL AND FORGING CO., INC., FOR LEAVE TO INTERVENE—Filed March 5, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now the Structural Steel and Forging Company, Inc. and hereby moves this Honorable Court for an order pursuant to Rule 24(b) and (c) of the Federal Rules of

Civil Procedure to intervene as party plaintiff in the above entitled proceedings.

1. That petitioner, Structural Steel and Forging Company, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business in Salt Lake City, Utah; that petitioner is engaged in the business of fabricating and selling steel, which fabricated steel is shipped to receivers located in Idaho and Montana; that petitioner transports steel and fabricated steel in interstate commerce, and has an important and pecuniary interest in the issues involved in the instant proceeding.

2. That petitioner, through its President and General Manager, M. S. Rosenblatt of Salt Lake City, Utah, entered testimony in Docket No. 30297, in which proceeding the order of the Interstate Commerce Commission is here assailed and by such testimony showed that petitioner is [fol. 224] vitally interested in the above proceedings; that petitioner received in the first ten months of 1949, 105 cars of steel from the east; in addition to the receipt of steel from points in the eatsern part of the United States, steel is shipped into its plant from the Pacific Coast and from Geneva, Utah; all steel originated in the eastern part of the United States for delivery to petitioner's plant at Salt Lake City, Utah, is routed over the Union Pacific Railroad Company and is transferred at Salt Lake City for delivery to its plant which is located on The Denver and Rio Grande Western Railroad Company. Petitioner routes all of its business to Salt Lake City via the Union Pacific railroad, primarily because it has no transit privileges for fabricating steel moving from eastern points via The Denver and Rio Grande Western Railroad Company into the areas of Idaho and Montana, which areas take approximately 50% of petitioner's business. It is impossible for petitioner to fabricate steel moving to its Salt Lake City plant over The Denver and Rio Grande Western Railroad Company and sell it in the Idaho and Montana markets as there are no transit privileges on steel moving over The Denver and Rio Grande Western Railroad Company through Ogden, Utah to Idaho and Montana points. When petitioner orders its steel it has no way of knowing where the final

destination will be; therefore, it can not take a chance on routing steel via the Denver and Rio Grande Western railroad, which steel petitioner might have to fabricate and sell in markets to which The Denver and Rio Grande Western Railroad Company would have no transit privileges. In view of this fact, petitioner is precluded from the possibility of purchasing steel at the Geneva, Utah plant of the United States Steel Company, or eastern points, shipping said steel over The Denver and Rio Grande Western Railroad Company and fabricating the steel at its Salt Lake City plant and shipping said steel through Ogden, [fol. 225] Utah to Idaho and Montana points. If joint through rates and transit privileges were established for shipments moving to points north of Ogden between the Union Pacific and the Denver and Rio Grande Western railroad, petitioner would be able to give better service to its customers in Idaho and Montana. This situation unduly discriminates against petitioner's business at Salt Lake City and unduly prefers petitioner's competitors at points served by the Union Pacific railroad in the States of Colorado, Utah and Idaho in violation of Section 3(1) of the Interstate Commerce Act. The order of the Interstate Commerce Commission here assailed failed to grant the relief requested by The Denver and Rio Grande Western Railroad Company and continued the undue discrimination against petitioner, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that petitioner will be bound by a judgment in this action and that its interests and the main action have questions of law and fact in common, and that petitioner's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

3. That pursuant to Rule 24(c) of the Rules of Civil Procedure (28 U.S.C.A., Rule 24) there is attached hereto the complaint of petitioner, which complaint sets forth the claim for which intervention is sought.

Wherefore, petitioner prays for an order granting leave to intervene as plaintiff in the above entitled proceedings, and to file its complaint which is tendered herewith, with the right to have notice and to be treated in all other re-

spects as if it had been named as plaintiff, and for such other and further relief as the Court may deem requisite in the premises.

Respectfully submitted, Barry and Hupp, by Paul M. Hupp, Attorneys for Petitioner, 738 Majestic Building, Denver 2, Colorado.

Address of Petitioner: Salt Lake City, Utah.

[fol. 226] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF STRUCTURAL STEEL AND FORGING CO., INC.—Filed April 12, 1954

Pursuant to leave granted by this Honorable Court to become intervening plaintiff herein, Structural Steel and Forging Company, Inc. files its complaint.

I

That plaintiff, Structural Steel and Forging Company, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business in Salt Lake City, Utah; that plaintiff is engaged in the business of fabricating and selling steel, which fabricated steel is shipped to receivers located in Idaho and Montana; that plaintiff transports steel and fabricated steel in interstate commerce, and has an important and pecuniary interest in the issues involved in the instant proceeding.

II

That plaintiff, through its President and General Manager, M. S. Rosenblatt of Salt Lake City, Utah, entered testimony in Docket No. 30297, in which proceeding the order of the Interstate Commerce Commission is here assailed, and by such testimony showed that plaintiff is vitally interested in the above proceedings; that plaintiff received in

[fol. 227] the first ten months of 1949, 105 cars of steel from the east; in addition to the receipt of steel from points in the eastern part of the United States, steel is shipped into its plant from the Pacific Coast and from Geneva, Utah; all steel originated in the eastern part of the United States for delivery to petitioner's plant at Salt Lake City, Utah is routed over the Union Pacific Railroad Company and is transferred at Salt Lake City for delivery to its plant which is located on The Denver and Rio Grande Western Railroad Company. Plaintiff routes all of its business to Salt Lake City via the Union Pacific railroad, primarily because it has no transit privileges for fabricating any steel moving from eastern points via The Denver and Rio Grande Western Railroad Company into the areas of Idaho and Montana, which areas take approximately 50% of petitioner's business. It is impossible for plaintiff to fabricate steel moving to its Salt Lake City plant over The Denver and Rio Grande Western Railroad Company and sell it in the Idaho and Montana markets as there are no transit privileges on steel moving over said The Denver and Rio Grande Western Railroad Company through Ogden, Utah to Idaho and Montana points. When plaintiff orders its steel it has no way of knowing where the final destination will be; therefore, it can not take a chance of routing steel via the Denver and Rio Grande Western Railroad, which steel plaintiff might have to fabricate and sell in markets to which The Denver and Rio Grande Western Railroad Company would have no transit privileges. In view of this fact, plaintiff is precluded from the possibility of purchasing steel at the Geneva, Utah plant of the United States Steel Company, or eastern points, shipping said steel over The Denver and Rio Grande Western Railroad Company and fabricating the steel at its Salt Lake City plant, and shipping said steel through Ogden, Utah to Idaho and Montana [fol. 228] points. If joint through rates and transit privileges were established for shipments moving to points north of Ogden, Utah between the Union Pacific and the Denver and Rio Grande Western railroad, plaintiff would be able to give better service to its customers in Idaho and Montana. This situation unduly discriminates against plaintiff's business at Salt Lake City and unduly prefers plaintiff's com-

petitors at points served by the Union Pacific railroad in the States of Colorado, Utah and Idaho in violation of Section 3(1) of the Interstate Commerce Act. The order of the Interstate Commerce Commission here assailed failed to grant the relief requested by The Denver and Rio Grande Western Railroad Company and continued the undue discrimination against plaintiff, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that plaintiff will be bound by a judgment in this action and that its interests and the main action have questions of law and fact in common, and that plaintiff's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

III

To avoid reiteration and repetition, plaintiff adopts as its own, and as if pleaded herein, the complaint, as amended, filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, plaintiff prays that the relief requested in the complaint be granted.

Respectfully submitted, Barry and Hupp, by Paul M. Hupp, Attorneys for Plaintiff, 738 Majestic Building, Denver 2, Colorado,

Address of Plaintiff: Salt Lake City, Utah.

[fol. 229] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF UTAH GROWERS COOPERATIVE, INC., FOR LEAVE TO INTERVENE—Filed March 5, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now the Utah Growers Cooperative, Inc., and hereby moves this Honorable Court for an order, pursuant to Rule 24 (b) and (c) of the Federal Rules of Civil Pro-

cedure, permitting petitioner to intervene as party plaintiff in the above entitled proceeding.

1. That petitioner, Utah Growers Cooperative, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Utah; that its principal place of business is in American Fork, Utah; that petitioner represents approximately 450 vegetable producers, and operates sheds and processing plants on The Denver and Rio Grande Western Railroad Company; the latter are at American Fork, Springville, and Midvale, Utah; that petitioner purchases crate material, fertilizer, seed potatoes and other items for its members and ships for its members agricultural products in interstate and foreign commerce, and has an important and pecuniary interest in the issues involved in the instant proceeding.

2. That petitioner, through its Executive Secretary and General Manager, John W. Gerber, entered testimony in [fol. 230] Docket No. 30297, the proceeding in which the order of the Interstate Commerce Commission is here assailed, and by such testimony duly showed that petitioner is vitally interested in the above proceeding; that petitioner would like to buy box crate material in Idaho and ship this material to its American Fork and Springville locations on The Denver and Rio Grande Western Railroad Company but that it is prohibited from doing so because of the higher rates that apply via the Union Pacific and The Denver and Rio Grande Western Railroad Company; that when box material is moved to its Midvale location, it must absorb a switching charge of the Union Pacific on the movement. On manufactured fertilizer purchased for its growers at Pocatello, Idaho, and Anaconda, Montana, it is required to pay a combination of the local rates over Ogden or Salt Lake City, Utah, or truck the fertilizer across town at its American Fork and Springville, Utah, locations. The same is true of seed potatoes obtained in Idaho and Montana. On seed potatoes obtained in the Red River Valley of North Dakota it cannot unload a part of carload shipments at its locations at Springville, American Fork and Midvale, Utah, on The Denver and Rio Grande Western Railroad and unload the balance of the carload shipments at

points north of Ogden, Utah, without paying a combination of the local rates which is higher than the through rate.

The available markets east of the Mississippi River have been greatly limited because of post-war rate increases and because of increases in estimated weights on celery and carrots. This necessitates petitioner's members going into nearer markets, viz., Idaho, Montana, Wyoming, and Nebraska. They are prevented from shipping into these markets by rail because of the refusal of the Union Pacific Railroad Company and other railroads to enter into joint rates with The Denver and Rio Grande Western Railroad Company for movement of their products via Ogden, Utah. [fol. 231] Petitioner has 100 members in the territory north of Ogden, Utah, that would like to be able to load their onions and potatoes ungraded, and move them to petitioner's packing sheds at American Fork and Springville, Utah, for processing and movement to points in Montana, Wyoming and Nebraska at competitive joint rates. This situation unduly discriminates against petitioner's operation at American Fork and Springville, Utah, and unduly prefers petitioner's competitors located at points served by the Union Pacific Railroad in the States of Idaho, Montana, Wyoming and Nebraska in violation of Section 3(1) of the Interstate Commerce Act; that the order of the Interstate Commerce Commission here assailed failed to grant the relief requested by The Denver and Rio Grande Western Railroad Company and continued the undue discrimination against petitioner, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that petitioner will be bound by a judgment in this action and that its interests and the main action have questions of law and fact in common, and that petitioner's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

3. That pursuant to Rule 24(c) of the Rules of Civil Procedure (28 U. S. C. A., Rule 24) there is attached hereto the complaint of petitioner, which complaint sets forth the claim for which intervention is sought.

Wherefore, Petitioner prays for an order granting leave to intervene as plaintiff in the above entitled proceedings, and to file its complaint which is tendered herewith, with the

right to have notice and to be treated in all other respects as if it had been named as plaintiff, and for such other and further relief as the Court may deem requisite in the premises.

Respectfully submitted, Barry and Hupp, by Paul M. Hupp, Attorneys for Petitioner, 738 Majestic Building, Denver 2, Colorado.

Address of Petitioner: American Fork, Utah.

[fol. 232] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF UTAH GROWERS COOPERATIVE, INC.—Filed April 12, 1954

Pursuant to leave granted by this Honorable Court to become intervening plaintiff herein, Utah Growers Cooperative, Inc., files its complaint:

I

That plaintiff, Utah Growers Cooperatives, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Utah; that its principal place of business is in American Fork, Utah; that plaintiff is the representative of approximately 450 vegetable producers, and operates sheds and processing plants on The Denver and Rio Grande Western Railroad Company; the latter are at American Fork, Springville, and Midvale, Utah; that plaintiff purchases crate material, fertilizer, seed potatoes and other items for its members and ships for its members agricultural products in interstate and foreign commerce, and has an important and pecuniary interest in the issues involved in the instant proceeding.

II

That plaintiff, Utah Growers Cooperative, Inc., is a cor-

eral Manager, John W. Gerber, entered testimony in Docket

No. 30297, the proceeding in which the order of the Interstate Commerce Commission is here assailed, and by such [fol. 233] testimony duly showed that plaintiff is vitally interested in the above proceeding; that plaintiff would like to buy box crate material in Idaho and ship this material to its American Fork and Springville locations on The Denver and Rio Grande Western Railroad Company but that it is prohibited from doing so because of the higher rates that apply via the Union Pacific and The Denver and Rio Grande Western Railroad Company; that when box material is moved to its Midvale location, it must absorb a switching charge of the Union Pacific on the movement. On manufactured fertilizer purchased for its growers at Pocatello, Idaho, and Anaconda, Montana, it is required to pay a combination of the local rates over Ogden or Salt Lake City, Utah, or truck the fertilizer across town at its American Fork and Springville, Utah, vegetable locations. The same is true of seed potatoes obtained in Idaho and Montana. On seed potatoes obtained in the Red River Valley of North Dakota it cannot unload a part of carload shipments at its branches at Springville, American Fork and Midvale, Utah, located on The Denver and Rio Grande Western Railroad and unload the balance of the carload shipments at points north of Ogden, Utah, without paying a combination of the local rates which is higher than the through rate.

The available markets east of the Mississippi River have been greatly limited because of post-war rate increases and because of increases in estimated weights on celery and carrots. This necessitates petitioner's members going into nearer markets, viz., Idaho, Montana, Wyoming, and Nebraska. They are prevented from shipping into these markets by rail because of the refusal of the Union Pacific Railroad Company and other railroads to enter into joint rates with The Denver and Rio Grande Western Railroad Company for movement of their products via Ogden, Utah.

Plaintiff has 100 members in the territory north of Ogden, Utah, that would like to be able to load their onions and [fol. 234] potatoes ungraded, and move them to plaintiff's packing sheds at American Fork and Springville, Utah, for processing and movement to points in Montana, Wyoming and Nebraska at competitive joint rates. This situation

unduly discriminates against plaintiff's operation at American Fork and Springville, Utah, and unduly prefers plaintiff's competitors located at points served by the Union Pacific Railroad in the States of Idaho, Montana, Wyoming and Nebraska in violation of Section 3(1) of the Interstate Commerce Act; that the order of the Interstate Commerce Commission here assailed failed to grant the relief requested by The Denver and Rio Grande Western Railroad Company and continued the undue discrimination against plaintiff, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that plaintiff will be bound by a judgment in this action and that its interests and the main action have questions of law and fact in common, and that plaintiff's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

III

To avoid reiteration and repetition, plaintiff adopts as its own, and as if pleaded herein, the complaint, as amended, filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, plaintiff prays that the relief requested in the complaint be granted.

Respectfully submitted, Barry and Hupp, by Paul M. Hupp, Attorneys for Plaintiff, Utah Growers Cooperative, Inc., 738 Majestic Building, Denver, Colorado.

Address of Plaintiff, Utah Growers Cooperative, Inc., American Fork, Utah.

[fol. 235] CERTIFICATE OF SERVICE OF PETITIONS FOR LEAVE TO INTERVENE AND COMPLAINTS (omitted in printing)

[fol. 236] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ORDER CONSTITUTING THREE-JUDGE COURT—March 8, 1954

Heretofore, on October 26, 1953, I made an order constituting a three-judge court to hear the above matter and designated Honorable Royce H. Savage, United States District Judge for the Northern District of Oklahoma, as one member of such court. Thereafter, on November 19, 1953, it appearing that Honorable Royce H. Savage would not be able to sit as a member of such court to hear certain matters coming on for hearing in the above case on Friday, November 20, 1953, I made an order designating Honorable Walter A. Huxman, Judge of the United States Court of Appeals, Tenth Circuit, as a member of the three-judge court in the place of Honorable Royce H. Savage, to sit and hear the matter coming on for hearing on Friday, November 20, 1953. Such matters have heretofore been heard and decided.

Now, therefore, it is ordered that said court shall be constituted as follows: Honorable Orie L. Phillips, Chief [fol. 237] Judge, United States Court of Appeals, Tenth Circuit, Honorable Royce H. Savage, United States District Judge for the Northern District of Oklahoma, and Honorable William Lee Knous, United States District Judge for the District of Colorado.

Dated at Denver, Colorado, March 8, 1954.

Orie L. Phillips, Chief Judge, United States Court of Appeals, Tenth Circuit.

[fol. 238] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF PUBLIC SERVICE COMMISSION OF UTAH—Filed March 22, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of the Public Service Commission of Utah, intervening plaintiff herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II

Answering paragraph I of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII, inclusive, of said plaintiff's complaint, as amended.

[fol. 239] Wherefore, having fully answered the allegations of the intervening complaint herein, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, by Edward M. Reidy, Chief Counsel, Samuel R. Howell, Assistant Chief Counsel.

[fol. 240] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF THE IDAHO FARM BUREAU FEDERATION—Filed March 22, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of The Idaho Farm Bureau Federation, intervening plaintiff herein, answers and says:

I.

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II.

Answering paragraph I of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII, inclusive, of said plaintiff's complaint, as amended.

[fol. 241] Wherefore, having fully answered the allegations of the intervening complaint herein, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel, Samuel R. Howell, Assistant Chief Counsel.

[fol. 242] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF STRUCTURAL STEEL AND FORGING COMPANY, INC.—Filed March 22, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of Structural Steel and Forging Company, Inc., intervening plaintiff herein, answers and says:

I.

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II.

Answering the allegations of paragraph I of the intervening complaint, the Commission admits the same, except that it denies that the intervening plaintiff has any standing to intervene in this suit and it, therefore, relies on its aforesaid "First Defense."

[fol. 243] III.

Answering paragraph II of the intervening complaint, the Commission admits that witnesses for intervening plaintiff entered testimony in the proceedings in Docket No. 30297, out of which this suit arises. But it is denied that the evidence presented proves that the Commission's order herein attacked unjustly discriminates against intervening plaintiff's business at Salt Lake City, or at any other place, or that it unduly prefers intervening plaintiff's competitors at points served by the Union Pacific in the States of Colorado, Utah and Idaho in violation of Section 3(1) of the Act.

IV.

Answering paragraph III of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII of said plaintiff's complaint, as amended.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the intervening complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said intervening complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel, Samuel R. Howell, Assistant Chief Counsel.

[fol. 244] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF UTAH GROWERS COOPERATIVE, INC.—Filed March 22, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of Utah Growers' Cooperative, Inc., intervening plaintiff herein, answers and says:

I.

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II.

Answering the allegations of paragraph I of the intervening complaint, the Commission admits the same except that it denies that the intervening plaintiff has any standing to intervene in this suit and it, therefore, relies on its aforesaid "First Defense".

[fol. 245] III.

Answering paragraph II of the intervening complaint, the Commission admits that witnesses for intervening plaintiff entered testimony in the proceedings in Docket No. 30297, out of which this suit arises. But it is denied that the evidence presented proves that the Commission's order herein attacked unjustly discriminates against intervening plaintiff's operations at American Fork and Springvale, Utah, or at any other place, or that it unduly prefers intervening plaintiff's competitors located at points served by the Union Pacific in the States of Idaho, Montana, Wyoming and Nebraska, in violation of Section 3(1) of the Act.

IV.

Answering paragraph III of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII of said plaintiff's complaint, as amended.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the intervening complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said intervening complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel, Samuel R. Howell, Assistant Chief Counsel.

[fol. 246] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF KNUDSEN BUILDERS SUPPLY COMPANY, INC.—Filed March 22, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of Knudsen Builders Supply Company, Inc., intervening plaintiff herein, answers and says:

I.

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II.

Answering the allegations of paragraph 1 of the intervening complaint, the Commission admits the same, except that it denies that the intervening plaintiff has any standing to intervene in this suit and it, therefore, relies on its aforesaid "First Defense".

[fol. 247] III.

Answering paragraph II of the intervening complaint, the Commission admits that witnesses for intervening plaintiff entered testimony in the proceedings in Docket No. 30297, out of which this suit arises. But it is denied that the evidence presented proves that the Commission's order herein attacked unjustly discriminates against intervening plaintiff's dealers and branches located in western Colorado, Utah and Idaho, and unduly prefers its competitors located at points served by the Union Pacific in the States of Colorado, Idaho, Utah, Wyoming, Nebraska, Kansas and Missouri, in violation Section 1(3) of the Act.

IV.

Answering paragraph III of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII of said plaintiff's complaint, as amended.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the intervening complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said intervening complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel, Samuel R. Howell, Assistant Chief Counsel.

[fol. 248] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENING RAILROADS TO PETITIONS AND INTERVENING COMPLAINTS OF PUBLIC SERVICE COMMISSION OF UTAH, STRUCTURAL STEEL AND FORGING COMPANY, INC., UTAH GROWERS COOPERATIVE, INC., KNUDSEN BUILDERS SUPPLY COMPANY, INC., AND THE IDAHO FARM BUREAU FEDERATION—Filed March 22, 1954

Now come Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, intervening defendants in the above-entitled case, and for their answers to

the intervening petitions and complaints of the Public Service Commission of Utah, Structural Steel and Forging Company, Inc., Utah Growers Cooperative, Inc., Knudsen Builders Supply Company, Inc., and The Idaho Farm Bureau Federation, these intervening defendants:

1. Admit that the aforementioned petitioners are located and engaged in the business or activity alleged in their respective petitions and complaints.

2. Deny that said petitioners or any of them have any pecuniary or legal interest in this suit, and deny all other [fol. 249] allegations of said petitions and complaints.

3. For further answer to the petitions and complaints of the aforementioned parties, these intervening defendants adopt and rely upon their Motion to Dismiss and their Answer to the amended complaint of plaintiff The Denver and Rio Grande Western Railroad Company.

Wherefore, having fully answered these intervening railroad defendants pray that the original complaint, as amended, and the intervening petitions and complaints of the aforementioned parties be dismissed with costs to the plaintiffs and to said intervening petitioners and plaintiffs.

Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, F. G. Knowles, 300 International Trust Bldg., Denver, Colorado, Telephone: MAin 0196, Attorneys for Intervening Railroads.

[fol. 250] CERTIFICATE OF SERVICE OF ANSWER (Omitted in Printing)

[fol. 251] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF WASHINGTON PUBLIC SERVICE COMMISSION, ET AL., TO INTERVENE AS DEFENDANTS UNDER RULE 24, AND NOTICE THEREOF—Filed March 19, 1954

I

Washington Public Service Commission, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of Montana, State Board of Equalization and Public Service Commission of Wyoming, State of Nebraska and Nebraska State Railway Commission, file this motion pursuant to Rule 24(a) and (c), (28 U.S.C.A., Federal Rules of Civil Procedure, Rules 17-51), to intervene as defendants in the above-entitled proceeding.

II

Movants are duly constituted administrative agencies of the states named in the foregoing paragraph and are empowered and required to regulate and supervise railroads and other transportation agencies operating intrastate in their respective states and to appear on behalf of and represent the public interest of their states in proceedings in which such public interest may be involved.

III

The complaint in the above-entitled proceeding seeks to enjoin, suspend, annul and set aside "in part" an order [fol. 252] issued January 12, 1953, by the Interstate Commerce Commission (hereinafter called "Commission") in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al.* Because the demands of The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande"), in its complaint to the Commission in said proceedings threatened seriously to jeopardize and harm the interest of shippers and the public

generally in their respective states as well as the economic and general welfare of those states, Movants intervened in said proceedings before the Commission and presented testimony and oral and written arguments in support of their contentions that the Commission should deny all of the demands of the Rio Grande and dismiss its complaint. Notwithstanding that said order grants a large part of the Rio Grande's demands and potentially jeopardizes and threatens to deteriorate railroad service to shippers and citizens of said states without affording any additional transportation service or other compensating results or substantial benefits to anyone in any manner except the enhancement of the financial position of the Rio Grande, its complaint herein alleges that "the part of the order of the Commission here assailed is unlawful * * * in that the Commission * * * failed and refused to prescribe joint competitive rates and through routes on all of the traffic eastbound and westbound and between all of the points involved," and the complaint prays that "the order" of the Commission be adjudged unlawful, null and void "in the respects" described in the complaint, and that "in these respects it be set aside and their enforcement forever enjoined." That is to say, the complaint seeks to annul and set aside, and enjoin the "enforcement" of the Commission's failure and refusal to require through routes and joint rates on all of the traffic and between all points not specified in the Commission's order, and the amendment to the complaint prays that the Court "remand" the proceedings to the Commission "for such action as the Court may direct the Commission to take in the premises." The "action" that the Court may "direct the Commission to [fol. 253] take" is not specified or described in the complaint or the amendment, but the complaint as amended seeks, in effect, to have the Court compel the Commission to serve the Rio Grande's alleged "pecuniary interest" by requiring through routes and joint rates on all traffic and between all points which the Commission failed to include in its order.

IV

Movants believe that the complaints of plaintiff, Rio Grande, and of the intervening plaintiffs to state a cause

of action, and that "in the part of the order of the Commission" assailed and attacked by the complaints is lawful and valid, and Movants desire to intervene as defendants in the above-entitled proceeding and present to the Court on behalf of the public in their respective states the grounds upon which they contend that "the part of the order of the Commission" attacked by the complaints is lawful and valid and that the complaints should be dismissed, as referred to and shown in the attached statement of "Claims for Which Intervention is Sought as Defendants."

Respectfully submitted, Don Eastvold, Attorney General of Washington; Robert L. Simpson, Asst. Attorney General of Washington, Attorneys for Washington Public Service Commission, State Capitol, Olympia, Washington; C. W. Ferguson, Counsel for Public Utilities Commissioner of Oregon, Public Service Building, Salem, Oregon; James B. Patten, Secretary-Counsel, Board of Railroad Commissioners of the State of Montana, [fol. 254] Helena, Montana; Howard B. Black, Attorney General of Wyoming, Attorney for State Board of Equalization and Public Service Commission of Wyoming, Cheyenne, Wyoming; Clarence S. Beck, Attorney General of Nebraska; Bert L. Overcash, Assistant Attorney General of Nebraska, Attorneys for State of Nebraska and Nebraska State Railway Commission, State Capitol, Lincoln, Nebraska; Richard H. Shaw, 301 Equitable Building, Denver 2, Calorado.

NOTICE OF MOTION (Omitted in Printing)

[fol. 255] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

CLAIMS FOR WHICH INTERVENTION IS SOUGHT AS DEFENDANTS BY WASHINGTON PUBLIC SERVICE COMMISSION; ET AL. —Filed March 19, 1954

I

Washington Public Service Commission, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of Montana, State Board of Equalization and Public Service Commission of Wyoming, State of Nebraska and Nebraska State Railway Commission, seek intervention as defendants in the above-entitled proceeding upon the claims, and grounds and for the reasons set forth in the answers of the United States of America and the Interstate Commerce Commission, and in the Motion to Dismiss and Answer filed by the Intervening Railroad Defendants to the complaints herein, which Motion and Answers are hereby adopted and made the claims; grounds and reasons of these Movants, together with the matters hereinafter set forth, for dismissing said complaints of the plaintiff and the intervening plaintiffs.

II

Movants intervened in said proceedings before the Interstate Commerce Commission (hereinafter called "Commission") and presented testimony, written and oral argu- [fol. 256] ments showing that the demands of The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") in that proceeding, were inconsistent with and contrary to the National Transportation Policy and other legislation enacted by Congress, and that granting such demands in whole or in substantial part, would, through the diversion of traffic and revenue from the Union Pacific Railroad Company to the Rio Grande, impair and deteriorate the railroad transportation services of shippers and the public in said states; would jeopardize and impair the ability of the Union Pacific Railroad Company

and other railroads to continue to render satisfactory and efficient transportation service in those said states; would result in curtailment of train service and railroad employment in numerous cities, towns, and communities in said states, thus impairing and deteriorating the economic welfare of their citizens; and would result in wasteful and uneconomic transportation through diversion of traffic to the longer routes of the Rio Grande.

III

The evidence and showing in said proceeding required a finding and conclusion that there is no public need for the through routes and joint rates requested by Rio Grande; that said respective intervener States and the shippers and citizens therein represent and constitute the public interest directly involved and controlling in this case; that the Rio Grande has no remedial interest of its own, or in the claims of any shippers, cannot maintain this proceeding as a representative of any shipper or public interest and cannot obtain relief herein upon any claims of individual shippers; that intervening plaintiffs have no remedial interest and cannot maintain this suit; that no complaints have been filed with and no demands have been made by any shipper or the public upon the respective commissions of said states and that the only purpose of the Rio Grande's demands is to improve its financial position to the harm and detriment of citizens and the public in said states.

[fol. 257] IV

Movants by this intervention seek an opportunity to present to the Court their reasons and arguments as indicated above upon which they believe the complaints herein should be dismissed.

Respectfully submitted, Don Eastvold, Attorney General of Washington; Robert L. Simpson, Asst. Attorney General of Washington, Attorneys for Washington Public Service Commission, State Capitol, Olympia, Washington; C. W. Ferguson, Counsel for Public Utilities, Commissioner of Oregon, Public Service Building, Salem, Oregon;

James B. Patten, Secretary-Counsel, Board of Railroad Commissioners of the State of Montana, Helena, Montana; Howard B. Black, Attorney General of Wyoming, Attorney for State Board of Equalization and Public Service Commission of Wyoming, Cheyenne, Wyoming; Clarence S. Beck, Attorney General of Nebraska; Bert L. Overcash, Assistant Attorney General of Nebraska, Attorneys for State of Nebraska and Nebraska State Railway Commission, State Capitol, Lincoln, Nebraska; Richard H. Shaw, 301 Equitable Building, Denver 2, Colorado.

[fols. 258-259] CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 260] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., TO INTERVENE AS DEFENDANTS UNDER RULE 24, AND NOTICE THEREOF—Filed March 24, 1954

I

This motion to intervene as defendants in the above-entitled proceeding is filed pursuant to Rule 24 (a) and (c) (28 U.S.C.A., Federal Rules of Civil Procedure, Rules 17-51) by M. P. Caveny of Omaha, Nebraska, and employees of the Union Pacific Railroad Company who are represented by the following standard railroad labor organizations:

Brotherhood of Locomotive Engineers.
Brotherhood of Locomotive Firemen and Enginemen.
Order of Railway Conductors.
Brotherhood of Railroad Trainmen.

American Train Dispatchers Association.
Railroad Yardmasters of America.
Order of Railroad Telegraphers.
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.
Brotherhood of Railroad Signalmen of America.
Brotherhood of Maintenance of Way Employes.
American Railway Supervisors Association.
International Association of Machinists.
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America.
International Brotherhood of Blacksmiths, Drop Forgers and Helpers.
Sheet Metal Workers International Association.
International Brotherhood of Electrical Workers.
Brotherhood Railway Carmen of America.
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

[fol. 261] II

Movants are duly constituted and recognized collective bargaining representatives of employees of Union Pacific Railroad Company, designated as such by the National Mediation Board under the provisions of the Railway Labor Act. The Congress has permitted them to intervene, in Section 17.(11) of the Interstate Commerce Act (49 U.S. C.A. § 17 (11)) reading as follows:

> *Intervention of representatives of employees.* (11) Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

The above right of intervention was held to be absolute, in *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519 (526-7). The movants have an interest in the above-entitled civil action because they would be adversely affected by any decree this Court might enter granting any part of the plaintiffs' demands, and because this proceeding involves matters which embrace their wages and

working conditions and might have a vital effect upon the movants, their families and dependents.

M. P. Caveny, of Omaha, Nebraska, is the General Chairman of the Brotherhood of Locomotive Engineers on the Union Pacific Railroad Company, and has been designated to speak for and represent in this action not only the locomotive engineers, but all Union Pacific employees who are represented by the standard railroad labor organizations named in this motion to intervene as defendants. They were duly admitted by the Interstate Commerce Commission as interveners in the proceeding entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* vs. *Union Pacific Railroad Company, et al.*, and were permitted to introduce testimony and evidence at the hearings, and appeared in oral argument and briefs, as parties in interest in the proceeding before the Commission; and therefore they have a statutory right under the provisions of U. S. C. Title 28, § 45a to intervene and appear as parties in the Civil Action herein.

[fol. 262] III

The complaint in this suit seeks to enjoin, suspend, annul and set aside, in part, an order issued under date of January 12, 1953, by the Commission in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.* These railorads will be referred to below as the Rio Grande, and the Union Pacific. Because the demands of the Rio Grande in its complaint in said proceedings before the Commission threatened to seriously jeopardize and harm the interests of the Union Pacific employees, as well as the shippers and the general public, movants intervened in said proceedings before the Commission and presented testimony, written evidence, and oral and written arguments in support of the contention by the Union Pacific employees that the Commission should deny the demands of the Rio Grande and dismiss the complaint. The order of the Commission, however, granted a large part of the Rio Grande's demands, thereby jeopardizing the employment, seniority rights, earnings, pension rights, and other working conditions of the Union Pacific employees because of potential reductions in train service and con-

sequent abolishing of nonoperating employment, resulting from the diversion of traffic from the Union Pacific to the Rio Grande.

In the same proceeding the Commission failed and refused to grant the major portion of the Rio Grande's demands, and it is this failure and refusal of the Commission to grant the Rio Grande's demand for through routes and joint rates on all traffic in all commodities between all points that the Rio Grande's complaint in this suit seeks to annul and enjoin, with the ultimate purpose to divert to its line the greatest possible amount of traffic and revenues from the Union Pacific and other intervening railroads, and thus threatening to inflict the greatest possible injury upon and detriment to these intervening Union Pacific employees by jeopardizing the permanency and security of their wages and employment.

[fol. 263] IV

Movants believe that in failing and refusing to grant that part of the Rio Grande's demands which it seeks to realize as a result of this suit, the Commission acted lawfully and validly in all respects. Movants desire to intervene as defendants in this suit and present to the Court on behalf of approximately 55,000 employees of the Union Pacific the grounds upon which they believe said failure and refusal of the Commission is valid and lawful and that the Rio Grande's complaint and the complaints of intervening plaintiffs should be dismissed.

Respectfully submitted, M. P. Caveny, of Omaha, Nebraska, Chairman of The Union Pacific General Chairman's Association on behalf of the employees of Union Pacific Railroad Company who are represented by the following labor organizations: Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, Brotherhood of Railroad Trainmen, American Train Dispatchers Association, Railroad Yardmasters of America, Order of Railroad Telegraphers, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Brotherhood of

Railroad Signalmen of America, Brotherhood of Maintenance of Way Employes, American Railway Supervisors Association, International Association of Machinists, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, International Brotherhood of Blacksmiths, Drop Forgers and Helpers, Sheet Metal Workers International Association, International Brotherhood of Electrical Workers, Brotherhood Railway Carmen of America, International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, William E. Doyle, 630 Symes Building, Denver, Colorado, Attorneys for Movants.

[fol. 264] NOTICE OF MOTION—(Omitted in Printing)

[fol. 265] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

CLAIMS FOR WHICH INTERVENTION IS SOUGHT AS DEFENDANTS BY BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.—Filed March 24, 1954

I

M. P. Caveny of Omaha, Nebraska, chairman of the Union Pacific General Chairmen's Association, for himself and on behalf of the approximately 55,000 employees of the Union Pacific Railroad Company (hereinafter called the Union Pacific) who are represented by the following standard railroad labor organizations:

Brotherhood of Locomotive Engineers.
Brotherhood of Locomotive Firemen and Enginemen.
Order of Railway Conductors.
Brotherhood of Railroad Trainmen.
American Train Dispatchers Association.
Railroad Yardmasters of America.

Order of Railroad Telegraphers.
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.
Brotherhood of Railroad Signalmen of America.
Brotherhood of Maintenance of Way Employes.
American Railway Supervisors Association.
International Association of Machinists.
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America.
International Brotherhood of Blacksmiths, Drop Forgers and Helpers.
Sheet Metal Workers International Association.
International Brotherhood of Electrical Workers.
Brotherhood Railway Carmen of America.
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers,

seek intervention in this suit upon the claims and grounds and for the reasons and purposes set forth in the Motion [fol. 266] to Dismiss and in the Answer of the intervening railroad defendants and in the Answers of defendants United States and Interstate Commerce Commission, upon which these movants will urge that the action of the Interstate Commerce Commission in failing and refusing to grant the full demands of the Rio Grande in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al.*, is lawful and valid.

II

In addition, these movants desire to show to the Court that the evidence before the Commission proved and required a finding and conclusion that no public need exists for the through routes and joint rates demanded by the Rio Grande; that shippers, citizens, carrier employees and communities affected represent and constitute the public interest in this proceeding and that the Rio Grande has no legal remedial interest in the claims of any shippers and cannot maintain this suit as a representative of any shipper or the public interest and cannot have relief herein upon any claims of individual shippers.

III

These movants will further claim and show that the only purpose of the Rio Grande in this suit is to improve its financial position to the harm and detriment of citizens, the employees of the Union Pacific and other railroads who are intervening defendants herein and to the public.

IV

These movants further will claim and show that the objective of the Rio Grande in this suit is contrary to the National Transportation Policy (49 U.S.C., preceding §§ 1); that in its report of January 12, 1953, in said proceeding, the Commission outlined the disastrous adverse effect upon conditions of employment of Union Pacific employees if the Rio Grande's full demands were granted and these movants will further show and claim that if the Court should grant the demands of the Rio Grande in this suit, the Court should condition such grant by requiring that [fol. 267] any injury, detriment, loss of employment or other adverse effect upon employees of the Union Pacific resulting from such grant shall be protected and borne by the Rio Grande inasmuch as its own enrichment through diversion of traffic and revenues to its line from the Union Pacific would be the direct cause of such injury and detriment to employees of the Union Pacific.

V

These movants by this intervention request an opportunity to present to the Court their reasons and arguments orally and upon brief as indicated above, showing that the Commission's failure and refusal to grant the Rio Grande's full demands is valid and lawful and that the complaint of the Rio Grande and the complaints of intervening plaintiffs herein should be dismissed.

Respectfully submitted, M. P. Caveny of Omaha, Nebraska, Chairman of The Union Pacific General Chairmen's Association, for the employees of Union Pacific Railroad Company who are represented by the following labor organizations: Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen,

Order of Railway Conductors, Brotherhood of Railroad Trainmen, American Train Dispatchers Association, Railroad Yardmasters of America, Order of Railroad Telegraphers, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Brotherhood of Railroad Signalmen of America, Brotherhood of Maintenance of Way Employes, American Railway Supervisors Association, International Association of Machinists, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, International Brotherhood of Blacksmiths, Drop Forgers and Helpers, Sheet Metal Workers International Association, International Brotherhood of Electrical Workers, Brotherhood [fol. 268] Railway Carmen of America, International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, William E. Doyle, 630 Symes Building, Denver, Colorado, Attorney for Movants.

[fols. 269-270] Certificate of Service (omitted in printing)

[fol. 271] [File endorsement omitted]

In United States District Court

[Title omitted]

Petition of Brotherhood Committees on the Denver & Rio Grande Western Railroad Co. for Leave to Intervene—Filed April 2, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now the following Brotherhood Committees on The Denver and Rio Grande Western Railroad Company, to-wit:

General Committee of Adjustment of Brotherhood of Locomotive Engineers;

General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen;

General Committee of Adjustment of Order of Railway Conductors;

General Grievance Committee of Brotherhood of Railroad Trainmen;

General System Committee of American Train Dispatchers Association;

General Grievance Committee of Railroad Yardmasters of America;

General Committee of System Division 49 of Order of Railroad Telegraphers;

System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees;

General Committee of Brotherhood of Railroad Signalmen of America;

Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees;

[fol. 272] General Adjustment Committee of Switchmen's Union of North America;

District No. 20 of International Association of Machinists;

District No. 22 of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America;

System Council No. 27 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers;

District Council No. 10 of Sheet Metal Workers International Association;

System Council No. 21 of International Brotherhood of Electric Workers;

Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America;

System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers;

Protective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, AF of L;

Local No. 383 of Hotel and Restaurant Employees International Alliance, AF of L;

and hereby moves the Court for an order pursuant to Rule 24 (a) and (c) of the Federal Rules of Civil Procedure permitting petitioners to intervene as parties plaintiff in the above entitled proceeding, and as grounds therefor state:

1. That petitioners are all the functioning and carrier-wide Brotherhood Committees on The Denver and Rio Grande Western Railroad Company and represent all the employees on The Denver and Rio Grande Western Railroad system under the Railway Labor Act, and have an important interest in this proceeding and in the rights of labor as these rights will be affected by a decision of the issues here involved.

2. That in the proceedings before the Interstate Commerce Commission in which was entered the order herein [fol. 273] assailed petitioners were intervening complainants, and under the provisions of Section 2323 of the Judicial Code, U. S. C. A. 2323, petitioners are authorized to intervene in this proceeding as of right.

3. That accompanied herewith as required by the provisions of Rule 24(c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., is the complaint of petitioners, which complaint sets forth the claims for which intervention is sought.

Wherefore, petitioners pray for an order granting them leave to intervene as plaintiffs in the above entitled proceeding and permit them to file the complaint tendered herewith the right to have notice and be treated in all respects as if named plaintiffs, and for such other and further relief as the Court shall deem proper in the premises.

Alden T. Hill, Woolworth Building, Fort Collins, Colorado, Attorney for Petitioners.

[fol. 274] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF INTERVENERS, BROTHERHOOD COMMITTEES ON THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY—Filed April 12, 1954

Pursuant to leave granted by this Court to become intervening plaintiffs herein the Brotherhood Committees on The Denver and Rio Grande Western Railroad Company files their complaint:

1. The Brotherhood Committees for their complaint, and to avoid reiteration and repetition, adopts as their own and as if pleaded herein, the complaint as amended, filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, intervening plaintiffs pray that the relief requested in the complaint of The Denver and Rio Grande Western Railroad Company be granted.

Alden T. Hill, Woolworth Building, Fort Collins, Colorado, Attorney for Complainants, General Committee of Adjustment of Brotherhood of Loco- [fol. 275] motive Engineers; General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen; General Committee of Adjustment of Order of Railway Conductors; General Grievance Committee of Brotherhood of Railroad Trainmen; General System Committee of American Train Dispatchers Association; General Grievance Committee of Railroad Yardmasters of America; General Committee of System Division 49 of Order of Railroad Telegraphers; System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees; General Committee of Brotherhood of Railroad Signalmen of America; Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees; General Adjustment

Committee of Switchmen's Union of North America; District No. 20 of International Association of Machinists; District No. 22 of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America; System Council No. 27 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers; District Council No. 10 of Sheet Metal Workers International Association; System Council No. 21 of International Brotherhood of Electrical Workers; Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America; System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse, and Railway Shop Laborers; Pro-
[fol. 276] tective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, AF of L; Local No. 383 of Hotel and Restaurant Employees International Allianee, AF of L.

[fols. 277-279] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 280] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF INTERVENING RAILROADS FOR POSTPONEMENT OF HEARING ON APRIL 19, 1954—Filed April 2, 1954

Come now the intervening railroads and move that the hearing in the above entitled matter set for April 19, 1954, be postponed until May 31, 1954. As grounds for such postponement said interveners state:

1. The effective date of the Order of the Interstate Commerce Commission, attacked in the complaint, has been postponed until July 1, 1954.

2. The delay of the hearing for a period of six weeks can have little effect upon the time of ultimate determination of the case by this court or the appellate courts. Plaintiff, if a decision is obtained in its behalf in courts, will still have to resort to further hearings before the Interstate Commerce Commission for the rate relief sought.

3. Civil Action No. 76-53, Union Pacific Railroad Company, et al. vs. United States of America and Interstate Commerce Commission, pending in the United States District Court for the District of Nebraska, Omaha Division, involves the validity of the same Interstate Commerce Commission Order attacked in this proceeding. Said action was tried to a three-Judge Court November 24, 1953, and decision has been pending so long, it is anticipated that there will be a ruling within the near future. Said decision, when announced, although not binding upon this court, will be important for consideration by the court and counsel in connection with the argument and determination of the issues to be raised on hearing in this case.

[fol. 281] 4. At the date of the filing of their appearance herein, the intervening railroads asked *inter alia* for a stay of the proceedings until the Omaha case was determined and it is consistent with that motion that the court postpone a hearing in this matter until the Omaha case has been decided.

5. It is understood that Edward M. Reidy, Chief Counsel for the Interstate Commerce Commission, who appeared to support the Order at the Omaha hearing, has a serious problem in connection with litigation before the Supreme Court of the United States which may prevent his participation in argument on any date between the 19th of April and the end of May.

6. Counsel for several of the interveners who have recently entered the case, find it very difficult to arrange their conflicting legal engagements so that a hearing can be had on April 19.

7. Counsel for the intervening railroads have matters pending which make it extremely difficult to be ready for a full hearing on April 19.

8. The trial calendar of the United States District Court

for the District of Colorado is very crowded for the period between April 19 and the end of May.

Dated this 1st day of April, 1954.

Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, by E. G. Knowles, 300 International Trust Bldg., Denver, Colorado, Tel. Main 0196, Attorneys for Intervening Railroads.

[fols. 282-283] CERTIFICATE OF SERVICE—(omitted in printing)

[fol. 284] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF INDEPENDENT LUMBER COMPANY, INC., FOR LEAVE TO INTERVENE—Filed April 3, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now the Independent Lumber Company, Inc. and hereby moves this Honorable Court for an order pursuant to Rule 24(b) and (c) of the Federal Rules of Civil Procedure to intervene as party plaintiff in the above entitled proceedings.

1. That petitioner, the Independent Lumber Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, with its principal place of business at Grand Junction, Colorado; that petitioner is engaged in the business of processing and selling lumber and lumber products at points in Colorado. Petitioner's facilities at Grand Junction, Colorado are served by the tracks of the Denver and Rio Grande Western railroad; that petitioner transports lumber and lumber products to receivers located in Colorado and other western

states; that said shipments are transported in interstate commerce and petitioner has an important and pecuniary interest in the issues involved in the instant proceeding.

[fol. 285] 2. That petitioner, through its Purchasing Agent Floyde H. Hughes of Grand Junction, Colorado, entered testimony in Docket No. 30297, in which proceeding the order of the Interstate Commerce Commission is here assailed and by such testimony showed that said petitioner is vitally interested in the above proceeding; that petitioner operates fourteen (14) retail lumber yards in western Colorado, also (at Grand Junction) a wholesale distribution yard, a box factory, a lumber manufacturing plant, and a storing and drying yard covering about thirteen acres. Petitioner is also financially interested in the Crissey and Fowler Company at Colorado Springs, Colorado. Petitioner in procuring lumber for its transit plant at Grand Junction, Colorado, prefers to purchase lumber adjacent to the railroads other than the Union Pacific Railroad Company because when the inbound routing on lumber is via railroads other than the Union Pacific, petitioner enjoys competitive rates to Colorado common points and beyond. Cascade and Winchester, Idaho, and Burns, Oregon are typical points on the Union Pacific Railroad Company from which petitioner has procured lumber in the past but petitioner could not do a transit business into such points as Colorado Springs, Colorado or beyond, with lumber originating at points served by the Union Pacific Railroad Company such as Cascade and Winchester, Idaho, and Burns, Oregon, as above mentioned.

Petitioner receives about 300 carloads of lumber a year from the Northwest. Its plant at Grand Junction, Colorado can handle from one to two carloads a day. Petitioner feels that the operation, in order to expand, must seek additional markets since its present market in Colorado is limited. If petitioner's inbound materials originate on the Union Pacific Railroad Company it is limited to western Colorado in its transit operations. Petitioner feels that it should have the same rates as its competitors have to competitive areas of destination. In some cases where the present rate on [fol. 286] lumber to Grand Junction applies via the Chicago, Burlington & Quincy Railroad Company to Denver, Colo-

rado, thence The Denver and Rio Grande Western Railroad Company it would receive a reduction in its present rate if the through competitive rates to Denver were established via The Denver and Rio Grande Western Railroad Company through Ogden, Utah. A rate of 71¢ (to Denver, Colorado) applies both via the Great Northern Railway Company to Laurel, Montana, thence via the Chicago, Burlington & Quincy Railroad Company or The Colorado and Southern Railway Company and the Chicago, Burlington & Quincy Railroad Company to Denver, Colorado, as well as via the Great Northern Railway Company to Butte, Montana and the Union Pacific Railroad Company to Denver, Colorado. If this rate applied via the Great Northern Railway Company to Butte, Montana, Union Pacific Railroad Company to Ogden, Utah, and The Denver and Rio Grande Western Railroad Company to Denver, the rate to Grand Junction would then be 71¢ instead of 80¢, which is now the rate via the Great Northern, Chicago, Burlington & Quincy, or Chicago, Burlington & Quincy and The Colorado and Southern Railway Company to Denver, and The Denver and Rio Grande Western Railroad Company to Grand Junction. Petitioner needs the privilege of partially unloading at competitive rates.

As an example of the difficulties encountered by petitioner in attempting to partially unload is the following:

Petitioner was endeavoring to divide a carload of doors between its Grand Junction and Colorado Springs, Colorado operation. The car to be divided was to be shipped from Tacoma, Washington via the Union Pacific Railroad Company. Petitioner had to divert the car to the Great Northern Railway Company out of Tacoma, Washington for the through rate via that line is not applicable via the Union Pacific Railroad Company. The shipper charged petitioner a penalty of $25.19 which was the amount the shipper fig- [fol. 287] ured he had lost because of the inapplicability of the inbound Union Pacific Railroad Company's transit credit at Tacoma, Washington.

Petitioner was faced with a similar disability in trying to divide a carload of screen doors between its Colorado Springs and Grand Junction, Colorado, operations, which traffic originates at Hoquiam, Washington. Petitioner, to

make such a division, would have had to crate the doors for delivery at Colorado Springs at its Grand Junction plant and ship them by motor carrier to its yard at Colorado Springs. Petitioner is sometimes forced to go to lumber mills located on the Union Pacific Railroad Company for supplies at its Grand Junction plant because of price and quality and when this is done, petitioner can not move such lumber out of storage to its yard at Colorado Springs, Colorado except at combination rates because of the absence of joint through rates from Cascade and Winchester, Idaho by way of Grand Junction, Colorado. Petitioner's Colorado Springs yard once had to procure ten carloads of lumber from a competitor (at a disadvantage) because it would have cost an additional 46¢ per cwt. to move lumber purchased from points on the Union Pacific into its Colorado Springs yard from its storage yard in Grand Junction.

These are but some examples of the manner in which petitioner is injured by the non-existence of through competitive rates via the Denver and Rio Grande Western railroad through Ogden, Utah from the Pacific Northwest.

Joint competitive rates between the Denver and Rio Grande Western railroad and the Union Pacific railroad through Ogden would enable petitioner to stop shipments at Grand Junction, Colorado and have transit privileges at its Colorado Springs yard and beyond, and to develop new [fol. 288] markets in Colorado, which it is now precluded from servicing. The situation unduly discriminates against petitioner and unduly prefers petitioner's competitors at points served by the Union Pacific railroad in the states of Colorado, Utah, Idaho, and Oregon in violation of Section 3(1) of the Interstate Commerce Act. The order of the Interstate Commerce Commission here assailed failed to grant the relief requested by The Denver and Rio Grande Western Railroad Company and continued the undue discrimination against petitioner, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that petitioner will be bound by a judgment in this action and that its interests and the main action have questions of law and fact in common, and that petitioner's intervention will not, to any extent delay or prejudice the adjudication of the rights of the original parties.

3. That pursuant to Rule 24(c) of the Rules of Civil Pro-

cedure (28 U.S.C.A., Rule 24) there is attached hereto the complaint of petitioner, which complaint sets forth the claim for which intervention is sought.

Wherefore, petitioner prays for an order granting leave to intervene as plaintiff in the above entitled proceedings, and to file its complaint which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as plaintiff, and for such other and further relief as the Court may deem requisite in the premises.

Respectfully submitted, Barry and Hupp, by John R. Barry, Attorneys for Petitioner, 738 Majestic Building, Denver 2, Colorado.

Address of Petitioner: Grand Junction, Colorado.

[fol. 289] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF INDEPENDENT LUMBER COMPANY, INC.—Filed April 12, 1954

Pursuant to leave granted by this Honorable Court to become intervening plaintiff herein, the Independent Lumber Company, Inc., files its complaint.

I

That plaintiff, the Independent Lumber Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, with its principal place of business at Grand Junction, Colorado; that petitioner is engaged in the business of processing and selling lumber and lumber products at points in Colorado. Petitioner's facilities at Grand Junction, Colorado are served by the tracks of the Denver and Rio Grande Western railroad; that petitioner transports lumber and lumber products to receivers located in Colorado and other western

states; that said shipments are transported in interstate commerce and petitioner has an important and pecuniary interest in the issues involved in the instant proceeding.

II

That plaintiff, through its Purchasing Agent Floyde H. Hughes of Grand Junction, Colorado, entered testimony [fol. 290] in Docket No. 30297, in which proceeding the order of the Interstate Commerce Commission is here assailed and by such testimony showed that plaintiff is vitally interested in the above proceeding; that plaintiff operates fourteen (14) retail lumber yards in western Colorado, also (at Grand Junction) a wholesale distribution yard, a box factory, a lumber manufacturing plant and a storing and drying yard covering about thirteen acres. Plaintiff is also financially interested in the Crissey and Fowler Company at Colorado Springs, Colorado. Plaintiff in procuring lumber for its transit plant at Grand Junction, Colorado prefers to purchase lumber adjacent to railroads other than the Union Pacific Railroad Company because when the inbound routing on lumber is via railroads other than the Union Pacific, plaintiff enjoys competitive rates to Colorado common points and beyond. Cascade and Winchester, Idaho, and Burns, Oregon are typical points on the Union Pacific Railroad Company from which plaintiff has procured lumber in the past but plaintiff could not do a transit business into such points as Colorado Springs, Colorado or beyond, with lumber originating at points served by the Union Pacific Railroad Company such as Cascade and Winchester, Idaho, and Burns, Oregon, as above mentioned.

Plaintiff receives about 300 carloads of lumber a year from the Northwest. Its plant at Grand Junction, Colorado can handle from one to two carloads a day. Plaintiff feels that the operation, in order to expand, must seek additional markets since its present market in Colorado is limited. If plaintiff's inbound materials originate on the Union Pacific Railroad Company it is limited to western Colorado in its transit operations. Plaintiff feels that it should have the same rates as its competitors have to competitive areas of destination. In some cases where the present rate on

lumber to Grand Junction applies via the Chicago, Burlington & Quincy Railroad Company to Denver, Colorado, [fol. 291] thence The Denver and Rio Grande Western Railroad Company it would receive a reduction in its present rate if the through competitive rates to Denver were established via The Denver and Rio Grande Western Railroad Company through Ogden, Utah. A rate of 71¢ (to Denver, Colorado) applies both via the Great Northern Railway Company to Laurel, Montana, thence via the Chicago, Burlington & Quincy Railroad Company or The Colorado and Southern Railway Company and the Chicago, Burlington & Quincy Railroad Company to Denver, Colorado, as well as via the Great Northern Railway Company to Butte, Montana and the Union Pacific Railroad Company to Denver, Colorado. If this rate applied via the Great Northern Railway Company to Butte, Montana, Union Pacific Railroad Company to Ogden, Utah, and The Denver and Rio Grande Western Railroad Company to Denver, the rate to Grand Junction would then be 71¢ instead of 80¢ which is now the rate via the Great Northern, Chicago, Burlington & Quincy, or Chicago, Burlington & Quincy and The Colorado and Southern Railway Company to Denver, and The Denver and Rio Grande Western Railroad Company to Grand Junction. Plaintiff needs the privilege of partially unloading at competitive rates.

As an example of the difficulties encountered by plaintiff in attempting to partially unload is the following:

Plaintiff was endeavoring to divide a carload of doors between its Grand Junction and Colorado Springs, Colorado operation. The car to be divided was to be shipped from Tacoma, Washington via the Union Pacific Railroad Company. Plaintiff had to divert the car to the Great Northern Railway Company out of Tacoma, Washington for the through rate via that line is not applicable via the Union Pacific Railroad Company. The shipper charged petitioner a penalty of $25.19 which was the amount the shipper figured he had lost, because of the inapplicability of the inbound Union Pacific Railroad Company's transit credit at Tacoma, Washington.

[fol. 292] Plaintiff was faced with a similar disability in trying to divide a carload of screen doors between its

Colorado Springs and Grand Junction, Colorado operations, which traffic originates at Hoquiam, Washington. Plaintiff, to make such a division, would have had to crate the doors for delivery at Colorado Springs at its Grand Junction plant and ship them by motor carrier to its yard at Colorado Springs. Plaintiff is sometimes forced to go to lumber mills located on the Union Pacific Railroad Company for supplies at its Grand Junction plant because of price and quality and when this is done, plaintiff can not move such lumber out of storage to its yard at Colorado Springs, Colorado except at combination rates because of the absence of joint through rates from Cascade and Winchester, Idaho, by way of Grand Junction, Colorado. Plaintiff's Colorado Springs yard once had to procure ten carloads of lumber from a competitor (at a disadvantage) because it would have cost an additional 46¢ per cwt. to move lumber purchased from points on the Union Pacific into its Colorado Springs yard from its storage yard in Grand Junction.

These are but some examples of the manner in which plaintiff is injured by the non-existence of through competitive rates via the Denver and Rio Grande Western railroad through Ogden, Utah from the Pacific Northwest.

Joint competitive rates between the Denver and Rio Grande Western railroad and the Union Pacific railroad through Ogden would enable plaintiff to stop shipments at Grand Junction, Colorado and have transit privileges at its Colorado Springs yard and beyond, and to develop new markets in Colorado, which it is now precluded from servicing. This situation unduly discriminates against plaintiff and unduly prefers plaintiff's competitors at points served by the Union Pacific railroad in the States of [fol. 293] Colorado, Utah, and Oregon in violation of Section 3(1) of the Interstate Commerce Act. The order of the Interstate Commerce Commission here assailed failed to grant the relief requested by The Denver and Rio Grande Western Railroad Company and continued the undue discrimination against plaintiff, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that plaintiff will be bound by a judgment in this action and that its interests and the main action have questions of law and fact in common, and that plaintiff's

intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

III

To avoid reiteration and repetition, plaintiff adopts as its own and as if pleaded herein, the complaint, as amended, filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, plaintiff prays that the relief requested in the complaint be granted.

Respectfully submitted, Barry and Hupp, By John R. Barry, Attorneys for Plaintiff, 738 Majestic Building, Denver 2, Colorado.

Address of Plaintiff: Grand Junction, Colorado.

[fols. 294-295] Certificate of Service—(omitted in printing)

[fol. 296] [File endorsement omitted]

In United States District Court

[Title omitted]

Petition of the Arnold Milling Company, et al., for Leave to Intervene—Filed April 3, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now The Arnold Milling Company; The Buhler Mill & Elevator Co.; The Consolidated Flour Mills Co.; Dixie Portland Flour Company; The William Kelly Milling Company; Light Grain & Milling Co.; The New Era Milling Company; The Wall Rogalsky Milling Company; and, Walnut Creek Milling Co.; and hereby move this Honorable Court for an order pursuant to Rule 24(a) and (c) of the

Federal Rules of Civil Procedure permitting petitioners to intervene as parties plaintiff in the above entitled proceedings.

1. That the petitioners are all corporations organized under the corporate laws of the State of Kansas, except Dixie Portland Flour Company which is a Tennessee corporation. All are authorized to buy, sell and/or store grain and/or to manufacture, mill or process flour, feed and/or other products of grain, which business is conducted in interstate commerce and therefore said companies have an important and pecuniary interest in the issues involved in the instant proceeding.

2. That petitioners were interveners in the original proceeding and since the original order of the Interstate Commerce Commission is here assailed, the petitioners are authorized to intervene in this proceeding as a matter of right under the provisions of Section 2323 of the Judicial Code (28 U. S. C. A. Section 2323).

[fol. 297] 3. Accompanied herewith, pursuant to the provisions of Rule 24(c) of the Federal Rules of Civil Procedure (28 U. S. C. A. Rule 24), is the complaint of the petitioners, which complaint sets forth the claim for which intervention is sought.

Wherefore, Petitioners pray for an order granting them leave to intervene as plaintiffs in the above entitled proceeding and to file the complaint which is tendered herewith with the right to have notice and to be treated in all other respects as if they had been named as plaintiffs, and for such other and further relief as the Court may deem requisite in the premises.

Barry and Hupp, by John R. Barry, Attorneys at Law, 738 Majestic Building, Denver, Colo. Attorneys for Petitioners: The Arnold Milling Company, The Buhler Mill & Elevator Co., The Consolidated Flour Mills Co., Dixie Portland Flour Company, The William Kelly Milling Company, Light Grain & Milling Co., The New Era Milling Company, The Wall Rogalsky Milling Company, and Walnut Creek Milling Co.

[fol. 298] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF THE ARNOLD MILLING COMPANY, THE BUHLER MILL & ELEVATOR CO., THE CONSOLIDATED FLOUR MILLS CO., DIXIE PORTLAND FLOUR COMPANY, THE WILLIAM KELLY MILLING COMPANY, LIGHT GRAIN & MILLING CO., THE NEW ERA MILLING COMPANY, THE WALL ROGALSKY MILLING COMPANY, AND WALNUT CREEK MILLING CO.—Filed April 12, 1954

Pursuant to leave granted by this Court to become intervening plaintiffs herein, The Arnold Milling Company, The Buhler Mill & Elevator Co., The Consolidated Flour Mills Co., Dixie Portland Flour Company, The William Kelly Milling Company, Light Grain & Milling Co., The New Era Milling Company, The Wall Rogalsky Milling Company and Walnut Creek Milling Co., file their complaint.

I

For their complaint and to avoid reiteration and repetition, petitioners adopt as their own and as if pleaded herein, the complaint filed in this Court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

Wherefore, petitioners pray that the relief requested in the complaint be granted.

Respectfully submitted, Barry and Hupp, by John R. Bary, 738 Majestic Building, Denver 2, Colorado. Attorneys for Petitioners: The Arnold Milling Company, The Buhler Mill & Elevator Co., The Consolidated Flour Mills Co., Dixie Portland Flour Company, The William Kelly Milling Company, The New Era Milling Company, Light Grain & Milling Co., The Wall Rogalsky Milling Company, and Walnut Creek Milling Co.

[fols. 299-305] CERTIFICATE OF SERVICE—(omitted in printing).

[fol. 306] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT OF INTERVENING RAILROADS TO MOTION FOR POSTPONEMENT OF HEARING APRIL 19, 1954—Filed April 8, 1954

Come now the Intervening Railroads and for their Amendment to the Motion for Postponement of the Hearing in the above entitled matter show the Court as additional grounds therefor:

Elmer B. Collins, Esq., of Omaha, Nebraska, has, throughout the proceedings before the Interstate Commerce Commission and before the Nebraska three-Judge District Court proceeding held at Omaha last November, been the leading counsel, and the one with chief responsibility for the Intervening Railroads.

Although the main defendants are the United States of America and the Interstate Commerce Commission, the Intervening Railroads are vitally interested, financially and otherwise, in the outcome, and Mr. Collins was expected personally to handle the defense for them.

On April 5, 1954, Mr. Collins was stricken with an attack of coronary thrombosis and taken to St. Joseph's Hospital in Omaha, and his physician, Dr. J. R. Kleyla, whose address is Medical Arts Building, Omaha, Nebraska, advised on April 6 that Mr. Collins is in a fairly serious condition, and, in his opinion it will be necessary for him to remain in the hospital from three to five weeks. On April 7, Dr. Kleyla further advised that he had examined Mr. Collins [fol. 307] again and the diagnosis is the same, that it is impossible to determine the period of confinement but that, in his opinion, it would be necessary for Mr. Collins to remain in the hospital from three to five weeks.

This information was promptly communicated to counsel for plaintiff.

It is not possible for associate counsel for the Intervening Railroads to take full responsibility on short notice and prepare the necessary briefs to proceed with this case on April 19, and to require the Intervening Railroads to proceed at that time will seriously prejudice them in their presentation of their case.

A postponement of trial from April 19, 1954 until at least May 31, 1954, may make it possible for Mr. Collins to participate in the trial and will enable other counsel to take over the case to carry on the proceeding in the event Mr. Collins cannot do so.

Dated this 8th day of April, 1954.

Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, by E. G. Knowles, 300 International Trust Bldg., Denver, Colorado, Telephone MAin 0196, Attorneys for Intervening Railroads.

[fol. 308] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

TELEGRAPHIC REQUEST FOR CONTINUANCE—Filed April 8, 1954

Western Union

I.KC531 PRA434
PR. OLA097 NL PD-WUX Olympia Wash. 7
Hon. Orie L. Phillips Chief Judge

United State Court of Appeals Dvr

In regard to Denver Rio Grande Railroad vs. U. S. A. and I. C. C. 4492 request continuance of hearing on above until May 10 or later prior commitments preclude our participation in April.

Robert L. Simpson, Assistant Attorney General, State of Washington.

11—332-3-4

[fols. 309-310] CERTIFICATE OF SERVICE TO AMENDMENT TO MOTION FOR POSTPONEMENT (omitted in printing)

[fol. 311] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENING RAILROADS TO PETITIONS AND INTERVENING COMPLAINTS OF INDEPENDENT LUMBER COMPANY, INC.; ET AL.—Filed April 12, 1954

Now come Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chi-
[fol. 312] cago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, intervening defendants in the above-entitled case, and for their answers to the intervening petitions and complaints of Independent Lumber Company, Inc.; The Arnold Milling Company; The Buhler Mill & Elevator Co.; The Consolidated Flour Mills Co.; Dixie Portland Flour Company; The William Kelly Milling Company; Light Grain & Milling Co.; The New Era Milling Company; The Wall Rogalsky Milling Company; Walnut Creek Milling Co.; General Committee of Adjustment of Brotherhood of Locomotive Engineers; General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen; General Committee of Adjustment of Order of Railway Conductors; General Grievance Committee of Brotherhood of Railroad Trainmen; General System Committee of American Train Dispatchers Association; General Grievance Committee of Railroad Yardmasters of America; General Committee of System Division 49 of Order of Railroad Telegraphers; System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees; General Committee of Brotherhood of Railroad Signalmen of America; Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees; General

Adjustment Committee of Switchmen's Union of North America; District No. 20 of International Association of Machinists; District No. 22 of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America; System Council No. 7 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers; District Council No. 10 of Sheet Metal Workers International Association; System Council No. 21 of International Brotherhood of Electrical Workers; Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America; System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; Protective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, AF of L; and Local No. 383 of Hotel and Restaurant Employees International Alliance, AF of L; these intervening defendants:

1. Admit that the aforementioned petitioners are located [fol. 313] and engaged in the business, activity, or employment alleged in their respective petitions and complaints.

2. Deny that said petitioners or any of them have any pecuniary or legal interest in this suit, and deny all other allegations of said petitions and complaints.

3. For further answer to the petitions and complaints of the aforementioned parties, these intervening defendants adopt and rely upon their Motion to Dismiss and their Answer to the amended complaint of plaintiff The Denver and Rio Grande Western Railroad Company.

Wherefore, having fully answered, these intervening railroad defendants pray that the original complaint, as amended, and the intervening petitions and complaints of the aforementioned parties be dismissed with costs to the plaintiffs and to said intervening petitioners and plaintiffs.

Elmer B. Collins, F. J. Melia, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, 300 International Trust Bldg., Denver, Colorado, Telephone: MAin 0196, Attorneys for Intervening Railroads.

[fols. 314-315] CERTIFICATE OF SERVICE OF ANSWER (omitted in printing)

[fol. 316] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF INDEPENDENT LUMBER COMPANY, INC.—Filed April 12, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of Independent Lumber Company, Inc., intervening plaintiff herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II

Answering the allegations of paragraph I of the intervening complaint, the Commission admits the same, except that it denies that the intervening plaintiff has any standing to intervene in this suit and it, therefore, relies on its aforesaid "First Defense."

III

Answering paragraph II of the intervening complaint, the Commission admits that witnesses for intervening plaintiff [fol. 317] entered testimony in the proceedings in Docket No. 30297, out of which this suit arises. But it is denied that the evidence presented proves that the Commission's order herein attacked unjustly discriminates against intervening plaintiff's business at points in the States of Colorado, Utah, Idaho, and Oregon, or at any other place, or

that it unduly prefers intervening plaintiff's competitors at points served by the Union Pacific in any of the aforesaid states in violation of Section 3(1) of the Act.

IV

Answering paragraph III of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII of said plaintiff's complaint, as amended.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the intervening complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said intervening complaint be dismissed.

Interstate Commerce Commission, by Edward M. Reidy, Chief Counsel, Samuel R. Howell, Assistant Chief Counsel.

[fol. 318] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF BROTHERHOOD COMMITTEES ON THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY—Filed April 12, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of the Brotherhood Committees on The Denver and Rio Grande Western Railroad Company, intervening plaintiffs herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver

and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II

Answering paragraph I of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts [fol. 319] as its answer thereto the answers heretofore made to paragraphs I to XII, inclusive, of said plaintiffs' complaint as amended.

Wherefore, having fully answered the allegations of the intervening complaint herein, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel, Samuel R. Howell Assistant Chief Counsel.

[fol. 320] In United States District Court

Telegraphic Requests for Continuance

Western Union

1954, April 10, P.M. 12.04

KB216 SA165
S.AVA040PD-AV.ST LOUIS MO 10 1155 AMC—

Honorable O. L. Phillips, Chief Judge—United States Court of Appeals—Federal Bldg. DVR-RE Motion for Continuance filed by interveners on behalf of defendants in District Court Number 4492, D&RGW R. Co. vs. United States and Interstate Commerce Commission. Mr. Elmer B. Collins, Counsel for Union Pacific, has borne the principal burden for defendants in the Interstate Commerce Commission Proceedings and in the Appeals Proceedings. [fol. 320a] The position of the movants in the motion before you for continuance cannot be adequately presented at this time in view of Mr. Collins serious illness. Accordingly, we urge your favorable consideration of the mo-

tion for continuance to some convenient date for the court in June.

Wabash Railroad Co., Eugene S. Davis, Assistant General Attorney.

4492 VS Movants—

[fol. 320b] Western Union

1954, April 10, A.M. 11.54

MA033
M.SPA192 CAK-ST PAUL MINN 10 1204PMC—

Honorable Orrie L. Phillips, Chief Judge—United States Court of Appeals, United States Federal Courts Bldg. DVR—Great Northern Railway Company one of the intervening defendants in Civil Action 4492. Denver & Rio Grande Western Railway Company v. United States, et. al., now pending in United States District Court for the District of Colorado and set for hearing April 19, at Denver respectfully requests that hearing in said matter be [fol. 320c] postponed to a date not earlier than June 15. Stop The request is made because of the serious illness of Elmer B. Collins, who has carried the burden of this important case for all the intervening plaintiffs including the Great Northern, and it would seriously prejudice presentation on their behalf if the trial proceeded on April 19 without benefit of Mr. Collins active participation. Stop As you know, this case involves a long and detailed record of testimony, voluminous exhibits and important [fol. 320d] questions of law which require careful an- time-consuming preparation and effective presentation-

L. E. Torinus, Great Northern Railway Co.

[fol. 320e] Western Union

1954, April 10, P.M. 12.28

KB236
K.DVB110 PD—CHICAGO ILL VIA DENVER COLO 10—

Judge Orie L. Phillips, Chief Judge, U. S. Court of Appeals—U. S. Federal Bldg DVR—Earnestly urge you grant motion for continuance coming before you Monday, April 12 in Civil Action 4492, Denver Rio Grande and West-

ern versus United States owing serious illness of Elmer Collins counsel for Union Pacific who has been carrying principal burden of case on behalf of intervening railroads—

Roland J. Lehman, Attorney for Santa Fe Ry—

[fol. 320f] Western Union

1954, April 10, P.M. 12.02

KB214
K.CA082 NL PD—CHICAGO ILL 10—

Honorable Orie L. Phillips, Chief Judge. Care G. Walter Bowman—Clerk United States District Court 247 Post office Bldg. DVR—In Civil Action No. 4492 Denver and Rio Grande Western Railroad Company versus United States and Interstate Commerce Commission. The undersigned attorney for Chicago and North Western Railway Company hereby represents to the court that plans on behalf of his client, The Union Pacific Railroad Company and the [fol. 320g] several other railroads opposing the plaintiff Denver and Rio Grande's contentions have been completely disrupted by the recent heart attack suffered by Elmer B. Collins, Chief Counsel for this group, who has been preparing to make the principal presentation and argument at the hearing set for April 19th. The voluminous record and numerous issues involved are such that it will not be possible for the undersigned or for any of the other attorneys associated with this group to make adequate preparation to substitute for Mr. Collins before April 19th, [fol. 320h] and Mr. Collins enforced rest at the hospital for the next three weeks will make it impracticable if not completely impossible to confer with him during that time. The undersigned therefore joins in the pending motion for a continuance and respectfully suggests that the case be reset for hearing at a date most convenient for the court around the middle of June.

Fred O. Steadry—.

[fol. 321] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ON PETITIONS AND MOTIONS TO INTERVENE—
April 12, 1954

The above entitled cause came before this statutory Court, convened pursuant to provisions of applicable statutes for a hearing of this suit, wherein certain petitions and motions to intervene were filed, and the Court being fully advised in the premises, it is

Ordered:

1. That the Petition of the Holly Sugar Corporation for Leave to Intervene as a party plaintiff is granted and its complaint shall be filed;

2. That the Petition of The Idaho Farm Bureau Federation for Leave to Intervene as party plaintiff is granted, and its complaint shall be filed;

3. That the Petition of the Knudsen Builders Supply Company, Inc. for Leave to Intervene as party plaintiff is granted, and its complaint shall be filed;

4. That the Petition of the Public Service Commission of Utah for Leave to Intervene as party plaintiff is granted, and its complaint shall be filed;

5. That the Petition of the Structural Steel and Forging Company, Inc. for Leave to Intervene as party plaintiff is granted, and its complaint shall be filed;

6. That the Petition of the Utah Growers Cooperative, Inc. for Leave to Intervene as party plaintiff is granted, and [fol. 322] its complaint shall be filed;

7. That the Motion of M. P. Caveny and employees of the Union Pacific Railroad Company who are represented by the following standard railroad labor organizations:

Brotherhood of Locomotive Engineers.
Brotherhood of Locomotive Firemen and Enginemen.
Order of Railway Conductors.
Brotherhood of Railroad Trainmen.
American Train Dispatcher's Association,

Railroad Yardmasters of America.
Order of Railroad Telegraphers.
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.
Brotherhood of Railroad Signalmen of America.
Brotherhood of Maintenance of Way Employees.
American Railway Supervisors Association.
International Association of Machinists.
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America.
International Brotherhood of Blacksmiths, Drop Forgers and Helpers.
Sheet Metal Workers International Association.
International Brotherhood of Electrical Workers.
Brotherhood Railway Carmen of America.
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

to intervene as defendants under Rule 24, is granted;

8. That the Motion of Washington Public Service Commission, Public Utilities Commission of Oregon, Board of Railroad Commissioners of the State of Montana, State Board of Equalization and Public Service Commission of Wyoming, State of Nebraska and Nebraska State Railway Commission to Intervene as Defendants Under Rule 24, is granted;

[fol. 323] 9. That the Petition of the following Brotherhood Committees on The Denver and Rio Grande Western Railroad Company, to wit:

General Committee of Adjustment of Brotherhood of Locomotive Engineers.
General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen.
General Committee of Adjustment of Order of Railway Conductors.
General Grievance Committee of Brotherhood of Railroad Trainmen.
General System Committee of American Train Dispatchers Association.
General Grievance Committee of Railroad Yardmasters of America.

General Committee of System Division 49 of Order of Railroad Telegraphers.

System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees.

General Committee of Brotherhood of Railroad Signalmen of America.

Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees.

General Adjustment Committee of Switchmen's Union of North America.

District No. 20 of International Association of Machinists.

District No. 22 of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America.

System Council No. 27 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers.

District Council No. 10 of Sheet Metal Workers International Association.

System Council No. 21 of International Brotherhood of Electrical Workers.

Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America.

System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

Protective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, A. F. of L.

[fol. 324] Local No. 383 of Hotel and Restaurant Employees International Alliance, A. F. of L., for Leave to Intervene as parties plaintiff, be granted, and their complaint shall be filed;

10. That the Petition of the Independent Lumber Company, Inc. for Leave to Intervene as party plaintiff be granted, and its complaint shall be filed;

11. That the Petition of The Arnold Milling Company, The Buhler Mill & Elevator Co., The Consolidated Flour Mills Co., Dixie Portland Flour Company, The William Kelly Milling Company, Light Grain & Milling Co., The New

Era Milling Company, The Wall Rogalsky Milling Company, and Walnut Creek Milling Co., for leave to Intervene as parties plaintiff, be granted, and their complaint shall be filed.

Dated at Denver, Colorado, this twelfth day of April, A. D. 1954.

By the Court: Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit; Royce H. Savage, United States District Judge for the Northern District of Oklahoma; William Lee Knous, United States District Judge.

[fol. 325] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING MOTION OF INTERVENING RAILROADS FOR POSTPONEMENT OF HEARING SET FOR APRIL 19, 1954—April 12, 1954.

The above entitled cause came before this statutory Court, convened pursuant to the provisions of the applicable statutes for a hearing of this suit upon the motion of certain of the intervening railroads for postponement of the hearing heretofore set for April 19, 1954, and the Court having heard arguments of counsel and being advised,

It Is Ordered that the motion be granted and the hearing continued to June 7, 1954, at ten o'clock a. m., and counsel for the United States of America, the Interstate Commerce Commission, the Denver & Rio Grande Western Railroad Company and the Union Pacific Railroad Company shall file with each member of the Court and serve copies on opposing counsel, a trial brief by June 1, 1954.

Dated at Denver, Colorado, this twelfth day of April, A. D. 1954.

Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit; Royce H. Savage, United States District Judge for the Northern District of Oklahoma; William Lee Knous, United States District Judge.

[fol. 326] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. R. KLEYLA, M. D., AS TO CONDITION OF ELMER B. COLLINS, ASSISTANT WESTERN GENERAL COUNSEL, UNION PACIFIC RAILROAD COMPANY, COUNSEL FOR INTERVENING RAILROADS—Filed April 12, 1954

STATE OF NEBRASKA,
County of Douglas, ss:

J. R. Kleyla, M. D., being first duly sworn on oath, deposes and says that Elmer B. Collins was stricken with a heart attack known to medical science as coronary thrombosis on the evening of April 5, 1954; that he was taken to St. Joseph's Hospital that evening; that affiant examined him on the morning of April 6, 1954, and has attended him in said hospital ever since that time; that affiant examined Elmer B. Collins last on April 10, 1954; that as of the date of said last examination the condition of Elmer B. Collins was serious, and requires absolute bed rest; that in his opinion it will be at least three to five weeks before the said Elmer B. Collins can be consulted on business matters, and then for only limited periods; that his hospitalization will be for at least three to five weeks from the date of admission.

John R. Kleyla, M. D.

Subscribed and sworn to before me this 10th day of April, 1954. Louis Schoennig, Notary Public.
(Seal.)

Louis Schoennig, Notary Public.

[fol. 327] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF J. I. CASE COMPANY, INC., FOR LEAVE TO INTERVENE—Filed April 13, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Comes now the J. I. Case Company, Inc. and hereby moves this Honorable Court for an order pursuant to Rule 24(b) and (c) of the Federal Rules of Civil Procedure to intervene as party plaintiff in the above entitled proceedings.

1. That petitioner, J. I. Case Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, with its principal place of business in Racine, Wisconsin; that petitioner is engaged in the business of producing agricultural implements and farm machinery at points in Wisconsin, Illinois, Iowa, and Alabama; it also maintains a branch distribution point for its products in the intermountain states' territory at Salt Lake City, Utah. This branch is served by the tracks of the Denver and Rio Grande Western railroad; that petitioner transports agricultural implements and farm machinery to receivers located in Idaho and the eastern part of Oregon; that said shipments are transported in intertsate commerce and petitioner has an important and pecuniary interest in the issues involved in the instant proceeding.

[fol. 328] 2. That petitioner, through its Branch Manager, D. G. Adams of Salt Lake City, Utah, entered testimony in Docket No. 30297, in which proceeding the order of the Interstate Commerce Commission is here assailed and by such testimony showed that petitioner is vitally interested in the above proceedings; that petitioner's Salt Lake City branch is the distribution point for its agricultural implements and farm machinery for the intermountain states' territory; about 70% of the agricultural implements and farm fachinery shipped to petitioner's Salt Lake

City branch is destined to points in Utah north of Salt Lake City and to points in Idaho and eastern Oregon, and about 30% is destined to other parts of Utah and western Colorado. Although petitioner's Salt Lake City branch is served by the tracks of the Denver and Rio Grande Western Railroad Company, to be on the safe side all shipments from the east to Salt Lake City should be routed via the Union Pacific Railroad Company, of which a majority are, because if routed to Salt Lake City via The Denver and Rio Grande Western Railroad Company and then reshipped to points on the Union Pacific Railroad Company in Idaho, northern Utah or eastern Oregon, the higher combination rates apply. Petitioner recognizes that to route all shipments of the Salt Lake City branch via the Union Pacific Railroad discriminates against the Denver and Rio Grande Western Railroad and, therefore, on occaison, petitioner routes shipments to its Salt Lake City branch via The Denver and Rio Grande Western Railroad Company.

The following is an actual example of how petitioner is adversely affected when it ships to its Salt Lake City branch via the Denver and Rio Grande Western railroad:

A carload of plows which were moving to petitioner's Salt Lake City branch via the Rio Grande railroad were badly needed at Idaho Falls, Idaho. These plows could not be diverted to Idaho Falls at the through competitive rates so petitioner was required to rebill this carload of plows after arrival at Salt Lake City, Utah, to Idaho Falls, Idaho, at an additional extra freight cost of approximately $300.00.

[fol. 329] Another instance of injuries suffered by petitioner at its Salt Lake City branch operation because of the lack of through competitive rates is as follows:

A carload of tractors was en route from the east to petitioner's Salt Lake City branch. This shipment contained two tractors of the type needed by petitioner's Ontario, Oregon, dealer. Petitioner told its Oregon dealer that it would unload all of the tractors from this car at Salt Lake City except two, and then divert the car to Ontario, Oregon. However, this car of tractors was moving to Salt Lake City via The Denver and Rio Grande Western Railroad Company and as a result the car could not be partially unloaded at Salt Lake City for further movement to On-

tario, Oregon, with the two tractors without paying the less-than-carload rate from Salt Lake City to Ontario, and therefore, the two tractors were shipped by truck from Salt Lake City to Ontario, Oregon, at a cost of approximately $50.00 apiece, causing this loss to petitioner.

These are but two examples of the manner in which petitioner is injured by the non-existence of through competitive rates via the Denver and Rio Grande Western Railroad through Ogden, Utah, to the Pacific northwest.

Joint competitive rates between the Denver and Rio Grande Western railroad and the Union Pacific railroad through Ogden would enable petition to stop shipments in Western Colorado en route to Salt Lake City as well as en route to Idaho and beyond, and would save the payment of the higher combination rates as illustrated and permit petitioner to develop new markets in Colorado and Utah, which it is now precluded from servicing. This situation unduly descriminates against petitioner and unduly prefers petitioner's competitors at points served by the Union Pacific railroad in the states of Colorado, Utah, Idaho and Oregon in violation of Section 3(1) of the Interstate Commerce Act. The order of the Interstate Commerce Commission here assailed failed to grant the relief requested by the Denver and Rio Grande Western Railroad Company and continued the undue discrimination against [fol. 330] petitioner, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that petitioner will be bound by a judgment in this action and that its interests and the main action have questions of law and fact in common, and that petitioner's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

3. That pursuant to Rule 24(c) of the Rules of Civil Procedure (28 U.S.C.A., Rule 24) there is attached hereto the complaint of petitioner, which complaint sets forth the claim for which intervention is sought.

Wherefore, petitioner prays for an order granting leave to intervene as plaintiff in the above entitled proceedings, and to file its complaint which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as plaintiff, and for such

other further relief as the Court may deem requisite in the premises.

Respectfully submitted, Barry and Hupp, by Paul M. Hupp, Attorneys for Petitioner, 738 Majestic Building, Denver 2, Colorado.

Address of Petitioner: Racine, Wisconsin.

[fol. 331] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF J. I. CASE COMPANY, INC.—Filed June 8, 1954

Pursuant to leave granted by this Honorable Court to become intervening plaintiff herein, the J. I. Case Company, Inc., files its complaint.

I

That plaintiff, J. I. Case Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, with its principal place of business in Racine, Wisconsin; that plaintiff is engaged in the business of producing agricultural implements and farm machinery at points in Wisconsin, Illinois, Iowa, and Alabama; it also maintains a branch distribution point for its products in the intermountain states' territory at Salt Lake City, Utah. This branch is served by the tracts of the Denver and Rio Grande Western railroad; that plaintiff transports agricultural implements and farm machinery to receivers located in Idaho and the eastern part of Oregon; that said shipments are transported in interstate commerce and plaintiff has an important and pecuniary interest in the issues involved in the instant proceeding.

[fol. 332] II

That plaintiff, through its Branch Manager, D. G. Adams of Salt Lake City, Utah, entered testimony in Docket No. 30297, in which proceeding the order of the Interstate Com-

merce Commission is here assailed and by such testimony showed that plaintiff is vitally interested in the above proceedings; that plaintiff's Salt Lake City branch is the distribution point for its agricultural implements and farm machinery for the intermountain states' territory; about 70% of the agricultural implements and farm machinery shipped to plaintiff's Salt Lake City branch is destined to points in Utah north of Salt Lake City and to points in Idaho and eastern Oregon, and about 30% is destined to other parts of Utah and western Colorado. Although plaintiff's Salt Lake City branch is served by the tracts of the Denver and Rio Grande Western Railroad Company, to be on the safe side all shipments from the east to Salt Lake City should be routed via the Union Pacific Railroad Company, of which a majority are, because if routed to Salt Lake City via the Denver and Rio Grand Western Railroad Company and then reshipped to points on the Union Pacific Railroad Company in Idaho, northern Utah or eastern Oregon, the higher combination rates apply. Plaintiff recognizes that to route all shipments of the Salt Lake City branch via the Union Pacific railroad discriminates against the Denver and Rio Grande Western railroad and, therefore, on occasion, plaintiff routes shipments to its Salt Lake City branch via the Denver and Rio Grande Western Railroad Company.

The following is an actual example of how plaintiff is adversely affected when it ships to its Salt Lake City branch via the Denver and Rio Grande Western railroad:

A carload of plows which were moving to plaintiff's Salt Lake City branch via the Rio Grande railroad were badly needed at Idaho Falls, Idaho. These plows could not be diverted to Idaho Falls at the through competitive rates so plaintiff was required to rebill this carload of plows after arrival at Salt Lake City, Utah, to Idaho Falls, Idaho, at an additional extra freight cost of approximately $300.00. [fol. 333] Another instance of injuries suffered by plaintiff at its Salt Lake City branch operation because of the lack of through competitive rates is as follows:

A carload of tractors was en route from the east to plaintiff's Salt Lake City branch. This shipment contained two tractors of the type needed by plaintiff's Ontario, Oregon, dealer. Plaintiff told its Oregon dealer

that it would unload all of the tractors from this car at Salt Lake City except two, and then divert the car to Ontario, Oregon. However, this car of tractors was moving to Salt Lake City via The Denver and Rio Grande Western Railroad Company and as a result the car could not be partially unloaded at Salt Lake City for further movement to Ontario, Oregon, with the two tractors without paying the less-than-carload rate from Salt Lake City to Ontario, and therefore, the two tractors were shipped by truck from Salt Lake City to Ontario, Oregon, at a cost of approximately $50.00 apiece, causing this loss to plaintiff.

These are but two examples of the manner in which plaintiff is injured by the non-existence of through competitive rates via the Denver and Rio Grande Western Railroad through Ogden, Utah, to the Pacific northwest.

Joint competitive rates between the Denver and Rio Grande Western railroad and the Union Pacific railroad through Ogden would enable plaintiff to stop shipments in western Colorado en route to Salt Lake City as well as en route to Idaho and beyond, and would save the payment of the higher combination rates as illustrated and permit plaintiff to develop new markets in Colorado and Utah, which it is now precluded from servicing. This situation unduly discriminates against plaintiff and unduly prefers plaintiff's competitors at points served by the Union Pacific railroad in the states of Colorado, Utah, Idaho, and Oregon in violation of Section 3(1) of the Interstate Commerce Act. The order of the Interstate Commerce Commission here assailed failed to grant the relief requested by the Denver and Rio Grande Western Railroad Company and continued the undue discrimination [fol. 334] against plaintiff, which is declared to be unlawful under Section 3(1) of the Interstate Commerce Act; that plaintiff will be bound by a judgment in this action and its interests and the main action have questions of law and fact in common, and that plaintiff's intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

III

To avoid reiteration and repetition, plaintiff adopts as its own, and as if pleaded herein, the complaint, as amended, filed in this Court by The Denver and Rio Grande Western Railroad Company, the plaintiff herein.

Wherefore, plaintiff prays that the relief requested in the complaint be granted.

Respectfully submitted, Barry and Hupp, By Paul M. Hupp, Attorneys for Plaintiff, 738 Majestic Building, Denver 2, Colorado.

Address of Plaintiff: Racine, Wisconsin.

[fols. 335-336] CERTIFICATE OF SERVICE—(omitted in printing)

[fol. 337] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

PETITION OF NATIONAL LIVE STOCK PRODUCERS ASSOCIATION, ET. AL. FOR LEAVE TO INTERVENE—Filed April 13, 1954

To the Honorable Judges of the United States District Court for the District of Colorado:

Come now the National Live Stock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers Association, Utah Cattle and Horse Growers Association, and hereby move this Honorable Court for an order pursuant to Rule 24 (a) and (c) of the Federal Rules of Civil Procedure permitting petitioners to intervene as parties plaintiff in the above entitled proceeding.

I

That the National Live Stock Producers Association, is a cooperative organization composed of over 500,000 live stock growers and feeders throughout the live stock producing areas of the country, and twenty-two cooperative [fol. 338] live stock associations, with its principal offices at 139 North Clark Street, Chicago 2, Illinois.

That the American National Cattlemen's Association, is a voluntary non-profit organization of live stock producers with principal membership in the seventeen States west of the Missouri River, also in the States of Florida, Louisiana, Oklahoma and elsewhere, with executive office and postoffice address 515 Cooper Building, Denver, Colorado.

That the Colorado Cattlemen's Association, is a non-profit Association organized under the laws of the State of Colorado, with offices at 4651 Lafayette Street, Denver, Colorado; it is composed of 48 local associations throughout the State of Colorado, comprising approximately 5,000 members, many of whom have cattle ranching operations contiguous to The Denver and Rio Grande Western Railroad.

That the Idaho Wool Growers Association, is a voluntary non-profit organization in the State of Idaho, with executive office and postoffice address 17 Broadbent Building, P.O. Box 2598, Boise, Idaho.

That the Utah Cattle & Horse Growers Association, is a voluntary, non-profit organization composed of twenty local associations and numerous individuals totaling approximately 2,000 members in the State of Utah with executive office and postoffice address at Heber, Utah.

II

That the petitioners have an important and pecuniary interest in the issues involved in the above entitled proceeding and the members of the above petitioner associations are engaged in the production, buying, selling and shipping of live stock within, to, and from the area involved in this [fol. 339] proceeding and that they pay and bear the charges for the transportation of such live stock.

III

That the petitioners were intervening complainants before the Interstate Commerce Commission in the proceedings in which the order of that Commission is here assailed and therefore are authorized to intervene in this proceeding as of right under the provisions of Section 2323 of the Judicial Code (28 U.S.C.A., Section 2323).

Accompanied herewith, pursuant to provisions of Rule 24(c) of the Federal Rules of Civil Procedure (28 U.S.C.A.) is the complaint of the petitioners, which complaint sets forth the claim for which intervention is sought.

Wherefore, petitioners pray for an order granting them leave to intervene as plaintiffs in the above entitled proceeding, and to file the complaint which is tendered herewith, with the right to have notice and to be treated in all other respects as if they had been named as plaintiffs, and for such other and further relief as the court may deem proper in the premises.

Respectfully submitted, National Live Stock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers Association, Utah Cattle and Horse Growers Association, Paul M. Hupp, Barry & Hupp, 738 Majestic Building, Denver 2, Colorado, Lee J. Quasey, 139 North Clark Street, Chicago 2, Illinois, Attorneys for Petitioners.

[fol. 340] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF NATIONAL LIVESTOCK PRODUCERS ASSOCIATION, AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, COLORADO CATTLEMEN'S ASSOCIATION, IDAHO WOOL GROWERS ASSOCIATION, UTAH CATTLE AND HORSE GROWERS ASSOCIATION—Filed June 8, 1954

Pursuant to leave granted by this court to become intervening plaintiffs herein, the National Live Stock Producers

Association, American National Cattlemen's Association; Colorado Cattlemen's Association, Idaho Wool Growers Association, and Utah Cattle and Horse Growers Association file their complaints.

I

For their complaint and to avoid reiteration and repetition, intervening plaintiffs adopt as their own and as if pleaded herein, the complaint as amended, and filed in this court by The Denver and Rio Grande Western Railroad Company, plaintiff herein.

[fol. 341] Wherefore, intervening plaintiffs pray that the relief requested in the said complaint, as amended, be granted.

Respectfully submitted, National Live Stock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers Association, Utah Cattle and Horse Growers Association, Barry & Hupp, 738 Majestic Building, Denver 2, Colorado, Lee J. Quasey, 139 North Clark Street, Chicago 2, Illinois, Attorneys for Intervening Plaintiffs.

[fol. 342] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENING RAILROADS TO PETITIONS AND INTERVENING COMPLAINTS OF J. I. CASE COMPANY, INC.; NATIONAL LIVE STOCK PRODUCERS ASSOCIATION; AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION; COLORADO CATTLEMEN'S ASSOCIATION; IDAHO WOOL GROWERS ASSOCIATION; AND UTAH CATTLE AND HORSE GROWERS ASSOCIATION—Filed April 27, 1954

Now come Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The At-

chison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, intervening defendants in the above-entitled case, and for their answers to the intervening petitions and complaints of J. I. Case Company, Inc.; National Live Stock Producers Association; American National Cattlemen's Association; Colorado Cattlemen's Association; Idaho Wool Growers Association; and Utah Cattle and Horse Growers Association; these intervening defendants:

1. Admit that the aforementioned petitioners are located and engaged in the business or activity alleged in their respective petitions and complaints.

2. Deny that said petitioners or any of them have any pecuniary or legal interest in this suit, and deny all other allegations of said petitions and complaints.

3. For further answer to the petitions and complaints of the aforementioned parties, these intervening defendants adopt and rely upon their Motion to Dismiss and their An- [fol. 343] swer to the amended complaint of plaintiff The Denver and Rio Grande Western Railroad Company.

Wherefore, having fully answered, these intervening railroad defendants pray that the original complaint, as amended, and the intervening petitions and complaints of the aforementioned parties be dismissed with costs to the plaintiffs and to said intervening petitioners and plaintiffs.

Elmer B. Collins, F. J. Melia, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, 300 International Trust Building, Denver, Colorado, Telephone: Main 0196, Attorneys for Intervening Railroads.

[fols. 344-345] Certificate of Service of Answer—(omitted in printing)

[fol. 346] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF J. I. CASE COMPANY, INC.—Filed April 30, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of J. I. Case Company, Inc., intervening plaintiff herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II

Answering the allegations of paragraph I of the intervening complaint, the Commission admits the same, except that it denies that the intervening plaintiff has any standing to intervene in this suit and it, therefore, relies on its aforesaid "First Defense."

[fol. 347]

III

Answering paragraph II of the intervening complaint, the Commission admits that witnesses for intervening plaintiff entered testimony in the proceedings in Docket No. 30297, out of which this suit arises. But it is denied that the evidence presented proves that the Commission's order herein attacked unjustly discriminates against intervening plaintiff's business at points in the State of Colorado, Utah, Idaho, and Oregon, or at any other place, or that it unduly prefers intervening plaintiff's competitors at points served by the Union Pacific in any of the aforesaid states in violation of Section 3(1) of the Act.

IV

Answering paragraph III of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII of said plaintiff's complaint, as amended.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the intervening complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said intervening complaint be dismissed.

Interstate Commerce Commission, By Edward M. Reidy, Chief Counsel; Samuel R. Howell, Assistant Chief Counsel.

[fol. 348] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF NATIONAL LIVESTOCK PRODUCERS ASSOCIATION ET AL.—Filed April 30, 1954

The Interstate Commerce Commission, one of the defendants in the above-styled cause, hereinafter called the Commission, for answer to the intervening complaint of the National Livestock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers Association, and Utah Cattle and Horse Growers Association, intervening plaintiffs herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and

Rio Grande Western Railroad Company, plaintiff herein, as its first defense to the intervening complaint.

II

Answering paragraph 1 of the intervening complaint, which adopts the allegations contained in the complaint, [fol. 349] as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII, inclusive, of said plaintiff's complaint as amended.

Wherefore, having fully answered the allegations of the intervening complaint herein, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel, Samuel R. Howell, Assistant Chief Counsel.

[fol. 350] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION TO INTERVENE AS PLAINTIFF—Filed May 14, 1954

Now comes The American Short Line Railroad Association, hereinafter referred to as the Association, and pursuant to Rule 24 (a) of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 24(a), and section 2323 of Title 28, United States Code, respectfully moves this Honorable Court for leave to intervene in this action in order to assert the claims set forth in its Complaint, of which a copy is hereto attached, on the following grounds:

1. The American Short Line Railroad Association is a voluntary unincorporated association, with a membership in excess of 300 common carriers by railroad, of which all members but five (5) are engaged in interstate and foreign commerce, and therefore subject to the Interstate Commerce

Act and related acts, and to the jurisdiction of the Interstate Commerce Commission, hereinafter referred to as the Commission.

[fol. 351] 2. Pursuant to petition filed September 23, 1949, and leave granted September 27, 1949, the Association intervened and participated as a complainant before the Commission in Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, the administrative proceeding leading to the issuance of the order sought to be set aside and enjoined by this action.

3. Section 2323 of Title 28, United States Code, in part provides, ". . . associations . . interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof."

4. The Association, its members in general, and many of its members in particular, are vitally interested in the issues presented in this action.

Wherefore, the premises considered, and pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, Title 28 of the United States Code, the Association respectfully prays that it be permitted to intervene as of right in this action, and become a party thereto in support of the plaintiff.

Respectfully submitted, The American Short Line Railroad Association, By: W. J. Hickey, Vice President and General Counsel, 2000 Massachusetts Avenue N. W., Washington 6, D. C.

May 13, 1954.

[fol. 352] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 353] IN UNITED STATES DISTRICT COURT

COMPLAINT OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION—Filed June 8, 1954

Now comes The American Short Line Railroad Association, hereinafter sometimes referred to as the Association,

and having intervened in this action, and become a party in support of the plaintiff, for cause shows:

1. The Association is a voluntary, unincorporated association, with a membership in excess of 300 common carriers by railroad, of which all members but five (5) are engaged in interstate and foreign commerce and therefore subject to the Interstate Commerce Act and related acts, and to the jurisdiction of the Interstate Commerce Commission. The Association maintains its offices at Washington, D. C.

2. The Association, its members in general, and many of its members in particular, are vitally interested in the issues in this action, with respect to the maintenance of routes and rates, and with particular reference to the es- [fol. 354] tablishment of competitive joint through rates.

3. For the remainder of its complaint herein, the Association specifically adopts as its own paragraphs numbered IV to XIII, inclusive, of the Complaint filed herein on behalf of the Plaintiff, The Denver and Rio Grande Western Railroad Company.

4. Wherefore, the intervening plaintiff respectfully prays that the order of the Interstate Commerce Commission of January 12, 1953, in the respects hereinbefore described be found unlawful and void, and that in these respects set aside and permanently enjoined, and that the intervening plaintiff have such other and further relief in the premises as the Court may deem fit and proper.

Respectfully submitted, The American Short Line Railroad Association, By: W. J. Hickey, Vice President and General Counsel, 2000 Massachusetts Avenue N. W., Washington 6, D. C.

[fol. 355] Certificate of Service—(omitted in printing)

[fol. 356] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION—Filed May 20, 1954

The Interstate Commerce Commission, one of the defendants in the above styled cause, hereinafter called the Commission, for answer to the intervening complaint of The American Short Line Railroad Association, intervening plaintiff herein, answers and says:

I

The Commission adopts its First Defense, set forth in its answer to the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, at its first defense to the intervening complaint.

II

Answering paragraph 1 of the intervening complaint, the Commission admits the same.

III

Answering paragraph 2 of the intervening complaint, the Commission denies the same.

[fol. 357]

IV

Answering paragraph 3 of the intervening complaint, which adopts the allegations contained in the complaint, as amended, of The Denver and Rio Grande Western Railroad Company, plaintiff herein, the Commission adopts as its answer thereto the answers heretofore made to paragraphs I to XII, inclusive, of said plaintiff's complaint as amended.

Wherefore, having fully answered the allegations of the intervening complaint herein, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Chief Counsel, Samuel R. Howell, Assistant Chief Counsel.

[fol 358-359] Certificate of Service of Briefs—(Omitted in Printing)

[fol. 360] [File endorsement omitted]

In United States District Court

[Title omitted]

Motion of Intervening Railroad Defendants to Deny the American Short Line Railroad Association's Motion to Intervene as Plaintiff—Filed May 28, 1954

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railway Company; and Wabash Railroad Company, intervening defendants in the above-entitled cause, move that the Court deny the motion dated May 13, 1954, of The American Short Line Railroad Association (hereinafter referred to as the "Association") to intervene in the above-entitled case on the ground that said motion fails to completely to state or show on behalf of the Association or any of its members, any interest in this suit or facts upon which intervention by said Association as plaintiff could be justified.

In support of their motion, these intervening defendants invite the Court's attention to the statement in paragraph 4 of the motion stating that "The Association, its

members in general, and many of its members in particular, [fol. 361] are vitally interested in the issues presented in this action," but that the motion is utterly devoid of facts, and fails completely, to show how such alleged interest arises or is vital; it fails to show how the through routes and joint rates prescribed by the Interstate Commerce Commission's order or the demand by the Rio Grande in this case for through routes and joint rates via its line for all of the involved traffic, have or could possibly have the slightest effect upon any of the Association's members; it fails to show that any of such members are now denied participation in existing routes, rates or revenues; it fails to show that any of such members would or might, if the Rio Grande prevails in this case, participate in traffic and revenues not now enjoyed by them; and it fails to set forth or to give the slightest indication as to what change for better or worse in the position, financial or otherwise, could possibly result to any of the Association's members from any decision in this case.

These intervening defendants further show that in its petition for intervention to the Interstate Commerce Commission in the proceeding described in paragraph 2 of its motion herein, it was asserted that the Association has "for many years, actively supported legislation which would give to this Commission the authority to act in such a way as to promote the public interest," and that the Association "desires an opportunity to present its views, and reasons therefor, for the Commission's consideration in passing upon the merits of the issues raised in this proceeding." Although the Commission overruled our objection to the Association's intervention in that proceeding, it is plain that the Association has no interest whatever in this suit other than to pursue its perennial contention that the Congress should repeal section 15(4) of the Interstate Commerce Act which prohibits the Commission from requiring through routes that short haul existing routes except under conditions there specified. The alleged interest of the Association and its members is even more remote, irrelevant and insufficient to justify its intervention in this suit than was the interest of the Boston Tow Boat Company whose right to intervene before the Commission was

questioned but not decided by the Supreme Court in *Boston* [fol. 362] *Tow Boat Co.* v. *U. S.*, 321 U.S. 632, wherein the Court, holding that the Boston company's interest in the outcome of the litigation in which it had intervened, afforded no ground for a separate appeal, stated at page 633:

> "* * * Boston's petition did not allege, and the record fails to show, that it had any financial interest in Cornell, or was engaged in competition with Cornell, or that its interests would be adversely affected by a decision against Cornell except insofar as that decision might establish a precedent holding tugboats subject to the Commission's jurisdiction under Part III of the Interstate Commerce Act."

The Association's motion alleges that it has a membership in excess of 300 common carriers by railroad, but it fails to allege or show that the order of the Commission attacked by the Rio Grande in this suit, directs any of such members to do or refrain from doing anything or that it affects any of them in any manner whatsoever.

For its complaint, the Association states in paragraph 3 that it "adopts as its own paragraph numbered IV to XIII, inclusive, of the complaint filed herein" by the Rio Grande. All of those allegations except those numbered XII and XIII are merely recitals concerning the Rio Grande's complaint to the Commission and the proceeding as it progressed through the Commission. Neither the Association's motion nor its "complaint" alleges or indicates in any way what, if any, legal or other effect the alleged errors in paragraph XII of the Rio Grande's complaint may have upon the Association or any of its members, and in fact makes no showing that said alleged errors will have any effect upon the Association or its members. Nor does the Association's motion or its "complaint" state any fact or make any allegation indicating any necessity for or right to the relief prayed for in paragraph XIII of the Rio Grande's complaint.

Wherefore, these intervening railroad defendants respectfully move that the "Motion to Intervene as Plain-
[fol. 363] tiff" filed by said Association be denied.

Respectfully submitted, Elmer B. Collins, F. O. Steadry, Warren H. Ploeger, L. E. Torinus, Jr., Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, E. G. Knowles, 300 International Trust Building, Denver, Colorado, Attorneys for Intervening Railroads.

[fols. 364-365] Certificate of Service of Motion—(Omitted in Printing)

[fols. 366-367] Certificate of Service of Brief—(Omitted in Printing)

[fols. 368-369] Certificate of Service of Brief—(Omitted in Printing)

[fol. 369A] In United States District Court

Clerk's Note Re Rio Grande Exhibit 1

The Rio Grande Exhibit 1 is transmitted separately, consisting of the Transcript of the proceedings before the Interstate Commerce Commission in Docket No. 30297, together with the intervening railroad Exhibit A.

[fol. 370] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE AS PARTY PLAINTIFFS BY J. I. CASE COMPANY, INC., ET AL.—June 8, 1954

The above entitled cause came before the statutory Court for the consideration of further petitions to intervene as party plaintiff, and the Court being fully advised in the premises, it is

Ordered:

1. That the petition of J. I. Case Company, Inc., for Leave to Intervene as party plaintiff is granted and its complaint shall be filed.

2. That the petition of National Livestock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers' Association and the Utah Cattle and Horse Growers' Association for Leave to Intervene as Party Plaintiff is granted and their complaint shall be filed.

Dated this 8th day of June, 1954.

By the Court: Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit; [fol. 371] Royce H. Savage, United States District Judge for the Northern District of Oklahoma; William Lee Knous, United States District Judge.

[fol. 372] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING MOTION OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION TO INTERVENE AS PARTY PLAINTIFF —June 8, 1954

The above entitled cause came on before the statutory Court for the consideration of a motion of The American

Short Line Railroad Association to intervene as party plaintiff, and the motions of Intervening Railroad Defendants to deny The American Short Line Railroad Association's motion to Intervene as Plaintiff, and the Court being fully advised in the premises, it is

Ordered:

1. That the Motion of The American Short Line Railroad Association to intervene as party plaintiff is granted and its complaint shall be filed.

Dated this 8th day of June, 1954.

By the Court: Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit; Royce H. Savage, United States District Judge for the Northern District of Oklahoma; William Lee Knous, United States District Judge.

[fol. 372] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

UNION PACIFIC RAILROAD COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants

OPINION—October 26, 1954

Messrs. Elmer B. Collins, Asst. Western General Counsel, John J. Burchell and W. R. Rouse, Of Counsel, Omaha, Nebraska, for Union Pacific Railroad Company.

Mr. F. O. Steadry, Chicago, Illinois, for Chicago and North Western Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company.

Mr. Carson L. Taylor, Chicago, Illinois, for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Mr. Eugene S. Davis, St. Louis, Missouri, for Wabash Railroad Company.

Messrs. Robert E. Quirk, Washington, D. C., Harry L. Welch, Omaha, Nebraska, and Herbert M. Boyle, Denver, Colorado, for Denver & Rio Grande Western Railroad Company.

Mr. L. E. Torinus, Jr., St. Paul, Minnesota, for Great Northern Railway Company.

Mr. Bert L. Overcash, Lincoln, Nebraska (Mr. Clarence S. Beck, Attorney General of Nebraska, was on the brief) for the State of Nebraska and Nebraska State Railway Commission.

Mr. Robert L. Simpson, Olympia, Washington (Mr. Don Eastvold, Attorney General of Washington, was on the brief) for Washington Public Service Commission.

Mr. John H. Carkin, Salem, Oregon (Mr. C. W. Ferguson was with him on the brief) for Public Utilities Commission of Oregon.

Mr. John H. Riskin, Helena, Montana, for Board of Railroad Commissioners of the State of Montana.

Mr. Howard B. Black, Attorney General of Wyoming, Cheyenne, Wyoming, for State Board of Equalization and Public Service Commission of Wyoming.

[fol. 374] Mr. Justus R. Moll, Washington, D. C.; and Messrs. J. D. Cranny and J. P. Moore, Omaha, Nebraska, for M. P. Caveny of Omaha, chairman of the Union Pacific General Chairmen's Association.

Mr. Ray McGrath for Idaho Farm Bureau, Public Service Commission of Utah, Committees of the Railroad Brotherhoods who work for the D & RG, and National Livestock Producers Association.

Messrs. Warren H. Ploeger and Roland J. Lehman, on the brief, Messrs. Nye F. Morehouse, M. L. Countryman, Jr., Edwin C. Matthias, J. C. Gibson, M. L. Bluhm, Joseph H. Miller, Of Counsel, for the plaintiffs.

Mr. Edward M. Reidy, Chief Counsel, and Mr. Samuel R. Howell, Asst. Chief Counsel, of Counsel, for Interstate Commerce Commission.

Mr. Henry B. Cockrum, Acting Assoc. Solicitor, United States Department of Agriculture, Washington, D. C.; Mr. Charles W. Bucy, Assoc. Solicitor, was with him on the brief for the Department of Agriculture.

Mr. E. Riggs McConnell, Special Asst. to the Attorney

General, Washington, D. C.; Messrs. Stanley N. Barnes, Asst. Attorney General, James E. Kilday, Special Asst. to the Attorney General, and Donald R. Ross, United States Attorney, were with him on the brief for the United States.

Before Johnsen and Collet, Circuit Judges, and Delehant, District Judge

COLLET, Circuit Judge:

The Denver and Rio Grande Western Railroad Company, hereafter referred to as the Rio Grande, filed a complaint with the Interstate Commerce Commission requesting the Commission to order the Union Pacific Railroad Company (and other lines comprising the Union Pacific System, together with connecting carriers comprising, in all, 221 railroads, which will be referred to as the Union Pacific to file joint rates over through routes with the Rio Grande for the transportation of feright from and to certain areas. The Commission granted the request as to certain types of freight with substantial territorial limitations. The Union Pacific *Union Pacific* brings this action to enjoin and set [fol. 375] aside the order. A reference to a map of the United States will be helpful in understanding the following summarization of the facts.

The northern terminus of the Rio Grande is Ogden, Utah. From Ogden it runs south through Salt Lake City and Provo, Utah, then southeasterly and east, entering Colorado at about the south central part of that state, thence east and somewhat north through the central part of Colorado to Dotsero, west of Denver, where it divides, one branch going on east to Denver, the other swinging south and east to Pueblo, Colorado. From Denver the Rio Grande line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serve territory in southern Utah, northwestern New Mexico, and southern Colorado. These latter lines are not of special importance in this action. At Denver, Colorado Springs, Pueblo, and Trinidad the Rio Grande maintains joint rates and through routes with lines other than the Union Pacific to destinations east and south of those points.

The Union Pacific (including connecting lines which were defendants in the I.C.C. proceedings) serves the greater

part of the east, south and midwestern sections of the United States. Traffic involved in this action from those sections flowing westward over the Union Pacific and connecting lines converges at Denver and Cheyenne, Wyoming, then moves westwardly across the southern part of Wyoming to Ogden and Salt Lake City. One of its lines runs from Salt Lake City south to Provo, Utah, thence southwest to Los Angeles, California.

[fol. 376] The Union Pacific also serves the northwestern part of the United States, including that part of Utah north of Ogden, Idaho, Montana, Oregon, and Washington. It is traffic from and to this latter territory, referred to herein as the northwest territory or area, which is the principal subject of the present controversy.

The Union Pacific maintains joint rates and through routes over its lines and with many connecting carriers from and to the northwest territory through Ogden and Salt Lake City, Cheyenne, Denver, and points east and south to the Atlantic Seaboard and the Gulf of Mexico. For a comparatively short distance, from Ogden through Salt Lake City to Provo, where the Los Angeles line swings southwest, the Union Pacific and the Rio Grande parallel and serve some common points. To and from these points, joint rates and through routes are maintained by the Union Pacific over its lines with the northwest territory and the area east of Cheyenne and Denver served by the Union Pacific. The Union Pacific does not maintain joint through rates with the Rio Grande, with certain exceptions not material in this proceeding. Freight moving from the northwest territory to points in southern Utah and Colorado on the Rio Grande, finally destined to points east of the eastern termini of the Rio Grande, moves on the combination rate, consisting of the total of the Union Pacific rate to Ogden via Union Pacific and the Rio Grande rate from Ogden via Rio Grande to points on the Rio Grande. The same is true of the rates on shipments from points east of Denver to those points on the Rio Grande finally destined to the northwest territory. This combination of rates, or combination rate, as it is called, is considerably higher [fol. 377] than a joint through rate. Freight moving from and to the northwest territory from and to all points east

of Denver[1] served by the Union Pacific and connecting carriers has the benefit of joint through rates via Union Pacific, with accompanying in-transit privileges en route, while freight originating on the Union Pacific in the northwest territory and moving to the area east of Denver, which is routed over the Rio Grande, pays the combination rate without in-transit privileges at points on the Rio Grande. The result is that practically all of the long-haul traffic originating in the northewest area and destined to [fol. 378] the area east of Denver goes over the Union

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[1] "All points east of Denver" will be used as the designation of all points included in the Commission's order to or from which through routes and joint rates were ordered established by the Union Pacific with the Rio Grande. The Commission's order in this respect was: (287 I.C.C. 611, 659)

"We conclude:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grand, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

Pacific all the way on the lower joint and through rates. Since the formal record before the Commission consists of 1,957 pages of testimony, 57 exhibits and 74 verified statements, the foregoing statement is obviously only a salient outline of the basis for the Rio Grande's complaint. For a complete understanding of the intricacies of the case by one unfamiliar with the record, it will be necessary to refer to the extensive report and order of the Commission reported in 287 I.C.C. 611.

The Commission ordered the establishment of through routes and joint rates via Ogden or Salt Lake City by the Union Pacific with the Rio Grande for the transportation of granite and marble monuments in carloads from points of origin in Vermont and Georgia to destinations in the northwest area, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from points of origin in the northwest territory to destinations "east of Denver." The order is based upon three primary basic findings. First, that the through routes and joint rates are necessary and desirable in the public interest, in order to provide *adequate and more economic transportation;* second, that the existing joint rates maintained by the Union Pacific are and will be *unjust and unreasonable and unduly prejudicial* to shippers and receivers of freight using or desiring to use the Rio Grande and *unduly preferential to shippers and receivers of freight using the Union Pacific;* third, that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad between the northwest area and points [fol. 379] on the Bamberger line between Ogden and Salt Lake City, while refusing to establish joint rates with the Rio Grande to and from the same points on the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Sec. 3 (4) of the Interstate Commerce Commission Act. Finding No. 1 has heretofore been quoted in footnote 1. Findings 2 and 3 are set out below.[2] To understand the import of these findings it is

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[2] "2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and

necessary to explain the factual theory upon which they are based.

First as to the finding that the rates ordered are necessary and desirable to provide adequate and more economic transportation. Located along the route of the Rio Grande, between Ogden on the west and Denver, Pueblo and Trinidad on the eastern termini, are a number of livestock feeders. Some of these are ranchers who graze and feed cattle and sheep. Others are operators of beet sugar plants which produce livestock feed as a by-product and feed the by-product to livestock. These livestock feeders buy cattle and sheep in the northwest area, which are ultimately des- [fol. 380] tined for the market, and ship them to points on the Rio Grande for feeding. Many of the principal livestock markets of the United States are located east of Denver. Without joint through rates with in-transit privileges which would permit these livestock feeders to ship from the northwest area to the feeding points on the Rio Grande and then reship on joint through rates to points east of Denver, Pueblo, and Trinidad, they are at a substantial rate disadvantage with similar livestock feeders following the same practice who are located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific, who reship to points east of Denver. They are also at a substantial rate disadvantage in purchasing livestock in the northwest area in competition with buyers located on the Union Pacific lines

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unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act." 287 I.C.C. 611, 659-660.

west of Denver and Cheyenne who have the benefit of joint through rates and in-transit privileges over the Union Pacific.

Also located on the Rio Grande are a number of industries which clean, package, process, freeze, and store fresh fruits, vegetables, poultry, food products, butter, eggs and beans, and ship them on east to points beyond Denver, Pueblo, and Trinidad. These industries are at a comparable rate disadvantage, without in-transit privileges, as livestock feeders, and for the same reasons.

Monument dealers obtaining or shipping granite and marble from Vermont and Georgia are unable to ship full carloads to the northwest territory and have the rate advantage of partially unloading cars at intermediate points on the Rio Grande under in-transit privileges of through [fol. 281] routes and joint rates which are available at points located on the Union Pacific.

This finding, which is finding No. 1 quoted in the foot-note, is held by the Commission to justify ordering the establishment of through routes and joint rates under Secs. 15 (3) and 15 (4). Title 49 U.S.C.A. Secs. 15 (3) and 15 (4). Sec. 15 (3) empowers the Commission to establish through routes and joint rates when necessary or desirable in the public interest,[3] but Sec. 15 (4) prohibits the Commission from ordering the establishment of through routes by a carrier under Sec. 15 (3) without the carrier's consent if the result would be to short-haul that carrier unless, as provided by Sec. 15 (4), the Commission finds that the through route is needed in order to provide (1) *adequate*, and (2) *more efficient* or *more economic* transportation.[4]

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[3] "Sec. 15 (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by carriers subject to this part, * * *."

[4] "Sec. 15 (4) In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and un-

[fol. 382] The Commission accurately states the legal effect of Sec. 15 (4) in its report (Denver & R.G.W. R. Co. v. Union Pac. R. Co., 287 I.C.C. 611) at page 655 as follows:

> "Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the 'through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation.' Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In Pennsylvania R. Co. v. United States, 323 U.S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in D. A. Stickell & Sons, Inc., v. Alton R. Co., supra, the supreme Court said that the expressions 'more efficient or more economic' transportation, as used in section 15 (4), 'may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found.' These latter considerations are not determinative, how-

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der a common management or control therewith, which lies between the termini of such proposed through route, * * * (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. * * *."

ever, unless the existing routes can be found not to provide 'adequate' transportation.

"In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests."

Was there evidence to support the finding of inadequacy? Only in the event there was inadequacy of transportation can the question of efficiency or economy be reached. It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order. There is no evidence to support a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are [fol. 383] inadequate. There is abundant support, however, for the finding that the service is inadequate to patrons of the Rio Grande, located on the Rio Grande between Ogden on the west and Denver, Pueblo, and Trinidad on the east (not served by the Union Pacific between Ogden and Provo), who do not have in-transit privileges with respect to freight moving from the northwest area which is to be reshipped to points east of Denver, if under the law the lack of in-transit privileges may constitute "inadequacy". That is also true as to the service to shippers of marble and granite from Vermont and Georgia to initial points on the Rio Grande who need the in-transit privileges of partial unloading or processing en route, incident to reshipment to final destination points beyond Ogden in the northwest area. The foregoing inadequacies are based upon the premise that the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15 (4). The Union Pacific vigorously contends that it does not. This question presents the crux of this case. If, as the Union Pacific contends, in-transit rights and privileges are matters over which the Commission under the law has no control, the existence or granting of which is subject only to managerial discretion of the carrier, and relate only

to economy or efficiency of transportation to the exclusion of considerations of adequacy of transportation, then the lack of in-transit privileges will not suffice as a proper basis for ordering "adequate" transportation. The argument is made in effect that since the transportation facilities are now available over the Union Pacific and the Rio Grande on the higher combination rates, the present nonexistence of in-transit privileges relates only to the cost or economy [fol. 384] of transportation. Reference is made to excerpts from opinions which it is said support the conclusion that the Commission may not under its general regulatory power force a carrier to provide or establish in-transit privileges. The question has many ramifications. We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. Pennsylvania R. Co., et al. v. United States, et al., 323 U.S. 588, 54 F. Supp. 381.

But the inadequacy established by the evidence does not extend to shipments from the northwest area to initial destinations east of Denver. The same is true of shipments of monuments from Vermont and Georgia to points of initial destination in the northwest territory. Transportation service is now adequate between those points. There is ample evidence to support the finding that the establishment of the through routes and joint rates between the northwest area and points on the Rio Grande (not also served by the Union Pacific between Ogden and Provo), as to shipments which require in-transit privileges at points on the Rio Grande for reshipment to points east of Denver, will result in more economical transportation. Differences in mileage and other comparative factors are for the Commission to weigh, evaluate and determine. Its ultimate [fol. 385] factual conclusion may not be overturned when supported by the evidence. But, again, there is no evidence that the service is inadequate or that more eco-

nomical transportation service will result with respect to shipments from the northwest area to points between Ogden and Provo served by both the Union Pacific and the Rio Grande and to be reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established. The evidence therefore sustains the finding of inadequacy and the need for more economical transportation only as to (1) carload shipments of commodities embraced in the Commission's order from points in the northwest territory destined to points of final destination east of Denver which require in-transit privileges at points on the Rio Grande; (2) shipments of granite and marble monuments from Vermont and Georgia to final destinations in the northwest territory which require in-transit privileges at points on the Rio Grande not also served by the Union Pacific. If the order has been so limited to the evidence it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15 (4). [fol. 386] The second finding, that the combination rates maintained by the Union Pacific and the Rio Grande are unduly prejudicial to shippers using or desiring to use the Rio Grande and unduly preferential to shippers and receivers using the Union Pacific to the extent they exceed the joint and through rates available to shippers located on the Union Pacific, is made for the purpose of bringing the order within the authorization of Sec. 3 (1). Title 49 U.S.C.A. Sec. 3 (1). That section is as follows:

> "Sec. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm,

corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The situation which this finding seeks to correct, simply stated, is that the shippers and receivers of the designated commodities located on the Rio Grande who do not have in-transit privileges and joint and through rates are at an economic disadvantage compared to shippers and receivers located on the route of the Union Pacific who do have joint and through rates and in-transit privileges.

If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3 (1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15 (4) heretofore considered. But the prejudice and preference pro- [fol. 387] hibited by Sec. 3 (1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3 (1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3 (1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in Central R. Co. of New Jersey v. United States, 257 U. S. 247, was different, the purpose of Sec. 3 (1) was there stated as follows: (Loc. cit. 259-260)

"What Congress sought to prevent by that section, as originally enacted, was not differences between lo-

calities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of § 3."

If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3 (1) merely because a shipper entity described in Sec. 3 (1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15(4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3(1).

The third finding, heretofore quoted, to the effect that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad to and from points in the north-[fol. 388] west area and points on the Bamberger line from Ogden to Salt Lake City, inclusive, while refusing to maintain joint rates with the Rio Grande on shipments from the northwest area to the points served by both the Rio Grande and the Bamberger Railroad from Ogden to Salt Lake City, inclusive, discriminates against the Rio Grande, is based on Sec. 3 (4), which is as follows:

"Sec. 3 (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

The Bamberger Railroad is an electric line operating only from Ogden to Salt Lake City, serving those cities and intermediate points. The Rio Grande serves all points served by the Bamberger. The criterion for determining unlawful discrimination under Sec. 3 (4) is stated by the Commission at page 658 of its order as follows:

> "A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred."

The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3 (4) clearly prohibits such discrimination. The Commission's order in this respect is valid under Sec. 3 (4).

[fol. 389] Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the Rio Grande's case before the Commission. We do not find justification for serious consideration of that question.

Findings of Fact

I

The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points.

II

The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from [fol. 390] the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.

III

The record supports the Commission's finding that present transportation service for granite and marble monuments, in carloads, originating in Vermont and Georgia, consigned to initial destination points on the Rio Grande, requiring unloading and in-transit privileges for continued movement to points in the northwest territory, is inadequate and uneconomical and that the establishment of joint rates and through service is necessary in order to provide adequate and more economic transportation for such shipments.

IV

The evidence supports the finding that as to designated items of traffic moving from the northwest area, shippers and receivers of freight located on the Rio Grande are at an economic disadvantage compared with shippers and receivers of freight from the northwest area who are located on the Union Pacific. But there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3 (1).

V

The evidence supports the finding of the Commission, referred to and quoted herein as Finding 3, that unlawful discrimination prohibited by Sec. 3 (4) is being practiced by the Union Pacific in refusing to establish through routes [fol. 391] and joint rates with the Rio Grande comparable

to those existing between the Union Pacific and the Bamberger Line on traffic moving from the northwest area to points served by both the Bamberger Line and the Rio Grande between Ogden and Salt Lake City.

Conclusions of Law

I

The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4). The evidence therefore supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities in carloads originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities the order of the Commission is valid under Secs. 1, 15 (3) and 15 (4) of the Act and does not violate the direction of Sec. 15 (4) that reasonable preference be given the carrier which originates the traffic.

II

The evidence supports the finding of the Commission that it is necessary, in order to provide adequate and more economic transportation of shipments of marble and granite monuments in carloads from points in Vermont and Georgia [fol. 392] to points of final destination in the northwest territory, which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area, that through routes and joint rates be established between the Union Pacific and the Rio Grande as to such shipments.

III

To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad, said order is not valid, because Sec. 15 (4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking.

[fol. 393]

IV.

To the extent the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande at Ogden on carload traffic moving from the northwest area to points between Ogden and Salt Lake City, inclusive, served by both the Rio Grande and the Bamberger Line, the order is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act.

To the extent stated in the foregoing opinion, findings of fact, and conclusions of law, the order of the Commission will be enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings as it may deem appropriate, consistent herewith.

[fol. 394] Civil Action No. 76-53

UNION PACIFIC R. CO.

vs.

UNITED STATES

JOHNSEN, Circuit Judge, dissenting:

The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute. The majority opinion upholds in part the result which the Commission has so reached.

What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is "perishable food articles". Here, as taken from its Report, are the manner and perspective of its approach to the question.

"Growers [of perishable food articles in Idaho, located on the Union Pacific] * * * market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon and Washington] need as many markets and outlets as possible."[1] 287 I.C.C. at page 642. To comprehend or evaluate that need, says the Commission, "it is necessary to consider the nature, extent and functioning of our intricate and far-flung commodity marketing system." P. 655. The importance, in our condition of growing population and national develop-

[1] It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a "bridge" line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles.

ment, of having "a constantly expanding flow of diverse commodities" and "particularly articles of food" is em- [fol. 395] phasized. The comment is made that "A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible," and the truism is expressed that "Adequate transportation facilities and services are required for the proper functioning of the system." P. 656.

Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

1. "Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible.* This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process be permitted.*" (Emphasis mine.) P. 656.

2. "A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities." In-transit privileges, "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit," are available at various points on the Union Pacific to through-shippers, on the basis of the joint rates applicable over that route, and similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates, by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these additional facilities would be able to enjoy them on the same basis as those on the Union Pacific. Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union Pacific, [fol. 396] "The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities." P. 656.

3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them "from effective participation in the widespread system developed for the marketing of such commodities." In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given "as many routes as possible" and "as much flexibility as possible in the distribution process", because otherwise they will be debarred from effective participation in * * * the marketing of such commodities."

In other words, whenever it is possible physically and practicably to open up a new or an additional through route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15 (4) of the Act, 49 U.S.C.A. § 15 (4), where the element of short-hauling another carrier is involved, as it is here, [fol. 397] that such an added through-route must also provide "more efficient or more economic transportation" than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15 (3) to prescribe joint rates and pointing out that joint rates necessarily in the situation will provide "more economic transportation", since they obviously are lower than the previous combination rates.

I have grave legal doubt whether the Commission's

power to establish joint rates under section 15 (3) has any relationship to the term "more economic transportation" in section 15 (4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term "more economic transportation" in section 15 (4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportational comparison from the standpoint of the interests of both the public and the carriers—and that the Commission's power to establish joint rates under section 15 (3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15 (4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term "more economic transportation" under section 15 (4), in the addition of another carrier's route as a mere "bridge" line for such traffic. If that be not so, then there is not any [fol. 398] situation in which the Commission can not make a finding of "more economic transportation" for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to "as many routes as possible" and "as much flexibility as possible in the distribution process," so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and

further such new route can be declared to provide "more economic transporation", because by placing joint rates in effect the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15 (4) entirely, as affording them any protection whatsoever against deprivation of their long hauls.

Here the opening up of a through route over the Rio Grande as a bridge carrier for the transcontinental freight involved will deprive the Union Pacific of a long haul of 975 miles upon such traffic as the Rio Grande is able to solicit away from it. But this is not the sole purport or effect of the Commission's order. If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessarily will reduce the cost of using the new through route as against the combination rate previously applicable.

[fol. 399] Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" is, as previously indicated, "perishable food articles". But it has, by means of some artificial classification, included ordinary livestock as a perishable food article (P. 656), saying merely before doing so, that "We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway." And it has further held that a little monument dealer, located on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and there in Colorado, on a through rate basis,

some individual monuments out of an estimated four-car-load lot of monuments per year.[2]

All of this to me is but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that [fol. 400] end. But Congress has never been willing to accede to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All this is familiar history in the railroad world, and I shall not bother to go into it further here.

It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out.

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[2] I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of "urgent need" (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of "as many routes as possible" and "as much flexibility as possible in the distribution process" for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country.

I do not mean to make any implication, nor do I here assume to pass judgment, on whether the Ogden gateway is in other manner or to other extent subject to being opened up. All I say is that the philosophy and standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" can not be made the basis for overriding the short-hauling provisions of section 15(4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term "more economic transportation" to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any [fol. 401] commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did.

I have previous referred to the fact that most of the traffic that is here involved originates on the branch lines of the Union Pacific, and that on such of this traffic as the Rio Grande is able to solicit to use its route, the Union Pacific will lose a line haul of 975 miles. The Report of the Commission admits that "the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves" is about 200 miles. Page 654. It also recognizes that the Rio Grande is a mountainous route, of higher grades, more circuity, and greater operational costs than the Union Pacific. "The total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific. Other data as to physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over

the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services." Page 648.

All of these matters, however, the Commission lightly brushes aside, as not having relationship to the question of "more economic transportation" in the situation, and so leaving it free to hold, as above indicated, that the new through route provides "more economic transportation", because its joint rates necessarily are lower than the previously applicable combination rates. All that the Com- [fol. 402] mission says, in brushing aside the transportational differences which I have set out, as not requiring consideration on the question of "more economic transportation" in the situation, is that, when they are spread over hauls of such great lengths as are here involved, "they become relatively insignificant." Page 658.

The Report does not undertake to show what amount of traffic goes where. It merely says that "About 90 per cent of the traffic upon which joint rates are sought via Ogden and the Rio Grande moves to (Missouri River crossings and points east and southeast) and about 10 per cent to the Southwest." Page 626. How much terminates at the Missouri River crossing points or at other midwestern destinations, the Report does not state. As to livestock, however, it certainly is a matter of common knowledge that the primary markets are Chicago, Omaha, Kansas City and some other Missouri River points. To each of these points, as well as to the Minneapolis and St. Louis markets, the record shows that a haul of 200 miles more, and a transportation time of at least 24 hours longer, as well as at least one or two more terminal-yard services, are involved over the Rio Grande route. I do not believe that without rational demonstration the Commission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1524 miles (Chicago), the elements of difference which I have set out are so "relatively insignificant" as to be entitled to be ignored on the question of whether "more economic transportation" is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do

not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportational and service differences existing, as related to the question of "more economic transportation" under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without [fol. 403] establishment of the reality of that horizon for lumping purposes.

Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District Rates*, 176 I.C.C. 1, 190 I.C.C. 175, 190 I.C.C. 611, 200 I.C.C. 535, the Commisison prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15(4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations.

This dissent is being written hastily, in order not to delay the filing of the majority opinion, and I shall accordingly not take the time to go into detail on other matters. [fol. 404] I agree with the majority that the Commission had no right here to find a violation of section 3(1) of the

Act against the Union Pacific and its connecting through-route carriers, but the basis for my view is not that adopted by the majority, that a discrimination under this section cannot at all exist, unless the complaining person or entity is located upon the lines of the carrier or combination of carriers claimed to have committed the discrimination. I do not believe that this viewpoint is tenable on the language of section 3(1), nor on the expressions contained in St. Louis Southwestern Ry. Co. v. United States, 245 U.S. 136, 144, as well as on the plain, contrary assumptions made in Texas & Pacific Ry. Co. v. United States, 289 U.S. 627. But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3(1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3(1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3(1), I am certain that its action resting on this basis alone could not on these facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15(4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the perscribing of through routes and joint rates in relation to the existing conditions.

[fol. 405] In the pattern of the Commission's apparent attempt to strike at as much in the present situation as possible, the Commission further, as noted in the majority opinion, required the Union Pacific to establish joint rates with the Rio Grande to and from the same points where it maintained joint rates with the Bamberger Railroad. The Report says: "The Bamberger operates, for about 36 miles,

between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande." P. 659. The brief of the Union Pacific argues pointedly that "No evidence was submitted concerning or comparing transportation conditions on the Bamberger's electric line between Ogden and Salt Lake City with conditions on the Rio Grande." The brief of the Commission makes no denial of the fact that no such evidence is contained in the record. The most that the Commission could properly have said, I think, was that it had not been made to appear by the evidence that there was any important dissimilarity in the conditions on the two roads. But the lack of any such evidence of dissimilarity could hardly afford a basis for a finding of similarity on the part of the Commisison. This segment of the Commission's order is perhaps of relatively small importance in the present controversy. I refer to it simply as being characteristic or in the pattern of the loose and improper basis and manner in which it seems to me that the Commission has dealt with the entire situation.

I would strike down the Commission's order generally, on the basis and manner in which its result has been reached. In taking that position, however, I would again emphasize that I intend no implication that there may not exist some proper basis and some proper manner of reach as to some parts of the Ogden gateway situation. I have not allowed my mind to look at that avenue, in either one direction or the other. The pervading infirmities on which [fol. 406] the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right there.

[fol. 407] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 4492 Civil

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants

OPINION—January 13, 1955

Messrs. Dennis McCarthy and Robert E. Quirk (Herbert M. Boyle was with them on the brief) for plaintiff.

Mr. E. Riggs McConnell (Messrs. Stanley N. Barnes, James E. Kilday, and Donald E. Kelley, were with him on the brief) for the United States of America, defendant.

Mr. Samuel R. Howell (Mr. Edward M. Reidy was with him on the brief) for the Interstate Commerce Commission, defendant.

Messrs. Elmer B. Collins, F. O. Steadry, L. E. Torinus, Jr., and Eugene S. Davis (Messrs. F. J. Melia, Warren H. Ploeger, Roland J. Lehman, Carson L. Taylor, E. G. Knowles, W. R. Rouse, Nye F. Morehouse, M. L. Countryman, Jr., Edwin C. Matthias, J. C. Gibson, and Joseph H. Miller were with them on the briefs) for intervening railroad defendants.

Messrs. W. J. Hickey, John R. Barry, and Lee J. Quasey (Messrs. Duke W. Durbar, Frank W. Wachob, William T. Secor, E. R. Callister, Jr., Peter M. Lowe, Paul M. Hupp, Lowe P. Siddons, Dennis O'Rourke, and Alden T. Hill were with them on the briefs) for intervening plaintiffs.

Messrs. William E. Doyle, Robert L. Simpson, Howard B. Black, and Bert L. Overcash (Messrs. Don Eastvold, C. W. Ferguson, James B. Patten, Clarence S. Beck, and Richard H. Shaw were with them on the briefs) for intervening defendants.

Before Phillips, Chief Circuit Judge, and Knous, Chief District Judge, and Savage, District Judge

Per Curiam:

[fol. 408] This action was brought by the Denver and Rio Grande Western Railroad Company against the United States of America and the Interstate Commerce Commission under the Urgent Deficiencies Act to set aside and permanently enjoin, in part, an order of the Interstate Commerce Commission.

In August, 1949, the Rio Grande filed a complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroad defendants. In such complaint the Rio Grande alleged that the defendants have failed and refused to establish and maintain competitive joint rates on freight traffic with the Rio Grande: (a) via its Colorado and Utah gateways between places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and (b) between Utah common points and places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, [fol. 409] Oregon, Washington and British Columbia;

And that through routes now exist and have for many years existed for the interchange of traffic by the Rio Grande with the Union Pacific at Provo, Ogden and Salt Lake City, Utah, and with the Union Pacific and certain other defendants at Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colorado, as to freight traffic

(a) between points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and

(b) as to freight traffic between Utah common points and points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that the rates and charges applicable to such traffic between the points described via such through routes, with minor exceptions, are based upon the combination of the

intermediate local or other rates, which rates and charges, [fol. 410] in the aggregate, are substantially higher than the joint rates maintained by the defendants on similar competitive traffic between the same origin and destination places and territories which moves via the Union Pacific or via the Union Pacific and the other defendants, and that such combination rates are unjust, unreasonable and discriminatory, as compared with the competitive joint rates maintained by the Union Pacific or via the Union Pacific and the other defendants on like freight traffic via other competitive routes;

And that the failure and refusal of the Union Pacific and other railroad defendants to establish joint competitive through rates and charges applicable to the freight traffic between the points above described results in combination through rates which are excessive, unjust, unreasonable and constitute violations of §§ 1, 3 and 15 of the Interstate Commerce Act [1] and was and is contrary to the national transportation policy, since it deprives the public, [fol. 411] shippers and the Rio Grande of the use of reasonable and available through routes and rail facilities at just, reasonable and non-discriminatory through joint rates, which were and are necessary and desirable in the public interest.

The Rio Grande prayed that the Commission enter an order requiring the Union Pacific Railroad and the other defendant railroads to establish and maintain for the future, just, reasonable, and non-discriminatory competi- [fol. 412] tive joint rates on the freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific and its connections in Utah, north of Ogden, Utah, and in Idaho, Montana, Oregon, Washington, and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, and points east thereof; and between (b) the points designated in (a); and (d) Utah common points.

[fol. 413] By the challenged order entered on January 12, 1953, the Commission granted some but not all of the

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[1] Hereinafter called the Act.

relief sought by the Rio Grande. 287 I.C.C. 611. In this action the Rio Grande seeks to have the court enjoin, set aside, annul and remand, with appropriate directions, that part of the order which denied relief sought by the Rio Grande. Union Pacific and other railroads and other persons have intervened with permission of the Court.

Section 1, Par. (4) of the Interstate Commerce Act in part provides:

> "It shall be the duty of every common carrier * * * to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

[fol. 414] Section 3, Par. (4) of such Act in part provides:

> "All carriers * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. * * *."

Section 13(1) of such Act in part provides:

> "That * * * any common carrier, complaining of *anything done or omitted to be done* by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to

said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such Common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall [fol. 415] make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satify the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.'" (Italics ours.)

Section 15(1) of such Act provides:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this [fol. 416] part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum or maximum and minimum, to be charged, and what individual or joint classification, reguiation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such viola-

tion to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

At the threshhold we are confronted with a motion of the defendants to dismiss on the ground that the Rio Grande is without standing to maintain this suit. We hold that the Rio Grande has such standing. Since we so hold, by reason of our conclusion with respect to the [fol. 417] existence of the through routes, the erroneous finding of the Commission on that issue, the erroneous application to the facts by the Commission of certain provisions of the Act, and the rights of the Rio Grande under the provisions of the Act, we shall state in detail our reasons for denying such motion, after a full consideration of the merits.

I

The Merits

The Rio Grande operates approximately 2400 miles of railroad in Colorado, New Mexico and Utah. From its northern terminus at Ogden, Utah, it runs south to Salt Lake City and Provo, Utah, thence generally east to Dotsero, Colorado, where it divides, one branch going east to Denver, the other southeast to Pueblo. From Denver the line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serving territories in southern Utah, northwest New Mexico and southern Colorado are not of importance in this action.

The Rio Grande has interchange track connections and interchanges traffic with the Union Pacific at Denver, [fol. 418] Colorado, and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and the Western Pacific at Salt Lake City. It has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, Santa Fe and the Colorado

& Southern; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo with the Santa Fe, the Colorado & Southern and the Missouri Pacific; at Walsenburg with the Colorado & Southern and at Trinidad with the Santa Fe and the Colorado & Southern.

The Union Pacific, with its leased lines, operates as a single system. From Ogden, Utah, one line of the Union Pacific extends in a southwesterly direction through Salt Lake City and Provo and thence to Los Angeles. Another line extends northwest through Utah, Idaho, Oregon, Washington and Montana, serving what is referred to as the northwest territory, or the closed door territory. From Ogden, the Union Pacific runs generally easterly through [fol. 419] Cheyenne and Denver, with eastern termini on the Missouri River at Omah and Kansas City. At various points on its line it connects and interchanges traffic with the other intervening railroads.

The Union Pacific and other intervening railroads and the Rio Grande participate in through routes and joint rates with each other and with other carriers on transcontinental and other traffic, with certain exceptions. Joint rates generally do not apply in connection with the Rio Grande on traffic originating at or destined to points in Utah, north of Ogden, and in Idaho, Montana, Oregon and part of Washington. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande to and from Ogden, the higher combination rate, consisting of the aggregate of local rates, applies.

The transcontinental traffic to and from this northwest territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than [fol. 420] over the Rio Grande route. This is due, in part, to the refusal of Union Pacific to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates is limited by §15 (4) of the Act, which declares that, except as provided in § 3 of the Act,

a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide "adequate, and more efficient or more economic, [fol. 421] transportation." It is further provided that in prescribing through routes the Commission shall, so far as is consistent with the public interest and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier which originates the traffic. The section further provides that no through routes and joint rates applicable thereto shall be established for the purpose of assisting any carrier to meet its financial needs. This section was designed to restrict the power of the Commission to establish through routes which would short haul a carrier without its consent.

Rio Grande contended at the hearing before the Commission, and contends here, that the routes over which joint rates are sought were in existence and open to traffic at combination rates, and that the Commission was not called upon to establish through routes and, therefore, limitations on its power to do so, imposed by §15 (4), are [fol. 422] not applicable and need not be considered. It urged that the principal task of the Commission was to determine whether the through rates resulting from the combination or aggregate or intermediate rates over such existing through routes are unjust, unreasonable or discriminatory, in violation of §§1 and 3 of the Act, and contrary to the national transportation policy.

The Commission recognized that the first question for its determination "is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15 (3) and (4) of the Act." Only five of the ten participating members of the Commission joined in the report and order of the Commission, wherein it was first determined that through routes were not in existence over the Rio Grande in connection with

the Union Pacific through the Ogden gateway. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment [fol. 423] of such through routes and joint rates over them must be grounded on findings, as specified in § 15 (3) and (4). Thus limited in its further consideration of the case, the Commission entered its order:

> "That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegtables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, [fol. 424] including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

In all other material respects the relief requested by the Rio Grande was denied.

This very brief and sketchy statement of the case will suffice, since we rest our decision upon a narrow ground. We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through

routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding.

The undisputed evidence bearing upon the crucial question of existing through routes must be summarized. In [fol. 425] 1897, the Union Pacific established joint through competitive rates with the Rio Grande to and from points in the northwest area through Ogden. These rates were in effect until canceled by Union Pacific in 1906 from and to some points and in 1912 from and to remaining points. But the through routes were not closed.

Counsel for Union Pacific expressed the opinion at the hearing before the Commission, in response to interrogation by Chairman Alldredge, that the cancellation of the joint rates did not close the through routes and that shippers were free to route via the Rio Grande if they wanted to pay more.

The principal traffic witness of the Union Pacific testified at the hearing that a shipper who was willing to pay the higher combination rate had the right to specify under §15 (8) of the Act a route via the Rio Grande. It should be observed that this right exists only when through routes and through rates have been established. This witness [fol. 426] further testified that some joint through rates are now published in a Union Pacific tariff for application to shipments of sheep and goats from the northwest area via Ogden and the Rio Grande to points on the Missouri River and east thereof.

A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at through combination rates, without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small. In 1948, which was selected as a representative year, 37 carload shipments were made on through bills of lading from the northwest area to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific or its connections, but none moved to any destination east of Colorado common points. In the same year,

18 carload shipments were made west bound on through [fol. 427] bills of lading from points east and southwest over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific to destinations in the northwest area. In addition, 21 carload shipments moved on through bills of lading from various eastern points to destinations in the northwest area, which were routed over the Rio Grande and Union Pacific, were held by Rio Grande at Denver or Pueblo for change of the routing because the joint through rates were not applicable. The traffic movement to and from the northwest area over the Rio Grande through the Ogden gateway on through bills of lading and at through rates was substantially the same in years prior to 1948 and continued into 1949, until the date of the Commission hearings.

[fol. 428] From November, 1942, to August, 1945, a number of shipments were diverted under service orders issued by the Commission from the regularly used routes to the Rio Grande route. During World War II mixed trains of troops in passenger cars and of military supplies in freight cars moved from eastern and southern points on through billing over the Rio Grande via Ogden and Union Pacific to the closed door area. These trains were not routed under service orders issued by the Commission. In 1949, when the main line of the Union Pacific in Wyoming was blocked by snow, the traffic was diverted over the Rio Grande between Denver and junctions with the Union Pacific in Utah. These latter movements were made under emergency conditions and admittedly do not tend to establish an ordinary course of business between the carriers involved, but the Commission did not invoke its authority under § 15(4) of the Act to establish temporary through routes which indicates that the Commission assumed that through routes were already in existence.

[fol. 429] It is well settled that a joint rate is not essential to the existence of a through route. The rate which applies over a through route may be the aggregate of separate rates fixed independently by the several carriers participating in the through route. St. Louis-Southwestern R. Co. v. United States, 245 U.S. 136, 139; Thompson v. United

States, 343 U.S. 549, 556. In Thompson v. United States, supra, the court defines a through route as follows:

> "* * * The statutory term 'through route,' used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> "'A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. Through Routes and Through Rates, 12 I.C.C. 163, 166.'
>
> * * * * * * *
>
> [fol. 30] "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

While the foregoing definition of "through route" compels us to conclude that the through routes contended for by Rio Grande were in existence, the Commission relied on the Thompson Case in reaching its decision that through routes were not in existence. But the facts in the Thompson Case are in striking contrast with the facts in this case. There, the question was whether a route from Lenora, Kansas, via Missouri Pacific to Concordia, Kansas, and thence via Burlington to Omaha was a through route. No evidence was presented that any shipment had ever been made from Lenora to Omaha via the Burlington or that the carriers had ever offered through service over that route.

In our case, through routes and joint rates were established in 1897 and the joint rates remained in effect for

some fifteen years. While the joint rates were canceled by [fol. 431] Union Pacific, nothing was ever done to close the routes and diminished traffic continued to move over the same through routes at the higher through combination rates. Moreover, joint rates were continued in effect as well as through routes in respect to the shipment of sheep and goats from the closed door area through Ogden over the Rio Grande to the Missouri River and beyond. The Union Pacific and other participating railroads have issued through bills of lading, thereby recognizing the through route status. Shipments were diverted from the Union Pacific over the Rio Grande under emergency conditions without having the Commission authorize temporary through routes, which suggest that both the Union Pacific and the Commission assumed the existence of through routes.

The Commission stated in its report and order that "The Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable." Then follows a statement that the establishment of joint competitive rates would result in such routes becoming "effective through routes, a character which they do not [fol. 432] now possess." Thus, it appears that the Commission reasoned that the closing of the routes in a commercial sense by applying the higher combination rates terminated the through routes. But, it was held to the contrary in Virginian Railway Co. v. United States, 272 U.S. 658. There, of 99 coal mines located on the line on the Virginian, 45 enjoyed through routes and joint rates to the West because of certain trackage arrangements entered into between the Virginian and the Chesapeake & Ohio. As to other complaining mines, the court said, at page 661:

> "* * * But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive. * * *"

In discussing the attack made on the order of the Commission fixing joint non-discriminatory rates, the court stated, at page 666:

> [fol. 433] * * * The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under § 15(3). But the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination. (Citing cases.) The fact that the combination rates were excessive constituted the only obstacle to the movement."

The intervening railroads argue that Rio Grande had the burden of proving, in order to show the existence of the through routes contended for, an actual movement of traffic between every point in the northwest area and every point in the United States on every railroad east of a north and south line drawn roughly along the eastern boundary of Colorado. They point out that there are some 2900 railroad stations in the northwest area and some 30,000 stations in the area east of Colorado and that there are undoubtedly hundreds of thousands of through routes available in the published tariffs between the thousands of stations in the involved area of which Rio Grande claims to be a part. This question was not considered by the Commission, and we [fol. 434] do not reach it here. In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond. Since the case must be remanded to the Commission for a new hearing, we believe that the Commission should initially pass on the question of whether the burden is on the Rio Grande to show some actual movement of traffic on through billing over each of the possible routes between the thousands of stations in the involved areas. It might be mentioned in passing that the court in

the Virginia Railway Company Case concluded that "through routes to the west are already in existence," without apparent direct proof of transportation of freight from all points on the Virginian to all points in the west via the Chesapeake & Ohio.

The contention of the intervening railroads that we are not authorized to enter an order remanding the case to the Commission with appropriate instructions is refuted by the recent order entered by the Supreme Court in Secretary of Agriculture v. United States, 347 U. S. 645.

[fol. 435]

II

The Motion to Dismiss

We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We have further concluded that the Commission, in determining whether the Union Pacific Railroad and the other defendant railroads should be required to establish and maintain for the future just, reasonable, and non-discriminatory competitive joint rates, as prayed for by the Rio Grande, erred as a matter of law in failing to apply the provisions of § 1(4) and § 3(4), rather than the provisions of § 15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in § 1(4) and § 3(4) of the Act. The right of the Rio Grande to file its complant with the Commission and seek the relief therein prayed for is clearly given by § 13 of the Act. [fol. 436] Under the Act, a carrier is as fully entitled to non-discriminatory treatment as a shipper. See Chicago Junction Case, 264 U. S. 258, 267, which cites with approval Pennsylvania Co. v. United States, 236 U. S. 351, where the complainant sought relief under § 3 of the Act.

The fact that the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief. See Rochester Telephone Corp. v. United States, 307 U. S. 125, 135-143; Mitchell v. United States, 313 U. S. 80, 92, 93.

The negative portion of the order required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had, and, if considered solely from those points of view, the order caused no pecuniary loss to the Rio Grande.

If the Rio Grande, in the proceding before the Commission, established its right to the relief prayed for, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and equitable divisions [fol. 437] thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of § 1(4) and § 3(4) of the Act.

If the Rio Grande, on its showing before the Commission and an application of the provisions of § 1(4) and § 3(4), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of [fol. 438] a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated, if the Rio Grande, under the facts established by the evidence before the Commission, and the application of the provisions of § 1(4) and § 3(4) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

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[2] The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]

[fol. 439] While it is our view that the denial of the relief here challenged will result in pecuniary injury to the Rio Grande, we do not think such injury is essential to the right to judicial review. In Mitchell v. United States, 313 U. S. 80, Mitchell brought a proceeding before the Commission in which he alleged that the Chicago, Rock Island and Pacific Railway Company, in its purported compliance with an Arkansas statute requiring segregation of the races during transportation did not provide as desirable accommodations for colored as for white passengers traveling in Arkansas over its line, which resulted in unreasonable charges and unjust discrimination against and undue prejudice to colored passengers in violation of §§ 1, 2, 3, and 13 of the Act and the Fourteenth Amendment. The only relief sought was the removal and avoidance in the future of the alleged discrimination and prejudice in the furnishing of accommodations. The Commission, while holding that the matters complained of were prohibited by § 3(1) of the Act, denied the relief prayed for. Mitchell then brought an ac- [fol. 440] tion in the District Court of the United States for the Northern District of Illinois to set aside the Commission's order. In passing on whether Mitchell had standing to maintain the action, the Supreme Court said, at pages 92 and 93:

> "*First.* The Commission challenges the standing of appellant to bring this suit. We find the objection untenable. This question does not touch the merits of the suit, but merely the authority of the District Court to entertain it. The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order

[3] The Chicago Junction Case, 264 U. S. 258, 266, 267.

is not controlling. Rochester Telephone Corp. v. United States, 307 U. S. 125, 143.

"Nor is it determinative that it does not appear that appellant intends to make a similar railroad journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he choose to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids. He presents the question whether the Act does forbid the conduct of which he complains.

[fol. 441] "The question of appellant's right to seek review of the Commission's order thus involves the primary question of administrative authority, that is, whether appellant took an appropriate course in seeking a ruling of the Commission. The established function of the Commission gives the answer. The determination whether a discrimination by an interstate carrier is unjust and unlawful necessitates an inquiry into particular facts and the practice of the carrier in a particular relation, and this underlying inquiry is precisely that which the Commission is authorized to make. As to the duty to seek a determination by the Commission in such a case, we do not see that a passenger would be in any better situation than a shipper. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426; Robinson v. Baltimore & Ohio R. Co., 222 U.S. 506; Mitchell Coal Co. v. Pennsylvania R. Co., 230 U.S. 247; Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U.S. 304; General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422.

"The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law."

[fol. 442] There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission, that he was an aggrieved party, and that he was entitled to judicial review. See, also, Henderson v. United States, 339 U.S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform the duty of establishing just and reasonable joint rates, fares, and charges over through routes, and it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

Edward Hines Trustees v. United States, 263 U.S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the continuation of a so-[fol. 443] called penalty charge of $10 per car per day on lumber held at reconsignment points. The court said that the plaintiffs had no absolute right to require carriers to impose penalty charges and that plaintiffs' right was "limited to protection against unjust discrimination." Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines. In the Chicago Junction Case, supra, the court distinguished between an incident of more effective competition and injury inflicted by denying equality of treatment. Just, reasonable, and non-discriminatory joint rates is the equality of treatment which the Rio Grande here seeks.

In Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249, the Interstate Commerce Commission entered an order directed to the railroads operating in Oklahoma, Arkansas, Texas, and Louisiana, which required them to remove in a prescribed manner, undue prejudice and pref-[fol. 444] erence caused by their rates on cotton shipped from interior points to Houston and other ports on the Gulf of Mexico. Two actions were brought, one by Sprunt & Son and one by the Texas & New Orleans Railroad Company and other carriers, to enjoin the enforcement of the order. Upon final hearing, the District Court sustained the validity of the order and entered a decree dismissing the bills. None of the carriers appealed from the decree. Sprunt & Son appealed. The court held that the issue of

undue prejudice and unjust preference which had been passed upon by the Commission had become moot, because most of the carriers never sought to annul the order and that the carriers who joined in the suit to set it aside had voluntarily severed themselves from the shipper, who objected to it. With respect to the right of Sprunt & Son to maintain the action, the court at pages 254, 255, said:

> "* * * We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents [fol. 445] per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under § 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. * * * But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where *a right of his own is alleged to have been violated by the order.* * * * In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. *They are entitled as shippers only to reasonable service at reasonable price and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled.* The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so." (Italics ours.)

[fol. 446] Here, again, the court recognized that mere deprivation of a competitive advantage was not enough and that they were only entitled to reasonable service at

reasonable rates and without unjust discrimination. Here, the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings.

In Pittsburgh & West Virginia Railway Co. v. United States, 281 U.S. 479, the Commission entered an order authorizing the New York Central Railroad and other rail carriers to join in establishing a union passenger station at Cleveland, through a subsidiary, Cleveland Union Terminals Company. The Wheeling & Lake Erie Railway Company had for some years owned and maintained an independent passenger station at Ontario Street, in Cleveland, in the line of the easterly approach to the proposed [fol. 447] union terminal. It was apparent that either ownership of or an easement in the Wheeling site would be indispensable in order to provide the necessary eastern approach to the terminal. Wheeling consented to sell its site and become a tenant in the new terminal. Contracts were made embodying this plan, subject to approval of the Interstate Commerce Commission. Thereupon, Wheeling filed before the Commission two applications for certificates of public convenience and necessity, one permitting it to abandon its Ontario Street station, and the other authorizing it to use the facilities of the union terminal, and pending its completion to use the facilities of the station of the Erie Railroad and the tracks of the Big Four.[4] Pittsburgh & West Virginia Railway, a minority stockholder and connecting carrier of the Wheeling, intervened in opposition to the applications. It opposed them on the ground that the Ontario Street station was ample for both the present and future needs of the Wheeling and that the contracts were disadvantageous to the Wheeling in certain particulars. The Commission found the [fol. 448] public convenience and necessity would be served by the granting of both applications and accordingly issued its certificates as prayed for. Pittsburgh & West Virginia

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[4] Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

Railway then brought an action in the District Court of the United States for the Northern District of Ohio to set aside and annul the order of the Commission. The Supreme Court held that the order did not affect Pittsburgh & West Virginia as a carrier and that the claim that the order threatened Wheeling's financial stability and Pittsburgh & West Virginia's financial interest as a minority stockholder was not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. The court, at page 487, said: "* * * The injury feared is the indirect harm which may result to every stockholder from harm to the corporation," and that the interest of Pittsburgh & West Virginia was insufficient to give it standing to bring the action.

[fol. 449] In Moffat Tunnel League v. United States, 289 U.S. 113, the Commission had entered an order authorizing the Denver and Rio Grande Western Railroad Company by stock purchase to acquire control of the Denver and Salt Lake Railway Company, called the Moffat Road. In the proceeding before the Commission the Moffat Tunnel Improvement District and the Public Utilities Commission of Colorado had intervened and they brought an action in the District Court of the United States for the District of Delaware to set aside the Commission's order. In holding that the plaintiffs did not have standing to maintain the suit, the Supreme Court said, at page 119:

> "* * * the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. Edward Hines Trustees v. United States, 263 U.S. 143, 148. Sprunt & Son v. United States, 281 U.S. 249, 254. Pittsburgh & W. Va. Ry. v. United States, 281 U.S. 479, 486. Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment, such as may be entertained by members of the public in the territory west of [fol. 450] Craig, that the improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points."

The Pittsburgh & West Virginia Railway case and the Moffat Tunnel League case are obviously distinguishable from the instant case.

With respect to cases relied on by the defendants, the statement by the court in Youngstown Sheet & Tube Co. v. United States, 295 U.S. 476, is apposite. "* * * The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were *unreasonable or discriminated against them.*" (Italics ours.) Here, the existing rates are attacked by the Rio Grande on the ground that they are unjust, unreasonable, and discriminatory as against the Rio Grande and shippers on its line, deny them equality of treatment, and cause injury to them.

[fol. 451] It is urged that to maintain the action, equitable grounds for relief must be alleged. But, it should be remembered that in the Rochester Telephone Case, the court, at page 142, said:

> "* * * An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. * * *"

Moreover, in overruling Procter & Gamble v. United States, 225 U.S. 282, the court, at page 136, in the Rochester

[fol. 452] Telephone Case, supra, observed that the shipper in that case "was within the express language of Congress authorizing suits 'to enjoin, set aside, annul, * * * any order of the Interstate Commerce Commission.'"

In the instant case, the Rio Grande, in its complaint, alleges that it was without adequate remedy at law. Clearly, the Rio Grande can maintain no other action which will give it adequate relief or prevent injury to it.

Accordingly, we conclude that the Rio Grande had standing to maintain the action.

The order in so far as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion.

[fol. 453] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Titled omitted]

MOTION OF INTERVENING DEFENDANTS FOR A NEW TRIAL OR REARGUMENT AND RECONSIDERATION—Filed February 10, 1955

Intervening defendants, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company; and intervening defendants, Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, move the Court, pursuant to Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 59, to grant a new trial in the above-entitled cause, or in the alternative to permit reargument, and to reconsider this cause, for the reason that the opinion filed herein by the Court January

13, 1955 contains certain erroneous statements of fact which are vital to the conclusions reached, contains numerous errors of law, and also errs in failing to dismiss the complaints.

[fol. 454] More specifically, these Movants respectfully urge in support of this motion that the opinion is erroneous in the following particulars:

I

The Court Erred in Holding that the Rio Grande has Standing to Maintain this Suit and in Failing and Refusing to Grant the Motion to Dismiss on the Ground that the Rio Grande Lacks such Standing

Counsel for these Movants have diligently searched the Court's opinion, but in vain, for the precise reason why it concludes that the Rio Grande has standing to maintain this suit. Under the consistent rulings of the numerous decisions of the Supreme Court cited in Volume I of the intervening railroads' brief, the question whether the Commission's order is valid or invalid can be of no concern to the Rio Grande and its complaint must be dismissed unless it clearly shows or discloses a legal or other right that entitles the Rio Grande to this Court's injunctive protection against the Commission's order.

We now discuss holdings, conclusions or statements in the opinion that the Court seems to rely upon in reaching its conclusion, but they do not, either individually or collectively, specify or disclose precisely or understandably any legal or other right of the Rio Grande held by the Supreme Court to be essential to enable a complainant to maintain a suit to enjoin and annul an order of the Commission:

(1) Beginning at page 29, under the heading "The Motion to Dismiss", the opinion states that the evidence before the Commission clearly established the existence of through routes via the Rio Grande "as a matter of law" and that the Commission "erred, as a matter of law, in not finding the existence of such through routes." The opinion next states that the Commission, in determining whether it should [fol. 455] require "just, reasonable, and non-discriminatory competitive joint rates, as prayed for by the Rio Grande,

erred as a matter of law in failing to apply the provisions of § 1(4) and §3(4), rather than the provisions of § 15(3)." The opinion then says that the Commission's duties and powers, "with respect to the relief sought by the Rio Grande, are clearly provided in § 1(4) and § 3(4) of the Act"; that the Rio Grande's right to file its complaint with the Commission and "seek the relief therein prayed for is clearly given by § 13 of the Act"; that "a carrier is as fully entitled to non-discriminatory treatment as a shipper", and that the fact that the portion of the order assailed by the Rio Grande's suit in this Court was negative "no longer affords a ground for the denial of judicial relief".

None of the statutory provisions or other matters so far mentioned in the opinion has the slightest bearing upon the question whether the Rio Grande has standing to maintain this suit. While Section 3(4) of the Act entitles the Rio Grande to nondiscriminatory treatment by other railroads and it may complain to the Commission against alleged discriminatory treatment, the opinion thus far:

(a) errs in stating that the Rio Grande has a right to complain to the Commission under Section 1(4) that its own combination rates are unreasonable and discriminatory and to demand "competitive joint rates", for those rights belong to the public and to shippers who pay the freight rates, and not to carriers. Being a carrier, the Rio Grande is under the statutory duty to establish reasonable and non-discriminatory rates, and if its rates are unreasonable or discriminatory, it is free to correct them upon its own initiative, but it may not be heard to complain against itself or to ask the Commission to order it to do what the law requires it to do;

[fol. 456] (b) errs in holding that the Commission erred in failing to apply the provisions of Section 1(4) and Section 3(4), rather than the provisions of Section 15(3), because, first, its report clearly shows that the Commission *did* apply the provisions of Section 1(4) and Section 3(4), for at pages 659-660 the Commission expressly found in its conclusion number "2" that the combination rates via the Rio Grande are unjust and unreasonable, thus applying its authority

under Section 1(4), and then it ordered establishment of rates it found reasonable, and in the last full paragraph on page 658 the report, applying the standards and provisions of Section 3(4) of the Act, the Commission finds that the evidence of record will not support a finding that carriers participating in Union Pacific routes discriminate against the Rio Grande by refusing to make joint rates with it;

(c) errs in ignoring the fact that the Commission has no power under Section 1(4) or Section 3(4) to order the equal joint rates demanded by the Rio Grande, its only power under those sections being to require establishment of reasonable rates and to require that other carriers "cease and desist" practicing discrimination against the Rio Grande;

(d) errs in ignoring the fact that the only power the Commission has to require the joint rates prayed for by the Rio Grande is conferred by Section 15(3) upon finding such rates in the "public interest", and that without applying Section 15(3) the Commission would have been powerless to require the joint rates it did order, even if it had, as the Court says it should have, found and held that through routes via the Rio Grande were already in existence; and

[fol. 457] (e) errs in holding or implying that the Rio Grande has standing to maintain this suit because it has a right to complain to the Commission of discriminatory treatment by other railroads, or because "the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief".

Contrary to the apparent view of this Court, neither the right of the Rio Grande to complain to the Commission nor the negative character of the Commission's failure to grant the Rio Grande's full demands has any bearing on the question whether the Rio Grande has necessary legal interest or standing to maintain this suit, *Edward Hines Trustees* v. *U. S.*, 263 U.S. 143. Since the Commission is the exclusive tribunal to determine whether the Rio Grande's rights under the Act have been violated, its determination

upon substantial evidence in this case that its rights have *not* been violated clearly is not, as the Court seems to think, a denial of the Rio Grande's statutory rights, but instead is an adjudication or determination that the Rio Grande has failed to establish by the evidence that its rights under the Act are being violated. No provision of the Act entitles the Rio Grande to any of the joint rates it demanded, for that is a right of shippers, if they can prove that joint rates are required in "the public interest". The Rio Grande's right under the Act to non-discriminatory treatment is most certainly not a peremptory right to an order requiring that the alleged discrimination be stopped, but is merely a right to prove, if it could, to the Commission that the treatment of which it complained was in fact discriminatory within the meaning of the Act, and, if the Commission believed its evidence proved the alleged discrimination, to an order requiring that the guilty parties "cease and desist" practicing such discrimination as the Commission might find from the evidence. The Commission having found at page 658 of its report that the evidence [fol. 458] failed to prove such discrimination (except at points on the Bamberger Railroad which the complaint did not allege), the Rio Grande's rights under the Act were exhausted and the Commission accordingly failing or refusing to grant the "relief" demanded by the Rio Grande is not a denial of any right of the Rio Grande but merely a refusal to grant something to which the evidence failed to prove the Rio Grande's claim that it had a right to receive.

The Commission did grant the joint rates on some of the traffic because it believed the evidence of shippers proved that joint rates on that part of the traffic were necessary "in the public interest", but not because the Rio Grande had any right to demand joint rates.

If the bare right accorded by the Act to file the complaint with the Commission gives the Rio Grande standing to maintain this suit, then the Supreme Court has been wrong in all of its decisions holding that the fact that one who seeks in court to enjoin and annul an order was a party to the proceeding before the Commission does not give such party the standing or right to maintain its suit in court (see cases

cited and quoted at pages 28-29, Volume I of brief for the intervening railroads).

At page 32, the opinion states:

> "Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order."

The Chicago Junction Case, 264 U.S. 258, is cited, presumably as authority for the statement just quoted. But, insofar as the case at bar is concerned, there are several errors and oversights which render the statement and the citation erroneous and inapplicable.

First, the quoted statement erroneously ignores the fact that the Act gives no right to the Rio Grande to complain that its own rates are unreasonable or discriminatory, or [fol. 459] to an order requiring joint rates; that its only right is to treatment by other carriers which does not discriminate, in violation of Section 3(4), and whether that right is being violated is for exclusive determination by the Commission upon evidence duly submitted.

Second, the Commission's exclusive administrative power to make such determination upon the evidence necessarily includes the power to decide against a complainant if, in the Commission's judgment, the evidence does not support and sustain the complaint, regardless of whether the decision results in "pecuniary injury" or "pecuniary gain" to the complainant.

Third, the Commission having determined upon the evidence that the Rio Grande is not suffering discrimination in violation of Section 3(4), and having found upon the evidence that joint rates are necessary in the public interest only to the extent required by the order, the rights of the Rio Grande and "the public" have not been denied, but have been adjudicated and fully satisfied in accordance with the evidence of record as evaluated by the Commission in exercise of its administrative judgment and discretion.

Fourth, an order, supported by evidence, refusing to require joint rates for the "pecuniary gain" of the Rio

Grande when it has no statutory or other legal right to joint rates, or for shippers' "pecuniary gain" where the evidence fails to show the joint rates are "in the public interest", is not an order denying a right given by the Act, or causing "pecuniary injury" of the kind which entitles the Rio Grande or shippers to judicial review. The Court's theory seems to be that the Rio Grande has standing to maintain its suit on the ground that the order inflicts "pecuniary injury" upon the Rio Grande because it grants only a part of its demand for "pecuniary gain", or, in other words, the failure to grant complete "pecuniary gain" is unlawful infliction of a "pecuniary injury", which the Court holds to be legal injury because the Act gives the Rio Grande a right to complain against discriminatory treatment. It is certain that the fact that the Commission [fol. 460] failed to grant the Rio Grande complete "pecuniary gain" affords no possible standing to maintain its suit, especially since, as the Rio Grande itself admits in its argument based on cases cited at page 111 of its brief in this case, neither the Rio Grande nor any other carrier has an absolute right even to "traffic which terminates or originates" on its line, to say nothing of the Rio Grande's assertion here of a right to have traffic it neither originates nor terminates diverted for a "bridge" haul over its longer line so that it can enjoy "pecuniary gain" at the pecuniary *loss* of the Union Pacific. All of the numerous cases cited at pages 29-40 of intervening railroads' brief, Volume I, hold that a party has no standing to maintain a suit to enjoin an order of the Commission without a clear showing that the order threatens legal injury or to deprive such party of something to which it is legally entitled. As the Rio Grande correctly admits it has no legal right of its own to divert traffic for a "bridge" haul over its line for "pecuniary gain" or any other purpose, its suit should be dismissed.

Fifth, the decision in the *Chicago Junction Case* lends no support whatever for the statement in the last paragraph of page 32 of the opinion. The legal right and standing of the complaining railroads to maintain the suit in that case was sustained by the Supreme Court—*not* because the order *denied* them "pecuniary gain", but, as stated at page

266, though apparently ignored in this Court's opinion, plaintiffs there showed that because of the order:

> "A large volume of traffic has been diverted from their lines to those of the New York Central. The diversion of traffic has already subjected the plaintiffs to irreparable injury. The loss sustained exceeds $10,000,000. Continued control by the New York Central will subject them to an annual loss in net earnings of approximately that amount."

While the Court said at page 267, *if*, as *suggested* in a prior decision, "a legal interest exists where carriers' revenues may be affected, there is clearly such an interest [fol. 461] here", and that, under the Act, carriers are as fully entitled as any shipper to "equality of treatment", it is indisputable that standing to maintain the suit was sustained by the Court because the order inflicted a *loss* of $10,000,000 a year upon the plaintiffs, which the Court held to be "irreparable injury", saying:

> "This loss is not the incident of more effective competition. * * * It is injury inflicted by denying to the plaintiffs equality of treatment."

Here, the Commission has found that the evidence fails to prove that the Rio Grande is denied "equality of treatment" and the order inflicts no *loss* upon the Rio Grande. Indeed, as stated in the intervening railroads' brief, Volume I, page 14, the order grants the Rio Grande's demands to "pecuniary gain" to the extent of requiring joint rates on the articles named therein, which gives the Rio Grande the opportunity to divert to its line some 50,000 carloads annually of traffic it never had, producing revenue of some $15,000,000 annually to the Union Pacific.

Although the Court said in the *Chicago Junction Case* at page 267 that "The plaintiffs may challenge the order because they are parties to it", it may not be assumed that their standing to sue would have been sustained if the order had merely denied plaintiffs a "pecuniary gain" and had not inflicted irreparable *loss* and legal injury upon them. Three Justices (Sutherland, McReynolds and Sanford) dissented from the majority opinion written by

Justice Brandeis, March 3, 1924, in that case, and it was Justice Brandeis who, less than four months earlier, November 12, 1923, wrote the unanimous decision in the *Edward Hines Case*, and who also wrote the unanimous decisions, April 14, 1930, in the *Sprunt Case*, and May 19, 1930, in the *Pittsburgh & W. Virginia Case*, all holding expressly that the fact that one is a party to a proceeding before the Commission gives him no right or standing to maintain a suit to enjoin the order made in such proceeding, and that such suit cannot be maintained in the absence of threatened or actual legal injury. In fact, the *Chicago* [fol. 462] *Junction* decision is the only one we find which says a party may challenge an order in Court because he is a party to the order, and the statement in that case was clearly *dictum* for the opinion shows that the order caused great and irreparable loss and inflicted legal injury more than sufficient to maintain the suit. In all other decisions on the point the Supreme Court holds that whether one who sues to enjoin an order was a party to the proceeding before the Commission has no bearing on his standing to maintain suit to enjoin the order. Therefore, the *Chicago Junction Case*, being contrary to all other decisions of the Supreme Court, is not the law on that point, and this Court erred in relying upon it to sustain the Rio Grande's right to maintain this suit.

(2) Beginning at page 30, the opinion continues the confusing and inconclusive speculation with respect to the Rio Grande's rights under the Act. The opinion says that *if*, before the Commission, the Rio Grande established its rights to the relief prayed, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and that "denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established"; that the Rio Grande was entitled, as a matter of law, to have the Commission apply the provisions of Section 1(4) and Section 3(4) of the Act in determining whether the defendant railroads should be required to establish the competitive joint rates demanded by the Rio Grande; and again, *if* on the Rio Grande's showing before the Commission and application of Section 1(4) and Section 3(4), the Rio Grande was entitled to an order establishing such joint rates, then the denial of such order

"deprived the Rio Grande of a pecuniary gain to which it was entitled" because the granting of the joint rates would have resulted in a large increase in the Rio Grande's traffic and income; and again, *if*, under the facts established by the evidence and the application of Sections 1(4) and [fol. 463] 3(4) of the Act, the Rio Grande was entitled to an order requiring such joint rates, then the denial of that right resulted in pecuniary injury to the Rio Grande; and yet again,

> "Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order."

All of the foregoing from the opinion completely ignores and gives no effect whatever to the fact that the Commission has found that the evidence failed to prove that discrimination was being practiced against the Rio Grande, and failed to prove that joint rates were necessary in the public interest except upon the commodities for which the order requires them, and the Court also erroneously assumes that Section 1(4) and Section 3(4) confer power on the Commission to require establishment of joint rates. This part of the opinion goes extremely far toward holding that, upon the exercise of its right to complain to the Commission of discrimination and to submit such evidence as it had in support of its complaint, the Rio Grande had a right under the Act to demand equal joint rates, and that the Commission had no alternative but to find that the alleged discrimination was being practiced and to issue an order granting the joint rates demanded by the Rio Grande. The Court has misled itself because of its obvious disagreement with the Commission's refusal, in the exercise of its exclusive administrative judgment and discretion, to grant the Rio Grande's full demands for joint rates on all commodities so that it could reap "pecuniary gain" and increased revenues in the fullest possible measure. At page 37 of the opinion, in an apparent effort to establish a right

entitling the Rio Grande to maintain its suit, the Court makes its own finding that:

> "Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines."

This is a plain usurpation by the Court of the Commission's exclusive administrative authority to weigh the evi- [fol. 464] dence and make findings of fact from it, and the Court would make its usurpation binding and effective upon the Commission by "remanding" the case to the Commission for further proceedings "in conformity with this opinion", if the "remand" were within the Court's authority. In other words, the Court would compel adoption of its own finding of discrimination against the Rio Grande despite the Commission's finding to the contrary. Of course, the Commission may not so easily be reduced to the function of "rubber-stamping" claims and demands of litigants before it, nor may the exclusiveness of its function to weigh the evidence and decide upon it, or finality of its findings and orders based upon substantial evidence be so easily thwarted or its administrative functions invaded, usurped or directed by a court, for the Supreme Court holds that the courts are forbidden to "usurp merely administrative functions", even if they do disagree with the Commission's findings of fact or the wisdom of the order, *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U.S. 452, 470. The Court clearly exceeded its authority in attempting to make the administrative finding of discrimination against the Rio Grande, and then relying upon that finding in sustaining the Rio Grande's right to maintain its suit.

If, as the Rio Grande argues at page 111 of its original brief in this Court, *neither the Union Pacific nor any other railroad has* a legal right even "to the traffic which terminates or originates in the territory" it serves (citing several cases), *afortiori*, the Rio Grande can claim no semblance of a legal right to an order granting its demands for joint rates for the purpose of enhancing its financial position by

diverting traffic from Union Pacific routes for a "bridge" haul over its line, nor may the Court sustain the Rio Grande's standing to maintain this suit upon the ground that it has a right to "pecuniary gain" by diversion of traffic from Union Pacific routes.

[fol. 465] It is fundamental that a showing of threatened or actual "legal injury" resulting from the order is essential to the right to judicial review, whether the injury is financial loss or invasion of a legal right without financial loss. The Rio Grande's complaint and those of intervening plaintiffs relied upon their allegations that the Commission's order affects their "pecuniary interest", and we have argued that denial of part of the Rio Grande's demand to enrich itself by obtaining a "pecuniary gain" at the expense of the Union Pacific is not an "injury" at all, and most certainly is not a legal injury or denial of any other element of legal or equitable right for protection of which the Rio Grande may sue to enjoin and annul the Commission's refusal to grant its full demands for "pecuniary gain".

One decision of the Supreme Court should furnish sufficient enlightenment on the point. In *Alabama Power Co. v. Ickes, et al.*, 302 U. S. 464, the Power Company sued to enjoin the Federal Administrator of Public Works from making loans and grants under a federal statute to certain municipalities for construction of electricity distribution systems, the competition of which the Power Company alleged would result in great and destructive loss and injury to its business of producing, distributing and selling electricity. The Court held that the Power Company had no standing to maintain its suit, saying at page 478:

> "Unless a different conclusion is required from the mere fact that petitioner will sustain financial loss by reason of the lawful competition which will result from the use by the municipalities of the proposed loans and grants, it is clear that petitioner has no such interest and will sustain no such legal injury as enables it to maintain the present suits."

After making it clear that to maintain a suit for an injunction, a party must show that the thing complained of

threatens or causes him "direct injury" in a legal sense, meaning "a wrong which directly results in the violation of a legal right", the Court undertook to define or describe, [fol. 466] at page 479, the injury essential to the maintenance of a suit for injunctional protection, as follows:

> " 'An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria,*) does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain . . . Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action.' *Parker* v. *Griswold*, 17 Conn. 288, 302-303. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained."

Holding that, since the Power Company had no legal or equitable right to be free of competition of other electric power plants, it had no standing to maintain its suit to prevent such competition even "if its business be curtailed or destroyed" by such competition. Later on, the Court held that a "legal interest" which qualifies a complainant to sue—

> " . . . is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty."

and that—

> "The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right."

Since the Rio Grande admits, as it must, upon decisions cited at page 111 of its brief that it has no legal right to the traffic it seeks to divert to its line for a "pecuniary gain", and, indeed, that no carrier has an absolute right even "to

the traffic which terminates or originates" on its line, it clearly has no standing to maintain suit to enjoin the Commission's refusal to grant its full demands even if denial of its desire for a "pecuniary gain" be treated as a "pecuniary injury", for as held in the case just discussed and in numerous other decisions cited in the railroads' brief, Volume I, and supplemental brief, it would not be the result of an "invasion of some legal or equitable right" of the Rio Grande.

[fol. 467] (3) After all of its discussion of the Rio Grande's alleged rights under the Act and its exhaustive effort to prove that the Commission's failure to grant the Rio Grande's full demands for "pecuniary gain", is a "pecuniary injury" giving the Rio Grande standing to maintain its suit, the Court seems to recognize the "circular" character and futility of its reasoning and then abruptly abandons that effort, saying at page 33:

> "* * * we do not think such injury is essential to the right to judicial review."

The opinion then cites *Mitchell v. United States*, 313 U. S. 80, and after lengthy quotation of the decision in that case, the opinion states that Mitchell "suffered no pecuniary injury," but that the Supreme Court:

> "* * * had no difficulty in concluding that he had a right to maintain the proceeding before the Commission, that he was an aggrieved party, and that he was entitled to judicial review."

The opinion then apparently attempts to fit the case at bar into the facts of the *Mitchell Case*. At page 36 it states:

> "Here, the Rio Grande sought an order compelling the defendant railroads to perform the duty of establishing just and reasonable joint rates, fares, and charges over through routes, and it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate."

The statement is patently erroneous because of the erroneous assumptions and implications which it involves:

First, the Act gives the Rio Grande no right to an order compelling other railroads to establish "just and reasonable joint rates, fares, and charges over through routes", for, as we have repeatedly said, that is a right belonging to shippers upon proof that joint rates are necessary "in the public interest";

Second, there is no "statutory mandate" in the Act requiring the Commission to order other railroads to establish any joint rates with the Rio Grande or any other railroad, unless and until the Commission finds, upon substan- [fol. 468] tial evidence, that such joint rates are "in the public interest";

Third, the statement assumes that, upon the Rio Grande's demand for joint rates, the Commission had no alternative but to issue an order requiring the joint rates, regardless of whether the evidence established the prerequisite "public interest", which is but to disregard and completely eliminate the statutory necessity of the exercise of the Commission's administrative judgment and discretion upon evidence;

Fourth, the Commission's finding at page 658 of its report that the evidence of record failed to support or justify a finding that the Rio Grande is being discriminated against compelled its refusal of an order to remove alleged discrimination;

Fifth, in asserting that the Rio Grande "suffered discrimination" by the Commission's refusal to issue an order compelling the "joint rates" demanded by the Rio Grande, the Court completely contradicts its holding at page 29 that the Commission "erred as a matter of law in failing to apply the provisions of § 1(4) and § 3(4), rather than the provisions of § 15(3)", for the only power the Commission has to compel joint rates is that conferred by Section 15(3), and it has no power whatever to order joint rates as the remedy for violations of Sections 1(4) and 3(4).

But, the Court fails in its effort to fit this case into the facts and rulings in the *Mitchell Case* and fails also to recognize the real ground upon which the Supreme Court

held that Mitchell was entitled to judicial review of the order in his case. In that case, as pointed out at pages 91-92 of the Court's opinion, the Commission:

> "* * * thought that in deciding the case on the facts presented it must recognize that the state law required the defendants to segregate colored passengers"

and that, since passenger car accommodations offered Mitchell were fairly comparable in comfort to those offered other than colored passengers, the "segregation" requirement [fol. 469] that colored passengers be excluded from various parts of a train and restricted to the cars or coaches designated exclusively for them, was not discrimination prohibited by Section 3 of the Act. At page 93, the Court said Mitchell "presents the question whether the Act does forbid the conduct of which he complains." At page 94, the opinion points out that Mitchell had bought a first-class fare for the entire journey from Chicago to Hot Springs, Arkansas and had offered to pay the proper charge for a seat which was available in the Pullman car from Memphis to Hot Springs, but he was—

> "* * * compelled, in accordance with custom, to leave that car and to ride in a second class car and was thus denied the standard conveniences and privileges afforded to first class passengers. This was manifestly a discrimination against him in the course of his interstate journey and admittedly that discrimination was based solely upon the fact that he was a Negro."

After saying that whether this was a discrimination forbidden by the Act was not a question of segregation but one of "equality of treatment", the Court held at page 94 that the denial of equal accommodations to Mitchell because of his race was "an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment" to the Constitution of the United States and that such discrimination was "essentially unjust" and could not be deemed "to lie outside the purview of the sweeping prohibitions" of the Act. At page 97, the Court held:

> "On the facts here presented, there is no room * * * for administrative or expert judgment with respect to

practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act."

Thus, Mitchell was entitled to judicial review of the order in that case, because the discriminatory conduct of which he complained violated his Constitutional rights, and he was therefore entitled to the Court's determination of the question whether the Commission committed error of law in holding that Section 3 of the Act did not forbid conduct which the Court found to be so clearly discriminatory as to [fol. 470] violate Mitchell's Constitutional rights. (See the race segregation cases decided by the Supreme Court in May 1954 (*Hernandez* v. *Texas*, 347 U. S. 475; *Brown* v. *Board of Education*, 347 U. S. 483, and *Bowling* v. *Sharpe*, 347 U. S. 497), in which the Court held that racial segregation, *per se*, results in discrimination, denial of equal protection of laws, or denial of due process of law in violation of the Fifth or Fourteenth Amendments.)

We agree with this Court that "pecuniary injury", as such, to say nothing of the denial of "pecuniary gain", was not involved in that case and was not there held essential to Mitchell's right to judicial review; but, as the crux of the Supreme Court's decision is that Mitchell was entitled to judicial review and to relief under Section 3 of the Act because the conduct of which he complained clearly violated his Constitutional rights, the case is wholly inapposite for there is no question here whether the Rio Grande's Constitutional rights have been violated by the Commission's refusal of its full demands for joint rates, nor is there even a question whether the order denies any legal right of the Rio Grande under either the Act or the common law, for as we have previously pointed out, the Rio Grande itself argues, at page 111 of its brief in this case, that no railroad has an absolute right to any traffic, including even that which originates or terminates on its line. The Supreme Court held that Mitchell was an "aggrieved party" because the conduct of which he complained violated his Constitutional rights and the Commission had peremptorily denied him relief because it believed that the Act did not forbid such conduct.

Another of the three decisions in which this Court ap-

parently takes comfort and erroneously relies upon for its holding that the Rio Grande has standing to maintain this suit is *Youngstown Sheet & Tube Co.* v. *United States*, 295 U.S. 476, cited and quoted at page 44 of the opinion, apparently because the Court there, in distinguishing cases cited against judicial review of the order in that case, said that in the cited cases judicial review was refused either [fol. 471] because the parties had no legal interest or capacity to sue, "or failed to allege that the rates under attack were unreasonable or discriminated against them." The Rio Grande in its amended complaint has followed that pattern here and apparently the Court adopts it and sustains the Rio Grande's standing to maintain its suit, at least in part because its complaint alleges that the rates on commodities not included in the Commission's order are unreasonable and discriminatory. If the Rio Grande is entitled to judicial review of the order merely because it makes that allegation in its complaint, then everyone, including strangers to such orders not remotely affected by them, may sue to enjoin such orders, for there is nothing to prevent anyone from making that allegation in a complaint.

It is not understandable why the Supreme Court in that case left the possible implication that standing to maintain a suit to enjoin an order of the Commission derives from a mere allegation in the complaint to the Court that rates prescribed by the Commission were "unreasonable or discriminated" against the complainant. The order was not sustained by any finding by the Court that the rates prescribed by the Commission's order were in fact just and reasonable, but upon the ground that the prescription of the rates was within the Commission's authority and that its order was adequately supported by its findings and the evidence of record.

And, more important such allegation attempts to present to the Court an administrative question of fact which the Court is powerless to determine, for every decision of the Supreme Court on the point since its decision in *Texas and Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, has held without exception that the courts have no power or jurisdiction to determine whether an interstate rate is unreasonable, discriminatory or otherwise unlawful under the Act,

and that the Commission is the only tribunal to make such determinations in the exercise of its exclusive administrative judgment and discretion. Stated otherwise, the Rio [fol. 472] Grande seized upon the only case in which it could find this inadvertent, enigmatical and erroneous suggestion of power in the courts to determine the lawfulness of rates under the Act and this Court unfortunately relies upon it to the exclusion of the law that has been established in all other decisions for nearly 50 years.

If the allegations in the Rio Grande's complaint to this Court gives it standing to maintain this suit, then the Court has not performed its duty but should have proceeded to determine whether the rates are in fact unreasonable or discriminatory. In other words, the Rio Grande's standing to maintain this suit must be based upon some legal or other right which this Court has power to determine and protect, and unless this Court is willing to make the egregious error of holding that it has jurisdiction to determine whether the involved rates are unreasonable and discriminatory, and, upon its own determination of that administrative question, to protect the Rio Grande from such rates by issuing its own injunctive relief, then the Court fatally errs in relying upon the allegation that the rates are unreasonable and discriminatory as affording any semblance of ground for the Rio Grande to maintain its suit in this Court.

Furthermore, the Court has seen fit to ignore the fact pointed out in the brief of intervening railroad defendants, Volume I, pages 29 and 31, that the order reviewed in the *Youngstown Case* increased the rates of the shipper as much as 18¢ per net ton, or $9.00 per 50-ton car, and apparently the Supreme Court felt that the shipper was entitled to judicial review of the order imposing such a tremendous additional financial burden to have the Court determine whether the Commission committed any error of law in issuing the order.

Even the decision in *Rochester Tel. Corp. v. U.S.*, 307 U.S. 125, quoted at pages 45-46 in this Court's opinion, reiterates the settled law that the question whether interstate rates are reasonable, discriminatory or otherwise unlawful under the Act is for exclusive determination by

the Commmission and that the courts have no power to make such determinations.

[fol. 473] At pages 138-140 the opinion in that case says:

> "This Court 'ascribed' to the findings of the Commission 'the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U.S. 441, 454. Recognition of the Commission's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.
>
> "From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 226. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrafive finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commissions order becomes incontestable."

At page 146 the opinion holds that:

> "Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-287; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303, *et seq.*"

The standing of the Rochester Company to maintain its suit in that case was based upon the fact that the order

"necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority."

Moreover, Mr. Justice Frankfurter, who wrote the decision in that case, later pointed out (in his dissent in *Columbia System* v. *U. S.*, 316 U.S. 407, at page 436) that failure or refusal by Rochester to comply with the order would subject it to statutory penalties of $500.00 for each offense and $25.00 for each day of its continuance. The Rochester [fol. 474] Company had a right to judicial review because it had a right not to be regulated if it was not within the class of telephone companies embraced within the Commission's authority and it clearly had a right not to be subjected to the statutory penalties for refusal to obey the order if in making it the Commission had committed error of law in holding it subject to the regulatory provisions of the Act. In striking contrast, the Commission here has merely held that the Rio Grande's evidence fails to prove that its rights under the Act are being violated or that all of the joint rates demanded by it are necessary "in the public interest".

Accordingly, and without subjecting the Rio Grande to any burden, regulatory process or statutory penalty, the order fails to require joint rates enabling it to reap a "pecuniary gain" by diverting to its line traffic to which the Rio Grande admits it has no legal right whatever.

In Volume I of their original brief and in their supplemental brief, the intervening railroad defendants cited some 40 decisions of the Supreme Court involving judicial review of the Commission's orders and those of other administrative agencies. In more than half of those decisions, standing of the complaining party to maintain the suit was challenged and directly decided. In 11 of the decisions, the Court held that the complainants had standing to maintain the suits for reasons stated in the opinions and mentioned in the briefs of intervening railroad defendants herein. In 11 others of the cases cited, the Court dismissed the appeals, holding that the appellants were without standing to maintain the suits to enjoin the orders.

In all of the decisions sustaining the right to maintain suits to enjoin the orders, the facts show that the com-

plainants were threatened with pecuniary *loss* resulting from the fact that the orders, in some of the cases, would deprive railroads of money they previously had enjoyed [fol. 475] from their operations and to which they had either a legal or equitable right or a legal interest recognized in statutory provisions, and in others of those cases the orders resulted in pecuniary loss, in effect, by imposing burdensome increases of freight charges upon shippers who brought the suits. Not one of the cases in which standing to maintain suit was upheld involved an order or a part of an order which merely refused to grant a part or all of the complainant's demands for "pecuniary gain".

In 11 of the cases cited the Court held that standing to maintain the suits was lacking because the complainants failed to show that "the order alleged to be void subjects them to legal injury, actual or threatened", *Edward Hines Trustees* v. *U.S.*, 263 U.S. 143, 148. In several of the cases judicial review was denied for lack of the requisite legal standing to maintain the suits, even though the orders resulted directly in substantial pecuniary *loss* to the complaining parties. For example, in *Sprunt & Son* v. *United States*, 281 U.S. 249, the order caused Sprunt, a shipper, to lose $7.00 per ton advantage he had long enjoyed over his competitors, but the Court said, in the language quoted in this Court's opinion at pages 38-39, that Sprunt was only entitled to reasonable service at reasonable rates and without injurious discrimination and that since the Commission had prescribed such rates, the loss by Sprunt of his long-standing competitive advantage gave him no independent legal right of his own to maintain suit to enjoin the order.

If, as held in that case, the fact that the order inflicted pecuniary *loss* by depriving Sprunt of a substantial competitive advantage long enjoyed gave him no legal right to maintain his suit, it is incredible that this Court would hold, as it does, that the Commission's denial in part of the Rio Grande's effort to reap a "pecuniary gain" from the joint rates it demanded, gives the Rio Grande standing to [fol. 476] maintain its suit, particularly in the face of the Commission's finding that the evidence fails to prove that the Rio Grande is being denied equality of treatment, and the Rio Grande's admission that it has no right to the

traffic on which it seeks rates that would enable it to realize additional "pecuniary gain".

The Court's opinion at page 36 states that "the cases relied on by the defendants are distinguishable" and then proceeds to discuss 4 of the 11 cases cited by the railroad defendants in which judicial review was denied. But in its efforts to distinguish even those 4 decisions the Court overlooks or ignores the fact that in each of them, as in all the others which the Court does not undertake to distinguish, judicial review was denied on the fundamental ground that the parties suing to enjoin the orders lacked standing to maintain the suits because they failed to show that the orders subjected them to actual or threatened legal injury or invaded some independent legal or equitable right of their own or threatened economic damage or loss of something the parties had long and lawfully enjoyed. The opinion fails in its efforts to distinguish even the 4 cases it attempts to distinguish, for it does not and can not point to any statutory or judicial authority for the assertion that the Rio Grande has any right of any kind to divert traffic from other railroads for a "bridge" haul over its line, and the Rio Grande admits that it has no such right.

The opinion ignores the fact pointed out in connection with numerous cases cited in Volume I and the supplemental briefs of intervening railroad defendants, that every case in which the right to maintain suit was sustained involved an order which the Supreme Court held would result in irreparable injury and loss, or that the order violated or invaded some legal or other right of the complaining party or that some special statutory provision gave such parties the right to judicial review. For example, the opinion [fol. 477] at page 32 cites the *Chicago Junction Case*, 264 U.S. 258, but refrains from mentioning the fact shown in the Supreme Court's opinion in that case that the order deprived the complaining parties of $10,000,000 annually and that their right to challenge the order in court rested in part upon certain provisions in the Transportation Act, 1920. Similarly, the Court ignores the fact that in *Youngstown Co. v. United States*, 295 U.S. 476, the order inflicted an additional burden of $9.00 per 50-ton car upon the shipper, which most certainly was a pecuniary injury if,

as alleged in its complaint, the Commission committed errors of law in prescribing the increased rates. Even *Mitchell* v. *United States*, 313 U.S. 80, which the Court seems to have selected for its principal authority in sustaining the Rio Grande's right to maintain its suit, although involving no pecuniary loss, was as clear a case as one could imagine of a right to judicial review because of Mitchell's clear-cut and specific legal right under the Constitution of the United States to non-discriminatory treatment and to equality in passenger service and accommodations, and the Commission's order, in effect, deprived Mitchell of that Constitutional right.

The Court should reverse its holding that the Rio Grande has standing to maintain its suit and dismiss the complaint and intervening complaints for lack of standing of the plaintiffs to maintain the suits.

II

The Court Erred in Failing to Dismiss the Complaint on the Ground that the Commission's Failure to Compel Through Routes and Joint Rates on all Commodities is not an "order" or a part of the Order Issued by the Commission

This Court has power and jurisdiction only to enjoin, set aside, annul, or suspend in whole or in part any "order" of the Commission (Title 28, U.S.C., §§ 1336, 1398, 2284 and 2321-2325). There is nothing to which the Court's jurisdiction can attach unless and until the Commission issues [fol. 478] an "order". The only order issued by the Commission in this case is the order quoted at pages 7 and 8 of the intervening railroad defendants' brief, Vol. I. That order requires through routes and joint rates with the Rio Grande on the articles therein named and prohibits them from charging rates in excess of those prescribed, and the order further requires the defendant railroads to cease and desist from practicing undue prejudice and preference and unlawful discrimination referred to in the first paragraph of the order. There is no "part" of that order, nor is there any order or part of any order at all, refusing to require through routes and joint rates on articles other

than those named in the order issued, nor is there any order or any part of an order dismissing the Rio Grande's complaint or any part of its complaint. Therefore, unless the Rio Grande's complaint seeks to enjoin and annul the order which the Commission did issue, its complaint attacks, and the Court's conclusion is to annul and set aside, something that does not exist, namely an "order" dismissing the Rio Grande's complaint in part or as to articles not named in the order the Commission did issue. The complaint attacks, and the Court has erroneously dealt with something that is not embraced or touched upon in the order the Commission issued. The Court concludes to annul and set aside the Commission's mere failure to issue an order with respect to articles other than those named in the order it did issue. While the Commission's conclusion "4" is—

> "That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

that conclusion is not embraced in the order issued or embodied in any order or part of any order. The Supreme Court has expressly held that "matter", conclusions or findings contained in a Commission report, but not followed by and embraced in a formal "order", are not subject to judicial review. In *United States* v. *Atlanta B. & C. R. Co.*, [fol. 479] 282 U.S. 522, the Commission had issued a report at the end of which it stated its final conclusion and said that the carrier "will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report" (p. 524). But the Commission issued no "order". In holding that the Commission's report and the conclusions, findings or statements embodied therein were not subject to judicial review, the Court held, pages 527-528:

> "The action here complained of is not in form an order. It is a part of a report—an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons.
>
> * * * * * * *

"No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

The Rio Grande's complaint alleged that certain statements or conclusions in the Commission's report were erroneous or unsupported by evidence, but as held in the case just cited and other cases cited in the intervening railroad defendants' brief (Vol. I, p. 60, and Vol. II, pp. 1-6), the Commission's process of reasoning, its mere conclusions, or its mere failure to reach different conclusions from those stated in its report are not subject to judicial review, and no Court has any jurisdiction under the Act here invoked to review any matter complained of unless such matter has been embodied in "a formal order" issued by the Commission. There being no such "order embodying or carrying into effect the Commission's failure to include all commodities in the order it did issue, the Court has erred in failing to dismiss the Rio Grande's complaint on the ground that there is no "order or part of an order" giving the Court jurisdiction to review the matters of which the Rio Grande complains.

Our contention here is not based on the "negative" character of the Commission's failure to require through routes and joint rates on commodities not included in its order but upon the fundamental fact, pointed out earlier, that there is no order at all, or any part of an order embodying [fol. 480] the failure of the Commission to do more than it did in requiring through routes and joint rates on the few articles named in its order. In other words, we are not here arguing that judicial review should be denied because of the "negative" character of any order or part of any order, but because of the fact that there is no order and no part of any order embracing what the Rio Grande complains of or what the Court proposes to annul and set aside, and that consequently the very thing necessary to give the Court jurisdiction, namely an "order", is completely lacking. To make our position clearer if possible, we point to the fact that in all of the cases in which judicial review was denied because the Commission's orders were "negative", there were in fact actual "orders", in form, dismissing

complaints that had been filed with the Commission. (See cases reviewed and discussed in *Rochester Tel. Corp.* v. *U.S.*, 307 U.S. 125.) Such "order" dismissing the complaint had actually been issued in *Mitchell* v. *United States*, 313 U.S. 80, and, adhering to its decision in the *Rochester Case*, the Court, upon holding that Mitchell had standing to maintain the suit because the order deprived him of his Constitutional rights, proceeded to review the order, regardless of its negative character. But *there was an order in form and in reality* and not a complete absence of an order embodying the action or non-action of the Commission of which complaint was made. As stated by the Court in *United States* v. *Atlanta, B. & C. R. Co., supra*, holding that the Court had no power or jurisdiction to review the Commission's action because of the absence of an order:

> "No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

Clearly, this Court erred in proceeding on the theory indicated at page 30 of its opinion that, because, under the *Rochester Case* it had jurisdiction to review a "negative" order, it also had jurisdiction to review the Commission's failure to take the action of which the Rio Grande com- [fol. 481] plained because such failure was negative in character and regardless of the fact that there is no order or part of any order embodying the failure or negative action of the Commission against which the Rio Grande complains. The Court, upon reconsideration of this case, should dismiss the complaint because of the absence of any order embracing the matters complained of, in accordance with the decision in *United States* v. *Atlanta, B. & C. R. Co., supra*.

III

The Court Erred in Holding that the Commission's Finding that "There are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned" is not Supported by Substantial Evidence and is Erroneous as a Matter of law, and the Court Further Erred in its own Holding that the Evidence Establishes the Existence of such Through Routes

Although it can not be gleaned from its opinion just what fact or circumstance or what combination of facts or circumstances constitute the basis for the Court's conclusion that through routes already exist via the Rio Grande for the traffic involved, certain errors and implications are so necessarily embraced in that conclusion as, we think, to compel this Court to reconsider the conclusion along with other errors on which this motion for new trial and reconsideration is based. In such reconsideration of its conclusion that through routes via the Rio Grande already exist, we earnestly urge the Court to ponder carefully the discussions of this question in the Commission's report pages 615-619, and its brief, beginning at page 26, and in the brief filed by the five intervening states, beginning at page 19, and in Vol. 2, pp. 129-136 of the original brief filed by intervening railroad defendants, and at pp. 14-29 of their supplemental brief. The protection of railroads, and especially those like the Union Pacific that have built vast spreads of branch lines for the purpose of developing large areas in the hope [fol. 482] of obtaining a profitable haul of the traffic over their main lines, which protection Congress has steadfastly refused throughout the years to take from them, is so vitally important that it should not be nullified by administrative or judicial findings or interpretations of vague and doubtful meaning.

We cannot believe that the Court comprehended the enormity, scope or significance of the Rio Grande's contention that through routes exist via its line for the traffic involved or the impossible burden of proof inescapably shouldered by the Rio Grande in alleging at page 7 of its complaint to the Commission that through routes now exist and for

many years have existed via its line for the traffic it seeks in this case. The Rio Grande's complaint and evidence before the Commission seem to proceed upon the theory that it could prove its contention that through routes already exist via its line for the traffic involved, merely by showing that physical interchange of cars between its line and the Union Pacific and certain other railroads is possible and that considerable traffic, except that involved here, is actually being interchanged with it by certain other railroads. The Court's opinion apparently falls into the same error of treating the Rio Grande's demands here and its contention that through routes for the traffic involved exist via its line, as if the fact that interchange of traffic with the Union Pacific is physically possible makes the Rio Grande's line a part of the hundreds of thousands of through routes published and maintained by other railroads for the transcontinental traffic involved in this case.

We begin by pointing to allegation VII in the Rio Grande's complaint to the Commission that the Union Pacific and the other 200 railroads therein named publish tariffs maintaining through routes and joint rates for the involved traffic, and next to its allegation IX (pp. 6-7) that the railroads that publish and maintain through routes and joint rates for this transcontinental traffic "have failed [fol. 483] and refused" to include the Rio Grande's line as part of any of the through routes so published by them and by notes and exceptions in their tariffs have excluded the Rio Grande from the through routes via which the joint rates are applicable. It is this exclusion of the Rio Grande to which it objects, and in reality its complaint sought an order from the Commission requiring the carriers publishing the through routes and joint rates via their lines to remove from their tariffs the notes and exceptions which make the joint rates inapplicable via the Rio Grande, and to include the Rio Grande as a carrier participating in the hundreds of thousands of through routes and joint rates published in the tariffs of the defendant railroads for this transcontinental traffic. In the hope of avoiding the short haul prohibition in Section 15(4) of the Act, the Rio Grande's complaint alleged (p. 7) that through routes already exist via its line for the traffic involved, and in mak-

ing that allegation it most assuredly undertook the burden of proving that its line is a part of the myriad of through routes published in tariffs of the defendant railroads for this traffic.

The scope and extent of the Rio Grande's burden is indicated in the following statement at page 614 of the Commission's report describing the nationwide coverage of the multitude of through routes published and maintained by the defendant railroads, each and all of which the Rio Grande claims its line is a part:

> "Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions."

Although the record does not show and, indeed, it is hardly possible to show the total number of the hundreds of thousands of through routes of which the Rio Grande claims its line is a part, the appendices to its complaint [fol. 484] (pp. 24-37) afford some indication. The supplemental brief of the intervening railroads endeavored to give this Court an understanding of the scope and extent of the Rio Grande's contention by pointing (p. 24) to the fact that there are some 39,000 railroad stations in the involved part of the United States east and south of a north and south line roughly along the eastern boundary of Colorado, and approximately 2,900 railroad stations in the northwest area, between all of which stations through routes and joint rates for the transcontinental traffic involved are published and are applicable. There are, of course, from one route to hundreds or even thousands of routes between the stations in the northwest and those in the eastern and southern part of the country, but if there were only one through route between each of the stations, this would make

a minimum total of 113,000,000 through routes, of which the Rio Grande claims its line is a part.

In a further effort to give the Court a more definite and comprehensive grasp of the colossal and fantastic extent and scope of the Rio Grande's claim that it is already a part of all through routes published for the involved traffic, we now cite testimony from an official Federal document entitled "Through Routes", being a transcript of hearings before the Interstate and Foreign Commerce Committee of the House of Representatives on Senate Bill 1261, December 1937 and April 1938, concerning a proposal of short line railroads and the Interstate Commerce Commission to repeal the provision in Section 15(4) of the Act which protects carriers from being short hauled. It is shown in that document (p. 164) that there were then 12,291 different through routes for movement of traffic under specific tariff publication from Chicago, Ill. to Jacksonville, Fla., and (p. 142) that there were more than 10,000 through routes for so-called merchandise traffic alone between New York, N.Y. and Dallas, Texas, and (p. 141) that there were 2,300 through routes from New York to St. Louis and 2,628 through routes from Boston to St. Louis, and from such [fol. 485] smaller places as Butler, Pa. to Burlington, Ia., there were as many as 130 through routes, and from New York to Chicago 445 through routes. While that testimony concerned through routes east of the Missouri River, it illustrates the point we make, particularly since much of the transcontinental traffic here involved moves through such points as St. Louis, Kansas City, Omaha, Chicago, Pittsburgh, and other cities that are served by numerous railroads, nearly all of which doubtless are parties to the existing through routes of which the Rio Grande claims its line is a part, and it is indisputable that the number of such routes would run into many millions.

The Rio Grande undertook to prove its allegation that its line is a part of all these through routes by pointing to the fact that (1) it was a party to through routes and joint rates for tarffic to and from the northwest between 1897 and 1912, but it did not show that those were the same through routes between the same points that it now claims some 40 years later to be a part of, and the Commission's

report indicates that (p. 621) the then through routes were not as extensive or numerous as present through routes on the transcontinental traffic involved; (2) that 17 shipments of through traffic from 15 of the 39,000 stations in the east moved westbound via its line in 1948 at combination rates to 9 of the 2900 stations in the northwest area (Ex. 1, p. 5); that 37 carloads moved in 1948 from points on the Union Pacific in the northwest to destinations on the Rio Grande's line, which, of course, moved on joint rates and were not transcontinental through traffic which is involved in this case; (3) that through traffic was diverted to and moved over its line under emergency conditions of the war and the blizzards which blocked the Union Pacific Railroad a few days in 1949.

The Court's opinion simply summarizes the basis on which the Rio Grande claims through routes exist via its line and then abruptly agrees with the Rio Grande, without stating why it reaches that conclusion. Thus, the Court [fol. 486] reaches the opposite conclusion upon the same evidence on which the Commission, after careful analysis and reasoning at pages 615-619 of the report, rejected the Rio Grande's claim that its line is a part of the millions of through routes for this transcontinental traffic.

Since the opinion refrains from disclosing any rationale by which it reached the conclusion that through routes claimed by the Rio Grande already exist, we are left to the subjunctive method of pointing to the errors and inconsistencies in the opinion on which it must be assumed that the Court relied, and which we insist the Court should reconsider and reverse itself on the through routes question.

If, as indicated at page 19, the Court believes through routes via the Rio Grande still exist because some of the routes did exist from 1897 to 1912, and because, when the joint rates were cancelled "the through routes were not closed", then the discussion concerning movement of traffic over the Rio Grande at combination rates is clearly irrelevant. But, unless the Court intends to hold that, in order to close through routes, railroads must erect some physical roadblock or take other measure to prevent physical interchange of traffic, we insist that, upon the Rio Grande's own allegations and arguments, those old through

routes were effectively closed with the cancellation of the joint rates, leaving the higher combination of local rates in effect.

Thus, as alleged at page 8 of its complaint to the Commission, cancellation of the joint rates so effectively closed the through route via the Rio Grande "as to prevent the movement of freight traffic" over its line; and at page 10, operates "to deprive shippers of the advantages" of transit privileges at points on the Rio Grande, and to deprive the Rio Grande of "through freight traffic which it might obtain if equal rates applied in connection with it."

[fol. 487] So effective was the cancellation of the joint rates in closing of the through routes via the Rio Grande that its brief (p. 4) to the Commission argues that the higher combination rates "deprive the public, shippers and the complainant (Rio Grande) of the use" of its line for the through traffic involved; and at page 5, that refusal of carriers participating in the Union Pacific routes to short haul themselves by including the Rio Grande in the through routes at equal joint rates "actually prevents the movement of traffic from eastern points" via the Rio Grande to Salt Lake City and Ogden, and (p. 98) that the combination of local rates, after cancellation of the joint rates, via its line "prevent any regular or substantial movement of the traffic via" the Rio Grande; and again at page 101 of its brief that, "unless the same level of rates is prescribed on the traffic involved via the Ogden Gateway and the Rio Grande no practical or useful purpose will be served"; and (p. 116) that livestock shippers testified that any rates via the Rio Grande higher than livestock rates via Union Pacific routes "would be of no use to them and would not move the livestock" via the Rio Grande; and at page 26 that the combination rates via the Rio Grande "are excessive and prohibitive", which must mean that cancellation of the joint rates so effectively closed the through route via the Rio Grande as to prohibit shippers from using that line when their shipments could be moved via Union Pacific routes.

Certainly, cancellation of the joint rates was effective to close the through route via the Rio Grande sufficiently to preserve the right guaranteed by Section 15(4) of carriers

participating in Union Pacific routes not to be short hauled by the Rio Grande to any substantial extent, and indeed, if cancellation of the joint rates had not effectively closed the route, then the Rio Grande would have no reason to complain. The Rio Grande clearly stultifies its position in contending that cancellation of the joint rates had no ef- [fol. 488] fect on the existence of through routes via its line and, in the same breath, contending that cancellation of the joint rates so effectively closed its route "as to prevent the movement of freight traffic" over its line, and the Court's opinion is likewise inconsistent and erroneous.

If the Court relies on the statements of the counsel and witness for the Union Pacific that shippers may route such of the involved traffic over the Rio Grande as they desire if they are willing to pay the higher combination rates, the Court is clearly erroneous in holding that this fact tends to prove the existence of a through route via the Rio Grande, unless the Court intends to rest its decision on a theory the Supreme Court flatly rejected in *Thompson* v. *United States*, 343 U. S. 549, because such a theory would mean that "through routes exist between all points throughout the country wherever physical rail connections are available". The Court further errs in holding that a shipper's right under Section 15(8) of the Act to route his traffic "exists only when through routes and through rates have been established", for there is no provision in the Act preventing a shipper from routing his traffic over any series of connecting railroads wherever physical interchange is possible and the carriers have performed their duty of publishing local rates on their respective connecting lines. The right of a shipper under Section 15(8) is to choose between two or more "competing lines of railroad" and he may exercise that right by paying the rates published over the route or routes he chooses, regardless of whether the rates are combinations of local rates or joint rates.

If the Court relies on the statement at page 20 that joint rates are published for shipments of sheep and goats via the Rio Grande, the Court clearly errs because there is no statutory, judicial or administrative precedent or authority for the proposition that where carriers publish a through route with joint rates for one commodity, then such route

[fol. 489] becomes a through route within the meaning of Section 15(3) and (4) for every commodity. Such proposition is contrary to the Commission's settled administrative practice and treatment of through routes and carriers' rights under Section 15(4) not to be short hauled.

If the Court intends to hold that the existence of through routes can be established by proof of "a continuous use of the Rio Grande in the movement of traffic to and from the closed door area at through combination rates", then its ultimate conclusion is wholly erroneous and unsupported because the evidence here is limited to 17 westbound through shipments that moved in 1948, to 37 eastbound shipments that moved to local destinations on the Rio Grande in 1948, none of which moved beyond its eastern termini, and to traffic that was diverted to the Rio Grande under war and blizzard emergency conditions, which is clearly within the right of carriers to do by voluntary agreement or, in the absence of such agreement, the Commission may require under Section 15(4) of the Act. The Court further errs in saying at page 21 that movements of the traffic via the Rio Grande "was substantially the same in years prior to 1948 and continued into 1949" for that statement is squarely contrary to the Rio Grande's own assertion at page 98 of its brief to the Commission that the combination rates are so high as to "prevent any regular or substantial movement of the traffic" via its line; and there is no evidence whatever in the record concerning the movement of such traffic via the Rio Grande during any other years. The Rio Grande's witness who submitted the movement for 1948 did not say that 1948 was a representative year, but that he selected that year because "it was the last full calendar year prior to this proceeding" and, after testifying concerning problems of re-routing arising because shippers had sometimes mis-routed their traffic via the Rio Grande, in ignorance of the fact that the joint rates did not apply via that line, the witness said "the same problems prevailed to about the same extent in prior years, and have continued [fol. 490] thus far in 1949" (R. 74).

The statement at pages 22 and 25 that shipments diverted from the Union Pacific via the Rio Grande under emergency conditions without the Union Pacific having asked the Com-

mission to authorize temporary through routes via the Rio Grande and without the Commission invoking its authority under Section 15(4) to establish temporary through routes indicates and suggests "that both the Union Pacific and the Commission assumed the existence of through routes" via the Rio Grande, is untenable and illogical, and rests upon a misconception or a distortion of the statutory pattern. Section 1(15) of the Act authorizes the Commission to issue "service orders" whenever it is "of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country" and Section 15(4) authorizes the Commission, under the same type of emergency conditions, to "establish temporarily such through routes as in its opinion are necessary or desirable in the public interest". But no provision of the Act prohibits carriers from acting voluntarily among themselves in such emergencies without invoking the authority of the Commission under either of these statutory provisions and it is wholly illogical and erroneous to hold that, because the Union Pacific and the Rio Grande acted voluntarily in these emergencies, instead of invoking or waiting for an exercise of the Commission's emergency powers on its own initiative, indicates or suggests that the Union Pacific and the Commission assumed that through routes via the Rio Grande were already in existence, within the meaning of Section 15(3) and (4), for the traffic involved in this suit. It was shown by an experienced operating witness at page 833 of the record in this case that:

> "There is nothing unusual about such diversion of traffic among railroads under emergency conditions. It is the rule and not the exception.
>
> "Detour movement of trains and traffic via other lines in the event of interruptions is an accepted principle in American railroading, and hundreds of agreements are on file today stipulating the terms and conditions governing such movements. It is the device under which traffic of the Nation is kept fluid regardless of the temporary stoppage or incapacity of one line to function."

[fol. 491] At pages 23 and 24, the opinion states that "a joint rate is not essential to the existence of a through route" and that "the rate which applies over a through route may be the aggregate of separate rates fixed independently by the several carriers participating in the through route." The opinion then cites *St. Louis-Southwestern R. Co.* v. *United States*, 245 U. S. 136, 139, which defines the term "through route"; and *Thompson* v. *United States*, 343 U. S. 549, 556, and quotes from the latter decision the definition of a "through route" as there given. This Court's opinion then (p. 24) says:

> "* * * the foregoing definition of 'through route' compels us to conclude that the through routes contended for by the Rio Grande were in existence * * *"

but then at least implies that the Commission erred in relying on the *Thompson Case* in holding that through routes via the Rio Grande were not in existence, saying:

> "But the facts in the Thompson case are in striking contrast with the facts in this case."

and that:

> "No evidence was presented that any shipment had ever been made from Lenora to Omaha via the Burlington or that the carriers had ever offered through service over that route".

The opinion then again refers to the testimony concerning movement of traffic via the Rio Grande.

The opinion refrains from indicating what there is in the definitions of a through route in the *St. Louis Case* and the *Thompson Case* that "compels us to conclude that the through routes contended for by Rio Grande were in existence", so we are again left to guess what the Court means in this part of its opinion. The decision in the *St. Louis Case* clearly is against the Rio Grande's position here, as shown at page 143:

> "The order entered does not require any complaining carriers to substitute the route via Memphis for that via Cairo; nor does it require any to establish an

additional route via Memphis. Carriers are left free to furnish the through transportation either via Cairo or via Memphis. The order merely compels a through [fol. 492] route and a joint rate of 16 cents to Paducah. If they elect to continue the existing through route via Cairo, the order operates merely to introduce reduced joint rates. If they elect to discontinue the through routes via Cairo, the order operates to establish through routes and joint rates via Memphis, which the findings of the Commission fully justify."

In the instant case the Rio Grande's sole purpose is to "substitute" its line for lines of the Union Pacific and other roads so it can haul the traffic part way as "bridge" line.

If the Court means that the part of the definition in the *Thompson Case* that "compels" the conclusion that through routes exist via the Rio Grande is that part of the definition which says that a through route may exist where a "through rate" has been published and that such rate "may be merely an aggregate of separate rates fixed independently by the several carriers forming the 'through route' ", then this Court's conclusion that the definition compels it to hold that through routes exist via the Rio Grande is clearly erroneous because it flies in the face of the fact that this very theory was urged by the Commission but flatly rejected by the court in the *Thompson Case* in the following language (p. 558):

"The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route since the power to establish through routes under Sections 15 (3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines."

And, at pages 559-560, the Court further explained that:

"The Commission continues to support its order, but the logical conclusion of the theory advanced by

the Commission is that through routes exist between all points throughout the country wherever physical rail connections are available. If there is no through carriage over any combination of connecting carriers, the Commission under its present theory would never have to establish through routes under Section 15(3) and (4) but could divert traffic to any route between two points by ordering reduction of the sum of the local rates over that route. Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter [fol. 493] the form of its order. The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4), before the Court in *United States* v. *Great Northern R. Co.*, 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."

If this Court's opinion is that through routes claimed by the Rio Grande exist on the theory that by publishing their own independent local rates the connecting carriers "hold themselves out as offering through transportation service", then again, its conclusion is clearly erroneous and foreclosed by the language just quoted from the *Thompson Case*.

If this Court rests its decision that through routes are in existence as claimed by the Rio Grande upon that part of the definition in the *Thompson Case* which says that "through carriage implies the existence of a through route whatever the form of the rates charged for the through service", then there is no basis whatever for this Court's conclusion, because there is no evidence whatever in this case, and indeed the Rio Grande made no effort to prove, and does not even contend that there has been "through carriage" via its line over the myriad of transcontinental

routes, of which it claims to be a part. And the complete absence of any such evidence becomes more fatal to this Court's conclusion in view of its apparent reliance upon the fact that in the *Thompson Case* there was no evidence showing that any shipment had ever moved from Lenora to Omaha via the Burlington, and that the evidence upon which the Commission relied of shipments moving from Lenora to points on the Burlington short of Omaha:

> "* * * cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15(4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burling- [fol. 494] ton line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern." (p. 559)

If, as this Court erroneously seems to hold, under the *Thompson* decision the existence of a through route can be proved only by evidence showing actual movement of traffic over the entire lines of the connecting carriers "between the termini" (Section 15(4) of the claimed through route, then this Court is clearly wrong in holding that the meager token of evidence offered by the Rio Grande and summarized at pages 20-22 of the opinion, establishes the Rio Grande's claim that its line is a part of the millions of through routes published in the tariffs for the transcontinental traffic involved in this case.

The opinion is further inconsistent and erroneous in attempting to throw back to the Commission for decision the question whether the "burden is on the Rio Grande to show some actual movement of traffic on through billing over each of the possible routes between the thousands of stations in the involved areas", for the Court has readily assumed authority to make its own decision that through routes were already in existence via the Rio Grande and to reverse the Commission upon the very facts and circumstances on which the Commission held that through

routes via the Rio Grande did not exist. If this Court correctly construes the *Thompson* decision as holding that proof of actual movement "between the termini" of a claimed through route is essential to establish the existence of the route, then this Court is bound by that decision to hold that the burden is on the Rio Grande to make such proof with respect to actual movement over each of the millions of routes of which it claims to be a part. This Court's citation at page 28 of *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, lends no support to this Court's views for no question of actual movement of traffic was raised in that case, and the dictum of that decision concerning the existence of through [fol. 495] routes at combination rates has clearly been overruled by the very pointed decision in the *Thompson Case.*

At page 26, the opinion says it appears that the Commission "reasoned" that cancellation of the joint rates in 1906 and 1912 closed the through routes in a "commercial sense" by applying the higher combination rates and that this "terminated the through routes", but that "it was held to the contrary" in the *Virginian Case.* In passing, we observe that hardly, if ever, has there been a Supreme Court decision as frequently mis-cited and misunderstood as its decision in the *Virginian Case.* This Court's opinion says that 45 out of 99 coal mines located on the Virginian "enjoyed through routes and joint rates to the West because of certain trackage arrangements", but, as clearly shown at page 664 of the Supreme Court's decision, the 45 mines on the Virginian, while enjoying lower rates to the west than 54 other mines located on the Virginian, this was not because through routes existed or joint rates had been established from the 45 mines to the West, but because of a trackage agreement between the Virginian and the Chesapeake and Ohio for the use of each others tracks to certain mines in the area which agreement operated as a "reciprocal switching arrangement" whereby the Chesapeake and Ohio absorbed the switching charges of the Virginian from the 45 mines to its junction with the Chesapeake and Ohio, thus enabling "these mines to enjoy the same rate to the west as do those located on the Chesapeake and Ohio." But from the 54 other mines that complained to the Commission the trackage and reciprocal switching arrangement did not apply, because those mines were directly connected with the

Virginian's main line to the east by its own branch line tracks and it was unnecessary for the Virginian to have operating rights over Chesapeake and Ohio tracks to reach those mines (see the Commission's report, 98 I.C.C. 488, 490-491). Consequently, shippers from those 54 mines to the west had to pay the combination of the Virginian's local rate from the mines to its junction with the Chesapeake [fol. 496] and Ohio and whatever rate applied from that junction to the western destinations. This combination of rates was from $1.14 to $2.52 in excess of the rates enjoyed by the 45 mines as result of the absorption by the Chesapeake and Ohio of the Virginian's switching charge from the 45 mines to the junction of the two railroads. At page 661, the Court did say that:

> "For most of these 54 mines access to these (western) markets was and is *physically possible* through a junction of the Virginian and the Chesapeake and Ohio. But that route is closed commercially, because these two carriers have not established any joint rates to the west from any of these 54 mines".

At page 666, the Court further said "through routes to the west were already in existence. And there were through rates by combination." The Court's statements concerning through routes in that case are pure dictum and have no bearing upon the decision, and moreover the dictum of that case is necessarily overruled by the express holding of the Court in the *Thompson Case*, at the top of page 558, in addition to which in footnote 18 at page 560 of the *Thompson Case*, the Court says that the *Virginian Case* "is inapposite" and we insist and will now demonstrate that it is inapposite here. The opinion in the *Virginian Case* states at page 666 that "the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates" and (p. 667) that:

> "The Commission found that the combination rate was both unreasonable and discriminatory. It prescribed through rates which it found were reasonable and nondiscriminatory. *It did not order joint rates.*"

Instead, as stated at page 662, the Commission ordered the carriers to "cease and desist" from collecting rates from the 54 complaining mines to western destinations in excess of the rates enjoyed by the 45 mines and others in the district having the lower rates. Thus, neither the Commission nor the Court in that case faced any problem of establishing joint rates under Section 15(3) or any new through route with joint rates. In that case, there was no railroad [fol. 497] claiming that its line was a part of millions of existing through routes nor any demand, such as the Rio Grande makes here, that the Commission require that the joint rates via existing Union Pacific routes be made applicable via the Rio Grande for the purpose of its "pecuniary gain" from a "bridge" haul over its line of traffic diverted from existing routes.

Furthermore, there was no question of short hauling the *Virginian* in that case for the traffic involved was originated at the 54 mines located on its line and it necessarily hauled the coal from the mines to its junction with the Chesapeake and Ohio. This haul averaged 64.7 miles, as shown in Commissioner Cox's dissenting opinion, 98 I.C.C. 498, and included all of the Virginian's line "which lies between the termini" of the route over which the coal moved from the 54 mines to the western destinations and, since it obtained its longest possible haul on such coal to the west, there was no short hauling within the meaning of Section 15(4). As shown in the decisions of the Commission and the Supreme Court, the western terminus of the Virginian was at Deepwater, W. Va., and from there it "extends only eastward to tidewater", meaning Norfolk, Va., and other ports along the Atlantic Coast. The Virginian's purpose in refusing to reduce its local rates from the 54 mines to junctions with the Chesapeake and Ohio was to discourage shipments from those mines to the west and thereby retain or increase the volume of coal traffic over its line to the east which gave it the benefit of a maximum haul of 450 miles (98 I.C.C. 498). In view of the foregoing analysis of the *Virginian Case*, this Court clearly errs in relying upon the decision in that case, and further errs in saying at page 28 of the opinion that the statement in the *Virginian Case* that "through routes to the West are already in existence" was "without apparent direct proof of transportation of freight from all

points on the Virginian to all points in the west via the [fol. 498] Chesapeake & Ohio", for, as we have just shown, the case did not involve the question whether through routes to the West already existed or what evidence was necessary to prove that such routes existed. These questions were involved, however, in the *Thompson Case*, and, as we have said, in deciding them the Court flatly rejected the dictum of the *Virginian Case* that the existence of through routes between connecting carriers automatically results from the fact that each of the carriers publishes its own local rates as required by the Act.

We urge the Court to give the most thorough reconsideration to its holding that through routes claimed by the Rio Grande already exist. We earnestly believe that upon careful analysis of all the facts and circumstances the Court will reverse its holding and agree with the Commission that through routes via the Rio Grande do not exist for the involved traffic and that no such route can be required without invoking Section 15(3) as limited by the short haul prohibition in Section 15(4).

IV

Upon its Holding that the Commission "erred as a matter of law" in Finding that There are at Present no Through Routes via the Rio Grande as Claimed by it, and that this Finding "obviously prejudiced the entire proceeding", the Court Erred in Concluding that the Commission's Order will be Annulled and set Aside only "in so far as it denied relief to the Rio Grande", and in Failing to hold that the Order Requiring Through Routes and Joint Rates for the Articles Therein Named, as well as the Commission's Failure to Require Joint Rates for all Commodities *Should be Annulled and set Aside.*

The Court's decision on "The Merits" is (p. 28) that the evidence clearly established the existence of through routes as claimed by the Rio Grande and that in finding to the contrary the Commission "erred as a matter of law" (pp. 18 and 29), and that this error of law "obviously prejudiced the entire proceeding". The Court further holds (p. 29) that the Commission adopted an erroneous "approach" and "erred as a matter of law in failing to apply the provi-

[fol. 499] sions of § 1(4) and § 3(4), rather than the provisions of § 15(3)."

Thus, the Court adopts as its own the contention of the Rio Grande at pages 86-101 of its brief that, because the Commission found that through routes do not presently exist as claimed by the Rio Grande, the decision and order are erroneous, arbitrary and capricious, and the Court also adopts the contention of the Short Line Association at page 24 of its brief that "the failure of the Commission to correctly determine the issue of through routes completely prejudiced the whole proceeding" and "completely destroyed the opportunity for the Commission to perform its statutory duty, and all additional rulings have thus been legally prejudiced, and should not therefore be regarded as determinative of the issues properly before the Commission."

While we contend that the Commission correctly found that no through routes presently exist, as claimed by the Rio Grande, and that, as argued at pages 16-19 of the supplemental brief of the intervening railroad defendants, even if the Commission committed error of law in so finding, the error is irrelevant to the validity of the order and is of no consequence unless it is a "distinct and dominant proposition of law * * * the exact influence of which, in its (the Commission's) decisions, could be estimated," *Ill. Cent., etc., R.R. Co. v. Inter. Com. Comm.*, 206 U.S. 441, 457. We challenge anyone to demonstrate that the Commission's finding that through routes via the Rio Grande do not presently exist "prejudiced" or had any effect or influence upon its ultimate conclusions or its failure to grant the Rio Grande's full demands. That the finding was also made by the Chief Examiner in his proposed report without objection, exception or claim by the Rio Grande that it influenced or prejudiced the conclusions of the Chief Examiner, for he recommended that the Commission require through routes and joint rates on all commodities. If the Com- [fol. 500] mission had found that the evidence justified requiring joint rates on all commodities, it needed only to adopt the order recommended by the Chief Examiner, from which it is plain that the finding of both the Commission and the Chief Examiner that through routes do not exist as

claimed by the Rio Grande, even if erroneous, was not the reason the Commission failed to require joint rates on all commodities, and the finding was therefore of no consequence.

However, if we are wrong in these views and if the Court, the Rio Grande and the Short Line Association are correct in the view that the Commission's finding was an error of law and that it "prejudiced the entire proceeding" and "completely destroyed the opportunity for the Commission to perform its statutory duty, and all additional rulings have thus been legally prejudiced", it is inescapable, we submit, that the *whole proceeding* before the Commission, including its order requiring through routes and joint rates for the articles therein named as well as its failure to require joint rates on all commodities, was by that finding vitiated and completely nullified, and that the Court patently errs in decreeing that the order will be annulled and set aside only "in so far as it denied relief to the Rio Grande".

An error of law so fundamental and having such pervading, influential and consequential effect that it "obviously prejudiced the entire proceeding" and completely prevented the Commission from performing its statutory duty, and to legally prejudice all additional rulings made in the proceeding, necessarily nullifies all action flowing from such error of law and the Court certainly exceeds its power in attempting to save the order insofar as it confers benefits upon the Rio Grande. In that attempt the Court necessarily usurps administrative authority of the Commission and, in effect, makes an administrative finding that the joint rates required by the order are justified by the evidence upon application of Sections 1(4) and 3(4), rather than [fol. 501] Section 15(3). In other words, while "remanding" the case to the Commission, the Court has pre-empted and usurped that much of the very purpose of the "remand" and the function the Commission would be called upon by the remand to perform, namely a determination whether the evidence requires any joint rates, and whether the Rio Grande is entitled to any "relief", in the light of the provisions of Sections 1(4) and 3(4).

The inevitable and unavoidable effect of the Court's hold-

ing that the Commission's finding that through routes do not presently exist as claimed by the Rio Grande is an error of law which "obviously prejudiced the entire proceeding", like a blight which kills a tree and all its roots and branches, is completely destructive and nullifying of all and not merely a part of the action flowing from the error. There can be no "unblighted" or lawful part of the action flowing from an error which "obviously prejudiced the entire proceeding". No case can be found in which such incongruous action has been undertaken by a court under such circumstances. Instead, the courts have invariably completely, and not partly, annulled and set aside orders held to have resulted from fundamental errors of law, or from the Commission's misinterpretation of its authority or from its arbitrary action. For example, in *Ann Arbor R. Co. v. United States*, 281 U.S. 658, the Supreme Court held that the Commission had committed error of law by misconstruing a Joint Resolution of Congress in issuing the order there considered, but the Court did not undertake to save any part of the order. Instead, at page 669, it held:

> "Our conclusion is that the order of the Commission was based upon an erroneous construction of the Joint Resolution, and therefore should have been set aside by the Court below."

In *Atchison, etc. Ry. Co. v. U.S.*, 284 U.S. 248, the Commission had, after long hearings and consideration, issued an order prescribing rates on grain and grain products throughout the western part of the United States. After [fol. 502] the order was issued, several western railroads petitioned the Commission to reopen the proceedings and receive further evidence which would disclose drastically changed conditions resulting from the early effect of the great "Depression", and the consequent inability of the railroads to withstand the rate reductions required by the order. The Commission denied the petition. The Supreme Court held that the Commission's refusal of further hearings and consideration in the light of the facts which the petition offered to prove was an arbitrary denial of right. The Court did not attempt to save any part of the order

or to remand the case to the Commission. Instead, at page 263, the opinion concludes:

> "The order of the District Court refusing an interlocutory injunction is reversed, and the cause is remanded with direction to grant the injunction as prayed".

Even in cases where the courts have found that the Commission acted lawfully in granting *a part* of motor carrier operating rights but acted upon an error of law or misinterpretation of the Act in denying other parts of the operating rights sought by the application, the Courts, upon holding that the Commission's denial of a part of the operating rights sought, have not tried to save the rights lawfully granted but have annulled and set aside the entire order. Such a case is *Carolina Freight Carriers Corp. v. U. S.*, 38 F. Supp. 549, in which the Court, though "remanding" the case to the Commission, said at page 556:

> "For the reasons stated the order of the Commission will be set aside."

The decree of the three-judge District Court was "affirmed" by the Supreme Court on appeal without suggesting that the order should be annulled and set aside only insofar as it refused operating rights as a result of its error of law. *U. S. v. Carolina Carriers Corp.*, 315 U.S. 475, 490.

In *E. Brooke Matlack, Inc. v. United States*, 119 F. Supp. [fol. 503] 617, the Commission issued an order granting a part of operating rights but denying the motor carrier's application for still more extensive rights. The Court held that the denial of the more extensive rights was the result of erroneous and unlawful action by the Commission, but it decreed that the Commission's whole order be set aside, without suggesting that the operating rights lawfully granted by the order be saved, pending reconsideration by the Commission.

For the foregoing reasons, the Court, upon its holding that the "entire proceeding" was prejudiced by the Commission's finding that no through routes presently exist as claimed by the Rio Grande, can only decree that the

entire order be annulled and set aside for it has no power to save that part of the Commission's "prejudiced" action as the Court might think is beneficial to the Rio Grande while annulling and setting aside the part of the same "prejudiced" action which is unfavorable to the Rio Grande.

V

The Court Erred in Holding that the Commission "erred as a matter of law in failing to apply the provisions of § 1(4) and § 3(4), rather than the provisions of § 15(3)", in Determining Whether "joint rates, as prayed for by the Rio Grande", should be Required

There are at least four separate errors in that holding; first, it overlooks or ignores the fact that the Commission *did* make findings under Sections 1(4) and 3(1) and 3(4) and its order makes requirements that the defendant railroads correct violations found under those sections; second, the Rio Grande's complaint (page 10), though couched in evasive language, demanded *joint rates* "equal" to the joint rates via Union Pacific routes, and the Court clearly errs in holding (page 31) that the Rio Grande was entitled to such equal joint rates if its evidence proved violations of Sections 1(4) and 3(4), for the Commission has no power under those sections to require joint rates; third, the only power the Commission has to require joint rates is that [fol. 504] conferred by Section 15(3), as limited by Section 15(4), where, as in this case, short hauling other carriers is involved, and fourth, the only right the Rio Grande has under the allegations of its complaint is the right under Section 3(4) to be not discriminated against by other railroads, and it has no rights under Sections 1(4) or 3(1), for the right to reasonable rates and to be not unduly prejudiced or preferred, and the right to joint rates under Section 15(3) are all shipper's rights and not rights of the Rio Grande. These separate errors will now be discussed briefly in the order just stated:

1. The Court's erroneous thought that the Commission failed to apply the provisions of Sections 1(4) and 3(4) clearly is the result, as shown in the opinion, of strange and

incredible inadvertence or failure to observe what seems impossible of overlooking in the Commission's report and order. At pages 15 and 16, the opinion undertakes to state the Rio Grande's contentions before the Commission and then states that the Commission recognized the first question for determination was whether through routes via the Rio Grande exist within the meaning of Section 15(3) and (4). The Commission did make this statement at page 615 of its report but the Court's opinion completely overlooks the following statement of the issues on page 619 of the report:

> "The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15(3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together."

[fol. 505] By thus ignoring the Commission's statement that the issues include reasonableness of the combination rates, discrimination between connecting lines and undue prejudice against shippers using the Rio Grande route, the Court's opinion leaves the erroneous impression that the Commission's failure to grant all the Rio Grande's demands is the result of a self-imposed, limited and restricted consideration and treatment of the case, and a refusal and failure to consider the very things which the paragraph just quoted clearly shows the Commission recognized as issues presented and to be determined. At page 17 the opinion says, "Thus limited in its further consideration of the case, the Commission entered its order:", following which the opinion quotes, not from the order but the first

paragraph of the Commission's conclusions at page 659 of its report, following which the opinion states that:

> "In all other material respects the relief requested by the Rio Grande was denied." (p. 18)

The Commission's report (pp. 659-660) sets forth four separately stated conclusions. By quoting only the first conclusion as constituting the order of the Commission and by refraining from making any reference to the other three conclusions, the opinion would mislead one who reads it to believe that the Commission dealt with nothing more than appears in its conclusion "1", which the opinion quotes. Since the Court quite apparently was misled by its own oversight, we now quote conclusions "2", "3" and "4" from pages 659-660 of the Commission's report, which clearly show that the Commission considered and made findings with respect to all of the issues raised by the Rio Grande under all of the sections of the Act invoked by its complaint:

> "2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the [fol. 506] Union Pacific routes.
>
> "3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act.
>
> "4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

"An appropriate order will be entered."

Thus, the Commission not only states that the issues for determination include the reasonableness of the combination rates via the Rio Grande, discrimination against the Rio Grande resulting from the refusal of carriers forming Union Pacific routes to join with the Rio Grande in establishing joint rates lower than its combination rates, and undue prejudice against shippers using or desiring to use the Rio Grande, but also makes specific findings on all of the issues.

At page 658 its report states that the evidence adequately supports—

> "* * * a finding of undue prejudice and preference under section 3(1) of the act."

and, with respect to discrimination against the Rio Grande, the report, at page 658, makes the following finding:

> "There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3(4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. No such a showing has here been made."

Further, with respect to discrimination against the Rio Grande, the Commission finds at pages 658-659,

> "The situation is different with respect to traffic between Utah common points, on the one hand, and the northwest area, on the other. On such traffic the Union Pacific interchanges with the Bamberger Railroad Company at Ogden at joint through rates to and from [fol. 507] points on that line, including Salt Lake City. There is no apparent reason why similar arrangements should not apply on like traffic interchanged with the Rio Grande. The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the

Bamberger and those in connection with the Rio Grande."

The first paragraph of the Commission's order briefly summarizes its findings, and other paragraphs of the order require establishment of joint rates with the Rio Grande found reasonable (Section 1) and that the defendant railroad cease and desist from practicing undue prejudice and preference as between shippers (Section 3(1)), and unlawful discrimination against the Rio Grande (Section 3(4)), at points on the Bamberger Railroad.

2. The opinion reiterates the view that the Rio Grande was entitled to an order requiring the joint rates it demanded if its evidence provided violations of Sections 1(4) and 3(4), thus, assuming that those sections confer power on the Commission to compel joint rates and that the requirement of joint rates was the only remedy the Commission had power to order if it found violations of those sections, and is thoroughly confused with respect to the several separate sections and provisions of the Act. A mere reading of Sections 1(4) and 3(4) plainly shows that those provisions confer no power upon the Commission to order joint rates.

Sections 1(4) and 3(4), conferring the broad power upon the Commission to pass upon the reasonableness of rates and alleged discrimination against one carrier by others, were enacted in 1887. The special power to require joint rates was not conferred upon the Commission until 1906, in connection with the power to require through routes, Section 15(3) and (4), which expressly requires a finding that joint rates are necessary ad desirable "in the public interest" before the Commission may require them. See, for example, *U. S. v. Great Northern R. Co.*, 343 U. S. 562, where the court sustained the Commission's order requiring [fol. 508] joint rates found necessary in the public interest. The power to require joint rates is separate and distinct from the power to pass on the reasonableness of rates and discrimination under Sections 1(4) and 3(4). The Commission's power to order reasonable and non-discriminatory rates is not conditioned upon a finding of public interest; but the power to require joint rates may not be

exercised except upon a finding of public interest, *Atchison T. & S. F. Ry. Co. v. U. S.*, 279 U. S. 768, 776, *Virginian Railway Co. v. United States*, 272 U. S. 658, 667. To hold that the Commission has power to require joint rates upon finding violations of Sections 1(4) and 3(4) is to render useless and meaningless the later enactment of Section 15(3) in 1906, conferring the special power to require joint rates when found necessary in the public interest, and the Supreme Court has, as late as June 2, 1952, in *Thompson v. United States*, 343 U. S. 549, rejected any interpretation or application which so confuses, commingles or fails to give full effect to the separate and independent provisions of Section 15(3) and (4) with the power earlier conferred upon the Commission to correct unreasonable and discriminatory rates.

Although its complaint alleged violations of Section 1(4) and Section 3, under which the Commission had power to require reasonable and non-discriminatory rates, this was not what the Rio Grande wanted, for its complaint demanded joint rates "equal" to those via Union Pacific routes, and it argues at page 101 of its brief to the Commission, that—

> "Unless the same level of rates is prescribed on the traffic involved via the Ogden gateway and the Rio Grande no practical or useful purpose will be served."

Realizing that difference in transportation conditions via its longer and more onerous line might require a finding that reasonable rates via its line would be somewhat higher than rates via the Union Pacific routes, the Rio Grande [fol. 509] also alleged a violation of Section 15(3), but as that power is limited by the short haul prohibition in Section 15(4) and, realizing also that its only purpose was to short haul Union Pacific routes, the Rio Grande seized upon the contention rejected by the Commission but adopted by this Court that through routes via its line already existed for the traffic involved and that the limitations of Section 15(4) on the power to require joint rates and through routes did not apply. Thus, it sought to separate the power to require joint rates from the power to require through routes that would divert traffic to its line from Union Pacific routes and in that way to obtain the benefit of the Commission's

power to prescribe through routes and joint rates without having to hurdle the short haul prohibition in Section 15(4). The Court has adopted the Rio Grande's theory throughout and has even gone beyond it in holding that the Rio Grande is entitled to an order requiring joint rates if it establishes violations of Sections 1(4) and 3(4).

While the power to require joint rates in lieu of combination rates may, upon a valid finding that joint rates are necessary "in the public interest", be exercised separately from the power to require through routes where through routes actually exist, and requiring joint rates over the same through route via which combination rates previously existed would not divert traffic from either of the connecting railroads, but the joint rate power clearly may not be exercised separately from the limitations upon it where, as here, the very purpose is to divert traffic to the Rio Grande from Union Pacific routes, or for the purpose of curing violations of Section 1(4) and Section 3(4). *U. S. v. Great Northern R. Co.*, 343 U. S. 562.

3. The next error embraced in the Court's holding that the Commission erred in failing to apply Sections 1(4) and 3(4), rather than Section 15(3), is, as indicated above, that [fol. 510] the Court believes that the Rio Grande was entitled to the joint rates it demanded on all commodities and tha. he Commission might and probably would have granted the demand for joint rates on all commodities if it had applied only Sections 1(4) and 3(4) and had not resorted to its power under Section 15(3) and (4). Sufficient has already been said to demonstrate that if the Commission had limited its consideration and application to Sections 1(4) and 3(4) it would have been powerless to require the joint rates on all commodities, which the opinion strongly suggests the Commission should have required, or to require even the joint rates on the articles named in the order, for the Commission as shown above has no power under any section or provision of the Act to require joint rates other than the power granted by Section 15(3).

4. The Court erroneously assumes that the Rio Grande, as a carrier, may complain to the Commission that its own combination rates are unreasonable and discriminatory and

to demand an order requiring joint rates equal to those via the Union Pacific routes. But the numerous cases cited at pages 204-214 of the brief, Vol. II, of the intervening railroad defendants in this Court hold beyond question that the rights to reasonable and non-discriminatory rates and to joint rates when required "in the public interest" are all rights of shippers and that the only right the Rio Grande may assert is that granted in Section 3(4) declaring that carriers "shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper". Even that right not to be discriminated against is conditioned by the proviso in Section 3(1) that—

> "* * * this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

[fol. 511] The Commission itself held correctly at page 619 of its report that the Rio Grande, being a railroad, "could not raise, in its own behalf, an issue under section 3(1) against another railroad." Not only is the Rio Grande without any right to demand joint rates "in the public interest", since that is a right belonging only to the shipping public, but an order requiring joint rates, even if the Commission had found that the Rio Grande's rights under Section 3(4) had been violated, is beyond the Commission's power for the further reason that a violation of Section 3(4) calls for an order directing the guilty carriers to "cease and desist" from such violations and not for an order requiring joint rates equal to those maintained by competing carriers, *Central R. R.* v. *United States*, 257 U. S. 247, 257-259, and *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, holding at page 650, that:

> "Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. * * * (citing cases) The situation must be such that the carrier or carriers if given an option have an actual alternative."

It results that the Court holds the Commission guilty of committing an error of law which does not invalidate the joint rates the Commission did require, but nullifies its failure to grant the joint rates it did not require, because the Commission resorted to the only power it has to require joint rates (Section 15(3)) in granting the Rio Grande joint rates on such articles as the record justified. Surely, the Court will not permit this incongruous and erroneous holding to go down in the books.

VI

The Court Exceeded its Power by Usurping Administrative Authority to make Findings of fact Favorable to the Rio Grande and Thereupon "remanding" the case to the Commission "for further proceedings in conformity with this opinion"

The opinion reflects a strong tendency by the Court to suggest what it seems to think the Commission should have [fol. 512] done in the exercise of its exclusive administrative power and even goes so far as to make findings of fact which only the Commission has power to make. For example, at page 36, the opinion finds:

> "Here, the Rio Grande sought an order compelling the defendant railroads to perform the duty of establishing just and reasonable joint rates, fares, and charges over through routes, and it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate."

Again on page 37, the Court finds:

> "Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines."

These are plain findings of fact and in making them the Court ignores the settled rule laid down in Supreme Court decisions that in reviewing orders of the Commission the

courts may not "usurp merely administrative functions", *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 470. Having usurped administrative authority to make these findings, the Court then would further exceed its powers and make its own findings binding upon the Commission, thus directing and controlling its administrative discretion by "remanding" the case to the Commission "for further proceedings in conformity with this opinion". If the "remand" were within the Court's power, which it is not, the Commission in such "further proceedings" would be bound to adopt the administrative findings of fact which the Court has made although they are contrary to the Commission's own findings in its report.

Fortunately, the Commission's exclusive administrative discretion may not be so easily pre-empted or controlled, for, as pointed out elsewhere in this motion, the Court has no authority to make administrative findings of fact and it has no power to "remand" a case to the Commission with direction to proceed further in conformity with the Court's unauthorized administrative findings of fact.

[fol. 513] The statute (28 U. S. Code, Sec. 1336) authorizing review of the Commission's orders gives the courts no power to "remand" a case to the Commission; under the specific language of the statute, the courts are given power only to "enjoin, set aside, annul or suspend in whole or in part, any order" of the Commission. The Commission is a legislative and administrative arm or agency of Congress—the legislative department of the Federal Government—and not a part of the judicial department, and in view of the exact statutory specification and limitation of what the courts may do upon reviewing an order of the Commission, and the refusal of Congress to empower the courts to "remand" cases to that legislative and administrative agency, there is no power in the courts to "remand" cases to the Commission, and the Supreme Court was without power to "remand" to the Commission the order reviewed in *Secretary of Agriculture* v. *United States*, 347 U. S. 645, cited in this Court's opinion as authority for its "remand" of the order in this case. An appropriate federal court has power to compel the Commission *to act*

only in a mandamus suit, but this is not such a suit, and no court in any type of proceeding has power to compel the Commission to decide a case as a court might think it should be decided, nor even to adopt the court's view of the law, for the Commission's exclusive administrative power to decide includes the power to decide erroneously as well as correctly, and the courts can do nothing more than declare their views of the law and to "enjoin, set aside, annual or suspend in whole or in part" orders they adjudge to be erroneous in law.

Wherefore, these Movants pray that the Court grant this motion for new trial, that the Court grant oral argument and reconsideration of the matters presented and, there-
[fol. 514] upon, correct the errors specified and discussed in this motion.

Respectfully submitted, Don Eastvold, Robert L. Simpson, C. W. Ferguson, James B. Patten, Howard B. Black, Clarence S. Beck, Bert L. Overcash, Elmer B. Collins, F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, E. G. Knowles, 560 Denver Club Building, Denver, Colorado, Attorneys for Movants

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[fol. 515-516] CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 517] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, Defendants,

UNION PACIFIC RAILROAD COMPANY, ET AL, Intervening Defendants

FINAL JUDGMENT AND DECREE—February 1, 1955

The hearing in the above-entitled cause having been held on June 8 and 9, 1953, before Circuit Judge Orie L. Phillips and District Judges Royce H. Savage and William Lee Knous, constituting a District Court of three judges, convened pursuant to Title 28 U.S.C., Sections 2284 and 2325, and all parties being represented by counsel, and the Court having received the evidence offered and heard the arguments of counsel, and the Court being fully advised in the premises and having filed its opinion herein on January 13, 1955, and the Court being of the opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297 is invalid and unlawful insofar as it denied relief to the plaintiff above named;

Now, therefore, upon the basis of of said opinion of this Court dated January 13, 1955, and for the reasons therein set forth, It is ordered, adjudged and decreed that the injunction and other relief prayed for by plaintiff and in-
[fol. 518] tervening plaintiffs in the complaint be and the same is hereby granted, and the order of the Interstate Commerce Commission dated January 12, 1953, be and the same is hereby annulled and set aside insofar as it denied and withheld relief to the plaintiff and intervening plaintiffs,

It is further ordered, adjudged and decreed that this cause, insofar as the aforesaid order of the Interstate Com-

merce Commission denied and withheld relief to plaintiff and intervening plaintiffs, be and the same is hereby remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of this Court.

Dated this 1st day of February, 1955.

Orie L. Phillips, Chief Judge, United States Court of Appeals; Royce H. Savage, Judge, United States District Court; William Lee Knous, Judge, United States District Court

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[fol. 519] CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 520-521] CERTIFICATE OF SERVICE OF REPLY OF INTERVENING DEFENDANTS TO BRIEF OPPOSING MOTION FOR NEW TRIAL, ETC—(Omitted in Printing)

[fol. 522] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR NEW TRIAL OF REARGUMENT AND RECONSIDERATION—April 22, 1955

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company; and Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, intervening defendants herein,

having seasonably filed their motion for new trial or re-argument and reconsideration and this Court having entertained and duly considered said motion and brief of plaintiff in opposition thereto,

It is ordered:

1. That said motion be and it is hereby overruled and [fol. 523] denied;

2. That the Clerk of this Court transmit forthwith copies of this Order to counsel in this case.

Dated at Denver, Colorado, this 22 day of April, 1955.

By the Court: Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit; Royce H. Savage, United States District Judge for the Northern District of Oklahoma; William Lee Knous, United States District Judge.

[fols. 524-529] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER MODIFYING OPINION—April 22, 1955

It is ordered by the court that the opinion heretofore filed herein be modified by substituting for pages 14, 29, 31, 32 and 36 thereof the following pages numbered 14, 29, 31, 32 and 36 and by the changes reflected in such last-mentioned pages:

[fol. 530] Royce H. Savage, District Judge; William Lee Knous, District Judge; Orie L. Phillips, Circuit Judge.

[fol. 531] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Title omitted]

NOTICE OF APPEAL BY UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed June 20, 1955

I. Notice is hereby given that the United States of America and the Interstate Commerce Commission, defendants in the above-entitled action, hereby appeal to the Supreme Court of the United States from the final judgment and decree (dated February 1, 1955) setting aside the order of the Interstate Commerce Commission, entered in this action on February 14, 1955.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record before the district court.

[fol. 532] III. The following question is presented by this appeal:

Whether the district court, in setting aside the Commission's order establishing new through routes (and joint rates) on the ground that the "uncontradicted evidence" showed that through routes were already in existence, applied an erroneous standard for determining the existence of a through route.

Daniel M. Friedman, Special Assistant to the Attorney General, Attorney for the United States, Address: Department of Justice, Washington 25, D. C., Samuel R. Howell, Acting General Counsel, Attorney for the Interstate Commerce Commission, Address: Interstate Commerce Commission, Washington 25, D. C.

[fols. 533-534] PROOF OF SERVICE—(omitted in printing)

[fol. 535] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL BY UNION PACIFIC RAILROAD CO., ET AL. TO THE SUPREME COURT OF THE UNITED STATES—Filed June 20, 1955

I.

Notice is hereby given that Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, intervening defendants in the above-entitled cause, hereby appeal to the Supreme Court of the United States from the final judgment and decree entered in this cause February 14, 1955, the effect of which was suspended pending consideration of motion for new trial filed by these intervening defendants, said motion having been denied by order of the Court dated and entered April 22, 1955, which final judgment and decree orders, adjudges and decrees [fol. 536] that the order of the Interstate Commerce Commission dated January 12, 1953, in its docket No. 30297, *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co. et al*, 287 I.C.C. 611, "is invalid and unlawful insofar as it denied relief to the plaintiff" and intervening plaintiffs, grants "the injunction and other relief prayed for by plaintiff and intervening plaintiffs", annuls and sets aside said order insofar as it denied and withheld relief to the plaintiff and intervening plaintiffs' and orders and decrees—

> "* * * that this cause, insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief to plaintiff and intervening plaintiffs, be and the same is hereby remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of this Court."

This appeal is taken pursuant to 28 U. S. Code, Section 1253.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of the proceedings before the specially constituted three-judge Court, and all of Rio Grande Exhibit No. 1, which consists of a transcript of the pleadings, evidence and exhibits and other documents in the proceeding before the Interstate Commerce Commission.

III

The following questions are presented by this appeal:

(1) Whether the court erred in refusing to dismiss the Rio Grande's complaint and intervening complaints on the ground that, as the Commission's failure to order through routes and joint rates on *all* instead of only a part of the traffic is not an "order" or a part of any order issued by the Commission, there is no jurisdictional basis for judicial review.

[fol. 537] (2) Whether the district court erred in holding that plaintiff, The Denver a d Rio Grande Western Railroad Company (hereinafter called "Rio Grande"), admittedly lacking any legal or other right to traffic it seeks to divert to its line from other carriers, has standing to maintain this suit for the purpose of obtaining a "pecuniary profit" from that part of the traffic for which the Commission failed to order through routes and joint rates via the Rio Grande.

(3) Whether the court erred in making its own administrative finding that, "under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines", contrary to the Commission's finding that the evidence did not prove discrimination, and erred further in relying upon its own administrative finding to sustain

the standing of the Rio Grande and intervening shippers to maintain this suit.

(4) Whether the court erred in holding, in effect, that the Commission's finding that the evidence failed to prove discrimination against the Rio Grande and its failure to order through routes and joint rates on *all* instead of a part of the traffic amounts to the denial of a right given the Rio Grande by the [Interstate Commerce] Act adversely affecting its traffic and revenues, causing it to suffer pecuniary injury, and giving it "a right to judicial review of the order".

(5) Whether, in resting its decision that the Rio Grande has standing to maintain this suit upon several hypothetical or "if" propositions, the court erred in ignoring or giving no effect to the fact that, after full hearings and thorough consideration of the evidence, the Commission [fol. 538] found that, except to the extent indicated in its findings, the evidence failed to prove discrimination against the Rio Grande or undue preference and prejudice between shippers or that through routes and joint rates by the Rio Grande are necessary in the public interest to provide adequate and more economic transportation, and concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained".

(6) Whether the court erred in failing to hold that neither the Rio Grande nor intervening plaintiffs had standing to maintain this suit.

(7) Whether the court erred in holding that the Commission's finding that "there are at present no through routes, as that term is used in the Act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law, and whether the court further erred in its own holding that the existence of such through routes is established by the evidence and the law.

(8) Whether, in holding that through routes for the "bridge" traffic here concerned were in existence via the Rio Grande, the court erred in refusing to consider the fact that the evidence showed through movement of only

one shipment of non-emergency traffic via the Rio Grande over each of only 17 of the many hundreds of thousands of through routes of which the Rio Grande claims to be a part between the 2,900 railroad stations in the northwest area and the 39,000 stations in the eastern and southern parts of the country.

(9) Whether, in holding that through routes were in existence via the Rio Grande for the traffic here concerned, the court erred in failing and refusing to indicate or specify the through routes held to be in existence via the Rio Grande or the termini of, or the railroads comprising such [fol. 539] through routes, or the commodities for which the court holds that through routes exist via the Rio Grande.

(10) Whether, in view of the fact that the Commission overcame the short haul prohibition in Section 15(4) by ordering through routes and joint rates on all the commodities it considered upon the evidence to be necessary in the public interest, the court erred in holding that the Rio Grande and the "entire proceeding" were "prejudiced" by the Commission's finding that through routes did not already exist via the Rio Grande for the traffic it seeks.

(11) Whether, if the last preceding question is answered negatively, the court erred in annulling and setting aside "the order" *only* "insofar as it denied and withheld relief" to the Rio Grande.

(12) Whether the court erred in holding that the Rio Grande was entitled to have the Commission, in determining whether joint rates via the Rio Grande should be required, "apply the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, free of any of the limitations imposed by §15(4) with respect to establishing through routes".

(13) Whether the court exceeded its powers in making its own finding that the evidence proved discrimination against the Rio Grande, and thereupon in "remanding" the case to the Commission "for further proceedings in conformity with the opinion and judgment of this Court".

(14) Whether the court erred in failing to conside and

review the entire record and all the issues tendered in [fol. 540] briefs and arguments of the parties.

F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, James C. Wilson, E. G. Knowles, Elmer B. Collins, Attorneys for Intervening Railroad Defendants.

[fols. 541-544] PROOF OF SERVICE—(omitted in printing)

[fol. 545] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL BY WASHINGTON PUBLIC SERVICE COMMISSION ET AL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 20, 1955

I

Notice is hereby given that Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission; intervening defendants in the above-entitled cause, hereby appeal to the Supreme Court of the United States from the final judgment and decree entered in this cause February 14, 1955, the effect of which was suspended pending consideration of motion for new trial filed by these intervening defendants, which motion was denied by order of the Court dated April 22, 1955, which final judgment and decree orders, adjudges and decrees that the order of the Interstate Commerce Commission dated January 12, 1953, in its docket No. 30297, *Denver & R.G.W.R. Co.* v. *Union Pac. R. Co., et al.*, 287 I.C.C. 611, "is invalid and unlawful insofar as it denied relief to the plaintiff above named" and intervening plaintiffs, grants "the injunction

and other relief prayed for by plaintiff and intervening plaintiffs", annuls and sets aside said order insofar as it denied and withheld relief to the plaintiff and intervening plaintiffs and orders and decrees—

> [fol. 546] "* * * that this cause, insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief to plaintiff and intervening plaintiffs, be and the same is hereby remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of this Court."

This appeal is taken pursuant to 28 U. S. Code, Section 1253.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the same record as designated by the Union Pacific Railroad Company, et. al., intervening defendants in the above entitled action.

III

The following questions are presented by this appeal:

I. Does the plaintiff (hereafter called Rio Grande) which obtained certain joint through rates under the Commission's order, have legal standing to seek by a suit to enjoin the order, similar rates on all commodities via all possible routes when the granting of such additional relief is subject to administrative determination of public interest requirements under the Interstate Commerce Act.

II. Did the district court err in holding that Rio Grande sustained "pecuniary injury" and had standing to maintain this action on the ground that the Commission deprived Rio Grande of additional "pecuniary gain" which would be realized if all the joint rates demanded by Rio Grande had been granted.

III. Did the district court err in holding that Rio Grande need not sustain "pecuniary injury" in order to have a "right to judicial review".

IV. Did the district court err in holding that the Com-

mission's finding that "there are at present no through routes, as that term is used in the act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law.

V. Did the district court, in connection with its holding that through routes were in existence on the "bridge" traffic sought by Rio Grande, err in failing to consider and give effect to the fact that the primary objective of Rio [fol. 547] Grande was to participate in the transportation of the products of the northwest states to the eastern and southern markets and that not a single movement of such "bridge" traffic is shown to have occurred over the Rio Grande route.

VI. Did the district court, in connection with its holding that through routes were in existence, err in failing to find that the cancellation of joint rates in 1906 and 1912 effectively closed these through routes in accordance with the understanding and "course of business" of the parties concerned and that the conclusion of the Commission in this regard is supported by legislative amendments in 1940 to Section 15 (3) of the act.

VII. Did the district court, in connection with its holding that through routes were in existence, err in failing to find as the Commission found, that shippers have a right to route traffic via the Rio Grande and Union Pacific and that the Union Pacific had no right or duty to refuse shipments.

VIII. Did the district court err in holding that the decision of the Commission as to the existence of through routes "obviously prejudiced the entire proceeding" in view of the fact that the Commission's order established through routes and joint rates upon all commodities that it considered upon the evidence to be necessary in the public interest.

IX. Did the district court err in annulling and setting aside only that portion of the Commission's order which "denied relief to the Rio Grande" upon its holding that the Commission's finding as to through routes "obviously prejudiced the entire proceeding".

X. Did the district court err and exceed its powers in making findings of fact favorable to Rio Grande and in

[fol. 548] ordering the Commission to proceed "in conformity with the opinion and judgment of the court", and the "instructions" therein.

Don Eastvold, Robert L. Simpson, C. W. Ferguson, James B. Patten, George F. Guy, Clarence S. Beck, Beyt L. Overcash, Attorneys for Intervening Defendants, State Capitol Building, Lincoln, Nebraska

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[fols. 549-551] Proof of Service. (omitted in printing)

[fol. 552] [File endorsement omitted]

In United States District Court

[Title omitted]

Motion for Transmittal of Original Pleadings and Exhibits—Filed July 11, 1955

Comes now the United States of America, a party to the above-entitled matter, by Donald E. Kelley, United States Attorney for the District of Colorado, and shows unto the Court as follows:

1. That a Notice of Appeal herein was filed on June 20, 1955, to the United States Supreme Court in this matter.

2. That in the interests of justice, and to effect monetary savings, it is desirable that the Clerk of this Court transmit to the United States Supreme Court for its use, the original pleadings and exhibits on file in this cause, all of which should be returned to the Clerk of this Court when their purpose has been served in the Supreme Court of the United States.

Wherefore, it is prayed that an Order be entered permitting the Clerk of this Court to transmit to the United States Supreme Court the originals of the pleadings and exhibits on file in this cause, all to be returned to the

Clerk of this Court whenever they have served their purpose:

Donald E. Kelley, United States Attorney for the District of Colorado; Robert Swanson, Assistant United States Attorney for the District of Colorado.

RS/u

[fol. 553] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER RE TRANSMITTAL OF ORIGINAL PLEADINGS AND EXHIBITS —July 11, 1955

This matter coming on to be heard upon the application of the United States for an Order permitting the Clerk of this Court to transmit the original pleadings and exhibits on file in this case to the United States Supreme Court for use in the appeal proceedings, and the Court having examined the files and heard the statements of counsel,

It is ordered that the Clerk of this Court transmit to the Supreme Court of the United States, for use in connection with the appeal proceedings herein, the original pleadings and exhibits now on file in this cause, all to be returned when such pleadings and exhibits have served their purpose in the Supreme Court.

Dated at Denver, Colorado, this 11 day of July, A.D. 1955.

By the Court: William Lee Kraus, United States District Judge.

RS/u

[fol. 554] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 555] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 24, 1955

Appeals from the United States District Court for the District of Colorado.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated with Nos. 117, 118, and 119 and a total of 3 hours allowed for oral argument.

October 24, 1955.

(6024-4)

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SUPREME COURT, U.S.

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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, APPELLANTS,

vs.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., APPELLANTS,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

NOS. 117, 118 & 119 FILED MAY 31, 1955
NOS. 332, 333 & 334 FILED AUGUST 15, 1955
PROBABLE JURISDICTION NOTED OCTOBER 24, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT,

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UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS,

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No. 119

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vs.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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[fol. a]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL., Defendants

COMPLAINT—Filed August 1, 1949

To The Interstate Commerce Commission:

The complainant, The Denver and Rio Grande Western Railroad Company, by its complaint herein respectfully shows:

I.

That complainant, a corporation duly organized and existing under the laws of the State of Delaware, is a common carrier by railroad engaged in the transportation of persons and property in interstate and foreign commerce, and, as such, is subject to the provisions of the Interstate Commerce Act. Complainant owns and operates approximately 2400 miles of railroad in the States of Colorado, New Mexico and Utah. Its principal eastern terminals are at Denver, Colorado Springs and Pueblo, Colorado, and its [fol. b] principal western terminals are Ogden, Salt Lake City and Provo, Utah. Complainant is an important and necessary part of the railroad transportation system of the United States.

II

That defendant, Union Pacific Railroad Company, hereinafter called the Union Pacific, and the other defendants named in Appendix A attached hereto and made a part hereof, are common carriers engaged in the transportation

of property and persons in interstate and foreign commerce wholly by railroad or partly by railroad and partly by water between places in the States of Montana, Idaho, Washington, Oregon, California, Nevada, Utah and places in other states of the United States, the District of Columbia, the Dominion of Canada, and the Republic of Mexico, and, as such common carriers, are subject to the provisions of the Interstate Commerce Act.

III

That defendant, the Union Pacific, is engaged in the transportation of persons and property as a common carrier by railroad between Omaha, Nebraska, and Ogden, Utah, via Cheyenne, Wyoming, and other intermediate places, and between Kansas City, Missouri, Denver, Colorado, Cheyenne, Wyoming and Ogden, Utah. The Union Pacific is likewise engaged under lease in the operation of the railroad properties of the Oregon Short Line Railroad Company, the Oregon-Washington Railroad and Navigation Company and the Los Angeles and Salt Lake Railroad Company and by virtue of said lease and operation of the railroad properties described, the Union Pacific serves [fol. c] points and places in the States of Montana, Idaho, Washington, Oregon, California, Nevada and Utah.

IV

That complainant has interchange connections, inter alia, and interchanges traffic with the Union Pacific at Denver, Colorado, and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific Company at Ogden, Utah, and with the Western Pacific Railroad Company at Salt Lake City, Utah. Complainant also has interchange comections and interchanges traffic at Denver, Colorado, with the Chicago, Rock Island and Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, and The Colorado and Southern Railway Company; at Colorado Springs, Colorado, with The Atchison, Topeka and Santa Fe Railway Company and the Chicago, Rock Island and Pacific Railroad Company; at Pueblo, Colorado, with The Atchison, Topeka and Santa Fe Railway Company, The Colorado and South-

ern Railway Company and the Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); at Walsenburg, Colorado, with The Colorado and Southern Railway Company, and at Trinidad, Colorado, with The Atchison, Topeka and Santa Fe Railway Company and The Colorado and Southern Railway Company.

V

That in June, 1934, the complainant established a new through route between Denver, Colorado, and Salt Lake City and Ogden, Utah, via Dotsero, Colorado, frequently called the Moffat Tunnel route. The distance via this route is 175 miles shorter than the distance via the line of the complainant through Pueblo, Colorado, and the Royal [fol. d] Gorge, and is 43 miles shorter than the route of any other railroad between Denver, Colorado, and Salt Lake City, Utah. The route through the Moffat Tunnnel enabled complainant to establish, and it has established, greatly improved local and through freight and passenger service, not only as to freight and passengers between Denver, Colorado, and Salt Lake City and Ogden, Utah, but also as to freight and passengers which move via defendants or some of them, between points west of Salt Lake City, Provo and Ogden, Utah, and points east of Colorado common points in which the complainant is an intermediate carrier. In addition to the improvements of the service already described, approximately $73,000,000 were expended during the trusteeship of the predecessor of the complainant for additions and betterments, modernization of equipment, establishment of centralized traffic control, automatic block signaling, new rail, ballast and other physical improvements. The complainant acquired the property from the Trustees under appropriate court order on April 11, 1947, at which time The Denver and Salt Lake Railway Company was merged with the complainant, and complainant has since continued to make substantial expenditures which have resulted in the betterment of the service of complainant.

VI

That the phrase "freight traffic," as used in this complaint, shall include domestic, interstate and foreign traffic

in carload or trainload quantities, in any quantity lots, or in less-than-carload lots.

VII

That the Union Pacific and the other defendants maintain through routes, interchange facilities for the operation [fol. e] of such routes, and joint rates with each other and with complainant, which are applicable to freight traffic between points served by them in the several states and countries hereinbefore described and local points served by complainant in the States of Utah, New Mexico and Colorado. Complainant participates with the Union Pacific and the other defendants at the going or competitive joint rates on freight traffic between the places described in paragraph II herein except

(a) as to traffic that moves between points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia on the one hand, and Colorado common points and points east thereof, on the other hand, via Salt Lake City or Ogden, Utah,

and

(b) as to freight traffic between Utah common points on the one hand, and points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia on the other hand.

As is shown in paragraph X hereof, joint competitive rates do not apply between the places and to the freight traffic described in clauses (a) and (b). The rates and charges applicable to the freight traffic here in issue are too numerous to be set forth in full. For that reason, reference to representative tariffs is shown in Appendix B and Appendix C attached hereto and made a part hereof. The tariffs thus shown are representative and not necessarily all inclusive.

VIII

That in the year, 1897, at which time the Union Pacific, [fol. f] the Oregon Short Line and the Oregon Railroad

and Navigation Company were in receivership, competitive joint freight rates were established via the Ogden and Salt Lake City gateways with a predecessor of complainant, herein called the Rio Grande, on freight traffic which moved between places served by or via the Oregon Short Line and the Oregon Railroad and Navigation Company and points at or east of Colorado common points. Effective August 25, 1906, Supplement 1 to Union Pacific Tariff, I.C.C. 1970, the competitive joint rates on freight traffic between Colorado common points and certain points in Montana on or via the Oregon Short Line were cancelled via Ogden and Salt Lake City, Utah, in connection with the Rio Grande. On November 24, 1906, Union Pacific Tariff, I.C.C. 1583, the competitive joint freight rates in which the Rio Grande and the Oregon Short Line participated were cancelled on freight traffic to and from other points on or via the Oregon Short Line in Idaho, Montana and Oregon. On November 4, 1912, Agent Countiss, by Tariff I.C.C. 942, Sup. No. 12, cancelled the competitive joint rates on westbound transcontinental freight traffic to points on or via the Oregon-Washington Railroad and Navigation Company with the Rio Grande, and on December 16, 1912, Agent Countiss, by Tariff I.C.C. 958, cancelled the eastbound rates on transcontinental freight traffic via the Rio Grande from points on or via the Oregon-Washington Railroad and Navigation Company.

IX

That although the Union Pacific and the other defendants participate with complainant in competitive joint rates on freight traffic between places on the Los Angeles line of the Union Pacific in California, Utah and Nevada and Colo- [fol. g] rado common points and places east thereof, via Provo or Salt Lake City, Utah, they have failed and refused to establish and maintain competitive joint rates on freight traffic with complainant.

(a) via its Colorado and Utah gateways, between places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof,

and

(b) between Utah common points on the one hand, and places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia on the other hand.

X

That through routes now exist and have for many years existed for the interchange of traffic by complainant with the Union Pacific at Provo, Ogden, and Salt Lake City, Utah, and with the Union Pacific and certain other defendants at Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colorado, as to freight traffic.

(a) between points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof,

and

(b) as to freight traffic between Utah common points on the one hand and points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington, and British Columbia, on the other hand.

[fol. h] However, except as shown in Appendix D, the rates and charges applicable to such traffic between the points described via such through routes are based upon the combination of the intermediate local or other rates, which rates and charges in the aggregate are substantially higher than the joint rates maintained by defendants on similar competitive traffic between the same origin and destination places and territories which moves via the Union Pacific or via the Union Pacific and the other defendants. The combination rates applicable on the traffic and between the territories described, via said through routes of the complainant and defendants, are unjust, unreasonable and discriminatory as compared with the competitive joint rates maintained by the Union Pacific or via the Union Pacific and the other defendants on like freight traffic via other competitive routes, and as compared with the joint through rates and through routes maintained by the Union Pacific

and the other defendants with complainant on freight traffic on or via the Los Angeles line of the Union Pacific in California, Nevada and Utah.

XI

That the aggregate of the combination rates and charges applicable to the freight traffic involved via the routes described in paragraph X hereof is so much greater than the competitive joint rates and charges on the same freight traffic, via other routes which have also been described, as to prevent the movement of freight traffic via the routes in which the complainant participates. The through routes of the complainant via which the aggregate of intermediate rates make up the through charge are available, are efficiently and economically operated, and are comparable in service with the through routes of the Union Pacific and the [fol. i] other defendants via which the joint through rates apply. The failure and refusal of defendants to establish competitive joint rates via the routes of the complainant in respect to freight traffic which terminates and originates in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia, deprives the public and the complainant of the use of reasonable, necessary and desirable through routes at reasonable and non-discriminatory rates and charges. The routes of the complainant via which the combination rates apply on the freight traffic to and from the restricted territory, already described, were used during the war to a substantial extent and during the blockades and congestions on the line of the Union Pacific and other defendants which resulted from the snow storms and blizzards in the western part of the United States in January and February, 1949. In the special circumstances recited, the published through rates applicable via Union Pacific and not applicable via the complainant via Salt Lake City or Ogden thence Union Pacific were generally applied to the freight traffic involved via the routes actually used. It is clearly contrary to the National Transportation Policy and to the provisions of the Interstate Commerce Act for the defendants to restrict the use of such vital through routes to emergency situations, and they should be restrained from doing so.

XII

That the complainant and the defendants provide in their tariffs reconsignment, stoppage in transit to complete loading or to partially unload, and other transit arrangements which are generally applicable to carload freight traffic. These transit arrangements are of great importance to shippers, and are used by them to a substantial extent. In [fol. j] fact, in recent years there has been a continuing increase in the use of such arrangements. The restricted application of competitive joint rates via routes of the complainant operate to deprive shippers of the advantages of these transit arrangements at points on the line of complainant between the territories herein described, when point of origin is, or ultimate destination may become, a point on or via the line of the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia. Additionally, such restricted application not only operates to deprive complainant of through freight traffic which it might obtain if equal rates applied in connection with it, but by virtue of the transit arrangements, complainant is likewise deprived of a haul on an unknown volume of competitive traffic destined, for example, to Salt Lake City, Utah. Complainant finds that in numerous instances shippers will not route freight traffic from Chicago, for example, to Salt Lake City, Utah, via its line because, should it become necessary to reconsign their shipments via Union Pacific to places in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia, the competitive joint through rates would not be applicable. The situation with respect to reconsignment also applies to other transit arrangements, such as stopping a car for partial unloading at Salt Lake City, Utah, or at exclusively local points on lines of complainant. While the examples recited deal with westbound traffic, similar obstacles exist on eastbound traffic. For tariff references see Appendix E.

XIII

That in the transportation of the freight traffic involved between the territories and points hereinbefore described, [fol. k] the Union Pacific participates with defendants, or

some of them, in joint rates and through routes in which the haul of the Union Pacific is less than the entire length of its railroad, lying between the termini of such through routes, and conversely the defendants, or some of them, participate in joint rates and through routes with the Union Pacific in which the haul of the defendants, or some of them, is less than the entire length of their respective railroads, lying between the termini of such through routes. On the other hand, as hereinbefore shown, the Union Pacific and the defendants, or some of them, have failed and refused to accord like treatment under like circumstances and conditions to complainant by virtue of their failure and refusal to join with complainant in establishing competitive joint rates for the transportation of the freight traffic involved between

(a) points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof,

and

(b) on freight traffic between Utah common points on the one hand, and places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia, on the other hand.

which failure and refusal by the defendants constitute violations of Section 1(4), Section 3, Section 15(1) and Section 15(3) of the Interstate Commerce Act, and is contrary to the National Transportation Policy.

XIV

That the Commission should prescribe just, reasonable and non-discriminatory competitive joint through rates ap- [fol. 1] plicable to the transportation of the freight traffic in which the complainant may participate on a competitive or equal basis with defendants

(a) between points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof,

and

(b) between Utah common points on the one hand, and places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia on the other hand.

When and if such rates are prescribed by the Commission, the proceeding should be held open so that the complainant and defendants will be given an opportunity voluntarily to establish just, reasonable, equitable, non-preferential and non-prejudicial divisions, failing in which the proceeding should be assigned for further hearing so that the Commission may determine and prescribe just, reasonable, non-preferential and non-prejudicial divisions as between complainant and the defendants.

XV

That by reason of the facts stated in the foregoing paragraphs, the failure and refusal of the Union Pacific and the other defendants to establish competitive joint through rates and charges applicable to the freight traffic and between the points hereinbefore described constitutes violations by defendants of Section 1(4), Section 3, Section 15(1) and Section 15(3) of the Interstate Commerce Act, is contrary to the National Transportation Policy, and de-[fol. m]prives the public and the complainant of the use of available and reasonable through routes at reasonable and non-discriminatory through joint rates which are necessary and desirable in the public interest.

Wherefore, complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of the Interstate Commerce Act and the National Transportation Policy, and to require said defendants to establish, put in force, maintain and apply in the future to the transportation of the freight traffic hereinbefore described, in lieu of the existing unjust, unreasonable and discriminatory through combination rates and charges via the through routes in which

complainant participates, just, reasonable and non-discriminatory and competitive joint through rates and charges with respect to the traffic and between the places and territories hereinbefore described; that the Commission, by order, determine and prescribe the just, reasonable, equitable, non-preferential and non-prejudicial divisions of the said joint rates and charges herein sought, in the event the defendants fail and refuse voluntarily to establish such divisions; and that such other and further order or orders be made as the Commission may consider proper and necessary in the premises.

Dated at Denver, Colorado, the 1st day of August, 1949.

Respectfully submitted, (S.) Otis J. Gibson, 604 Rio Grande Building, Denver 2, Colorado; (S.) R. E. Quirk, 1116 Investment Building, Washington 5, D. C., Attorneys for Complainant

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[fol. n] APPENDIX A TO COMPLAINT

List of Defendants

A

Akron, Canton & Youngstown Railroad Company (The)
Alabama Great Southern Railroad Company (The)
Ann Arbor Railroad Company (The)
Atchison, Topeka and Santa Fe Railway Company (The)
Atlanta and West Point Rail Road Company
Atlantic Coast Line Railroad Company
Augusta Railroad Company

B

Baltimore and Ohio Chicago Terminal Railroad Company (The)
Baltimore and Ohio Railroad Company (The)
Bamberger Railroad Company
Bangor and Aroostook Railroad Company
Beaumont, Sour Lake & Western Railway Company (The) (Guy A. Thompson, Trustee)
Belt Railway Company of Chicago (The)

Bessemer and Lake Erie Railroad Company
Big Creek and Telocaset Railroad Company (The)
Boston and Maine Railroad
Brooklyn Eastern District Terminal
Burlington-Rock Island Railroad Company
Bush Terminal Railroad Company
Butte, Anaconda & Pacific Railway Company

C

Camas Prairie Railroad Company
Canadian National Railways
[fol. o] Canadian Pacific Railway Company
Canton Railroad Company
Carolina, Clinchfield and Ohio Railway
Central of Georgia Railway Company
Central Railroad Company of New Jersey (The) (Walter P. Gardner, Trustee)
Central Vermont Railway, Inc.
Charleston & Western Carolina Railway Company
Chesapeake and Ohio Railway Company (The)
Chicago, Aurora and Elgin Railway Company
Chicago and Eastern Illinois Railroad Company
Chicago & Illinois Midland Railway Company
Chicago and North Western Railway Company
Chicago and Western Indiana Railroad Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago Heights Terminal Transfer Railroad Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago North Shore and Milwaukee Railway Company
Chicago River and Indiana Railroad Company (The)
Chicago, Rock Island and Pacific Railroad Company
Chicago, St. Paul, Minneapolis and Omaha Railway Company
Chicago Short Line Railway Company
Chicago South Shore and South Bend Railroad
Cincinnati, New Orleans and Texas Pacific Railway Company (The)

City of Prineville Railway
Colorado and Southeastern Railroad Company (The)
[fol. p] Colorado and Southern Railway Company (The)
Colorado & Wyoming Railway Company (The)
Condon, Kinzua & Southern Railroad Company
Cowlitz, Chehalis & Cascade Railway

D

Delaware and Hudson Railroad Corporation (The)
Delaware, Lackawanna and Western Railroad Company (The)
Denver and Intermountain Railroad Company (The)
Denver Union Stock Yard Company (The)
Detroit and Toledo Shore Line Railroad Company (The)
Detroit, Toledo and Ironton Railroad Company
Duluth, Missabe and Iron Range Railway Company
Duluth, South Shore and Atlantic Railway Company (The) (P. L. Solether, Trustee)
Duluth, Winnipeg and Pacific Railway Company

E

Elgin, Joliet and Eastern Railway Company
Erie Railroad Company

F

Florida East Coast Railway Company (Scott M. Loftin and John W. Martin, Trustees)
Fort Dodge, Des Moines & Southern Railway Company
Fort Worth and Denver City Railway Company

G

Galveston, Houston and Henderson Railroad Company
Genesee and Wyoming Railroad Company
Georgia & Florida Railroad (Alfred W. Jones, Receiver)
Georgia Southern and Florida Railway Company
Georgia Rail Road & Banking Company operated as the Georgia Railroad by lessees:

Atlantic Coast Line Railroad Company
Louisville and Nashville Railroad Company

[fol. q] Grand Trunk Railway System (Lines in the United States, East of the West bank of the Detroit and St. Clair Rivers), comprising the following carriers:

Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company (Note)
The United States and Canada Rail Road Company (Note)
Note—Canadian National Railway Company, Lessee.

Grand Trunk Western Railroad Company
Great Northern Railway Company
Great Western Railway Company (The)
Green Bay and Western Railroad Company
Gulf, Colorado and Santa Fe Railway Company
Gulf, Mobile and Ohio Railroad Company

H

Hoboken Manufacturers Railroad Company
Houston and Brazos Valley Railway Company
(Guy A. Thompson, Trustee)

I

Illinois Central Railroad Company
Illinois Northern Railway
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
International-Great Northern Railroad Company
(Guy A. Thompson, Trustee)
Interstate Railroad Company

K

Kansas City Southern Railway Company (The)
Kansas City Terminal Railway Company
Kansas, Oklahoma & Gulf Railway Company

[fol. r] L

Lake Erie and Eastern Railroad Company (The)
Lake Superior & Ishpeming Railroad Company
Lake Terminal Railroad Company (The)

Lehigh and Hudson River Railway Company (The)
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company
Litchfield and Madison Railway Company
Long Island Rail Road Company (The)
(David E. Smuckeraud, Hunter L. Delatour, Trustees)
Longview, Portland & Northern Railway Company
Lorain & West Virginia Railway Company (The)
Louisiana & Arkansas Railway Company
Louisville and Nashville Railroad Company

M

Macon, Dublin & Savannah Railroad Company
Maine Central Railroad Company.
Manufacturers' Junction Railway Company
Manufacturers Railway Company
Midland Valley Railroad Company
Minneapolis & St. Louis Railway Company (The)
Minneapolis, Northfield and Southern Railway
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company
The Minnesota Transfer Railway Company
Missouri-Illinois Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri-Kansas-Texas Railroad Company of Texas
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee)
Missouri Pacific Railroad Corporation in Nebraska (Guy A. Thompson, Trustee)
[fol. s] Mobile & Gulf Railroad Company (The)
Monongahela Railway Company (The)
Montour Railroad Company
Mount Hood Railroad Company

N

Nashville, Chattanooga & St. Louis Railway (The)
New Orleans and Lower Coast Railroad Company
New Orleans and Northeastern Railroad Company
New Orleans Terminal Company
New Orleans, Texas & Mexico Railway Company (Guy A. Thompson, Trustee)

New York Central Railroad Company (The)
New York, Chicago and St. Louis Railroad Company (The)
New York Connecting Rail Road Company (The)
New York, New Haven and Hartford Railroad Company (The)
New York, Ontario and Western Railway Company (Raymond L. Gebhardt and Ferdinand J. Sieghardt, Trustees)
New York, Susquehanna and Western Railroad Company (Henry K. Norton, Trustee)
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk and Western Railroad Company
Norfolk Southern Railway Company
Northern Pacific Railway Company
Northern Pacific Terminal Company of Oregon (The)
Northwestern Pacific Railroad Company

O

Oakland Terminal Railway (The)
Ogden Union Stockyards Company (The)
Oregon, California & Eastern Railway Company
[fol. t] Oregon Electric Railway Company
Oregon & Northwestern Railroad Co.
Oregon Pacific and Eastern Railway Company
Oregon Trunk Railway

P

Pacific Coast R. R. Co.
Pacific Electric Railway Company
Panhandle and Santa Fe Railway Company
Pennsylvania Railroad Company (The)
Pennsylvania-Reading Seashore Lines
Peoria and Pekin Union Railway Company
Peoria Terminal Company
Petaluma and Santa Rosa Railroad Company
Pittsburgh & Shawmut Railroad Company (The)
Pittsburgh, Allegheny & McKees Rocks Railroad Company
Pittsburgh and Lake Erie Railroad Company (The)
Pittsburgh & West Virginia Railway Company (The)
Pittsburgh, Chartiers & Youghiogheny Railway Company
Pullman Railroad Company

Q

Quanah, Acme & Pacific Railway Company

R

Reading Company
Richmond, Fredericksburg and Potomac Railroad Company
Rutland Railroad Company (William E. Navin and Oscar O. Edlund, Trustees)

S

Sacramento Northern Railway
St. Louis and O'Fallon Railway Company (The)
[fol. u] St. Louis, Brownsville and Mexico Railway Company (The) (Guy A. Thompson, Trustee)
St. Louis-San Francisco Railway Company
St. Louis, San Francisco and Texas Railway Company
St. Louis Southwestern Railway Company
St. Louis Southwestern Railway Company of Texas
Salt Lake, Garfield and Western Railway Company
Seaboard Air Line Railroad Company
Seatrain Lines, Inc.
South Georgia Railway Company (The)
Southern Pacific Company
Southern Railway Company
Spokane International Railroad Company
Spokane, Portland and Seattle Railway Company
Staten Island Rapid Transit Railway Company (The)

T

Tennessee, Alabama & Georgia Railway Company
Tennessee Central Railway Company
Terminal Railroad Association of St. Louis
Texas and New Orleans Railroad Company
Texas and Pacific Railway Company (The)
Texas Mexican Railway Company (The)
Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans
Tidewater Southern Railway Company
Toledo and Eastern Railroad Company (The)

Toledo, Peoria & Western Railroad
Tooele Valley Railway Company.

U

Union Pacific Railroad Company
Union Railroad of Oregon

V

[fol. v-w] Valley and Siletz Railroad Company
Virginian Railway Company (The)

W

Wabash Railroad Company
Walla Walla Valley Railway Company
Western Maryland Railway Company
Western Pacific Railroad Company (The)
Western Railway of Alabama (The)
Wheeling and Lake Erie Railway Company (The)

[fols. X–Y]

APPENDIX B TO COMPLAINT

Issuing Road or Agent	I.C.C. No.	Tariff No.	Commodity	From (Except where (B) shown)	To (Except where (B) shown)
C. W. Boin (TLT)	A–888	111–B	Agric. Implements	(B) Trunk Line Territory	Ida., Ore., Mont., etc.
C. W. Boin (TLT)	A–767	107–C	Classes	(B) Trunk Line Territory	Ida., Ore., Mont., etc.
CI&L	4719	919–K	Stone	Indiana	Pocatello, Ida.
CMStP&P	B–6974	15244	Stone	Indiana	Pocatello, Ida.
H. E. Engdahl (SPFFC)	74	1028–C	Commodities	Ida., Mont., Ore., etc.	Southern Ports
B. T. Jones (CTR)	3766	491–D	Classes—Commodities	(B) CFA Territory	Ida., Mont., Utah
B. T. Jones (CTR)	4041	147–C	Commodities	CFA Territory	Ida., Ore., Mont., Utah
B. T. Jones (CTR)	4063	497–G	Autos	Ind., Mich., Ohio	Ida., Mont., Ore.
B. T. Jones (CTR)	4169	562–B	Agric. Implements	CFA Territory	Ida., Mont., Ore.
L. E. Kipp (TC)	1439	28–N	Lumber	B.C., Ida., Ore., Mont., Wash.	WTL and Southwest Ty.
L. E. Kipp (TC)	1444	35–H	Cottonseed	Southeast-Southwest Ty.	B.C., Ida., Mont., Ore., Wash.
L. E. Kipp (TC)	1462	52–G	Livestock	(B) Ida., Mont., Ore., Wash., etc.	WTL and Southwest Ty.
L. E. Kipp (TC)	1474	18–P	Lumber	B.C., Ida., Mont., Ore., Wash.	WTL and Southwest Ty.
L. E. Kipp (TC)	1476	33–G	Wool	Ida., Mont., Ore., Utah, Wash.	Official Territory
L. E. Kipp (TC)	1502	38–G	Classes	(B) B.C., Ida., Mont., Ore., Wash.	Colo. Common Points & east thereof.
L. E. Kipp (TC)	1504	27–V	Lumber	Ore., Wash.	Official—Southeast Ty.
L. E. Kipp (TC)	1511	17–S	Lumber	B.C., Ida., Mont., Ore., Wash.	Official—Southeast Ty.
L. E. Kipp (TC)	1520	30–G	Commodities (Import)	Pacific Coast Ports	U.S.
L. E. Kipp (TC)	1521	4–W	Commodities	WTL, Southwest, Southeast and	Ida., Mont., Wash.
L. E. Kipp (TC)	1522	43–K	Fruits and Vegetables	(B) Colo. Common Points and east	B.C., Ida., Mont., Ore., Wash.
L. E. Kipp (TC)	1526	29–I	Commodities (Export)	Points in U. S.	Pacific Coast
L. E. Kipp (TC)	1527	2–P	Commodities	B.C., Ida., Ore., Mont., Wash.	WTL, Official, Southwest and Southeast Ty.
L. E. Kipp (TC)	1529	16–K	Lumber	Ida., Mont., Ore., Wash.	Eastern Canada
L. E. Kipp (TC)	1530	14–I	Commodities	(B) Montana	WTL, Official, Southwest and Southeast Ty.
L. E. Kipp (TC)	1531	45–F	Grain	(B) Ida., Mont., Ore., Wash.	Colo. Common Points and east
L. E. Kipp (WTL)	A–2765	365	Seeds	Ida., Ore., Utah	WTL Territory
L. E. Kipp (WTL)	A–3117	367–A	Potatoes & Vegetables	Ida., Mont., Ore., Utah	Official Territory

[fols. BB–CC]

APPENDIX B—Concluded

Issuing Road or Agent	I.C.C. No.	Tariff No.	Commodity	From (Except where (B) shown)	To (Except where (B) shown)
Union Pacific	4568	3104–G	Bananas and Coconuts	Gulf and South Atlantic Ports	Idaho and Oregon
Union Pacific	4507	6035–H	Grain	Ida., Ore., Mont., Utah	Colorado Common Points and East
Union Pacific	4707	6030–C	Potatoes & Vegetables	Ida., Ore., Mont., Utah	Colorado Common Points
Union Pacific	4747	3040–E	Classes—Commodities	Colorado Common Points	Ida., Mont., Ore., Utah
Union Pacific	4749	3030–F	Classes—Commodities	Ida., Mont., Ore., Utah	Colorado Common Points
Union Pacific	4783	6085–B	Livestock	Ida., Mont., Ore., Utah	Eastern Livestock Markets
Union Pacific	4812	6080–C	Grain	East of Colorado Jcts.	Ida., Mont., Ore., Utah
Union Pacific	5105	6048–N	Sugar	Idaho, Utah	Colorado and New Mexico on AT&SF and C&S
Union Pacific	4981	6000–H	Ore, Smelter Products	Ida., Mont., Ore., Utah	Colorado Common Points and East
Union Pacific	4982	6050–H	Fruit	Ida., Ore., Mont., Utah	Colorado Common Points and East
Union Pacific	4991	6081–B	Hay and Straw	Ida., Mont., Ore., Utah	WTL Territory
Union Pacific	5001	6001–N	Ore, Smelter Products	Ida., Mont., Utah, Wash.	Colorado Common Points and East
Union Pacific	5122	6016–O	Canned Goods	Ida., Ore., Utah	Ark., Okla., Neb., etc.
J. P. Haynes (PFTB)	1372	130–S	Classes—Commodities	Ida., Mont., Ore., Utah	New Mexico and El Paso, Tex.

(B) Applies between.

APPENDIX C TO COMPLAINT

Issuing Road or Agent	I.C.C. No.	Tariff No.	Commodity	From (Except where (B) shown)	To (Except where (B) shown)
Great Northern	A–7873	351–I	Fish	B.C., Washington	Utah points on Bamberger and UP,
Great Northern	A–7897	275–S	Ore, Smelter Products	Idaho-Washington	Murray, Midvale, Utah, etc.
Northern Pacific	9640	29–C	Smelter Products	Montana, Idaho	Murray, Midvale, Utah, etc.
Union Pacific	4247	6089	Grain	(B) Ida., Mont., Ore., Utah	Utah, stations on UP
Union Pacific	4564	6044–D	Commodities	(B) Points on CMStP&P, GN and NP in Montana	Utah points on UP and Bamberger
Union Pacific	4689	6075–A	Classes	(B) Montana and Utah	Utah points on Bamberger and UP
Union Pacific	4693	2048–G	Fruits and Vegetables	(B) Ida., Mont., Ore., Utah	Salt Lake City, Sandy, Sugar House, Utah
Union Pacific	4709	6055–D	Fruits	Ore., Wash., Ida.	Utah points on Bamberger, and UP D&RGW (Sugar House only)
Union Pacific	4718	7002–A	Classes	(B) Ida., Mont., Ore., Utah	Utah points on Bamberger and UP, D&RGW (Sugar House only)
Union Pacific	4723	6073–D	Wool	Utah points on Bamberger	Albina and Portland, Oregon
Union Pacific	4719	7007–A	Emigrant Movables	(B) Idaho	Utah points on Bamberger and UP
Union Pacific	4731	7038–A	Clay Products	(B) Idaho, Mont., Ore., Utah	Utah points on Bamberger and UP
Union Pacific	4746	6013–C	Livestock	(B) Utah points on Bamberger and UP	North Coast, Ida., Mont., Ore., Utah
Union Pacific	4801	6090–B	Grain	(B) Ida., Mont., Ore., Utah	Utah points on Bamberger and UP
Union Pacific	4827	7010–C	Commodities	(B) Ida., Ore., Mont., Utah	Utah points on Bamberger and UP
Union Pacific	4867	6070–B	Potatoes & Vegetables	(B) Ida., Ore., Wash.	Utah points on Bamberger and UP
Union Pacific	4883	6088–C	Petroleum	Montana	Utah points on Bamberger and UP
Union Pacific	4884	7270–A	Grain	(B) Ida., Mont., Ore., Utah	Utah points on Bamberger and UP
Union Pacific	4932	6100	Oil	Portland, Seattle, and Spokane	Utah points on Bamberger and UP
Union Pacific	4994	6045–F	Classes	(B) Ida., Ore., Wash., Utah	Utah points on Bamberger and UP
Union Pacific	4995	6002–J	Hay and Straw	(B) Ida., Mont., Ore., Utah	Utah points on Bamberger and UP
Union Pacific	4999	7063–C	Vegetables	(B) Ida., Mont., Ore., Utah	Utah points on Bamberger and UP
Union Pacific	5000	6039–K	Lumber	(B) Ida., Mont., Ore., Utah., Wash.	Utah points on Bamberger and UP
Union Pacific	5006	6015–H	Ore, Smelter Products	Sumpter, Ore.	Midvale and Murray, Utah
Union Pacific	5052	6074–J	Commodities	(B) B.C., Ida., Ore., Wash.	Utah points on Bamberger and UP
Union Pacific	5054	6042–L	Commodities	Ida., Mont., Ore., Utah	Utah points
Union Pacific	5126	6018–L	Copper Cake	Black Eagle, Mont.	Utah points on Bamberger and UP

(B) Applies between.

[fols. Z-AA]

APPENDIX B—Continued

Issuing Road or Agent	I.C.C. No.	Tariff No.	Commodity	From (Except where (B) shown)	To (Except where (B) shown)
L. E. Kipp (WTL)	A-3202	350-B	Classes	(B) Ida., Ore., Mont., Utah	East of Colo. Common Points
L. E. Kipp (WTL)	A-3288	172-F	Wool	Utah, Idaho	Atlantic Seaboard
L. E. Kipp (WTL)	A-3399	368-B	Lime	Missouri, Illinois	Utah, Idaho
L. E. Kipp (WTL)	A-3511	297-B	Potatoes & Vegetables	Ida., Mont., Ore., Utah	WTL Territory
L. E. Kipp (WTL)	A-3531	268-C	Classes—Commodities	Idaho, Utah	Memphis, New Orleans, etc.
L. E. Kipp (WTL)	A-3541	282-C	Potatoes & Vegetables	Ida., Mont., Ore., Utah	Southeast Territory
L. E. Kipp (WTL)	A-3560	120-I	Classes—Commodities	(B) WTL Territory	Ida., Mont., Ore., Utah
L. E. Kipp (WTL)	A-3570	124-L	Classes—Commodities	(B) Ala., Fla., La., Miss.	Ida., Mont., Ore., Utah
L. E. Kipp (WTL)	A-3589	134-M	Classes—Commodities	Ida., Mont., Ore., Utah	Official and Southeast Ty.
L. E. Kipp (WTL)	A-3610	340-C	Classes—Commodities	Memphis, New Orleans, etc.	Utah-Idaho points
L. E. Kipp (WTL)	A-3613	265-E	Beans and Peas	Ida., Ore., Mont., Utah	WTL, Southwest and Southeast Ty.
L. E. Kipp (WTL)	A-3664	159-L	Sugar	Ida., Mont., Ore., Utah	WTL and Southwest Ty.
D. Q. Marsh (SWFB)	3832	182-F	Grain	Ida., Mont., Ore., Utah	New Mexico and Texas
D. Q. Marsh (SWFB)	3494	249-C	Oil	Kan., Okla., Tex., etc.	Ida., Mont., Ore., Utah
D. Q. Marsh (SWFB)	3529	96-D	Sugar	Ida., Ore., Utah	Texas and New Mexico
D. Q. Marsh (SWFB)	3543	102-V	Sulphur	Texas and Louisiana	Ida., Ore., Utah
D. Q. Marsh (SWFB)	3613	89-S	Bananas	Galveston & Rio Grande Crossings	Idaho and Oregon
D. Q. Marsh (SWFB)	3703	270-A	Commodities	Ida., Mont., Ore., Utah	Tex., La., Ark., Okla., etc.
D. Q. Marsh (SWFB)	3713	253-B	Commodities	Southwest Territory	Ida., Mont., Ore., Utah
D. Q. Marsh (SWFB)	3722	18-F	Potatoes & Vegetables	Ida., Mont., Ore., Utah	Ark., La., Okla., Tex., etc.
D. Q. Marsh (SWFB)	3739	17-I	Classes	(B) Ida., Mont., Ore., Utah	Ark., La., Okla., Tex., etc.
D. Q. Marsh (SWFB)	3743	148-I	Fruit and Vegetable Packages	Arkansas and Texas	Ida., Mont., Ore., Utah
W. G. Oliphant (FB)	A-31	82-I	Classes—Commodities	Utah and Idaho	Mobile, New Orleans
W. G. Oliphant (FB)	A-38	59-C	Classes	(B) Mobile, New Orleans, etc.	Utah and Idaho
W. G. Oliphant (FB)	A-53	43-D	Commodities	(B) Memphis, New Orleans, etc.	Ida., Mont., Utah
C. A. Spaninger (Southern Freight)	664	779	Bags	Southeast	Idaho and Montana

[fols. FF–GG]

APPENDIX D TO COMPLAINT

As referred to in paragraph X of the complaint, the representative tariffs shown below name joint through freight rates via the Rio Grande and the Union Pacific from or to Colorado Common Points via Denver, Colorado:

Issuing Road or Agent	I.C.C. No.	Tariff No.	Commodity	From (Except where (B) shown)	To (Except where (B) shown)
L. E. Kipp (TC)	1462	52–G	Livestock	Ida., Mont., Ore., Wash., etc.	Western Trunk Line and Southwest Territories
L. E. Kipp (TC)	1474	18–P	Lumber	Ida., Mont., Ore., Wash., etc.	Points in Colo., Kan., Neb., Tex., Ark., Okla., etc.
L. E. Kipp (TC)	1516	40–J	Territorial Directory (See Note)	(B) Ida., Mont., Ore., Wash., etc.	Colorado Common Points and east thereof
L. E. Kipp (TC)	1530	14–I	Commodities	(B) Montana	Colorado Common Points and east thereof
Union Pacific	4707	6030–C	Vegetables	Ida., Ore., and Mont.	Colorado
Union Pacific	4747	3040–E	Classes—Commodities	Colorado Common Points	Ida., Mont., Ore., and Utah
Union Pacific	4749	3030–F	Classes—Commodities	Ida., Mont., Ore., and Utah	Colorado Common Points
Union Pacific	4982	6050–H	Fruit	Ida., Mont., Ore., and Utah	Western Trunk Line, Official, Southeast and Southwest Territories

NOTE—The following tariffs are subject to Trans-Continental Territorial Directory No. 40–J, Agent L. E. Kipp's I.C.C. No. 1516, for territorial application and routing:

Publishing Agent	I.C.C. No.	Trans-Continental Tariff No.
L. E. Kipp	1444	35–H
L. E. Kipp	1502	38–G
L. E. Kipp	1521	4–W
L. E. Kipp	1522	43–K
L. E. Kipp	1527	2–P
L. E. Kipp	1530	14–I
L. E. Kipp	1531	45–F

[fols. HH–II]

APPENDIX D—Concluded

As referred to in paragraph X of the complaint, the representative tariffs shown below name competitive joint through freight rates via the Rio Grande and the Union Pacific from or to Utah Common Points via Ogden or Salt Lake City, Utah:

Issuing Road or Agent	I.C.C. No.	Tariff No.	Commodity	From (Except where (B) shown)	To (Except where (B) shown)
L. E. Kipp (TC)	1474	18–P	Lumber	Ida., Mont., Ore., Wash., etc.	Utah Common Points
Union Pacific	5054	6042–L	Commodities	(B) Ida., Mont., Ore., and Wash.	Utah Common Points

(B) Applies between.

[fols. JJ-KK]

Appendix E To Complaint

Tariffs listed below are those referred to in paragraph XII of the complaint, which tariffs authorize reconsignment and other transit arrangements.

Issuing Road or Agent	I.C.C. No.	Tariff No.
Denver and Rio Grande Western Railroad	774	7281-C
Denver and Rio Grande Western Railroad	775	7120-D
Denver and Rio Grande Western Railroad	792	7283-A
Denver and Rio Grande Western Railroad	796	7280-A
Denver and Rio Grande Western Railroad	827	7271-C
Denver and Rio Grande Western Railroad	829	7035-D
Denver and Rio Grande Western Railroad	831	7277-A
Denver and Rio Grande Western Railroad	838	6861-I
Denver and Rio Grande Western Railroad	847	6294-W
Denver and Rio Grande Western Railroad	848	6474-M
Denver and Rio Grande Western Railroad	849	7276-A
Denver and Rio Grande Western Railroad	850	7303-A
Denver and Rio Grande Western Railroad	851	6986-E
Denver and Rio Grande Western Railroad	852	6842-C
Denver and Rio Grande Western Railroad	854	7316-A
Denver and Rio Grande Western Railroad	856	7270-B
Denver and Rio Grande Western Railroad	858	7282-C
Denver and Rio Grande Western Railroad	862	7273-I
Denver and Rio Grande Western Railroad	864	7275-E
Denver and Rio Grande Western Railroad	865	6537-B
Denver and Rio Grande Western Railroad	868	7274-B
Denver and Rio Grande Western Railroad	869	7058-D
Denver and Rio Grande Western Railroad	872	6855-F
L. E. Kipp (WTL)	A-2725	226-B
L. E. Kipp (WTL)	A-3454	392-A
L. E. Kipp (WTL)	A-3581	331-M
L. E. Kipp (WTL)	A-3605	271-M
L. E. Kipp (WTL)	A-3636	213-Q
L. E. Kipp (WTL)	A-3692	419
L. E. Kipp (WTL)	A-3595	371-B
L. E. Kipp (WTL)	A-3651	403-B

[fol. 1] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

In the Matter of: THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL., Defendants

Transcript of Testimony—Salt Lake City, Utah, Monday, December 12, 1949

Met pursuant to notice, at 9:30 a.m.

Before Frank E. Mullen, Examiner

APPEARANCES:

Robert E. Quirk, 1116 Investment Building, Washington, D. C., appearing for The Denver and Rio Grande Western Railroad Company, Complainant.

Otis J. Gibson, 1531 Stout Street, Denver 2, Colorado, appearing for the Denver and Rio Grande Western Railroad Company, Complainant.

Elmer B. Collins, F. J. Melia, W. R. Rouse and John J. Burchell, 1416 Dodge Street, Omaha, Nebraska, B. P. Leverich, 10 South Main Street, Salt Lake City, Utah, L. W. Hobbs, 727 Pittock Block, Portland, Oregon, and L. H. Anderson, 321 Carlson Building, Pocatello, Idaho,—all appearing for Union Pacific Railroad Company, Defendant.

[fol. 1a] Robert H. Bierma, 652 Union Station, Chicago, Illinois, appearing for The Pennsylvania Railroad Company, Defendant.

L. C. Torinus, Jr., 1120 Great Norther Railway Building, St. Paul, Minnesota, appearing for Great Northern Railway Company, Defendant.

P. H. Draver, and Carson L. Taylor, 888 Union Station, Chicago, Illinois, appearing for Chicago, Milwaukee & St. Paul Railroad, Defendant.

F. G. Fitzpatrick an P. F. Gault, 400 West Madison Street, Chicago 6, Illinois, appearing for Chicago and

North Western Railway Company and Chicago, St. Paul, Minneapolis and Omaha Railway, Defendants.

Lee S. Davis, Smith Tower, Seattle, Washington, and Conrad Olson, Northern Pacific Building, St. Paul, Minn., appearing for Norther- Pacific Railway Company, Defendant.

F. H. Cole, Jr., 1315 Union Central Life Insurance Building, Cincinnati, Ohio, appearing for Baltimore & Ohio Railroad Company, Defendant.

Roland J. Lehman, 80 East Jaekson Boulevard, Chicago, Illinois, appearing for the Atchison, Topeka & Santa Fe; Gulf, Colorado & Santa Fe Railway Company, and Panhandle & Santa Fe Railway Company, Defendants.

James E. Lyons, 65 Market Street, San Francisco 5, California, appearing for Southern Pacific Lines, Defendant.

Eugene S. Davis and L. E. Clarahan, 1667 Railway Exchange Building, St. Louis 1, Missouri, appearing for Wabash Railroad Company, Defendant.

L. F. Purvis, W. B. Joy, H. N. Beamer, and B. Auger, State Capitol Building, Boise, Idaho, appearing for Public Utilities Commission of Idaho, Intervener as its interests may appear.

A. H. Michelsen, Albert P. Bruch and E. A. McKay, Cheyenne, Wyoming, appearing for Wyoming State Board of Equalization and Public Service Commission, Interveners in opposition to Complainant.

[fol. 1b] C. A. Miller, 2000 Massachusetts Avenue, N.W., Washington, D. C., appearing for the American Short Line Railroad Association, Intervener in support of Complainant.

Bert L. Overcash, State House, Lincoln, Nebraska, appearing for State of Nebraska and Nebraska State Railway Commission, Intervener in opposition.

Harry C. King, Room 2100 Capitol Building, Lincoln, Nebraska, appearing for Nebraska State Railway Commission, Intervener in opposition.

Edwin S. Booth, Board of Railroad Commission, Helena, Montana, appearing for Board of Railroad Commission, Intervener in opposition.

J. L. Pease, Washington, D. C., appearing for Transportation Rates and Services Division, Transportation

and Warehousing Branch, Production and Marketing Administration, U. S. Department of Agriculture, Intervener as interests may appear.

Phil H. Gallagher, Joseph Starni and Bartleet Burns, Attorney General's Office, Olympia, Washington, appearing for Washington Public Service Commission, Intervener in opposition.

Maurice H. Greene, 422 Idaho Building, Boise, Idaho, appearing for Brotherhood of Locomotive Engineers, et al. of the Union Pacific Railroad Company, and the Cheyenne Chamber of Commerce, et al., Interveners.

T. S. Wood, J. R. Barry, R. C. Horton and J. W. Hawley, 318 State Office Building, Denver 2, Colorado, appearing for Public Utilities Commission of the State of Colorado, Intervener as interests may appear.

John H. Carkin, 460 North Commerce Street, Salem, Oregon, appearing for Public Utility Commission of Oregon, Intervener in opposition.

Byron M. Gray, c/o State Corporation Commission, New England Building, Topeka, Kansas, appearing for Kansas Corporation Commission, Intervener in opposition.

[fols. 1c-2] Lee J. Quasey, 139 North Clark Street, Chicago, Illinois, appearing for National Live Stock Producers Association, Intervener in support of Complainant.

E. F. McGuire, 728 Great Northern Building, St. Paul, Minnesota, appearing for Great Northern Railway Company, Defendant.

Chas. A. Root, 314 State Capitol, Salt Lake City, Utah, appearing for Public Service Commission of Utah, Intervener as its interests may appear.

Thomas W. Dench, 460 North Commercial Street, Salem, Oregon, appearing for Public Utilities Commission of Oregon, Intervener in opposition.

[fol. 3] PROCEEDINGS RE APPEARANCES AND INTERVENTIONS

Exam. Mullen: The Interstate Commerce Commission has set for hearing at this time and place its Docket No. 30297. It is entitled "The Denver and Rio Grande Western Railroad Company versus Union Pacific Railroad Company, et al."

Who appears for the complainant?

Mr. Quirk: Robert E. Quirk, 1116 Investment Building, Washington, D. C., for the complainant.

Mr. Gibson: Otis J. Gibson, 1531 South Street, Denver 2, Colorado, for the complainant.

Exam. Mullen: Any other appearances for the complainant?

Who appears for the defendants?

Mr. Collins: Elmer B. Collins; F. J. Melia; W. R. Rouse; John J. Burchell, for the Union Pacific Railroad Company.

Exam. Mullen: Will you please state whether you are authorized to practice before the Commission?

Mr. Collins: We are. I believe Mr. Rouse is not, are you, Mr. Rouse?

Mr. Rouse: That is right.

Mr. Collins: He is not. The rest of us are.

Exam. Mullen: Any other appearances for defendants?

Mr. Bierma: Robert H. Bierma, appearing for the Pennsylvania Railroad Company, 652 Union Station, Chicago, Illinois. I am admitted to practice before the Commission.

Mr. Torinus: L. E. Torinus, Jr., 1120 Great Northern [fol. 4] Railway Building, St. Paul, Minnesota, appearing for the defendant, Great Northern Railway Company.

I am an attorney and a registered practitioner.

Mr. Draver: P. H. Draver and Carson L. Taylor for the Chicago, Milwaukee, St. Paul and Pacific Railroad, 888 Union Station, Chicago.

I am authorized to practice before the Commission.

Mr. Taylor is an officer of the railroad and appearing here as an officer of one of the defendants.

Mr. Gault: Frank G. Fitzpatrick and P. F. Gault, 400 West Madison Street, Chicago 6, Illinois, appearing for the Chicago & North Western Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, defendants.

I am admitted to practice.

Mr. Fitzpatrick is vice president and an officer of both companies.

Mr. Davis: Lee S. Davis, Smith Tower Building, Seattle, Washington, appearing as an officer of the Northern Pacific Railway Company; and Conrad Olson, Northern Pacific Railway Building, St. Paul, Minnesota, both appearing for the Northern Pacific Railway Company.

I am authorized to practice before the Commission.

Exam. Mullen: We will assume that all those appearing as attorneys are authorized to practice unless they state otherwise.

Mr. Cole: F. H. Cole, Jr., 1315 Union Central Life In-[fol. 5] surance Building, Cincinnati, Ohio, appearing for defendant, the Baltimore & Ohio Railroad Company.

Mr. Lehman: Roland J. Lehman, 80 East Jackson Boulevard, Chicago, Illinois, appearing for the Atchison, Topeka & Santa Fe Railway Company; the Gulf, Colorado & Santa Fe Railway Company; and Panhandle & Santa Fe Railway Company, defendants.

Mr. Lyons: James E. Lyons, 65 Market Street, San Francisco 5, California, appearing for Southern Pacific Lines.

Mr. Examiner, if this is an appropriate place I would like to address, through the Bench, an inquiry to counsel for the complainant. I have had correspondence with them, and I understand that they do not ask any affirmative relief from the Southern Pacific Lines and that we were only included because of our participation in certain of the tariffs.

Is that correct, Mr. Quirk?

Mr. Quirk: Yes, that is correct. Except that of course all defendants that are participants with the Union Pacific in what we are complaining about are, in that sense, jointly and severally responsible; but the answer is "Yes."

Mr. Lyons: Thank you.

Mr. (E. S.) Davis: Eugene S. Davis, for the Wabash Railroad Company. I wish to enter an appearance for Mr. L. E. Clarahan, vice president of traffic of that company and myself, an attorney and duly admitted practitioner, [fol. 6] 1667 Railway Exchange Building, St. Louis, Missouri.

Exam. Mullen: Are there any other appearances for defendants?

(No response.)

Exam. Mullen: Apparently not.

Who appears for the interveners?

Mr. Purvis: L. F. Purvis, for the Public Utilities Commission of Idaho, Boise, Idaho. I am admitted to practice.

Mr. Examiner, I would like to also enter the appearances of W. B. Joy, H. N. Beamer and B. Auger, constituting the Idaho Commission, neither of whom are practitioners.

At this time——

Exam. Mullen: Is either one of those gentlemen here?

Mr. Purvis: They are either present in the room, or will be in just a few moments.

Exam. Mullen: All right.

Mr. Purvis: At this time I would like to submit, Mr. Examiner, the Commission's petition of intervention.

Exam. Mullen: Before I examine this I will call for appearances of interveners whose petitions have already been received and filed with the Commission.

Mr. Michelsen: A. H. Michelsen, chairman, Wyoming State Board of Equalization, Wyoming Public Service Commission; Albert P. Bruch, member, and E. A. McKay, director, of the Wyoming Ad Valorem Tax Department. All are present.

[fol. 7] Mr. Miller: C. A. Miller, 2000 Massachusetts Avenue, N. W., Washington, D. C., for the American Short Line Railroad Association, intervener in support of the complainant.

Exam. Mullen: Mr. Michelsen, did you announce what position you take in the proceeding?

Mr. Michelsen: Yes. Opposition to the complaint.

Exam. Mullen: American Short Line Railroad Association in support?

Mr. Miller: That is right.

Exam. Mullen: Mr. Collins, did you want to say something?

Mr. Collins: I want to ask something in respect to Mr. Miller's intervention and appearance at the appropriate time. I really prefer to wait until these other interventions have been stated and appearances filed, if that is all right.

Exam. Mullen: That may be done.

The Colorado Wool Growers Association?

(No response.)

Exam. Mullen: Arkansas Valley Stock Feeders Association?

(No response.)

Exam. Mullen: Grand Junction Chamber of Commerce?

(No response.)

Exam. Mullen: Holly Sugar Corporation?

(No response.)

Exam. Mullen: Pueblo Chamber of Commerce?

(No response.)

[fol. 8] Exam. Mullen: Nebraska State Railway Commission?

Mr. Overcash: I am Bert L. Overcash, assistant attorney general of Nebraska, appearing in opposition to the complaint; also Harry C. King, a registered practitioner.

A Petition was filed by the Commission for leave to intervene as its interests may appear, and I would like to submit an amended petition in opposition to the complaint.

Exam. Mullen: That may be filed now, if you wish.

Mr. Quirk: Mr. Examiner, before you call for any additional interventions I would like to make this statement by way of explanation:

The Grand Junction Chamber of Commerce, the Holly Sugar Corporation, the Pueblo Chamber of Commerce, the Arkansas Valley Stock Feeders Association and the Colorado Wool Growers Association and the Colorado Cattlemen's Association are interveners in support of the complainant.

We are largely responsible for their not being here this morning. We told them the complainant would probably take two days and a half, at least, and if they would arrive Wednesday it would be ample time. They didn't care to sit longer than that unless it was necessary, so they will be here.

Mr. Collins: Mr. Examiner, will it be in ample time? Can they file their appearance at any time during the hearings?

Mr. Quirk: That is what the rules say.

[fol. 9] Exam. Mullen: They may file it when they actually appear.

Mr. Collins: I see.

Exam. Mullen: Mr. Overcash, how does this amended petition differ from the original one?

Mr. Overcash: The original petition does not state the position, but this one does.

Exam. Mullen: That is the only change?

Mr. Overcash: This states in detail the reasons for the position that we take.

Exam. Mullen: Is there any objection to the receipt of this amended petition?

Mr. Quirk: Mr. Examiner, I think, to the extent that that petition states conclusions of fact, it is objectionable unless they are proven; so I make that objection.

Exam. Mullen: That objection will be noted.

Are there any other objections?

(No response.)

Exam. Mullen: The petition will be received and filed.

The state Board of Railroad Commissioners of the State of Montana.

Mr. Booth: Edwin S. Booth, secretary-counsel of the Board of Railroad Commissioners, Helena, Montana, appearing for the Board. The intervention of the Board has heretofore been authorized and the copies of the intervention circulated. The intervention is against the complaint. [fol. 10] Mr. Quirk: Did your body, the Board of Railroad Commissioners, file an earlier petition?

Mr. Booth: They did not file one. They prepared one and it was forwarded and withdrawn prior to filing.

Mr. Quirk: It was? What position did you take in that one?

Mr. Booth: That petition was filed in support of the complaint.

Mr. Quirk: You have been on both sides then, haven't you?

Mr. Booth: We have sent one in. However, only one was filed, and the second one we can present evidence on if necessary.

Exam. Mullen: The Secretary of Agriculture of the United States.

Mr. Pease: J. L. Pease, Transportation Rates and Services Division, United States Department of Agriculture, appearing for the Secretary of Agriculture as intervener as the Secretary's interests may appear.

Exam. Mullen: Are there any other petitions of intervention to be filed at this time?

Mr. Gallagher: My name is Phil H. Gallagher, assistant attorney general representing the Washington Public Service Commission of the State of Washington. Also Joseph Starin and Bartlett Burns. The latter two are practitioners; I am assistant attorney general, but not a practitioner.

The Washington Department of Public Service filed its [fol. 11] original petition to intervene and were notified by Mr. Bartell, the Secretary, that they would not have time to distribute the petitions and asked us to serve the Examiner at this hearing. I would like to file a copy of the petition and leave it with you at this time.

For the State of Washington I might state that we are appearing in opposition to the complainant.

Exam. Mullen: In opposition to the complainant?

Mr. Gallagher: That is right, sir.

Exam. Mullen: Any opposition to this petition for leave to intervene?

Mr. Quirk: I make the same comment, and I suppose it probably is not necessary to state that it contains conclusions of fact about operating conditions, efficiency, and things of that kind. They are objectionable.

Mr. Collins: Mr. Examiner, then the complaint itself is objectionable on that ground.

Mr. Quirk: Those are allegations.

Exam. Mullen: We are not discussing that at this moment.

The petition for leave to intervene by the Washington Public Service Commission is allowed.

Any other petitions to intervene?

Mr. Greene: Maurice H. Greene, 422 Idaho Building, Boise, Idaho, appearing for 19 brotherhoods of railroad employees of the Union Pacific System; also the brother- [fol. 12] hoods of the railroad employees of the Union Pacific in the State of Wyoming; and on behalf of the Cheyenne Chamber of Commerce and eight other chambers of commerce in the State of Wyoming.

I am an attorney and admitted to practice before the Commission.

The original of one of the petitions was forwarded to Washington, Mr. Examiner, and we had a wire from the Secretary advising that it would be filed if accepted by the Examiner here.

Exam. Mullen: Do you have copies for counsel?

Mr. Greene: Yes, I have copies for counsel.

Exam. Mullen: Let's take up first this petition for the railway labor organization named in the petition. Is there any objection to that intervention?

Mr. Quirk: We have not seen it yet.

Mr. Greene: Our position is in opposition to the application.

Exam. Mullen: Distribute the copies, please.

Any objection to the receipt of this petition?

Mr. Quirk: No objection.

Exam. Mullen: It will be received, and the intervention is allowed.

The next one is the petition for labor organizations or groups representing over 20,000 persons employed in the State of Wyoming. Any objection to that intervention?

[fol. 13] Mr. Quirk: No.

Exam. Mullen: There being no objection, it will be received.

The third is for certain chambers of commerce and others. Any objection to that?

Mr. Quirk: No.

Exam. Mullen: It will be received.

Any other petitions?

Mr. Wood: Thomas S. Wood appearing for the Public Utilities Commission of Colorado and J. R. Barty for the State of Colorado. Both Mr. Wood and Mr. Barry are present.

I also want to enter an appearance for Commissioners Horton and Hawley, who are not present.

I have not filed my petition of intervention up until this time. Our position is as the shippers' interests may appear. We will clear our position before the close of the proceeding.

Exam. Mullen: Do you have copies of your petition?

Mr. Wood: I have.

Exam. Mullen: Any objection to this?

Mr. Quirk: No.

Exam. Mullen: It will be received.

Mr. Carkin: John H. Carkin, counsel for the Public Utilities Commission of Oregon, appearing on behalf of the defendant in opposition to the complainant.

Our situation is the same as Washington's. Our petition with some 200 copies was received and acknowledged by [fol. 14] Mr. Bartell, the Secretary, with a telegram asking that it be presented to the Examiner at this time. Copies have been distributed.

Exam. Mullen: What is your name, sir?

Mr. Carkin: John H. Carkin, counsel for the Public Utilities Commission of Oregon.

Exam. Mullen: No objection? It will be received.

Mr. Gray: Byron M. Gray, 2403 New England Building, Topeka, Kansas, appearing for the State Corporation Commission of the State of Kansas.

I wish to file a petition for leave to intervene in opposition to the complaint.

Exam. Mullen: If there is no objection, it will be received.

Mr. Quasey: Lee J. Quasey, counsel, National Live Stock Producers Association, 139 Clark Street, Chicago 2, Illinois.

I have a petition for intervention I would like to present for your consideration.

Mr. Examiner, the position we take is not adverse to the complaint.

Exam. Mullen: Any objection to this?

If there is no objection, this will be received and granted.

Are there any other petitions for leave to intervene?

(No response.)

Exam. Mullen: There are none.

Are there any other preliminary matters to be disposed [fol. 15] of before I read the statement of the issues?

Mr. Collins: Mr. Examiner, I wanted to make some inquiry of Mr. Miller, counsel for the Short Line Association, with respect to the status of his intervention. Do I understand Mr. Miller is intervening for his entire membership of 323 railroads?

Exam. Mullen: Mr. Miller.

Mr. Miller: I am intervening for the American Short Line Railroad Association as an organization.

Mr. Collins: His petition for leave to intervene says he is intervening on behalf of the membership, which constitutes 323 members.

Are you withdrawing the intervention insofar as your membership is concerned?

Mr. Miller: The petition recites the facts on the face of it, and I stand by what is said in the petition.

Exam. Mullen: And what you have stated here?

Mr. Miller: Yes.

Mr. Collins: Now then, Mr. Examiner, I call attention to the fact that 44 of the defendants to the complaint in this case are members of Mr. Miller's Short Line Railroad Association, and he has now, as I understand him, in the language of his petition for leave to intervene, brought those 44 members of his in on the side of the complainant, although they are still named as defendants.

Mr. Quirk: Mr. Examiner, I will have to answer that.

[fol. 16] Mr. Collins: I beg your pardon. I am addressing counsel for the Association.

Mr. Quirk: I am addressing you.

Exam. Mullen: I think the question was addressed to Mr. Miller.

Mr. Collins: Quite right.

Exam. Mullen: Does Mr. Miller desire to answer?

Mr. Miller: What is the question.

Mr. Collins: Will you read it, Mr. Reporter?

(Record read.)

Exam. Mullen: Would you like to clarify that, Mr. Miller?

Mr. Miller: That is correct. They are brought in in support of the complaint, even though they are named as defendants. It is one of those cases where all the people—that is, all the roads that participate with the Union Pacific—must necessarily be named as defendants. That doesn't mean that everybody who is named as a defendant is opposed to the complaint. It doesn't mean that so far as our membership is concerned. We are supporting the complaint.

Mr. Collins: You mean those 44 defendants are supporting the complaint?

Mr. Miller: Yes,

Mr. Collins: Now I call attention to the fact that 8 of the defendants are also members of the Short Line Association and are subsidiaries, under common management, of [fol. 17] certain long line defendants. I would like to inquire if those defendants, and the members of the Short Line Association, and subsidiaries, one of which is a subsidiary of the Union Pacific Railroad, are supposed to be supporting the complaint in this case, according to Mr. Miller's theory.

Mr. Miller: Yes.

Mr. Collins: Well, then I serve notice on you that the Yakima Valley Transportation Company is not supporting the complainant in this case. It is a subsidiary of the Union Pacific Railroad Company.

I call attention also, Mr. Examiner——

Exam. Mullen: Are you appearing for that road?

Mr. Collins: Yes, as a part of the Union Pacific Railroad and under common management with it.

I call attention to the fact, also, that the Chicago, Indianapolis and Louisville Railroad Company is a member of the Short Line Association and is a defendant in this complaint, and has filed an answer to the complaint denying the allegation of the complaint; yet under Mr. Miller's intervention for the Short Line Association that railroad, the Chicago, Indianapolis and Louisville, is, although denying the allegation of the complaint, at the same time supporting those allegations, according to Mr. Miller's intervention for the Short Line Association.

I call attention, further, to the very peculiar status or [fol. 18] predicament in which the Short Line petition for intervention and its intervention leaves us in this case. The Butte, Anaconda & Pacific, for instance, one of the defendants and a member of the Short Line Association, has filed an answer saying it is not a competing carrier, or not a competing short line, and yet the Short Line Association's petition for intervention says that its members have a vital interest in this case.

Others of the Short Line Association membership have filed answers saying they are not affected by the com-

plaint in this case. One of those is the Chicago Short Line Railway Company; also the Illinois Northern Railway Company, the Lake Terminal Railroad Company.

I call attention to those things, Mr. Examiner, for the purpose of trying to portray on this record in the beginning the rather incongruous situation that faces the defendants, or the Union Pacific Railroad in particular, insofar as my speech is concerned, and facing, also, the Commission.

It does seem to me that there should be some more orderly way to proceed without defendants being brought into the case as complainants or in support of complainants and leaving us without knowledge as to just by what authorization Mr. Miller proceeds for the Short Line Association.

I feel that I must go this far at this time, I must demand of the Short Line Association that it show actual authoriza-
[fol. 19] tion to intervene on behalf of its membership, as it has filed its intervention here.

Exam. Mullen: Do you desire to reply to that, Mr. Miller?

Mr. Miller: I don't think I need to other thar to express my sympathy for Mr. Collins.

Mr. Collins: I then move that his intervention—and it is under reconsideration now by the Commission, incidentally, on a motion I filed—I now move that, in view of this answer, and for that additional reason that he declines to show that he is authorized to intervene for those defendants who are named as defendants and are members of his Association, his petition for intervention be rejected on that additional ground.

Exam. Mullen: Do you desire to reply to that, Mr. Miller?

Mr. Miller: Mr. Examiner, our petition for leave to intervene in this case was filed with the Commission. The facts were stated in the petition for leave to intervene, and the Commission has entered an order granting us leave to intervene in support of the complaint. Our intervention in this case is a fait accompli, and I don't thing I am called upon to go any further at this time. I simply stand on the Commission's order granting leave to intervene. We are a party to this proceeding by order of the Commission.

Mr. Collins: Mr. Examiner, I call attention to the fact that I have received no notice of any action by the Commis-
[fol. 20] sion upon my motion to the Commission to recon-

sider an reject the Short Line Association's petition for leave to intervene. As far as I know, that matter has not been settled, and I think Mr. Miller is quite premature in assuming that the Commission is going to deny any reconsideration and possible rejection of his intervention.

Exam. Mullen: I think Mr. Miller should clarify the petition of intervention in connection with the matters that Mr. Collins has raised here as to those particular railroads. The particular motion of Mr. Collins now is denied, and if the Commission has left it to the Examiner here to act upon the prior motion, that motion is denied.

Mr. Collins: You say "if it has"?

Exam. Mullen: If it has been left to me. If the Commission has left it to me to rule upon your original petition, I will say that my ruling is that that petition be denied.

Mr. Collins: Mr. Examiner, has the Commission or has it not left it to you to rule on the original motion that I filed?

Exam. Mullen: That I don't know.

Mr. Collins: I see.

Exam. Mullen: I just wanted to make the record clear at this point.

Mr. Collins: Yes. So that your ruling actually is final, insofar as you are concerned, only on the motion I made pursuant to Mr. Miller's refusal to make any clarification? [fol. 21] Exam. Mullen: Yes. And my ruling with respect to your first petition is subject to any other ruling by the Commission.

Mr. Collins: Yes.

Exam. Mullen: Are there any further matters to be considered before we proceed with the taking of testimony?

(No response.)

Exam. Mullen: Apparently not.

Examiner's Statement of Issues Involved

I will read a brief statement of the issues in this case:

Complainant alleges that the Union Pacific Railroad Company and defendants, or some of them, have failed and refused to join with complainant in establishing joint rates for transportation of freight (a) between points on or via

the Union Pacific Railroad in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia, on the one hand, and Colorado common points and points east thereof, on the other hand; and (b) between Utah common points, on the one hand, and places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia, on the other hand. It further alleges that such refusal is unlawful and results in violations of sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act.

Complainant requests the Commission to prescribe just, reasonable and non-discriminatory competitive joint through rates applicable to the transportation of freight, in which complainant may participate on a competitive or equal basis with defendants between the said points and [fol. 22] territories described, in lieu of the present through combination rates which are alleged to be unjust, unreasonable and discriminatory.

In addition, the Commission is requested to prescribe just and reasonable divisions of any joint rates that may be prescribed as a result of this proceeding, and to hold the record open to permit the parties voluntarily to establish division of such rates, and for further hearing if such divisions are not so established.

Does that state the issues substantially?

Mr. Quirk: I think it summarizes the issues.

Exam. Mullen: You may proceed, Mr. Quirk.

Mr. Quirk: I call Mr. McCarthy.

Wilson McCarthy was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Mr. McCarthy, your name is Wilson McCarthy, and your business address is 1531 Stout Street, Denver, Colorado?

A. Yes, sir.

Q. And you have prepared a statement, copies of which have been served on counsel in this case. I suggest that you proceed to read your statement.

A. My name is Wilson McCarthy and I am president of the Denver and Rio Grande Western Railroad Company.

With regard to my transportation experience, I cam- to [fol. 23] Denver in 1934 as president of the Denver and Salt Lake Railway Company. I served in that capacity until April 11, 1947, when the Denver and Salt Lake was merged with the Denver and Rio Grande Western. In 1935 I was appointed co-trustee of the Denver and Rio Grande Western Railroad Company and served in that capacity until April 11, 1947, when I was elected president of the consolidated Denver and Rio Grande Western Railroad.

The Dotsero Cutoff had just been completed when I began my tenure as co-trustee of the Rio Grande. While this "cut-off" provided a potential means for the Rio Grande to participate in transcontinental traffic, the physical condition of our company at that time was such that we were in no position to effectively compete for this extremely competitive business from either a service or cost standpoint. Because of long depressed earnings, the Rio Grande's trackage and rolling stock were in very poor condition. At that time faster schedules were neither feasible nor possible.

Therefore, a planned program was immediately progressed with a view towards contributing to a sounder national transportation system by making the Rio Grande a vital link in transcontinental traffic. This embraced strengthening of the personnel, a revamping of the financial structure, and complete modernization of the physical plant.

To strengthen the personnel, training programs were [fol. 24] conceived, which are still in effect, planned to strengthen supervision in all departments. And where necessary the best talent available outside the railroad was brought in to bolster certain of the weaker departments.

To better fulfill its service responsibility to the public, the Rio Grande's on and off-line traffic forces have been augmented, comprehensive programs adopted for stimulating agricultural and industrial development, and the company's freight rates and services critically reviewed in the light of economic needs and shipper requirements.

The capital structure has been revamped so that annual

fixed charges on our mortgage obligations, which in 1935 amounted to $5,073,390, are now only $1,314,077.

The physical plant has been improved to the point where greater economy and expeditious operation is now possible. Since my coming to the property approximately 109 million dollars have been expended in improving the company's property and facilities.

When I came to the property, 70 per cent of our standard gauge freight equipment was over twenty years old. Today only 44 per cent of this equipment is over that age. Proportionately even greater gains have been made in our freight and passenger schedules.

Mr. Collins: Judge McCarthy, may I interrupt you a moment?, I'm sorry.

[fol. 25] Mr. Examiner, this is very interesting, and I am sure is quite correct, but for fear of not speaking timely I feel compelled to object to these recitals unless some relevancy to the Ogden gateway, to the issues in this case, are established. I can see no relevancy of these recitals to the issues which the Examiner stated.

Exam. Mullen: Well, the Examiner thinks it is relevant as background testimony.

Mr. Collins: All right.

Exam. Mullen: Go ahead, Mr. McCarthy.

The Witness: In 1935 our locomotives had an average tractive effort of only 49,574 pounds. Today the average tractive effort is 70,638 pounds—a gain of over 42 per cent.

The Rio Grande has moved rapidly toward dieselization and I believe today owns proportionately more of this type of equipment than any other western Class I railroad. Today over 70 per cent of our freight traffic is handled by diesel power. This compares with an average of 32 per cent for all Class I railroads.

During the same period since 1935, the Company's main line was virtually rebuilt. Four hundred and seventy-four bridges have been built or rebuilt, 531 repaired and some 215 eliminated. A total of 1,457 miles of rail have been laid—843 miles with new rail. Almost four million cross ties have been replaced with treated ties and heavy slag [fol. 26] ballast has been applied to 634 miles of track.

The capacity of our company's main line has been further increased through the construction of a second tunnel through the Continental Divide at Tennessee Pass, the installation of some 507 miles of Centralized Traffic Control and 186 additional miles of Automatic Block Signals, the building of more and longer passing tracks, and the reduction of grades and curvatures.

Safety and economy have been promoted through the construction of slide detector fences, widening of cuts, installation of track and flange oilers, purchase of off-track work equipment and the providing of a greatly improved communications system. The Rio Grande was the first U. S. railroad to receive a regular license to install and operate radio communication equipment on its trains.

Similar improvements have been made in the company's yard and terminal facilities with the view to expediting service and reducing costs. These have included extensive track changes, the construction of modern yard offices, the flood-lighting of yards, and the installation of pneumatic tube, radio and loudspeaker communication systems. Service and schedules have likewise benefited from an extensive motive power modernization program.

Our research laboratory is known throughout the world and many of its discoveries have added to the safety and [fol. 27] economy of rail transportation.

The effect of all this on the company's operating efficiency is evidenced in the fact that the Rio Grande has shown proportionately greater gains in recent years than either Class I or Western District carriers as a group in the number of gross ton miles it has produced per train hour operated. The record shows, moreover, that, notwithstanding the mountainous terrain, the company's freight trains in 1948 actually operated at higher average speeds than most lines.

Because of the improved physical conditions, and for other reasons that will be covered in the testimony for the complainant, the management of the complainant reached the conclusion that there is no justification for the failure and refusal of the defendants, including the Union Pacific, to maintain joint competitive rates via the route of the Rio Grande through the Ogden gateway; and, as a result of these considerations and conclusions, the complaint was

filed with the Interstate Commerce Commission on August 1, 1949.

However, prior to filing this complaint with the Commission, I conferred with Mr. Stoddard, president of the Union Pacific, regarding our necessity for the competitive joint rates here requested. On June 26th of this year, I went to Omaha and advised him that we had under consideration the filing of a complaint with the Commission, and asked him that he consider the issues involved and determine whether the Union Pacific was willing to satisfy the complaint and to publish competitive joint through rates [fol. 28] with the Rio Grande via Ogden, as described in the complaint.

After some discussion, it was decided that the traffic officials of the Union Pacific and the Rio Grande would confer. This conference took place on June 27th. On that date Mr. Hogue, our vice president, submitted copies of the proposed complaint to the officers of the Union Pacific.

After the Union Pacific officials had an opportunity to consider the complaint, they decided that there could be no agreement to publish joint rates via Ogden with the Denver and Rio Grande, and on July 16th of this year Mr. Stoddard came to Denver and so informed me.

In his refusal to consider publication of competitive joint rates, there was no offer or suggestion that any basis could be found on which this complaint might be adjusted and, as I have said before, it was therefore filed with this Commission on August 1st.

Mr. Quirk: I have no questions. You may examine the witness.

Cross-examination.

By Mr. Collins:

Q. Then, Judge McCarthy, I take it that you are personally familiar with the language of the complaint?

A. I have read the complaint, Mr. Collins.

Q. And did you authorize or direct that it be filed?

A. Yes, sir.

[fol. 29] Q. In your experience with the Denver & Salt Lake, I forgot what year you said you came with the Salt Lake line.

A. I came there in '34, in December of 1934.

Q. And did you not go through the reorganizations proceedings of the Denver and Rio Grande and personally participate actively in those proceedings?

A. I did, sir.

Q. You are familiar with it because of actual personal knowledge of the things that transpired affecting those two lines since 1934, I take it?

A. Yes, sir.

Q. And, in that capacity and your performance of your duties and your work in connection with the reorganization proceedings, are you not familiar with what we might, for some brevity, call the entire history of the Denver and Rio Grande, of the properties which now constitute the Denver and Rio Grande Western Railroad Company?

A. I am familiar with them since I have been there and know something about its other history, Mr. Collins.

Q. I suggest probably more so than any other individual at this time, if I may.

Now, I want to ask you some questions, Judge McCarthy, that go back a little way, and they have to do with your decision to file the complaint here; and I take it that the final decision to file the complaint was a result of considerable deliberation on the part of you and your board of directors and other officials of your line; is that correct? [fol. 30]

A. Yes, sir.

Q. May I ask, at this point, and before going on with these questions, whether you conferred with any other railroad presidents than Mr. Stoddard before finally deciding to file this complaint? I particularly have in mind, Judge, the lines connecting with the Union Pacific at Missouri City, Kansas City and Omaha, and so on.

A. Yes, I did confer with some presidents.

Q. And with what results?

A. I might state that I conferred with Mr. Budd, of the Burlington Railroad, in connection with the matter, and he was exceedingly sympathetic to what we are attempting to do and he later told me he could not come in with us because the Northern Pacific and Great Northern controlled his railroad and they did not concur with him.

Q. Was he the only one with whom you conferred?

A. I also conferred with Mr. Gurley and told him of our position, what we intended to do, and Mr. Gurley told me that his railroad—that is, it was their intention to stay neutral.

Q. Well, did you meet with any who made an offer of any kind, to use the term that you used in your concluding paragraph here, to join with you?

[fol. 31] A. I did not.

Q. Now, in your last paragraph of your statement——

A. Except, of course, the Short Line Association, which came in. They came in of their own volition and not by reason of any request from us.

Q. They join faster, Judge.

In your last paragraph you say that Mr. Stoddard made "no offer or suggestion that any ba-is could be found on which this complaint might be adjusted." I would like to inquire if you made any offer or suggestion to Mr. Stoddard yourself other than that you wanted the Ogden gateway, shall we say, "wide open"?

A. I don't recall making any other proposal. I might have stated that there were some grounds upon which we could get together. I don't recall that my statement was qualified. He and I had a very pleasant conversation which ended as I have indicated. I have no recollection of anything outside of what I have mentioned here.

Q. Well, I am sure that he feels the same way about your personal meeting, but what I am getting is that your position here is, is it not, simply that the Ogden gateway must be wide open or, at least, the Rio Grande wants it wide open for the same rates on all commodities as are in existence via the present routes?

A. That is right.

[fol. 32] Q. Now, in your meeting with Mr. Stoddard, did he not suggest to you the deferring of the filing of your complaint until these pending bills—the so-called through-route bills pending before Congress—had been acted upon?

A. No, sir, not that I have any recollection of.

Q. I see.

Now, Judge McCarthy, since you went to the Rio Grande as a trustee there have, of course, as is publicly known,

been many improvements, as you recited. The railroad certainly has taken on a better financial situation as well as physical improvements, as I understand the situation; but has it not been the policy since you became connected with the property, the Rio Grande, and a long time before, to try to develop so-called "bridge" traffic in order to enhance the revenues of the Rio Grande?

A. Yes, sir.

Q. And the filing of this complaint is, for lack of better language, another step in that direction, is it not?

A. Yes, that is one purpose of it.

Q. That is, from the standpoint of what I will say the treasury of the Rio Grande and the stockholders, that would be the purpose?

A. Yes, we hope to improve our condition if we can get these through rates.

Q. Insofar as the corporate management and the stock- [fol. 33] holders of the Rio Grande are concerned, that would really be the only immediate purpose to them, would it not?

A. Yes—that they would want to improve the financial condition of our railroad.

Q. Yes. That, of course, is apart from what you anticipate or what you have said would be some additional transportation conveniences that you would expect the public to derive?

A. That is right.

Q. Now, some years ago, Judge McCarthy, the Rio Grande had some 15 per cent of its revenues from so-called "bridge" traffic, did it not? Or do you recall? I refer back as far as 1923.

A. I think Mr. Hogue is going to cover that. Back many years ago it might have been that low.

Q. May I ask, then, in a little more general way: In your annual reports, copies of which the Union Pacific is pleased to receive as a courtesy, I notice, from year to year, that you speak of the increase in revenues from bridge traffic, and I would like to call your attention to a particular one of those reports. Here, for instance, on page 33 of your annual report for 1947 it is stated—and I take it that you are familiar with, or were familiar with, the state-

ments made in your annual reports, and I am quoting now on page 33—"The volume of Rio Grande's bridge traffic increased about 6 per cent, continuing the steady advance [fol. 34] in evidence for several successive years."

Now, that is, is it not, as planned by your management—that increase of bridge traffic?

A. We have been trying to build up our bridge traffic ever since I have been there, and have materially succeeded in doing so.

Q. You have materially succeeded?

A. Yes.

Q. To the point that, if I am correct in saying that your bridge traffic as far back as 1923 was about 15 per cent, it did go as high as more than 50 per cent during the war, did it not?

A. I think it went higher than that. As I recall, I think it was 60-some-odd per cent.

Mr. Quirk: This subject will be covered by Mr. Hogue, Mr. Examiner.

Mr. Collins: If Judge McCarthy doesn't mind me asking some more of these questions, I would like to go ahead with him.

Exam. Mullen. You may proceed, Mr. Collins.

By Mr. Collins:

Q. In the very interesting article concerning The Denver and Rio Grande in Fortune magazine of November, 1949, it is stated that 45 per cent of your traffic is bridge traffic?

A. I don't recall what it says.

Q. And 45 per cent—You are familiar with that article, aren't you?

[fol. 35] A. Yes, I read the article, but I don't recall what it stated in that regard. That might be an error regarding the 60 per cent.

Q. That is a little higher than I had heard of.

A. Maybe so. Mr. Hogue can give you those exact figures because I do not have them in my mind.

Q. Now, what has been the reason for pressing for the increase in bridge traffic over the Rio Grande?

A. The reason has been that, generally speaking, there is more money in it.

Q. More money than there is in traffic that you originate?

A. Originate, yes.

Q. Originate or——

A. We have been able to haul our own local traffic during these years, and, of course, have been aspiring to get bridge traffic.

Q. Has it not been the realization of the management of the Rio Grande, or at least their feeling, that they should devote their efforts to the solicitation of so-called bridge traffic rather than the development of local traffic along their line, along the D&RG line?

A. I think our desire is to keep our local traffic and develop our bridge traffic to the extent that we can.

Q. I notice that you refer to the fact—whether in your testimony or in some recent statement I saw from you, I don't recall how long ago—that you have now a director [fol. 36] of agricultural development, or something like that?

A. Yes.

Q. That is something new, is it not?

A. No. We had an agricultural man many years before I came to the property, and Mr. Fealy Young has been agricultural director for, I would say, 7 or 8 years—11 years. We had another man prior to him some years before, but he was not on the railroad when I came there. There had been a space when we had no agricultural man there.

Q. The increase, to which we have referred, in your bridge traffic, do you know what has been the source of that traffic?

A. I don't know that I understand you.

Q. The origin of it. Where did it come from? That is, just in a very general way.

A. All over; east and west. Our bridge traffic has increased, of course, on the Pacific coast and all the way from New York clear through to Chicago and all over our property—that is, wherever we have been soliciting.

Q. Your connection to the West to reach Oakland, California, is the Western Pacific, is it not?

A. Yes; we connect with the Southern Pacific at Ogden and the Western Pacific here.

Q. You do interchange traffic with the Southern Pacific, and, I suppose, to some extent with any other western roads over which the traffic may be routed?

[fol. 37] A. Yes, we connect here with your railroad going to Los Angeles and with the Western Pacific and Southern Pacific.

Q. In 1929, Judge McCarthy, the Interstate Commerce Commission had before it a proceeding entitled "Construction of Denver and Salt Lake Railroad Company." That had to do with the construction of the Dotsero cutoff. The then Denver and Ria Grande was making an appearance in that case, of course, in a rather large way, and I want to call your attention to a particular statement——

A. Just a moment. What petition was that? Who filed it?

Q. That was an application to the Commission by the Denver and Salt Lake for authority to construct the Dotsero cutoff.

Mr. Quirk: What was the date of that?

Mr. Collins: 1929, and the citation is 154 ICC page 51.

Mr. Quirk: That was before the witness was connected with either that property or the complainant here.

Mr. Collins: I realize what he said, Mr. Quirk.

By Mr. Collins:

Q. The Commission, in referring—of course all this is subject to check by your counsel or anyone else you direct by looking at the report—the Commission discussed the possible uses of the Dotsero cutoff and made the observation that freight, some more than half of the freight of Western Pacific eastbound, perishables in particular, were delivered to the Union Pacific at Salt Lake City, and if the cutoff was authorized and the Denver and Rio Grande [fol. 38] Western had trackage rights over it, then "this freight could be delivered to the new route" by way of the Dotsero cutoff.

Now, hasn't that, to your knowledge, developed to a very considerable extent—that is, the diversion of through traffic to the Rio Grande since you acquired, or the management acquired, rights over the Dotsero cutoff?

A. Well, I don't recall what happened to that particular petition there, Mr. Collins,——

Q. I should have added—excuse me for interrupting you—I should have added that the Commission authorized the construction subject to the condition that the Denver and Rio Grande have trackage rights over the cutoff.

A. Well, you see, the petition that was actually granted for the building of the Dotsero cutoff was later filed by the D&RG in 1932—'32 or '33.

Q. Yes, it came up again; I remember that.

A. It was on that petition that the Rio Grande was given the right to build the Dotsero cutoff, which was not completed until June, I think, of 1934.

Q. Yes, that's right. But I was speaking not so much as to who constructed the cutoff or the time of it, or the date of its construction, as to the effect. It is a fact, is it not, that the position that the position of the Denver and Rio Grande with respect to bridge traffic and transcontinental traffic has very greatly improved as a result, [fol. 39] partially at least, of the construction of the Dotsero cutoff?

A. I think so. Undoubtedly so, because it cuts off 175 miles.

Q. Yes.

A. Instead of going way around by Pueblo and up to Denver, you go through the Moffat Tunnel and cut off 175 miles between Denver and Salt Lake City.

Q. If I don't cause Mr. Quirk to faint, I would like to go even further back than I have with you. I would like to inquire of you if it isn't a fact that from the beginning—I am testing your lengthy knowledge of the history of the Rio Grande as against my rather hurried search of that history—isn't it a fact that from the beginning of moves to make the Rio Grande a part of a transcontinental route which took place in the early 1900's, according to the books I have consulted, efforts that have been made were to make the Rio Grande a so-called "California line?" I refer to

the time when it was decided to construct the Western Pacific and to work in the Missouri Pacific, the Rio Grande and the newly-constructed Western Pacific.

A. I think probably that was true, that in the early beginnings it was contemplated to— Of course the Rio Grande built the Western Pacific.

Q. Unhappily, supposition.

A. Yes— Well, I don't say that.

Q. Not any more, no.

[fol. 40] A. No. So that your general statement that they were attempting to get a western connection favorable to it undoubtedly occurred at that time. Of course you know that even in, I guess, 1900, somewhere in there, the Ogden gateway was opened.

Q. Yes.

A. 1906, I think.

Q. As late, on some commodities, as 1912, as your complaint says.

A. Yes.

Q. But the efforts were to make what you are now advertising—excuse me for saying "you"; I mean the management, or maybe your advertising department—what you are calling the direct central continental route.

A. I think they call it that.

Q. Yes. It is noticeably displayed on the bottom of each page in red ink.

A. Yes.

Q. I hope that doesn't portend anything.

A. Of course you probably know that we have a tremendous business with the Southern Pacific at Ogden.

Q. Yes, I so understand.

I would like to inquire of you whether or not you feel you are being deprived of what you consider to be a fair share of this traffic to and from the Oakland Bay country [fol. 41] —transcontinental traffic over this direct central transcontinental route that you are now operating.

A. I don't know that I understand you, Mr. Collins.

Exam. Mullen: Perhaps the reporter will read it again. I didn't understand it either.

Mr. Collins: Let me see if I can do better.

By Mr. Collins:

Q. Do you feel that you are failing to get a fair share of this transcontinental traffic to and from the California origins and destinations and the East?

A. Well, I think that we do fairly well. I hope that we might do better.

Q. I was encouraged somewhat to ask that because of your mentioning the *the* Southern Pacific, your interchanges with the Southern Pacific, which I understood are quite voluminous. It is then a matter which probably is within the breast of all railroad management, and that is to strive to increase the volume of the least expensive and best-paying traffic they can lay their hands on. Isn't that the very honorable position that you take?

A. I think we are all trying to improve our traffic situation.

Q. And revenues?

A. And revenues.

Q. Do you understand, from your knowledge of the history of the early days of the Rio Grande—and even down to, I will say, 3 or 4 years ago—do you understand that it [fol. 42] was ever contemplated that the Rio Grande should figure in routes to the Northwest—to Idaho and to eastern Oregon?

A. Would you read that to me?

(The question was read.)

The Witness: All I know is that they did figure in it for a good many years, and certainly it has been our hope and our thought that they ought to figure in it. We see no reason why we should be excluded from it at all.

By Mr. Collins:

Q. They figured in it, to continue using my awkward term, from the time that those rates described, mentioned in the complaint, were established in 1897 to the time they were cancelled in—the last of them in 1912.

The reason I ask the question is that I find nothing in the history of the formative or construction days——

Mr. Quirk: Mr. Examiner, it seems to me——

Mr. Collins:

Q. —that indicates there was any such thing in contemplation——

Exam. Mullen: Just a minute. Mr. Quirk has an objection.

Mr. Quirk: I object to that statement. Whether Mr. Collins could find it or not is not important. I found it.

Exam. Mullen: I took it Mr. Collins was explaining his question.

Mr. Collins, No, I was going to ask Judge McCarthy if he knew of any different situation or purpose of the early days. I mean the days of construction, and even the days [fol. 43] when the Goulds were making the plans to develop the Western Pacific.

The Witness: Well, I don't know what their intentions were during that time. I know that ever since I have been with the property I have been looking forward to the opening of the Ogden gateway and the publishing of through rates through there. At one time—I don't recall when—Mr. Harriman was a director of the DR&G.

By Mr. Collins:

Q. And Mr. Gould of the Union Pacific?

A. And Mr. Gould during the Union Pacific. I don't know what they had in mind during those days.

Q. Your hope, since you have been responsible for the management of the Rio Grande, to open the Ogden gateway, has been one of simply enhancing the position of the Rio Grande Railroad, hasn't it?

A. That is true—and the convenience to our shippers.

Q. Yes. Of course the convenience to the shippers would be of no value to the Rio Grande unless it collected revenue, would it?

A. That is right.

Q. Judge McCarthy, may I inquire—I don't want to annoy you with a lot of detailed questions unless you indicate to me some extent of the study that you yourself, or the attention that you yourself personally gave to the period of time leading up to the filing of this complaint; and I take it, from what you have just said a while ago, since

[fol. 44] you have wanted the Ogden gateway opened, that perhaps you have given a good bit of study to it—to the problem of opening it and your desire to have it opened.

A. Yes, sir.

Q. Will you tell me whether, in deciding to file the complaint in this case, you took into consideration the fact that the Union Pacific is the originating and terminating line for particularly the Idaho and eastern Oregon and southwestern Wyoming traffic and bears the expense of that service.

A. If we are originating traffic from Omaha west.

Q. Sir?

A. You are the originating traffic Omaha west, but not beyond there.

Q. No. Originating in Idaho, in the country I mentioned, in the Norothwest, and traffic terminating on the points on the line of the Union Pacific. In other words, eastbound traffic originating in the Northwest country local to the Union Pacific.

A. Oh.

Q. And westbound traffic—I don't know whether I said originating or terminating; I meant originating—westbound traffic terminating at points on the Union Pacific and that Northwest country.

A. I don't know whether you originate all of the traffic.

Q. No, I am not saying that we do. I am saying, as to [fol. 45] all of traffic that terminates in southern Idaho, no matter where it originates, that the Union Pacific necessarily is the terminating carrier.

A. Oh, yes; that is right.

Q. And as to traffic originating there, the Union Pacific is necessarily the originating carrier or gathering carriers.

A. That is right.

Q. Now, all I was inquiring was whether or not, in deciding to file the complaint, you took that feature into consideration.

A. Oh, yes.

Q. And did you take into consideration also the fact that the Union Pacific has some approximately 1400 miles of branch lines which it operates in Idaho?

A. I don't know how much we have there, but whatever

statement you would make on that I would accept. I don't know what your mileage is there.

Q. Well, actually, what I am trying to discover is the extent or depth of study you made of the problems involved. It is a matter of fact, the 1392 miles of branch lines in Idaho that the Union Pacific operates. You knew that the branch line mileage was large.

A. We certainly know that you cover Idaho, Mr. Collins. There is no doubt about that.

Q. Quite true. But did you know that more than half of our coverage is in branch lines?

[fol. 46] A. Well, I am sure you have quite a lot of branch lines there.

Q. Now, did you give consideration also to the fact that the mileage over routes by the Rio Grande between McCammon, Idaho—the point where the Omaha line of the Union Pacific and the Ogden line of the Union Pacific converge—to any destination point that you might pick out is longer by way of the Rio Grande by 33 miles to 219 miles than mileage by the existing routes?

Mr. Quirk: Mr. Examiner, I object to that. We are going farther than I think should be allowed. This witness did not cover that sort of statement. We have two witnesses, one witness in particular, who is going into distances, comparative distances and other matters of that kind, in a comprehensive manner. We are certainly taking up a lot of time to the satisfaction of Mr. Collins. He will have all that by other witnesses himself.

Mr. Collins: Mr. Examiner, Mr. Quirk must certainly have a crystal ball. I don't know what I am going to have. It has not been prepared.

Exam. Mullen: It seems it probably could be covered more directly by the other witnesses that Mr. Quirk mentioned.

Mr. Collins: Well, I want to find out——

Mr. Examiner, I have had a good bit of experience with the kind of so-called objections that Mr. Quirk makes: "Wait until we get to the next witness." And then the [fol. 47] next, the next and the next, and they don't come through. Judge McCarthy is trying to give me cooperative and fair answers.

Exam. Mullen: That is not quite so. We have a direct statement by Mr. Quirk that he will have witnesses here that will cover those points, Mr. Collins.

Mr. Collins: My question of Judge McCarthy is relevant, and I would like to pursue it, just in a general way.

Exam. Mullen: I know; it was a general question, and Mr. McCarthy may answer it to the extent of his knowledge.

The Witness: I think your 33 miles is shorter to Ogden, and of course less distance from Denver to Salt Lake. As to the distance over the cutoff, I do not know that mileage.

By Mr. Collins:

Q. I was not going to take you into details of distances with respect to particular routes. All I wanted to ask was whether you realized that if you succeeded in this complaint, then whatever traffic might be routed by way of the Rio Grande will be transported from origin points up in Idaho from 33 to more than 200 miles farther, or over that much more mileage, than if transported over the direct and existing routes.

A. Well, if your figures are correct, that is true; and it would not have made any difference, as far as I am concerned.

Q. I see.

Exam. Mullen: We will recess for 10 minutes.

(Short recess taken.)

[fol. 48] Exam. Mullen: We are ready to proceed, gentlemen. Mr. Collins.

By Mr. Collins:

Q. Judge McCarthy, are you familiar with the fact, as it appears in the Interstate Commerce Commission's reports—which I will recite at the appropriate time—that for many years the railroad that is now the Denver and Rio Grande Western have asked the Interstate Commerce Commission for authority to charge rates that were appreciably higher—as much as 30 per cent higher—than the rates of other lines in the general territory of the Rio Grande's location?

A. I don't know.

Q. You gave no consideration to that, then, in the filing of this complaint?

A. I don't know what you are talking about, Mr. Collins.

Q. Well, I would like to——

Mr. Quirk: Mr. Examiner, it does seem to me that Mr. Collins ought to be held somewhat closer than he is traveling to what this witness testified to on direct. He just can't take all the things that this railroad is interested in and cross examine this witness on it. There may be some others that he can.

Mr. Collins: I don't know what——

Exam. Mullen: I think there is some merit in that, Mr. Collins, as to this particular question that you have asked now. This witness stated he has no knowledge.

[fol. 49] Mr. Collins: Yes, I am willing to accept Judge McCarthy's statement that he had no knowledge.

By Mr. Collins:

Q. Do you have knowledge of the fact, also appearing in the Interstate Commerce Commission's reports, that the joint through rates over existing routes on principal commodities from Idaho—I have in mind particularly potatoes, onions, vegetables and those things—have been found by the Commission a number of times to be far below what they call maximum reasonable rates?

Mr. Quirk: That is another question——

Mr. Collins: Just a minute.

Mr. Quirk: I object.

Exam. Mullen: The sole question is whether he has given consideration.

Mr. Collins: I asked whether he was familiar with the fact.

The Witness: I am not.

By Mr. Collins:

Q. You are not?

A. No.

Q. So, consequently, you gave no consideration to that in the filing of this complaint?

A. No.

Q. Now, Judge McCarthy, I would like to go into a further and different matter, and we may save a lot of detailed questions if you will answer this question: Is it not a fact that on August 1, 1949, on which date the complaint in [fol. 50] this case was filed, that the Denver and Rio Grande Western Railroad immediately began what you might call an educational campaign among the shippers and the press in Utah, Colorado, Idaho, and finally extending up into Oregon in an endeavor to stimulate public interest and shipper interest in this complaint and its purposes?

A. Well, we had men representing us up in those districts, and I think that a pamphlet was put out evidencing some of the things that we thought the shippers might be interested in.

Q. I take it you were consulted, or at least approved that undertaking to give publicity to the filing of the complaint and its purposes?

A. Well, I imagine I had something to do with it. I don't know just what you are talking about.

Mr. Quirk: I submit it is irrelevant and immaterial to this issue, anyway.

Exam. Mullen: It strikes me so, Mr. Collins. I don't understand the pertinency of it.

Mr. Collins: I am not quite sure it is not.

I will tell you the purpose: Let Judge McCarthy say whether or not this—Have you seen this document? Will you pass it to him?

The Witness: I don't know what is inside of it.

Mr. Quirk: The question is: Have you seen them?

The Witness: I don't know whether I have or not, Mr. [fol. 51] Collins. This first news item here, I might have seen it, but I don't recall.

By Mr. Collins:

Q. Were you aware of the fact that this packet was being distributed to the press and the public?

A. No, sir. I don't recall that it was.

Q. All right. May I have that back, please?

You know, of course, as you just said——

Mr. Quirk: Just a minute, Mr. Examiner. I am going to object to this line of inquiry because it is irrelevant and

immaterial. Moreover, if you allow this line of inquiry we will have to go into it. The Union Pacific has not been a bit modest in educating the public, if that is what they call it, and they have been very, very active in it.

Exam. Mullen: Just a moment. What is your objection?

Mr. Quirk: I am giving the reason for my objection.

Mr. Collins: You are making a little speech there.

Exam. Mullen: Just a moment, Mr. Collins. What is the purpose of this inquiry?

Mr. Collins: The purpose, Mr. Examiner, is this: As this material shows—and, as Judge McCarthy indicated, this contact was made, whether you call it an educational program or a propaganda program—this shows that this was done immediately upon the filing of the complaint, and I say that any inquiry with respect thereto is relevant because, since it is the obligation of the complainant here to [fol. 52] prove actual public demand or need for the so-called relief sought in this complaint, if there had been such public demand or need for the opening of the Ogden gateway, as it is termed, then there would have been no necessity whatever for a campaign by the Rio Grande among the shippers local to the Union Pacific Railroad to try to stir up interest on their part in the Rio Grande's proposal to take part of the Union Pacific's traffic.

Exam. Mullen: What is your specific objection to that, Mr. Quirk?

Mr. Quirk: The objection is this: It isn't unusual for both sides of an inquiry of this importance to attempt to persuade the public to support them. That is a very common practice, and one well known to the Commission.

My objection is, Mr. Examiner, that if you allow Mr. Collins to go into this we will have to go into it, and we will show, if we must, how they have continued to neutralize our efforts, and not always with the most gentle methods.

Mr. Collins: I am frank to admit that we have done just What Mr. Quirk has said. We have attempted to neutralize the campaign that has been made among the local shippers, shippers local to the Union Pacific Railroad, in an effort to incite them against the Union Pacific Railroad.

He has not reached my point yet in his objection. Can I make it any clearer, Mr. Examiner? Or do I need to?

[fol. 53] Exam. Mullen: I am not convinced yet, Mr. Collins, that this particular line of inquiry is relevant. After all, we want to get the actual facts concerning the operations and the need and desirability for these joint through rates.

Mr. Collins: Mr. Examiner, they must prove a bona fide actual public need or demand for routes by the Rio Grande Railroad as sought in the complaint or else they have failed.

Mr. Quirk: If this is the time for argument, I want to ask——

Exam. Mullen: Just a moment. Let me take care of this, Mr. Quirk. I assume that is an obligation which the defendants recognize.

Mr. Quirk: They don't recognize it in the form Mr. Collins takes.

Exam. Mullen: Just a moment, please. This particular line of inquiry concerning what you call propaganda among shippers, in my opinion, is not relevant. I will sustain the objection.

Mr. Collins: You didn't let me finish, and neither did Mr. Quirk. I don't want to argue with your ruling, but I do insist that you reconsider it after I have finished stating again and tried to make clear to you my position. I think your ruling would be different if I had been permitted to finish.

Exam. Mullen: I assumed, Mr. Collins, you had finished. If you desire, you may restate your position.

[fol. 54] Mr. Collins: I stated to you that, in my judgment, it is their obligation to prove, it is the complainant's obligation or burden to prove an actual public need and those things which section 15(3) of the Act specify as justifying the Commission's compelling of joint through rates.

Now, to restate it, if there had been such a public need prior to the filing of this complaint on August 1, which I deny—that is, I deny there was a public need at that time—and if there had been there would have been no need to go into this publicity campaign that the Rio Grande entered into concurrently with the filing of the complaint. So my ultimate point is, in directing these questions to Judge McCarthy, that, instead of there being an actual bona fide public need or demand for the through routes and joint

rates that the complainant seeks to establish, there is an attempt to make it appear on this record by these efforts of the DRG&W that there is such a public demand through a simulated and artificial method of theirs which they hope to put in the record in lieu of an actually developed public demand and need which might, if it had existed, have justified the filing of the complaint.

It is a difference between an actual public need and one that they hoped to demonstrate to the Commission might be present through their agitation among the shippers local to the Union Pacific Railroad, and I think if Judge McCarthy felt like admitting to me that they had no particu-
[fol. 55] lar reason, except their own, to file this complaint, and that this information or educational program was engaged in for the purpose of trying to stimulate an interest that did not exist among the public and the shippers, that would end it.

Exam. Mullen: I so understood that was your position, and, as I stated the first time, I will adhere to the ruling. However, if there are witnesses later produced of the kind you have mentioned, and to which you want to direct that type of question, you are free to do so.

Mr. Quirk: Could I make one statement, Mr. Examiner?

Exam. Mullen: Yes, Mr. Quirk.

Mr. Quirk: I don't want to be bound by Mr. Collins' conception of what has to be proven in this kind of a case. I don't expect to convince him, but I do have some hope of convincing the Commission.

Exam. Mullen: Obviously, Mr. Quirk, you are not bound by what Mr. Collins says.

Mr. Quirk: I am glad to hear that.

Exam. Mullen: Go ahead. Proceed, Mr. Collins.

Mr. Collins: May I have just a moment, Mr. Examiner?

Exam. Mullen: Yes.

Mr. Collins: That is all from you, Judge. Thank you very much.

Examiner Mullen: Anything on redirect?

[fol. 56] Redirect examination.

By Mr. Quirk:

Q. Judge, Mr. Collins made some reference to the interest of the Rio Grande as it existed 25 or 30 years ago or

more in California traffic, and of the Western Pacific. Do you recall, Judge, at the time the old Rio Grande was inspired to build the Western Pacific, that the Union Pacific controlled the Southern Pacific?

A. I so understood.

Q. And that the Supreme Court of the United States, in December 1912, required the Union Pacific to divest itself of the control of the Southern Pacific?

A. I understood so.

Q. That is in 226 U. S. 61, United States versus the Union Pacific.

Now, there was also reference to the fact that in from 1897 to about 1912, or 1906—and I think some of the tariffs were cancelled in 1915—there were a line of joint rates competitive with other routes via the Rio Grande between the territory here involved and the territory served by the Oregon Short Line and the Oregon-Washington Railway and Navigation Company. You recall that, don't you?

A. Yes.

Q. Now, at the time those joint rates were in effect, during most of the time, isn't it a fact that the Oregon Short Line and the Oregon-Washington Railway and Navigation [fol. 57] Company were operated independently of the Union Pacific?

A. I understand so.

Mr. Collins: Excuse me. I object, unless Judge McCarthy can say positively he has positive knowledge of this.

The Witness: I haven't positive knowledge of it. I don't know whether or not the Union Pacific had some contingent interest somewheres or not, but during that time I had understood it was an independent line.

By Mr. Quirk:

Q. Under separate receivership

A. Both of those railroads went into receivership.

Mr. Collins: Mr. Examiner, so as to avoid any confusion in the facts of the situation we are going to show you, in our part of this case, that the Union Pacific Railroad controlled all of these lines as far back as 1878.

The Witness: That might be so. I thought they were independent during that period, Mr. Collins.

Mr. Quirk: I think it will not be too difficult to show they had separate receiverships during the period we are talking about; and then the receivers acted independently, established these rates. And when the end of that receivership came and the Union Pacific got in the seat again, it cancelled the rates.

Exam. Mullen: In view of Mr. Collins' statement as to putting in some direct evidence on that, I think this particular line of inquiry might cease.

Any further questions?

[fol. 58] By Mr. Quirk:

Q. Judge McCarthy, is it unusual for railroads to have branch lines?

Exam. Mullen: That needn't be answered.

Mr. Quirk: How is that?

Exam. Mullen: That needn't be answered. I think we are wasting a little time here, Mr. Quirk.

Mr. Quirk: I thought we were when he was talking about it, but he said the Union Pacific had 1400 branches up there.

Mr. Collins: I did not.

Mr. Quirk: 1400 miles, I mean.

Mr. Collins: Correct.

Exam. Mullen: Mr. Collins will establish whether that is true or not.

By Mr. Quirk:

Q. In all events, the Denver & Rio Grande doesn't have any branches, does it?

A. Not many—Not too many.

Mr. Quirk: I believe that is all, Judge.

Exam. Mullen: That is all, sir.

Thank you.

Mr. Collins: That is all.

(Witness excused.)

Mr. Quirk: I will call Mr. F. C. Hogue.

[fol. 59] F. C. Hogue was sworn and testified as follows:

Direct examination.

Exam. Mullen: Are you ready to proceed?
Mr. Quirk: Has the witness been sworn?
Exam. Mullen: Yes.

By Mr. Quirk:

Q. Mr. Hogue, you have a prepared statement. You have put your testimony in statement form?
A. I have.
Q. Is your business address 1531 Stout Street, Denver, Colorado?
A. That is correct.
Q. Proceed.
A. My name is F. C. Hogue. I am vice president in charge of traffic of The Denver and Rio Grande Western Railroad Company, with headquarters at 1531 Stout Street, Denver, Colorado.

I have been in its employ more than forty years, of which the first twelve years were in the operating department, and the past 28 years in the traffic department. I have occupied the position of vice president since April 11, 1947, and for nearly seven years prior to that date I was general traffic manager.

Q. Have you prepared an exhibit consisting of 7 pages?
A. I have.

Mr. Quirk: I would like to offer that for identification at this time, Mr. Examiner, as Complainant's Exhibit 1.
[fol. 60] Exam. Mullen: It will be so marked Exhibit No. 1.
(Complainant's Exhibit No. 1, Witness Hogue, marked for identification.)

The Witness: The original Denver and Rio Grande Railway Company, which is today's the Denver and Rio Grande Western Railroad Company, and hereinafter referred to as the Rio Grande, was incorporated October 27, 1870. Its standard gauge main line between Denver and Ogden via Pueblo, the Royal Gorge, and Tennessee Pass was opened to traffic November 14, 1890, and its shorter main line between Denver and Ogden via the Moffat Tunnel and the Dotsero Cutoff was opened to traffic June 15, 1934.

Page 1 of my exhibit shows a map of the Rio Grande as it exists today, with the distances between its eastern and western terminals indicated thereon. The original line over Tennessee Pass provides adequate and efficient service on traffic originating at, destined to, or interchanged with connecting lines at Pueblo, Colorado, and the Moffat Tunnel route provides adequate and efficient service on traffic originating at, destined to, or interchanged with connecting lines at Denver, Colorado.

Prior to the opening of the Moffat Tunnel route on June 15, 1934, the Rio Grande's line between Denver and Ogden via Pueblo, the Royal Gorge, and Tennessee Pass, was 782 miles in length, and its circuity was such that comparatively [fol. 61] little through traffic originating at, destined to, or interchanged with connecting lines at Denver, other than non-perishable freight, could be attracted to it. Thus until June 15, 1934, the Pueblo gateway afforded the only interchange point via which through traffic service comparable to that of other carriers could be maintained. Since that date, and because of the opening of the Moffat Tunnel route, both the Pueblo and Denver gateways enjoy a service parity.

Page 2 of my exhibit shows in detail the Rio Grande's tonnage and gross freight revenue from originated traffic, and on that received from connecting lines, for the 25-year period 1924-1948, inclusive. As to tonnage, it will be noted that in 1924, which is the first line, the Rio Grande originated 76.83 per cent of its tonnage, with 41.38 per cent thereof terminating on its line and 35.45 per cent being delivered connecting lines. In 1948, the bottom line, the Rio Grande originated but 47.66 per cent of its tonnage, with 17.90 per cent thereof terminating on its line and 29.76 per cent being delivered connecting lines.

As to gross freight revenue, it will be noted that in 1924 the Rio Grande received 66.29 per cent of its gross freight revenue from originated traffic, with 36.11 per cent thereof terminating on its line and 30.18 per cent being delivered connecting lines. In 1948 the Rio Grande received but 34.66 per cent of its gross freight revenue from originated [fol. 62] traffic, with 12.01 per cent thereof terminating on its line and 17.90 per cent being delivered connecting lines. Or, stated another way, the Rio Grande received but 33.71

per cent of its gross freight revenue or traffic from connecting lines in 1924, with 17.43 percent thereof terminating on its line and 16.28 per cent being delivered other connecting lines. In 1948 the Rio Grande received 65.34 per cent of its gross freight revenue on traffic from connecting lines, with 21.80 per cent thereof terminating on its line and 43.54 per cent being delivered other connecting lines.

Page 3 of my exhibit shows in detail the tonnage interchanged beteween the Rio Grande and its principal eastern and western connections for the 25-year period 1924 to 1948, inclusive. It indicates the extent of the Rio Grande's increased interchanged traffic with the Chicago, Burlington & Quincy Railroad, and the Chicago, Rock Island and Pacific Railroad Company at Denver as a result of the opening of the Moffat Tunnel route on June 15, 1934. It also indicates the Pueblo interchange with the Missouri Pacific Railroad has continued to show substantial increases since June 15, 1934. The 1948 interchange with the Union Pacific, as shown on the bottom line, reveals the Rio Grande delivered the Union Pacific 633,524 tons at Denver for which it received but 272,268 tons in return. At Utah junctions the Rio Grande delivered the Union Pacific 1,693,355 tons for [fol. 63] which it received but 1,086,182 tons in return, but this return traffic included 874,875 tons of ore on which the rate was not otherwise applicable. At both Denver and Utah junctions the Rio Grande delivered the Union Pacific a total of 968,429 more tons than it received in return.

Both pages 2 and 3 of my exhibit illustrate the changes in the character of the Rio Grande's freight traffic during the past 25 years. From a local railroad deriving its principal tonnage and revenue from freight traffic originating on its own line in 1924, it has become a transcontinental carrier deriving its principal tonnage and revenue from traffic delivered it by connecting lines. Few, if any, other Class I railroads have experienced such a change in the kind and character of their freight traffic during a similar period. Contributing to the decline in local traffic was the growing scarcity of Colorado non-ferrous ores, which closed Colorado smelters one by one. Today only one smelter, that of the American Smelting and Refining Company at Leadville, is in operation in the entire state.

The introduction of natural gas into our territory also caused a gradual decline in the Rio Grande's originated coal tonnage. For example, 4,379,249 tons were originated in 1924, and only 3,262,976 tons in 1946. Originated coke tonnage as a by-product of coal also declined from 278,043 tons in 1924 to 87,272 tons in 1946. Lumber and its products [fol. 64] have likewise declined as the timber has been cut and shipped to market. Many sawmills have been abandoned and only a comparatively few remain. For example, 86,608 tons of forest products were originated in 1924, and only 56,707 tons in 1946. As to originated coal, coke, and forest products tonnage, I have compared 1924 with 1946 rather than with 1948 for the reason that our having absorbed the Denver and Salt Lake Railway Company on April 11, 1947, distorted the 1948 figures for comparative purposes on these particular commodities.

With the decline experienced in the originated commodities named, plus a heavy tonnage loss of untold volume to other forms of transportation in the states served by the Rio Grande, we are forced to turn our thoughts and efforts to main line through freight traffic. In no other way could we have survived and continued to render rail transportation service to those people of Colorado, Utah and New Mexico who are reached only by the Rio Grande. Another witness will testify as to the expeditures made to change the Rio Grande's physical status from a local to a transcontinental carrier.

In connection with through freight traffic, it should be stated that the Rio Grande first became a party to the guaranteed eastbound freight train schedules on California perishable traffic via Western Pacific-Rio Grande-Missouri Pacific through the Pueblo gateway in 1924, and later this guar- [fol. 65] antee was extended via Southern Pacific-Rio Grande-Missouri Pacific. With the opening of the Dotsero cutoff on June 15, 1934, the same guaranteed schedule was made effective via the Denver gateway. During 1924 the Rio Grande handled 2,305 carloads of this important California perishable traffic, and in 1948 handled 15,649 carloads.

Another illustration might well be our participation in westbound freight forwarder traffic. In 1935, the first full

year of operation after opening the Dotsero cutoff route, we handled but 593 carloads, while in 1948 we handled 6,758 carloads. This forwarder traffic largely moves through the Denver gateway, and without the Moffat Tunnel route and the shortest line of railroad between Denver and Salt Lake City it could not have been attracted to our line.

This record of eastbound California perishable and westbound forwarder traffic is related only for the purpose of indicating capacity and ability to handle on competitive schedules.

With the transition of the Rio Grande to a transcontinental carrier, its twelve off-line traffic agencies were augmented by the establishment of eleven additional agencies at Atlanta, Georgia; Boston, Massachusetts; Cleveland, Ohio; Dallas, Texas; Eugene, Oregon; Fresno, California; Minneapolis, Minnesota; Reno, Nevada; Sacramento, California; Seattle, Washington; and Washington, D. C., and our traffic organization further strengthened by [fol. 66] the appointment of additional supervisory personnel.

The Rio Grande's ability to handle freight traffic was also demonstrated during the recent war years. Numerous diversion orders involving the Ogden gateway were issued by the Interstate Commerce Commission, and by W. F. Kirk, its agent. Our records indicate that:

Under ICC Service Order No. 94, effective November 2, 1942, and canceled August 17, 1945, the Rio Grande diverted 7,943 carloads destined points in Oregon and Washington via Western Pacific-Great Northern to the Union Pacific at Ogden and Salt Lake City.

Under ICC Service Order No. 98, effective November 28, 1942, and canceled August 17, 1945, the Rio Grande diverted 8,491 carloads destined points in Oregon and Washington via Southern Pacific to the Union Pacific at Ogden and Salt Lake City.

Under Kirk's Order No. 117, effective January 10, 1944, and canceled April 15, 1945, the Rio Grande diverted 1,804 carloads destined points in Oregon and Washington to the Union Pacific at Ogden and Salt Lake City.

Under Kirk's Order No. 242, effective May 12, 1945, and canceled September 5, 1945, the Rio Grande diverted 262

carloads destined points in Oregon and Washington to the Union Pacific at Ogden and Salt Lake City.

Under Kirk's Order No. 246, effective May 16, 1945, and [fol. 67] canceled August 18, 1945, the Rio Grande diverted 586 carloads destined points in Oregon and Washington to the Union Pacific at Ogden and Salt Lake City.

In addition to traffic diverted to the Union Pacific at Ogden and Salt Lake City during the war years and under appropriate orders referred to, many combination special trains of from 30 to 50 cars, consisting of troops on passenger transportation, and military supplies in freight cars on freight billing, from eastern and southern origins were initially routed and moved via Rio Grande-Ogden-Union Pacific. Examples:

Special train moving as Main 7370, consisting of 24 cars military supplies and six passenger cars, from Fort Sill, Oklahoma, December 18, 1941, to Fort Lewis, Washington, via SLSF-AT&SF-Rio Grande-Ogden-Union Pacific.

Special train moving as Main 3529, consisting of 50 cars military supplies and an unknown number of troops, from Camp Claiborne, Louisiana, February 22, 1942, to Fort Lewis, Washington, via MP-L&A-KCS-CRI&P-Rio Grande-Ogden-Union Pacific.

Special train moving as Main 3534, consisting of 50 cars military supplies and an unknown number of troops, from Camp Claiborne, Louisiana, February 22, 1942, to Fort Lewis, Washington, via MP-L&A-KCS-CRI&P-Rio Grande-Ogden-Union Pacific.

[fol. 68] Special train moving as Main 3537, consisting of 50 cars military supplies and an unknown number of troops, from Camp Claiborne, Louisiana, February 22, 1942, to Fort Lewis, Washington, via MP-L&A-KCS-CRI&P-Rio Grande-Ogden-Union Pacific.

Interline settlement sheets indicate the Government received the advantage of rates applicable only via Union Pacific long haul. Satisfactory divisions were negotiated with the Union Pacific, and no dispute exists.

We also have record of 524 carloads of war material handled into Utah via the Rio Grande during the period March 12, 1942, to May 31, 1945, and intended for storage at Ogden or Clearfield, Utah, but which were diverted to the Pacific

Northwest via Union Pacific from Salt Lake City or Ogden without being unloaded into these storage depots. Interline settlement sheets indicate the Government received the advantage of rates applicable only via Union Pacific long haul. Satisfactory divisions were also negotiated with the Union Pacific for application on this traffic and no dispute exists.

Attention is also directed to agent King's ICC Service Orders Nos. 50, 51 and 52, issued during February, 1949, when storms and blizzards blocked the Union Pacific's main line. Under these orders we have a record of 4,208 carloads of freight being diverted to the Rio Grande between Denver, Colorado, on the one hand, and Utah junctions with the [fol. 69] Union Pacific, on the other. 2,814 of these carloads moved on rates which were applicable via the Rio Grande, but the balance of 1,394 carloads originated at or were destined to Union Pacific points north of Ogden on which competitive through rates were not applicable in connection with the Rio Grande. Under the orders referred to the shipper properly paid only the going rates applicable via Union Pacific, but in some instances the division thereof between the two lines remains in dispute.

Arrangements were also perfected during the February storm period by which 210 carloads of express and 276 carloads of United States mail were diverted from the Union Pacific to the Rio Grande and handled by it between Denver and Salt Lake City. In addition, 44 Union Pacific passenger trains consisting of from ten to sixteen cars each were detoured via the Rio Grande between Denver and Salt Lake City. Another witness will testify in greater detail concerning our handling of the diverted and detoured traffic described.

During the past 28 years in my various traffic department assignments, including seven years as assistant traffic manager at Chicago, it has been my responsibility to contact hundreds of shippers and hundreds of shippers have contacted me in regard to their inability to use the Rio Grande at equal rates on freight traffic to or from Union Pacific territory north of Ogden. Some instances involved a sell- [fol. 70] ing problem for shippers who desired to use certain transit arrangements along the Rio Grande. For example, competitive through rates on traffic originating at

Missouri River or east thereof and destined to the Union Pacific's closed door territory north of Ogden do not apply via Pueblo, Colorado, with a population of seventy-five thousand, over any route or combination of routes. This fact is overlooked from time to time by certain shippers who bill cars to partly unload at Pueblo, which results in higher charges at combination rates.

One firm of national prominence, operating ten retail stores in Southern Colorado and Northern New Mexico, could effect a material saving in their freight costs on cars shipped to the closed door territory if they could be routed through Pueblo at equal rates and partly unloaded at that point.

Mr. Collins: Mr. Examiner, I object to this statement in line 3 of the last paragraph beginning on page 7, "the hundreds of shippers" and sweeping statements of that sort, unless Mr. Hogue is prepared to identify the shippers.

Mr. Quirk: I think it is relevant and competent for the witness to tell of his actual experience as vice president and in other positions in dealing with shippers.

Exam. Mullen: I think this witness is qualified to testify that way, Mr. Collins. This is his own personal experience with the shippers. You may proceed, Mr. Hogue.

[fol. 71] The Witness: On carload shipments delivered to the Union Pacific at Kansas City or Omaha, on which they receive the long haul to points in the closed door territory north of Ogden, they permit an out-of-line haul via Denver for partial unloading at that point at the through rate. The nationwide concern we referred to, or any other consignee taking advantage of partial unloading at Denver of merchandise intended for southern Colorado, or northern New Mexico, is then put to the additional freight charge for reshipping 119 miles farther. If cars could be partially unloaded at Pueblo at competitive rates, the reshipping expense and the transit time of the firm referred to, as well as that of any other consignee, would be materially lessened.

Other instances coming to my attention involved the possibility of a diversion to the closed door territory being required after arrival at a destination on the Rio Grande, and still others involved shipments which had already moved via the Rio Grande on which combination rates over

Ogden had been assessed. For example, page 4 of my exhibit covers 39 eastbound carloads from the closed door territory north of Ogden which actually moved via Union Pacific-Ogden or Salt Lake City thence Rio Grande to their destination during the calendar year of 1948. 36 of the 39 carloads originated on the Union Pacific for which that carrier issued bills of lading for through carriage to desti- [fol. 72] nation via the Rio Grande. The other 3 carloads were covered by bills of lading issued by connections of the Union Pacific, and routed via Union Pacific-Rio Grande. Competitive through rates not being applicable, shippers were penalized to the extent indicated on this statement, although 9 carloads required partial unloading at points on the Rio Grande.

By Mr. Quirk:

Q. Will you give the range of the amount of penalties, Mr. Hogue?

A. The last column, Mr. Counsel.

Q. But I would like to have you give the range right here.

A. The lowest penalty that I observe is $34, on line 21—Pardon me. The lowest penalty I observe is $29.75 on line 16. The highest penalty is $866.69 on line 31.

Mr. Collins: Mr. Examiner, for clarification, may I ask Mr. Hogue if what he refers to as a "penalty" is not just the difference between the combination rates and the through rates?

The Witness: The penalty charges are the difference between through rates applicable for only via Union Pacific and the combination charges that must of necessity be assessed when the business is interchanged between your line and ours at Ogden, destined to these points.

Mr. Collins: Thank you.

By Mr. Quirk:

Q. By that you mean, I suppose——

Mr. Collins: He has answered sufficiently for my purposes.

Mr. Quirk: He has not answered sufficiently for me.

[fol. 73] Exam. Mullen: What is your question?

By Mr. Quirk:

Q. My question is: By that statement you mean, Mr. Hogue, that this car that had the $866 charge, that you called a penalty charge, cost that shipper $866 more than he would have paid if it had moved on the joint rate via the Union Pacific?

A. That particular car, as stated, moved UP-Salt Lake-DRG&W in a combination which is $866.69 higher than the charge would have been had the car moved via the Union Pacific's long haul to Denver, thence the Rio Grande to destination.

Q. All right. Proceed.

A. Page 5 of my exhibit covers 17 westbound carloads which actually moved via Rio Grande-Salt Lake City or Ogden, thence Union Pacific to the closed door territory during the calendar year of 1949. Competitive through rates not being applicable, shippers were penalized to the extent of the Salt Lake City-Ogden combination, although 3 carloads required partial unloading at points on the Rio Grande.

Since page 5 was prepared, two additional carloads have come to my attention which were CRI&P 64136 shipped from Quincy, Illinois, April 29, 1948, destined Portland, Oregon, and routed Wabash-Missouri Pacific-Rio Grande-Salt Lake City-Union Pacific, resulting in additional charges of $637.20, and Reading 24221 shipped from Toledo, Ohio, October 24, 1948, destined Boise, Idaho, and routed NYC-[fol. 74] CB&Q-Rio Grande-Salt Lake City-Union Pacific, resulting in additional charges of $1,278.32. These two carloads came to my attention through our divisions department only last week, and it is probable there were other carloads of which we are presently uninformed.

Page 6 of my exhibit shows 22 westbound carloads routed Rio Grande-Union Pacific to the closed door territory which came to my attention and were held temporarily at Denver or Pueblo during 1948 because competitive through rates were not applicable via the Ogden gateway, and until disposition or reroute instructions could be obtained from

shipper or originating carrier. This statement indicates disposition which was made of each of these 22 carloads.

Pages 4, 5 and 6 of my exhibit all reveal that many shippers, large and small, and many railroads, assume a through route exists at competitive freight rates via Rio Grande-Ogden-Union Pacific on westbound traffic, and via Union Pacific-Ogden-Rio Grande on eastbound traffic. I selected the year 1948 for pages 4, 5 and 6 of my exhibit as it was the last full calendar year prior to this proceeding. I desire to state, however, that the same problems prevailed to about the same extent in prior years, and have continued thus far in 1949.

Page 7 of my exhibit shows the existence of a freight car interchange between the Rio Grande and Union Pacific railroads at Ogden, Utah, by detailing the number of loads and [fol. 75] empties delivered each line by the other at that point during the 5-year period 1944 to 1948, inclusive.

By Mr. Quirk:

Q. Have you prepared an additional map, Mr. Hogue?
A. I have.
Q. You have caused that to be prepared?
A. Yes.

Mr. Quirk: We offer that for identification as Complainant's Exhibit No. 2.

Exam. Mullen: It will be so marked.

(Complainant's Exhibit No. 2, Witness Hogue, marked for identification.)

By Mr. Quirk:

Q. Does that exhibit require any explanation or comment from you? If so, make it.

A. This is a reproduction of a map that we prepared to show the situation covered by the complaint in a graphic manner. The hatched lines in the territory north of Ogden, and in Utah common point territory, as far south as Provo and Payson, indicate that that is all within what we term the "closed door" territory.

As to the hatched lines from Denver south to Trinidad and west as far as Kansas City, those points are all located

in what we commonly refer to as Colorado common point territory. Traffic originating in that Colorado common point territory, or destined to it, can generally move only via the Union Pacific through Denver in order to enjoy the lowest competitive rate.

[fol. 76] Mr. Collins: Pardon me. You mean to or from this other hatched-line location in the Northwest, do you not?

The Witness: Between the Colorado common point territory, Mr. Collins, on the one hand, and the closed door territory, on the other; yes, sir.

I think otherwise the map is self-explanatory.

Mr. Quirk: You may examine the witness.

Mr. Collins: Mr. Examiner, I wish to indulge your sympathy, if I may. I would request that we adjourn or recess for lunch and have some relief from this Florida atmosphere we are in here, and let me decide whether I want to ask Mr. Hogue any questions.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

We will recess until 2 o'clock.

(Whereupon, at 12:20 p. m. the hearing was recessed until 2 o'clock p. m. the same day.)

[fol. 77] Afternoon Session, 2:00 p. m.

Exam. Mullen: We are ready to proceed, gentlemen.

In order to remove any misunderstanding, I desire to say that all the petitions for leave to intervene that were offered this morning have been received and granted.

I would like to inquire if there is any representative here of the Brotherhood of Railway and Steamship Clerks?

Mr. Greene: I believe they are included in my list. Yes, they are.

Exam. Mullen: That is included in the petition you filed this morning?

Mr. Greene: Yes.

Exam. Mullen: All right. You may proceed, Mr. Collins.

Mr. Collins: We have no cross examination of Mr. Hogue —I mean, I do not have, for the Union Pacific.

Exam. Mullen: Does anyone desire to cross examine Mr. Hogue on his testimony this morning?

Mr. Torinus: Mr. Examiner, I have one or two questions at this time. Possibly these questions might be directed at counsel rather than the witness. I am speaking on behalf of the defendants other than the Union Pacific. I would like to know first with respect to the traffic which originates or terminates in this so-called closed door territory shown on Exhibit 2, whether the complainant is seeking any relief with respect to traffic that is neither originated nor terminated [fol. 78] by the Union Pacific.

F. C. Hogue resumed the stand and testified further as follows:

Cross examination.

By Mr. Torinus:

Q. Can you answer that, Mr. Witness?

A. I think our complaint answers that question.

Q. What is the answer?

A. It defines the territory to which we seek joint competitive rates to the territory and from the territory.

Q. I understand what the territory is. What I would like to know is whether or not you are seeking joint rates with respect to traffic which is not originated or terminated by the Union Pacific Railroad.

Mr. Quirk: I can answer that. We are seeking precisely what the complaint seeks, to the extent that any of the defendants participating with the Union Pacific, whether they originate the traffic or they don't, and we are eliminated from the participation of joint rates on a competitive basis with the Union Pacific, and so forth. That is what we are seeking.

Now, the answer to your question, as you put it to Mr. Hogue, yes, we are seeking more than you suggest. In other words, this case cannot be determined on the proposition of traffic originating and terminating on the Union

Pacific, because the Union Pacific participates in other traffic which they have a right to participate in.

[fol. 79] Mr. Torinus: Then is your complaint confined to traffic with respect to which the defendants, other than the Union Pacific, participate in joint rates with the Union Pacific via Ogden?

Mr. Quirk: Yes, if the other railroads participate with the Union Pacific on competitive rates, they are defendants, and we expect to participate with them wherever they participate with the Union Pacific.

Mr. Torinus: Then, as I understand it, this is simply so that the defendants other than the Union Pacific, particularly the Great Northern, whom I represent, may understand precisely what the issues are, you are seeking competitive joint rates with respect to traffic handled by defendants other than the Union Pacific to the extent, and to the extent only, that those defendants, other than the Union Pacific, participate in joint rates with the Union Pacific on the traffic described in the complaint via Ogden, is that correct?

Mr. Quirk: That is my understanding of it.

Mr. Torinus: I have no further questions.

Exam. Mullen: Any further questions of this witness? That appears to be all.

The Witness: Thank you.

(Witness excused.)

Mr. Quirk: I call Mr. Earley.

[fol. 80] T. K. Earley was sworn and testified as follows:

Exam. Mullen: We will take a short recess for five minutes.

(Recess taken.)

Exam. Mullen: All right, Mr. Quirk.

Direct examination.

By Mr. Quirk:

Q. Have you been sworn, Mr. Earley?

A. Yes.

Q. Have you prepared your testimony in statement form?
A. Yes.
Q. And you have also prepared an exhibit?
A. I have.
Q. It has been distributed?
A. It has.

Mr. Quirk: I suggest, Mr. Examiner, before the witness starts, we number this exhibit for identification.
Exam. Mullen: Exhibit No. 3.

(Complainant's Exhibit No. 3, Witness Earley, marked for identification.)

By Mr. Quirk:

Q. Will you proceed with your statement, Mr. Earley?
A. My name is T. K. Earley. I am Assistant Freight Traffic Manager of The Denver and Rio Grande Western Railroad Company, 151 Stout Street, Denver, Colorado. I have been continuously employed in the Freight Traffic Department of the Denver and Rio Grande Western for more [fol. 81] than thirty years, and I will testify for that Company.

Since 1927, I have been actively engaged in handling matters pertaining to freight rates. In the performance of my duties I have prepared and introduced data in a number of formal proceedings before the Interstate Commerce Commission and various state commissions.

References in this statement to page numbers and lettered sections refer to pages and sections of my Exhibit No. 3, unless otherwise specifically stated.

Description of territory covered by Complaint:

On page 2 of Section A appears a definition of the various territories referred to in my testimony.

Introductory:

The Denver and Rio Grande Western Railroad Company, which I shall hereafter call the Rio Grande, now operating approximately 2,400 miles of line, was originally designed to serve a large local territory in Colorado and New Mexico, and secondly, to become a useful part of trans-continental routes and thus to handle traffic to and from the Pacific Coast. See Map, page 1 of Section A.

Today its main lines extend from Denver to Ogden via two routes, one through Pueblo and the Royal Gorge via Salida, Tennessee Pass and Dotsero; the other through the Moffat Tunnel and Dotsero, the routes being identical west of that point.

[fol. 82] These two main lines comprise 951 miles, or 51 per cent of the standard gauge tracks. The total of branch lines is 1,452 miles, of which 527 miles are of narrow gauge construction. Approximately 60 per cent of the Rio Grande consists of branch lines. The narrow gauge lines are located in the most rugged and remote parts of western Colorado and northwestern New Mexico, and were so constructed because of the physical characteristics of the country, its scant population and light density of traffic.

The poor prospects of future traffic development did not justify the much greater cost of standard-gauge construction, even in those instances where it would have been possible to build standard gauge lines. Some of the narrow gauge rails are laid on four per cent grades and encounter curvatures as great as twenty-four degrees.

These lines were built primarily to serve small communities, the metal mining industry and towns dependent thereon, which at the time were active and prosperous but now have largely been abandoned or practically so. These narrow gauge lines, now serve small communities which have built around the transportation facilities.

What sparse freight traffic has existed for the past twenty years, or more, is now shared with motor trucks, as is passenger traffic with the bus and air lines. The severe physical obstacles to be met, as well as the light traffic den-
[fol. 83] sity, result in high operating costs and cause large operating deficits, which are constantly increasing as the local traffic in narrow gauge territory continues to decline.

Likewise, the volume of traffic originated in the local territory served by standard gauge lines has not kept pace with the volume of freight received from connections. To show this changing picture in the composition and character of Rio Grande traffic over the years, the statements shown on pages 1 and 2, Section B, have been prepared.

Page 1 shows the amount of Rio Grande originated busi-

ness for certain calendar years. As will be seen from the statement on this page, originated freight traffic of the Rio Grande accounted for 74.43 per cent of all freight tonnage in 1925, as compared with 47.66 per cent in 1948; revenue on this traffic has decreased from 63.17 per cent to 34.66 per cent during the same period.

Page 2 of Section B shows that the revenue from coal traffic originated on the Rio Grande as compared with the total revenue from all freight traffic has declined from 27.62 per cent in 1928 to 14.82 per cent in 1948. On the other hand, as will be presently shown, the proportion of bridge or overhead traffic of the Rio Grande during the same period has substantially increased. In other words, the Rio Grande has become with the passage of time an important link in the chain of trans-continental railroads and depends to a [fol. 84] very large extent at the present time on such traffic.

There has been a diminishing activity in metal mining throughout the years, caused principally by lack of ore of value sufficient to be mined and treated at a profit; also, there has been a constant lessening of lumbering operations in southwestern Colorado, due to exhaustion of timber. These are some additional causes for the decline in originated business.

Bridge traffic is traffic received from connections and delivered to connections, the Rio Grande being an intermediate line. Largely, in our case, this means trans-continental traffic, either destined to or originating in the Pacific Coast states on the one hand, and Colorado Common Points and east, on the other. In 1922, bridge traffic accounted for 9.4 per cent of freight revenue; in 1928 it was 17.2 per cent of the total. By 1939, this figure had reached 35.82 per cent, and during the war years it reached a high of 56.58 per cent in 1945. The 1948 figure was 43.54 per cent.

The increase in bridge traffic has, in part, been made possible by extensive improvements upon the main lines and equipment used thereon. These improvements will be fully described in the testimony of other witnesses who will follow.

The importance of overhead or bridge traffic to the Rio Grande is thus emphasized. The Rio Grande can and does [fol. 85] participate at competitive rates in through traffic

with all of its connections at Utah junctions, except with the Union Pacific on traffic to or from northern Utah, Idaho, Montana, and the Northwest, upon which traffic combination rates apply.

The Rio Grande is an essential connecting link between the Prairie Lines on the east and Pacific Coast Lines on the west. Prairie Lines are the Burlington, Rock Island, Santa Fe, Missouri Pacific, and Union Pacific. While not a Prairie Line, the Colorado and Southern is an important connection at Colorado junctions for traffic to and from the Southwest. It is contrary to the general scheme of transcontinental rate-making to prohibit the interchange of traffic at competitive rates at such a natural dividing point as Ogden.

In a limited way, the Rio Grande can and does participate in freight traffic to and from places in western Oregon, Washington and British Columbia, via its connections at Salt Lake City with the Western Pacific and at Ogden with the Southern Pacific. In respect of distance, service and area covered, these routes do not afford the shipping public the adequate access to and from the Northwest that competitive rates via the Rio Grande and Union Pacific through Ogden would give it.

Exam. Mullen: Just a moment. Do the parties desire to have the historical statement read into the record by the witness?

[fol. 86] Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

The witness may proceed to read it.

The Witness: In order that a full explanation of what we are seeking to bring about may be made, it seems proper at this point to give the history of the Rio Grande as it relates to the Ogden Route. The route has existed without interruption since 1883. The map shown on page 3 of Section B will help to visualize the historical narrative that immediately follows.

The Rio Grande embodies within itself the rails of several pioneer companies, construction of some parts of which was started as early as 1870. The original company (The Den-

ver and Rio Grande Railway Company) was incorporated October 27, 1870, and the first construction was narrow gauge via Salida, Gunnison and Montrose to Grand Junction, Colorado. Here it joined another company, the Rio Grande Western Railroad, which was built as a narrow gauge line between Grand Junction and Ogden, Utah, via Provo and Salt Lake City. The through narrow gauge line from Denver to Ogden was completed May 21, 1883.

During the 1870's and until July of 1886, the operations of the first Denver and Rio Grande were in various hands, successively the original company, the A. T. & S. F. Railway, and three receivers. On July 12, 1886, the Denver and Rio Grande Railroad Company was organized and took over the property. Not long afterwards the main line was con- [fol. 87] verted to standard gauge, and between Salida and Grand Junction, Colorado, was relocated with Tennessee Pass and Glenwood Springs.

The through standard gauge line from Denver to Ogden was completed November 14, 1890. In 1901, the Denver and Rio Grande acquired the Rio Grande Western. Connections existed on the east at Denver, Colorado Springs and Pueblo, with lines operating into those points from the east, north and south, and at Ogden with the Central Pacific lines of the Southern Pacific Company and at Ogden and Salt Lake City with the Oregon Short Line Railroad.

Prior to 1890, it was possible for the Rio Grande to participate in transcontinental freight traffic, but only by transfer from standard gauge equipment to narrow gauge and back to standard gauge. After the main line was changed to standard gauge, the traffic could move through without transfer of lading, but at that time no competitive traffic (i.e., traffic originating or finding destination at Denver, Colorado Springs, Pueblo or east thereof) could be interchanged with the Oregon Short Line Railroad (see page 4, Section B) at Ogden or Salt Lake City at equal rates.

Additionally, Oregon traffic handled west of Ogden via the Southern Pacific could not, if originating or destined Colorado Common Points east thereof, move via the Rio Grande System at equal rates.

[fol. 88] As to the Oregon Short Line Railroad and Oregon Railroad and Navigation Company, this was changed in 1897. In that year, the Union Pacific Railroad and its controlled lines (i.e. St. Joseph and Grand Island, Kansas

Pacific, Oregon Short Line and Oregon Railroad and Navigation Company) were in separate receiverships. The policy of the Oregon Short Line Railroad and Oregon Railroad Navigation Company was changed in 1897 and competitive rates with the Rio Grande via the Ogden gateway were then established for the first time at the rates then in effect through Granger, Wyoming, via the Union Pacific Railroad.

Mr. Collins: May I interrupt for a moment for something I think is probably for clarification purposes only?

Would you take the trouble now to indicate, Mr. Earley, the source of your statement that "the policy of the Oregon Short line changed"?

The Witness: Yes.

Mr. Collins: Is that obtained from some official document some place, which you could give reference to?

The Witness: I have reference to the official transcript in I&S Docket No. 519, which was known as the "Ogden Gateway Case."

Mr. Quirk: What is the date of the hearing?

The Witness: The date of the hearing was November 17-18, 1914.

Mr. Collins: November?

[fol. 89] The Witness: November 17, 1914.

Mr. Collins: 1914?

The Witness: Yes sir.

Mr. Collins: That eventually resulted in a decision of the Commission?

The Witness: I think so.

Mr. Collins: Do you have the citation handy?

Mr. Quirk: It is in Volume 35. What the witness is attempting to do, Mr. Collins, is cite some testimony by your officers, if you want to hear it now.

Mr. Collins: All right.

Mr. Quirk: Former officers; Mr. Fort, for one.

Mr. Collins: Go ahead.

The Witness: I am reading from page 18.

Mr. Collins: I am not asking you to read that. Just give the citation, the source of your statement as to policy. That is the passenger fare case, isn't it?

The Witness: Yes sir.

Mr. Collins: You don't need to read or say any more to satisfy me in answer to my question.

Exam. Mullen: Go ahead, sir.

The Witness: Page 6 of Section B is a reproduction of the first page of the May 30, 1897 edition of the Salt Lake Tribune. The contemplated establishment of through competitive rates via the Rio Grande to and from points on [fol. 90] the Oregon Short Line Railroad and to and from the Northwest via Ogden as of June 1, 1897, is recorded here. I also find that Trans-Continental Freight Bureau West-Bound Tariff No. 1-A, Agent R. H. Countiss' I.C.C. No. 1, effective June 24, 1897, carried rates to Pacific Coast terminals, including Portland, Tacoma and Seattle and intermediate points via the Denver and Rio Grande, the Colorado Midland and the Rio Grande Western, in connection with the Oregon Short Line and the Oregon Railroad and Navigation Company.

This tariff applied on classes and commodities from New York, Pittsburgh, Buffalo, Cincinnati, Detroit, Chicago, Mississippi River points, Missouri River points and points grouped therewith. By Amendment No. 1 to the same tariff, issued on June 7, 1897, and effective June 24, 1897 (the same effective date as the tariff itself), the Rio Grande made the Missouri River rates maximum rates from stations on its standard gauge line.

This tariff does not carry any reference to cancellation of prior issues, and I have been unable to turn up any older tariff or tariffs which might have been effective between June 1, 1897 (the date predicted in the newspaper article) and June 24, 1897, but it seems logical to assume that trans-continental rates were in effect via the Rio Grande System in connection with the Union Pacific Lines via Ogden some time in June of 1897 and that similar tariffs [fol. 91] covering Idaho and Montana were made effective at approximately the same time.

Exam. Mullen: Mr. Earley, speaking of those rates, do you mean they were joint through rates?

The Witness: Yes sir.

Exam. Mullen: All right, sir.

The Witness: The Colorado Midland Railway, which had been built from Colorado Springs to Grand Junction Colorado, and which, as a competitor of the Denver and Rio

Grande, could interchange traffic with the Rio Grande Western at Grand Junction, was also included in through competitive rates from and to Idaho and the Northwest.

The Colorado Midland continued to operate until World War I, when it was abandoned. The tracks between Newcastle, Colorado, and Grand Junction, Colorado, were jointly used by the Colorado Mid*lena* and the Rio Grande. Since the abandonment of the Colorado Midland, the line between these points has been operated exclusively by the Rio Grande.

Shortly after, in the same year (1897), the O.R.& N. and the O.S.L. cancelled joint rates and divisions with the Union Pacific through Granger, Wyoming, by Supplement No. 8 to Agent R. H. Countiss' I.C.C. No. 1, effective September 23, 1897, and all O.S.L. and O.R. & N. traffic to and from the East was for a time interchanged with the Rio Grande at Ogden.

On October 14, 1897, the O.S.L. and O.R. & N. re-established the joint rates with the Union Pacific via Granger in [fol. 92] Supplement No. 9 to the same tariff, but the joint rates via the Ogden route with the Rio Grande remained in effect. Also, at about this time, through competitive joint rates between Oregon and Washington points served by the O.R. & N. on the one hand, and points on or via the Great Northern and Northern Pacific through Spokane or Wallula, Washington, on the other hand, were made effective.

Rates from and to Union Pacific points via these junctions are still in effect (see pages 2 through 5, Section F, for tariff authority). This action by the O.R. & N. caused some of its traffic that would otherwise move via the Oregon Short Line to move via the Great Northern Railway or the Northern Pacific Railway through Spokane or Wallula, and it may be assumed that this was objectionable to the Oregon Short Line and led to the early settlement of differences between the various units of the Union Pacific System.

Ogden was continued as an open gateway until August 25, 1906 when through competitive rates between Colorado Common Points and certain Montana points on or via the O.S.L. and the Rio Grande through Utah junctions were cancelled by Supplement No. 1 to Union Pacific Tariff No. 10340, I.C.C. No. 1970.

Between O.S.L. points in Idaho and Oregon, on the one hand, and Colorado Common Points and east thereof, on the other hand, the joint competitive rates via the Utah gateways with the Rio Grande, were cancelled effective [fol. 93] November 24, 1906, in U. P. Tariff No. 8606, I.C.C. No. 1583. On November 4, 1912, transcontinental rates to O.W.R.& N. points were cancelled in Supplement No. 12 to T.C.F.B. Tariff No. 4-1, Agent R. H. Countiss' I.C.C. No. 942. Eastbound transcontinental rates via D. & R. G. through Utah gateways from O.W.R. & N. points were cancelled in T.C.F.B. Tariff No. 2-1, Agent R. H. Countiss' I.C.C. No. 958, on December 16, 1912.

During this period, the Union Pacific Railroad controlled the Southern Pacific Company as well as the various units now operated by the Union Pacific. By the decision of the Supreme Court of December 2, 1912, in United States vs. Union Pacific Railroad Company, 226 U. S. 61, the Union Pacific was required to divest itself of the control of the Southern Pacific Company which it had exercised for some time prior to that date.

During the period of control, however, the Southern Pacific exerted every effort to influence the routing of freight and passenger traffic via the Union Pacific not only from or to Oregon, but from or to California. As the result of that situation, the officers of the Rio Grande, mindful af the need of California traffic in particular, conceived and constructed the Western Pacific Railroad as an outlet for the Rio Grande to the Pacific Coast.

As early as 1905, the annual reports of the Rio Grande portray the financing and the construction of the Western [fol. 94] Pacific, which railroad was finally placed on an operating basis July 1, 1911 (see pages 7 through 29 of Section B). (These are photostatic copies of those pages of the annual reports to the stockholders of the Rio Grande which deal with the early financing and construction of the Western Pacific.) The subsequent fortunes of the Rio Grande were thereafter linked with those of the Western Pacific.

On December 11, 1909, in Supplement No. 2 to Trans-Continental Freight Bureau West-Bound Tariff No. 1-J, Agent R. H. Countiss' I.C.C. No. 904, and effect the same date in Supplement No. 1 to T.C.F.B. East-Bound Tariff

No. 3-H, Agent R. H. Countiss' I.C.C. No. 906, the Western Pacific Railway was added to the list of participating carriers and routing provided via Salt Lake City, Utah in connection with lines operating from or to that point.

The only lines connecting with the Western Pacific at Salt Lake City for the interchange of transcontinental traffic, then and now, are the Rio Grande and the Union Pacific. Thus, the Union Pacific enjoyed joint competitive through rates with the Western Pacific at the very beginning of the latter's existence as a transcontinuental line, and it has continued to enjoy such through rates without interruption since that time. About 25,000 carloads are now interchanged annually between the Union Pacific and the Western Pacific at Salt Lake City.

[fol. 95] At the time these joint rates were made effective the Union Pacific, through its contral of the Southern Pacific enjoyed the status of a preferred connection in the handling of Pacific Coast traffic to, from or via points on the latter line. This relationship between the Southern Pacific and the Union Pacific brought about the necessity of building the Western Pacific by the Rio Grande.

Having conceived and sponsored the Western Pacific, joint through rates to, from or via points on that line through the Salt Lake City gateway were not restricted to the Rio Grande alone, but were applicable from the outset in connection with the Union Pacific as well, and the U. P. thus profited from the new railroad in Western Utah, Nevada and California.

While retaining its preferred position with the Southern Pacific, the Union Pacific acquired another connection to the west and has enjoyed, since through rates were first established immediately following construction, an equal competitive status as regards Western Pacific traffic, with the Rio Grande—the line which caused the Western Pacific to be built and which subsequently encountered serious financial difficulties by reason of its construction.

In 1915, the Western Pacific went into receivership and the Rio Grande, which had guaranteed the payment of interest on the bonds of that carrier, followed it into receivership on January 26, 1918. Since that time its corporate [fol. 96] history has been——

Mr. Quirk: Off the record.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

The Witness: January 26, 1918 to July 31, 1921, Receiver or Director General of Railroads; August 1, 1921 to July 21, 1922, the Denver and Rio Grande Western Railroad Company; July 22, 1922 to December 19, 1924, Receivers; December 20, 1924 to November 17, 1935, The Denver and Rio Grande Western Railroad Company; November 18, 1935 to April 10, 1947, Trustees; April 11, 1947 to date, Reorganized as The Denver and Rio Grande Western Railroad Company (The Denver and Salt Lake Railway merged with Rio Grande April 11, 1947).

In 1928, the Directors of the company, in compliance with its by-laws, commenced negotiations looking to the creation of a short line of railroad between Denver and Salt Lake City by the utilization of the existing line between Salt Lake City and Dotsero, and a line between Dotsero and Denver through the Moffat Tunnel.

In 1931, negotiations were completed and contracts executed granting trackage rights to the Rio Grande over the Denver and Salt Lake Railway's line between Utah Junction (Denver) and Orestod, and covering the construction by the Rio Grande, through The Denver and Salt Lake Western Railroad Company, of a new railroad between [fol. 97] Orestod and Dotsero, generally referred to as the "Dotsero Cut-Off." (154 ICC 51, 585 and 175 ICC 535). This route is shown on map on page 1 of Section A. The Denver and Salt Lake Railway is now a part of the Rio Grande (267 I.C.C. 862).

The Cut-off, 38.1 miles in length, was ready for operation and service was inaugurated on June 15, 1934, providing a new route between Denver and Salt Lake City and Ogden, 175 miles shorter than the old line via Pueblo and the Royal George, and 43 miles shorter than any other railroad between Denver and Salt Lake City.

Since January 1, 1936, as the result of Union Pacific Railroad Company Unification (189 I.C.C. 357 and 207 I.C.C. 543), the various units of the Union Pacific, theretofore operated as separate corporations, but as a part of the Union Pacific System, have been operated by the Union

Pacific under leases. (These properties are described on page 4, Section B.)

Mr. Collins: Section B?

The Witness: Section B.

Trans-Continental Traffic:

Trans-continental freight traffic is interchanged with other railroads by the Union Pacific at numerous junction points. This traffic generally moves under rates published in Trans-Continental freight tariffs covering the entire United States from the Atlantic to the Pacific, applying on [fol. 98] domestic and foreign commerce, eastbound and westbound, and naming practically every railroad, Class I or smaller, as participating carriers therein. On the one hand, the territory covered is that portion of the United States lying generally east of the Rocky Mountains or on and east of a line extending from the U.S.-Canadian border along the eastern boundaries of Montana and Wyoming, thence through Cheyenne, Wyoming, Denver, Pueblo and Trinidad, Colorado; to El Paso, Texas; on the other, the Pacific Coast states, also Nevada, Arizona, the northern portion of Idaho, western part of New Mexico and the extreme western points in British Columbia adjacent to Vancouver.

Obviously, it would be impractical to specify all of the junction points and routes available thereunder; hence, in the absence of restrictions, the Trans-Continental tariffs may be said to be open route tariffs. However, there are many exceptions to that general plan.

An outstanding example is freight traffic which moves via Union Pacific leased lines from and to points in the Northwest. On much of that traffic, the Union Pacific demands it long haul and the interchange of such traffic at Missouri River junction points. On the other hand, the general plan of open routes in respect to trans-continental traffic is followed by the Union Pacific as to traffic to and from California, Nevada and Utah points which moves via the Union Pacific.

Such traffic may be interchanged with the Rio Grande [fol. 99] at Provo or Salt Lake City at competitive rates. In 1934, the Union Pacific made a futile effort partially to close the interchange of traffic with the Rio Grande at the Utah gateways on livestock traffic. (I&S Docket No.

4062, decided July 23, 1935, and reported in 210 I.C.C. 153.)

I have said that the Rio Grande can participate in transcontinental traffic at competitive rates with all of its connections at Utah junctions, except on traffic to or from the Northwest via Union Pacific. This means that there exist through routes at competitive rates via the Los Angeles line of the Union Pacific; via the Western Pacific or Southern Pacific to and from central California (and southern California via the W.P. in connection with the A. T. & S. F. or S. P.); via the Western Pacific and Great Northern to and from Western Oregon and Washington; and via the Southern Pacific, or S.P. and connections, to and from Portland and Seattle and S.P. territory south of Portland.

In Great Northern Railway Construction, 166 I.C.C. 1, decided June 9, 1930, the Commission authorized the Great Northern and Western Pacific Railroads to construct a new line joining those two roads at Bieber, California. This gave the Western Pacific a route to the Northwest which it previously did not have, and provided a line competitive with the Southern Pacific between California and the states of Oregon and Washington.

The construction of this route created a new and competi- [fol. 100] tive route open to the Rio Grande, to and from a portion of the Northwest. The territory reached by this route is generally that served by the Great Northern from Bieber, California to Vancouver British Columbia through Klamath Falls, Bend, Wishram and Portland, Oregon, and Seattle and Everett, Washington.

Prior to February 1, 1949, the through rates available to the Rio Grande from the Northwest to competitive territory in Colorado and the East via the Bieber route included rates and routes on lumber from certain origins in Oregon and Washington on the Oregon Trunk Railway and the Spokane, Portland and Seattle Railway, both subsidiaries of the Northern Pacific and the Great Northern Railways.

Generally, the origin territory in question extended from Bend, Oregon through Wishram to Vancouver, Washington. On February 1 1949, rates on lumber from these points of origin to competitive destinations were cancelled via the Bieber route in Trans-Continental Freight Bureau Tariffs Nos. 16, 17, 18 and 28 series, thus further restrict-

ing the Rio Grande in the traffic which it can handle from and to the Northwest.

The statement on page 5 of Section B shows the movement of Rio Grande competitive traffic via the Great Northern-Western Pacific and Southern Pacific routes from and to the Northwest just discussed, for the five years prior to 1949. The preponderance of this traffic is lumber from [fol. 101] Southern Pacific points south of Portland, Oregon.

The trans-continental routes now open to the Rio Grande from and to the Northwest leave it without competitive through rates via the Union Pacific or any other route from and to the eastern parts of the states of Oregon and Washington, northern Idaho and part of Montana. The absence of competitive rates via Ogden and the Rio Grande sets up an obstacle to effective solicitation, in that diversion and transit privileges which are available to traffic moving via the Union Pacific are denied traffic which may be moving via the Rio Grande. This feature will be developed fully in a separate part of this testimony.

Idaho:

The testimony I have just offered has dealt with trans-continental traffic, principally, insofar as this complaint is concerned, traffic destined to or originating in the states of Oregon and Washington. My next testimony will be concerned with traffic to or from points in Idaho, which is divided into two parts by the Salmon River.

This river traverses the state from east to west just north of the forty-fifth parallel. South of the Salmon the Union Pacific is the only railroad. In the Panhandle of Idaho, north of the Salmon, the C. M. St. P. & P., Great Northern and Northern Pacific cross with their trans-continental lines, and connections with a branch of the Union Pacific [fol. 102] extending from Tekoa, Washington to Burke, Idaho exist between the Union Pacific and C. M. St. P. & P. at Plummer and the Union Pacific and the Northern Pacific at Burke and Wallace.

The Great Northern and Northern Pacific also connect with the Union Pacific at Moscow, the U. P. reaching this point with a branch line from Colfax, Washington.

In addition to the above, the Union Pacific likewise serves the Panhandle section of Idaho by virtue of its

ownership (joint with Northern Pacific) in the Camas Prairie Railroad, which extends from Riparia, Washington through Lewiston, Idaho, and thence to Headquarters, Sjites and Grangeville, Idaho. All of the Union Pacific lines in northern Idaho are reached via the Union Pacific from the east and south by means of its lines through Huntington and Pendleton, Oregon, and Walla Walla or Attalia, Washington.

The statement shown on page 1 of Section C has been prepared to reveal the composition of traffic to and from points in the state of Idaho and other states covered by this complaint. Idaho's predominantly agricultural status is clearly shown, although its production (originated tonnage) of forest products, while not as large as Washington's or Oregon's, is still very substantial.

The statement shown on pages 2, 3 and 4 of Section C is intended to portray the relative importance of the Union Pacific in Idaho's transportation picture. From the [fol. 103] sources quoted on page 5 of Section C, a five-year analysis of car-loadings of principal commodities has been developed, and for a selected list of these commodities a study of the Union Pacific's share in the state's forwarded traffic is graphically and briefly presented.

With regard to the routing restrictions in presently effective tariffs, the Union Pacific does not generally permit itself to be short-hauled on its southern Idaho traffic; in other words, that part of the state is practically closed to other railroads in the hauling of any traffic to or from the east or south until the Union Pacific has hauled the traffic as far as it can. There are important exceptions to this rule, where, for example, the Union Pacific interchanges Idaho traffic with its connections at Denver, Colorado, or Cheyenne, Wyoming, and I shall discuss these exceptions later in this testimony. However, no routing via Ogden and the Rio Grande is authorized at equal competitive rates.

The largest single crop in Idaho is potatoes. Ninety-nine and six-tenths per cent of rail-shipped Idaho potatoes are loaded on and move via Union Pacific. The average annual carload shipments of potatoes via Union Pacific from Idaho stations to all destinations for the period 1944 to 1948, inclusive, were 37,966 cars. We estimate the

average annual number of cars of potatoes which could move via the Rio Grande, contingent upon competitive rates via Ogden, to be 23,539 cars.

[fol. 104] Also of importance in the Agricultural Products list are Wheat and Wheat Flour. In Grain and Grain Products from Oregon, Idaho and Utah to Pacific Coast (268 I.C.C. 707), decided July 25, 1947, it is shown that, based on shipments during January, March, May, July, September and November, 1940, the movement of Wheat from eastern Oregon, southern Idaho and northern Utah was 13.9 per cent to the East; of the Flour shipped from the same territory during the same months 25.1 per cent went to the East. This eastbound movement of Wheat was destined in the greatest volume to points in Colorado, Kansas and Missouri; the Flour to Arkansas, Colorado, Georgia, Louisiana, and Mississippi. Traffic to these states could move via Ogden and the Rio Grande, if competitive rates were available.

This is mentioned here to point up the substantial reservoir of traffic which would be available to transient operators in Kansas, for example, who would like to secure Idaho Wheat for their operations, but who now cannot make use of this tonnage because of the absence of competitive rates via their mills. The Union Pacific generally requires its long haul on its Idaho grain traffic, there being no routes via Denver or Cheyenne to Missouri River rate-break points, viz., Sioux City, Omaha, Leavenworth, St. Joseph and Kansas City, via which the Union Pacific short-hauls itself. No competitive rates apply via Ogden and the Rio Grande.

[fol. 105] By Mr. Quirk:

Q. Just a minute, Mr. Earley. Will you explain whether there are any transit arrangements at the Kansas towns you have in mind under an existing tariff by any combination of routes to a certain territory?

A. Well, I think that the full explanation will come later when I am dealing with Section H of my testimony.

Q. If the inference you leave by this paragraph, as I read it, is that there would be transit to some of these Kan-

sas points if only the traffic moved via the long-haul route of the Union Pacific——

A. Well, if I understand your question correctly, the answer is that at the present time there is no transit via any route through certain Kansas towns, such as Wichita, on wheat from Idaho to the Missouri River.

Q. And east of the Missouri River?

A. Well, east of the Missouri River, the rates are made on the Missouri River combination.

Q. I see. Proceed.

A. The Utah Idaho Central Railroad, which formerly operated from Ogden, Utah, to Preston, Idaho, and which ceased operation July 25, 1947, paralleled the Union Pacific in northern Utah and into Preston. Joint through rates with the Rio Grande via Ogden were maintained by the U.I.C., which line also joined the Union Pacific in rates via [fol. 106] Ogden. These joint rates from and to competitive points (viz., Logan and Brigham, Utah, Preston, Idaho, etc.) were the same as in effect via the Union Pacific for its long haul. With the abandonment of the U.I.C. the participation by the Rio Grande in competitive traffic to or from Idaho ended. This is also true of Northern Utah.

Freight tonnage interchanged with Union Pacific:

Another witness has testified as to the volume of traffic which the Rio Grande receives from, as contrasted with traffic it delivers to, the Union Pacific at Denver and at Utah interchange points over a long period of years. It is sufficient for my immediate purpose to say here that in the year 1948 the Rio Grande delivered to the Union Pacific at Denver 361,256 tons more of freight than the Union Pacific delivered to the Rio Grande at that point, and that the excess of deliveries over receipts to and from the Union Pacific at Utah junctions during the same year was 607,178 tons.

The received tonnage at Utah junctions includes an extremely heavy movement of iron ore from Union Pacific origins in southern Utah to the steel works at Minnequa, Colorado. This ore commenced to move in great volume in 1942 and 1943. Prior to June 30, 1949, the joint through rate on this traffic applied only via the Union Pacific to Provo, thence Rio Grande.

This extraordinary action by the Union Pacific, of insist-

ing on short-hauling itself on this traffic, was taken for [fol. 107] reasons best known to itself. However, effective on June 30, 1949, the Union Pacific saw fit to make the rate apply also via its line to Denver, thence via connecting lines to Minnequa, without cancelling the rate via the Provo route.

Page 1 of Section D is a statement showing the tons of coal delivered by the Rio Grande to the Union Pacific at Utah junctions for destinations in the states shown on the statement for the twenty-five year period 1924 to 1948, inclusive. This coal originated at Utah mines located in the area shaded in green on the map on page 1 of Section E.

Over the years, the coal movement from Utah to the Northwest has been very substantial. During the war, and for a period thereafter, a huge increase took place in the movement to Oregon and Washington which included coal moving to North Pacific Coast ports for off-shore movement. This latter traffic is decreasing yearly.

The heavy coal movement to Idaho is worth of some comment. Idaho must, and does, draw on neighboring states for some of its raw materials such as coal. Practically all of its coal requirements come from Utah and Wyoming. Page 2 of Section D has been prepared to show the importance of Utah mines as a source of fuel for Idaho and other northwestern states.

This shows that Idaho looks to Utah for approximately 80 per cent of its coal requirements, Oregon for 75 per cent, and Washington for 50 per cent. The rates on coal [fol. 108] from Utah mines are higher than from Wyoming mines to this territory, the relationship being one of long standing, having been fixed by the Commission in Consolidated Fuel Co. vs. A.T.&S.F. (24 I.C.C. 213 and 27 I.C.C. 554) and later in Western Coal Rates (89 I.C.C. 666) and Utah Coal Operators Association vs. A.T.&S.F. (218 I.C.C. 663).

As a result of the last-named proceeding, the differential was fixed at 30 cents per ton Utah over Wyoming, which differential exists today. In spite of this rate situation, which would seem to accord Wyoming coal a favorable market position in these states, Utah shipments neverthe-

less far exceed Wyoming shipments of coal into the Northwest.

Page 3 of Section D has been prepared to show the relative position of the respective Utah lines as to handling of this important coal traffic. The Rio Grande and the Carbon County Railway, which connects only with the Rio Grande, originate 70 per cent of Utah coal and are, therefore, the major contributors to the handling of this fuel for the Northwest, since Utah is the source of most of the coal shipped into these states, as has been shown.

Coal traffic, like all raw material traffic, is relatively low-revenue traffic. Generally the railroads furnishing the transportation for raw materials moving into a territory or region, or to industries and communities located therein, are likewise the beneficiaries of the outbound traffic pro- [fol. 109] duced by such industries and communities. Generally, too, this outbound traffic pays relatively higher rates than is charged for the inbound raw materials.

In the case of the Rio Grande, however, it not only is deprived of outbound hauls on the products of the territory served exclusively by the Union Pacific, but also it cannot haul inbound traffic unless, as in the case of coal, it originates in the local territory of the Rio Grande. The preponderance of traffic delivered to the Union Pacific both at Colorado and Utah junctions (as contrasted with the traffic received from that line) supports the proposition that the Rio Grande is entitled to better treatment from the Union Pacific in the interchange of traffic.

Application of existing rates and routes between points on Rio Grande in Colorado, Utah and New Mexico, and points on and via the Union Pacific in Northern Utah, Idaho, Oregon, Montana, Washington and British Columbia:

The map shown on page 1 of Section E is a "Gateway" map of the Rio Grande. It has been prepared to show the application of rates between points on the Rio Grande, on the one hand, and points on or via the Union Pacific north and west of Ogden, Utah, on the other. The area shaded in red (on the East) is that part of the Rio Grande Denver and south to and inclusive of Trinidad and Bon Carbo and west to Canon City, Colorado.

[fol. 110] These points are in the Colorado Common Point group (see page 2 of Section A) and are likewise located in Trans-Continental Group J. This territory is competitive with either the Santa Fe or the Colorado and Southern Railway, or both. Routing between this territory and points north and west of Ogden, Utah, via Union Pacific at competitive joint rates is restricted to the Denver gateway. Thus, even though the Rio Grande originates the traffic, it cannot obtain its maximum haul to Ogden but must yield the traffic to the Union Pacific at Denver if the shipper is to enjoy the going through rate.

The area shaded in yellow on this map is likewise located in Trans-Continental Group J. Prior to April 11, 1947, this line was known as the Denver and Salt Lake Railway or the "Moffat Road". Under separate ownership and operation, it was naturally the policy of the D. & S. L. to maintain routes via Denver on traffic to or from trans-continental territory in connection with lines operating into Denver.

When the Dotsero Cut-off was put into operation, in June, 1934, the Rio Grande acquired another junction point with the D. & S. L. Railway for the interchange of trans-continental freight, viz., Orestod, Colorado. This route considerably shortened the distance between Moffat Road territory and the Pacific Coast.

When the D. & S. L. Railway was merged with the Rio Grande on April 11, 1947, no attempt was made (nor has [fol. 111] one been made since) by the Rio Grande to cancel competitive through rates via Denver with its connections on trans-continental traffic to or from former D. & S. L. points. The Denver routes applicable prior to that date are still available and the Rio Grande must compete with its Denver connections for the long haul to or from these local points.

Analysis of the interline carload shipments between points on the former D. & S. L. Railway (yellow shading on the map) and points in British Columbia, California, Idaho, Montana, Nevada, Oregon and Washington during the period April 11, 1947 to December 31, 1948, shows 499 cars forwarded and 409 cars received, a total of 908 cars. Of this number, 486 were interchanged with connecting

lines at Denver and 422 were interchanged at Utah junctions.

In the distribution of this traffic, the Union Pacific handled 229 cars via Denver and 162 cars via Utah junctions, a total of 391 cars, and our other connections handled 257 cars via Denver and 260 cars via Utah junctions, a total of 517 cars. Other connections are the A.T. & S.F., C.B. & Q., and C. & S. at Denver, W.P. at Salt Lake City, and S.P. at Ogden. The Union Pacific enjoyed 43 per cent of this traffic.

The area shaded in blue and green on the map (page 1, Section E) is the interior territory of the Rio Grande in Colorado, New Mexico and Utah, lying generally between Colorado Common Points on the east and Utah Common [fol. 112] Points on the west. The rate application to or from the green areas is the same as to or from the blue area, the distinction being made to show separately the location of the Utah coal fields served by the Rio Grande (green).

This area is served exclusively by the Rio Grande, and from earliest times has been the origin and destination of varied and substantial amounts of freight traffic moving to and from points on or via the Union Pacific north and west of Ogden. This interior territory is a large consumer of lumber from the Northwest, and, more particularly in recent years, it has been looking to the Pacific Coast for manufactured goods, such as furniture, automobiles, iron and steel products, in fact, almost every kind of manufactured article that formerly was procured almost exclusively in the East.

The map also shows in red (on the west) the so-called Utah Common Point territory from Ogden to Santaquin (see page 2 of Section A). This territory is served by both the Rio Grande and the Union Pacific, with additional service of the Bamberger Railroad between Salt Lake City and Ogden. Prior to July 15, 1946, the Salt Lake and Utah Railway operated between Salt Lake City and Magna, Utah on the north, and Payson, Utah on the south.

Paragraph (a), page 2 of Section E, names tariffs carrying rates where the Union Pacific formerly participated jointly to or from this territory in connection with the Salt

[fol. 113] Lake and Utah Railway via Salt Lake City, and now participates in joint rates with the Bamberger Railroad, which rates do not generally apply via Rio Grande-Union Pacific or vice-versa. There are exceptions to this general arrangement whereby the Rio Grande is permitted to join the Union Pacific in a few through rates to or from Utah Common Points, some of which are named in the tariffs listed in paragraph (b), page 2 of Section E.

Routing to and from points on Union Pacific in Idaho (Northern), Oregon and Washington to and from which the Union Pacific joints its various connections in competitive joint through rates via routes which short-haul the Union Pacific. (Map is shown in page 1 of Section E):

I have already shown that the Rio Grande cannot participate via Ogden at competitive rates in through traffic to and from the Northwest via the Union Pacific. I have also dealt in a general way with the fact that the Union Pacific makes important exceptions in respect to maintenance of competitive rates with other railroads.

I shall now show in considerable detail the scope and character of these exceptions. Briefly states as to trans-continental freight traffic to and from the Northwest, they show that the Union Pacific participates in numerous joint rates with railroad connections other than the Rio Grande in which the Union Pacific voluntarily takes less than its long haul.

Trans-continental traffic moving under rates named in [fol. 114] tariffs made subject to Trans-continental North Coast Territorial Directory No. 40-J (Agent L. E. Kipp's I.C.C. No. 1516) as a general rule can move under open or unrestricted routing east of certain gateways. The tariffs referred to are enumerated in Note 1 on page 4 of Section F.

These gateways are points located on or near the Trans-Continental frontier, such as Snowden, Montana; Portal, Oakes and Beach, North Dakota, Morbridge, South Dakota; Cheyenne and Speer, Wyoming; Denver, Pueblo and Canan City, Colorado; Santa Rosa, Albuquerque and Belen, New Mexico; and El Paso, Texas. West of these gateways specific routing is provided which, in some instances, permits interchange at interior Trans-Continental gate-

ways such as Plummer, Idaho; Spokane, Marengo, Wallula, Washington; and Portland, Oregon.

Due to the absence of provisions to the contrary, Trans-Continental tariffs contain literally thousands of partially open routes; however, the scheme of gateway-routing does restrict the movement of traffic to specific routes for that part of the movement west of the frontier and interior gateways referred to above.

The detail of the existing routes over which competitive rates apply to and from Union Pacific points in Trans-Continental territory is shown by the map on page 1 of Section F and the notes and explanations on pages 2 to 5, inclusive, of the same section. A simplified and brief sum-[fol. 115] mary of the situation which this testimony is designed to show is as follows——

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

The Witness: Among the points selected on this page to portray what I am attempting to show, is Pendleton, Oregon, which point is located in Group No. 4, which is shaded in green on the map on page 1.

Between Chicago, for example, and Pendleton, Oregon, if the traffic is routed via Union Pacific through Council Bluffs, Iowa, that line haul is 1560 miles. Now, there also exists other routes to or from Pendleton in which the Union Pacific joins with other of its connections. One of those routes is in connection with the C. M. St. P. & P., through Marengo, Washington.

By joining in that route, the Union Pacific accepts the haul of 165 miles. By joining the Great Northern in routes through Spokane, the Union Pacific accepts a haul of 227 miles. By joining the Northern Pacific in its Wallula route, it accepts a haul of 70 miles.

If there were competitive through rates available in connection with the Rio Grande through Ogden, the haul of the Union Pacific would be 633 miles.

I think that is descriptive of the other examples which I have attempted to portray on this page.

[fol. 116]

Between Chicago (for example) and points in Groups:	If routed via:	Resulting in Following Hauls for Union Pacific: Via Long-Haul	Via Short-Haul
Seattle, Wash. (Group 1) (Violet)	Council Bluffs, Ia.	1,954	—
	Portland, Ore.	—	184
	*Ogden, Utah	—	1,027
Centralia, Wash. (Group 2) (Red)	Council Bluffs, Ia.	1,862	—
	Marengo, Wash.	—	393
	*Ogden, Utah	—	935
Burns, Ore. (Group 3) (Yellow)	Council Bluffs, Ia.	1,777	—
	Marengo, Wash.	—	309
	Spokane, Wash.	—	370
	Wallula, Wash.	—	213
	Portland, Ore.	—	7
	*Ogden, Utah	—	850
Pendleton, Ore. (Group 4) (Green)	Council Bluffs, Ia.	1,560	—
	Marengo, Wash.	—	165
	Spokane, Wash.	—	227
	Wallula, Wash.	—	70
	*Ogden, Utah	—	633
Connell, Wash. (Group 5) (Orange)	Council Bluffs, Ia.	1,742	—
	Marengo, Wash.	—	58
	Spokane, Wash.	—	119
	*Ogden, Utah	—	844
Cheney, Wash. (Group 6) (Brown)	Council Bluffs, Ia.	1,769	—
	Spokane, Wash.	—	17
	*Ogden, Utah	—	842
Colfax, Wash. (Group 7) (Blue)	Council Bluffs, Ia.	1,756	—
	Plummer, Ida.	—	54
	Spokane, Wash.	—	88
	*Ogden, Utah	—	829
Lewiston, Ida. (Group 8) (Yellow)	Council Bluffs, Ia.	1,772	—
	Marengo, Wash.	—	132
	Spokane, Wash.	—	193
	*Ogden, Utah	—	845

*In the event of the establishment of competitive through rates in connection with the Rio Grande via Ogden, Utah.

[fol. 117] A further observation on this practice of the Union Pacific in joining in routes over which competitive rates apply, which practice results in short-hauling of the Union Pacific, is that it freely joins in routes from United States points to United States points through Canada, accepting its haul of 227 miles from Spokane to Pendleton,

for example, while declining to join the Rio Grande via Ogden where it would get a haul of 633 miles.

Traffic moving from St. Louis to Pendleton, Oregon via Soo Line-Canadian Pacific-Spokane International R. R.-U. P., moves 789 miles through Canada, yet there is no restriction against such routing, but a shorter route via Ogden in connection with the Rio Grande, entirely within the United States, permitting the Union Pacific to haul the traffic 406 miles further than when the traffic moves via the Canadian route through Spokane, is not authorized under present tariffs.

Examples of representative routes showing instances where the Union Pacific and other defendants take less than their maximum haul of traffic which they interchange with each other at various junctions:

Pages 6 to 27, Section F, outline a series of examples designed to show in a simplified manner the widespread practice of defendants in joining each other in so-called short-haul routes. Pages 6 to 20 list eastbound routes and page 21 to 27 list westbound routes.

[fol. 118] The Eastbound examples are divi-ed as follows:

Routes showing where Trans-Continental Lines take less than maximum haul on traffic interchanged at Idaho, Oregon, Washington or Montana junctions, pages 6 to 10 of Section F;

Routes showing where Trans-Continental Lines take less than maximam haul on traffic interchanged at California junctions, pages 11 to 13 of Section F;

Routes showing where Union Pacific takes less than maximum haul on traffic interchanged at Colorado, Utah, Wyoming or Nebraska junctions, pages 14 to 18 of Section F;

Routes showing where Missouri River Connections of Union Pacific take less than maximum haul on traffic interchanged at Missouri River junctions, pages 19 to 20, Section F.

The Westbound examples are divided as follows:

Routes showing where Trans-Continental Lines take less than maximum haul on traffic interchanged at Oregon, Washington, or Montana junctions, pages 21 to 22 of Section F;

Routes showing where Trans-Continental Lines take less than maximum haul on traffic interchanged at California junctions, page 23 of Section F;

Routes showing where Union Pacific takes less than maximum haul on traffic interchanged at Colorado, Utah or Wyoming junctions, pages 24 to 25, Section F;

Routes showing where Missouri River Connections of Union Pacific take less than maximum haul on traffic inter- [fol. 119] changed at Missouri River junctions, pages 26 to 27, Section F.

On pages 6 to 10, Section F, are listed 25 representative trans-continental movements of nine different commodities picked at random. These 25 routes include 14 instances where the Union Pacific gives up traffic that it originates at various junctions in the Northwest. The other 11 routes show instances where other trans-continental lines serving the Northwest relinquish their long haul to the Union Pacific at various junctions, which action deprives the originating lines of their long haul.

Here we see a pattern of agreement which reveals the existence of many open gateways at through competitive rates to and from the Northwest that amounts to almost wide-open routing, but there is no interchange of this traffic between the Rio Grande and the Union Pacific at Ogden. A few words about one or two of the examples will serve to point up what the whole set portrays.

Line 1, page 6, refers to eastbound carload movement of apples, rates on which are found in Agent Kipp's I. C. C. No. 1522. Using the first movement included under the heading of apples, viz., Yakima, Washington, to New York City, we find that the Union Pacific participates in a route via Spokane with the Great Northern and connections, under which route the Union Pacific accepts a haul of 253 miles to Spokane, whereas, if it insisted on its long haul and treated the Great Northern route as it treats the Rio Grande, it could haul the traffic 1,730 miles to Council Bluffs. [fol. 120] If competitive through rates are made effective via Ogden and the Rio Grande, the haul of the Union Pacific would be 803 miles, over three times its haul to Spokane.

In similar fashion another trans-continental line foregoes its maximum haul, as is shown in the example of a

movement of canned goods from Seattle to Philadelphia, opposite Line 2 on page 8 of Section F. The Northern Pacific, in joining the Canadian Pacific and other defendants in through competitive rates on this traffic via Sumas, Washington, contents itself with a haul of 127 miles while it could adopt a policy like that of the Union Pacific toward the Rio Grande through Ogden and insist on a haul of 1,886 miles to St. Paul.

Other examples could be dwelt upon, but it appears unnecessary to do so. The situation which the routes depicted on pages 6 to 10 of Section F show is clearly a picture of how the Rio Grande is excluded from participatin- (in connection with the Union Pacific) in traffic that otherwise moves freely via other routes and other junctions.

On pages 11 to 13, Section F, are listed 22 representative eastbound trans-continental movements of nine different commodities, likewise picked at random. Eleven of these examples show instances where the Union Pacific joints its California connections in through competitive rates via routes which leave the U. P. with hauls ranging from 7 miles to 147 miles in lieu of routes which would give it hauls [fol. 121] ranging from 1,395 miles to 1,933 miles, that it might secure if it followed in California the same hard-boiled policy that it maintains toward the Rio Grande through Ogden on traffic from and to the Northwest.

Exam. Mullen: We will pause at this time and take a recess for ten minutes.

(Recess taken.)

Exam. Mullen: Come to order, please, gentlemen.

I have received a copy of a petition for intervention by the Public Service Commission of the State of Utah.

Mr. Root: Charles A. Root, Commerce Attorney of the Public Service Commission, Utah. The Public Service Commission of Utah desires to intervene in this proceeding as its interests may appear. I have had copies of our petition of intervention circulated to the defendants, and personally to the complainants.

Exam. Mullen. Do you wish to state at the present time or at a future time what your direct interests will be?

Mr. Root: I think so, but I am not sure.

Exam. Mullen: Is there any objection to the granting of this petition for intervention?

Mr. Collins: As he stated, of course not.

Exam. Mullen: It will be received, and intervention is granted.

Is the witness ready to proceed?

The Witness: Yes.

[fol. 122] Other California defendants join the Union Pacific in interchanging trans-continental traffic at California junctions, thus extending into the South Coast territory the same smooth and flexible pattern which we found in the Northwest—with this difference, however.

The Rio Grande can and does participate in trans-continental business to and from Southern California at equal rates in connection with the Union Pacific via Provo or Salt Lake City. Pages 11 to 13, Section F, show eleven examples of routes where California defendants, other than the Union Pacific, join in short-haul routes with each other and with the Union Pacific, which routes limit their hauls to distances ranging from 24 to 427 miles, whereas a policy of "long-haul or nothing" would results in hauls ranging from 898 miles to 2,131 miles for the originating line.

The examples thus far shown, and those with which I shall presently deal, indicate that while the Union Pacific, in dealing with the Rio Grande on traffic from and to points on or via the Union Pacific north and west of Ogden, insists on taking its long haul, it does not insist on that policy in dealing with numerous other of its connections.

On pages 14 to 18 of Section F are listed routes showing how the Union Pacific is short hauled at junction points in the states of Utah, Colorado, Wyoming and Nebraska. For example, the Union Pacific has a line from Pendleton, Ore-[fol. 123] gon to Council Bluffs, Iowa, but it joins with other defendants in handling lumber from Pendleton to Milwaukee, Wisconsin via Denver, Colorado, then C. R. Y. & P. C. & N. W. As is shown on line 2, page 14 of Section F, this action results in the Union Pacific accepting a haul of 1,144 miles to Denver as against a maximum haul of 1,560 miles to Council Bluffs which it would receive if it insisted on treating the Rock Island as it does the Rio Grande.

Another example which illustrates this practice is shown

on line 3, page 15 of Section F. In the movement of canned goods from Ogden, Utah to Atlanta, Georgia, for example, the Union Pacific does not insist on its long haul to the Missouri River, as it does when the traffic originates on its lines north and west of Ogden, but relinquishes it to its connections at Denver, in this case the Rio Grande and Missouri Pacific through Pueblo, Colorado and St. Louis, Missouri, thereby limiting its haul to 577 miles, whereas, if it chose to insist on its long haul to Kansas City, it would handle this traffic 1,107 miles.

The Union Pacific frequently permits itself to be short-hauled on traffic moving between points on its own line. On line 2, page 16 of Section F, a route is shown in connection with the movement of canned goods from Evona, Utah to Boulder, Colorado—both Union Pacific points. As distinguished from its policy of not joining in the establish-
[fol. 124] ment of through competitive rates from and to points on its lines in northern Utah, Idaho and other northwestern states via the Rio Grande through Ogden, the Union Pacific here permits this traffic to move via Cheyenne, Wyoming and the Colorado and Southern Railway, thereby short-hauling itself 95 miles.

On Page 17 of Section F, line 1, a situation is revealed whereby the Union Pacific turns over potatoes originating at Idaho Falls, Idaho to the Colorado and Southern at Denver for movement to New Orleans, Louisiana. Had it elected to give the C. & S. and its connections the same treatment it accords the Rio Grande and insisted on routes via the Missouri River only, it would have assured itself of a haul of 1,226 miles to Kansas City. By joining in competitive rates via the Denver route, it limits itself to a haul of 696 miles on traffic interchanged at Denver. If joint competitive rates were established via Ogden, its haul would be 185 miles.

Other routes outlined on page 14 to 18 of this section serve to elaborate upon the widespread practice of the Union Pacific to apply, via the lines of other defendants, competitive through rates via junctions which deprive the Union Pacific of its maximum hauls. This practice is not restricted to traffic which it originates or delivers in competitive territory, such as California or at Utah Common Points, but

applies likewise on traffic which it handles from or to its exclusive points. The noteworthy exception to this scheme [fol. 125] is the absence of any routing via the Rio Grande through Ogden at competitive rates.

On pages 19 and 20 of Section F are listed representative examples of routes where defendants having connections with the Union Pacific at both Missouri River crossings and Colorado junctions, interchange, in some instances, traffic at the Missouri River, thereby short-hauling themselves without having an optional route via Colorado junctions which would give them the opportunity to handle the traffic for their own long haul. Line 6, page 19 of Section F, is a typical example.

In the movement of sugar from Blackfoot, Idaho to St. Louis, Missouri, the Union Pacific hauls the traffic to Kansas City, and when the movement beyond Kansas City is via the Rock Island that line hauls the traffic 298 miles. If rates were effective via Union Pacific to Denver thence Rock Island, that latter's haul would be 935 miles.

So much for the eastbound examples portrayed on pages 6 to 20 of Section F. On pages 21 and 22 are listed some examples of westbound movements showing where trans-continental lines, defendants in this proceeding, including the Union Pacific, accept less than their maximum haul on traffic interchanged at junctions in the Northwest. The friendly spirit of cooperation between these trans-continental lines is strikingly shown in two examples on page 21 of Section F.

On line 3 of this page I have shown that class-rate traffic [fol. 126] can move from Port Arthur, Texas to Umatilla, Oregon via Great Northern Railway from the Twin Cities to Spokane, thence U. P., thereby limiting the Union Pacific to a haul of 185 miles. The Union Pacific could insist on a haul from Kansas City, which would give it a haul of 1,717 miles. Establishment of joint through competitive rates via Ogden would result in a 675-mile haul for the Union Pacific.

On line 5 of this same page (page 21, Section F) the Great Northern assumes the role of the short-line connection of the Union Pacific. Here it appears that in handling roofing or building material from Chicago to Everett,

Washington, the Great Northern will accept the traffic from the Union Pacific at Spokane, thereby limiting its haul to 297 miles. If it kept the Spokane gateway closed to the Union Pacific, as the Union Pacific keeps the Ogden gateway closed to the Rio Grande, its haul from Minneapolis would be 1,721 miles. These two examples show how the Union Pacific and Great Northern join each other in routes which short-haul each other.

On page 22 of Section F is shown an example of short-hauling for the benefit of lines forming a through route from Milwaukee, Wisconsin through Canada to Seattle. The Northern Pacific, one of the defendants in this proceeding, accepts a haul of 127 miles in joining in the through rates via Sumas, Washington. Yet, the Northern Pacific and the Union Pacific do not join in through competitive rates via routes wholly within the United States in connection with [fol. 127] the Rio Grande through Ogden.

Other examples listed in Section F show that on westbound traffic the same general pattern as applies eastbound is in effect, with this exception, however: No optional routes are in effect via Denver in lieu of Missouri River junctions on traffic originating east of the Missouri River and destined points north and west of Ogden. Here the Union Pacific demands and gets its long haul from the Missouri River, although it does not originate the traffic.

For example, on line 4 of page 27, the Burlington has to deliver nursery stock which it originates at Shenandoah, Iowa, to the Union Pacific at Council Bluffs to haul to Nampa, Idaho. Here the originating line has no option, but must accept a short haul of 69 miles, whereas, if it insisted on hauling the traffic as far as it could (i. e., to Denver, 573 miles) it would only be acting as the Union Pacific does on most of the traffic it originates in Idaho and the Northwest.

In the same way, the Rock Island submits to a short haul of 176 miles, as is shown on line 5, page 27, when it delivers washing machines originating on its line at Newton, Iowa, to the Union Pacific at Council Bluffs when destined Twin Falls, Idaho. A stiff policy of retaining its own long haul would insure the Rock Island of a 761-mile haul if it insisted on interchanging this traffic with the Union Pacific at Denver.

The same situation is true of traffic originating in Colo-
[fol. 128] rado Common Point territory south of Denver. This traffic, some of it originating on the Rio Grande, cannot move at equal competitive rates to Union Pacific points north or west of Ogden unless it is delivered to the Union Pacific at Denver. Lumber:

Reference to page 6 of Section G shows that of the three northwestern states of Oregon, Washington and Idaho, Oregon had the greatest lumber production in 1946 and 1947. A brief analysis on the Union Pacific's position in the transportation of Oregon lumber should prove helpful.

The Union Pacific has filed with the Public Utilities Commissioner of Oregon reports showing that there were originated on its lines in the State of Oregon 19,031 carloads of lumber, shingles and lath during 1947, and 16,356 carloads during 1946. On the basis of an estimate 25,000 board feet per carload, it follows that the Union Pacific in 1947 originated about 35 per cent of the lumber originated by all lines in those counties of Oregon in which it has rails, and about 28 per cent in 1946. Using the figures shown on page 21 of Section L, the Union Pacific appears to have originated about nine per cent of all Oregon lumber shipped by rail for these two years.

As will be explained later when dealing with Section L, we estimate the average annual traffic potential for the Rio Grande on this particular traffic to be 8,576 carloads originating in Oregon and 22,519 carloads originating in the four states of Idaho, Montana, Oregon and
[fol. 129] Washington. I should explain that by traffic potential I mean the annual average number of cars originating in the territory covered by the complaint susceptible to Rio Grande routing in the event of the establishment of competitive through rates in connection with the Union Pacific via Ogden.

In my previous remarks (page 21 of this statement) in connection with Section E, I referred to some tariffs listed in paragraph (h), page 2, Section E, which tariffs name exceptions to the general basis of non-application of joint competitive rates between Utah Common Points on the Rio Grande and points on or via the Union Pacific north and west of Ogden.

One of the tariffs referred to is T. C. F. B. Tariff No. 18-P, Agent L. E. Kipp's I. C. C. No. 1474, which names rates on lumber from Idaho and other northwestern states to Utah Common points on the Rio Grande via Ogden. However, the Union Pacific maintains lower rates on lumber from certain Idaho, Montana and Oregon points to Salt Lake City, a common point with the Bamberger Railroad and the Rio Grande, than those contemporaneously maintained to Salt Lake City when routed via the Rio Grande (see U. P. Tariff No. 6039-K; I. C. C. No. 5000). This is another example of discrimination against the Rio Grande.

Pages 1 to 4 of Section G show some routes via which joint through competitive rates are today in effect in Trans-Continental eastbound lumber tariffs under which routes and rates the Union Pacific Railroad joins other carriers via junction which short-haul the U. P.

[fol. 130] There are many such routes and rates from other points of origin to other destinations, the ones shown in this section being representative. Both as an originating carrier and as an intermediate carrier of this lumber traffic, the Union Pacific participates in routes which short-haul itself, some of them operating through Canada for hundreds of miles, but lumber-destined Colorado Common Points or east thereof cannot move at competitive rates via UP, Ogden D&RGW.

This position is forcibly shown by the following distances (in miles) from representative origin points to junctions of the Union Pacific with other carriers, routes and competitive rates being in effect via all junctions shown except Ogden:

From	*To*						
	Marengo	Spokane	Ogden	Butte	Cheyenne	Denver Pullman	Council Bluffs
Portland, Ore.	307	368	849	978	1,266	1,360	1,776
Pendleton, Ore.	165	227	633	762	1,050	1,144	1,560

From Portland to St. Louis, Missouri, for example, the Union Pacific accepts a 368 mile haul in joining with its connections at Spokane (including the Canadian route), but declines to treat the Rio Grande in the same fashion via Ogden, although it would receive a longer haul of 849 miles via that route. Route No. 1, as explained on page 3 of Sec-

tion G, is via that Union Pacific from Portland, Oregon to [fol. 131] Spokane, Washington (368 miles), then via: Spokane International R.R., Spokane, Washington to Yakh, B.C., 151 miles; Canadian Pacific Railway, Yakh, B.C. to North Portal, Sask., 778 miles, Soo Line, Portal, North Dakota to St. Paul, Minnesota, 562 miles; Chicago, Burlington & Quincy R.R., St. Paul, Minnesota to St. Louis, 605 mines; a total through distance of 2,464 miles, 789 miles of this route being in Canada.

If competitive through rates via Ogden, Utah and Rio Grande were in effect, the distance via a representative tariff route would be: Union Pacific R.R., Portland, Oregon to Ogden, Utah, 849 miles; Rio Grande, Ogden, Utah to Pueblo, Colorado, 663 miles; Missouri Pacific R.R., Pueblo, Colorado to St. Louis, 902 miles; a total through distance of 2,414 miles.

Likewise, the Union Pacific hauls lumber destined Chicago, Illinois, for example, from Pendleton, Oregon to Marengo, Washington, a distance of 165 miles while refusing to apply similar rates via the Rio Grande and haul it 633 miles to Ogden.

In addition to participating in short-haul routes via junctions in the Northwest, the Union Pacific also participates in competitive rates on lumber which it interchanges with its connections at Cheyenne, Wyoming and Denver or Pullman (Denver), Colorado. Examples of these routes are shown on pages 1 to 4 of Section G. Here again the Union Pacific deviates from its "long-haul" p-licy in favor of its connections at Denver or Cheyenne, but no lumber from the [fol. 132] Northwest (including Idaho) can move at equal competitive rates via Union Pacific to Ogden, thence Rio Grande or Rio Grande and connections, if destined Colorado Common Points or points east thereof.

Transit and Reconsigning:

Transit, as that term is used in connection with regulation under the Interstate Commerce Act, is the practice, authorized by tariff, of shipping a specified commodity, generally in carload lots, to some designated point and there subjecting it to storage or one or more manufacturing or commercial processes or services and then re-shipping it to its

ultimate destination at a rate less than the combination of rates into and out of the transit point.

Transit is based on the fiction of a through movement and the application of a through rate, even though the actual movement is separated into two or more distinct hauls. Transit arrangements and privileges may be, and often are, a commercial necessity, and are usually made to meet the need of a free flow of traffic, and to aid shippers in marketing their products.

The types of transit services generally available to shippers today are many and varied and include storage, stopping to complete loading or to partially unload, fabrication, milling, creosoting, feeding and grazing (livestock) and other types of transit enumerated in the statement shown on pages 1 to 6 of Section H.

This statement covers the period from the year 1915 to [fol. 133] date and shows the increase in the number and variety of transit privileges published and on file with the Commission pertaining to transit of all kinds. It shows this situation for successive five-year period- from 1915 until 1940, inclusive, and as it is at the present time. This is a plain indication of the continuing increase in the demand and use of such arrangements. Naturally, the Union Pacific and other lines serving the same general territory as the Rio Grande have likewise published similar transit privileges for application at points on their lines.

While transit and reconsigning are being used today more than ever, and while both railroads and shippers are considered to be beneficiaries of these arrangements, the absence of through competitive freight rates by way of the Ogden interchange has brought about a situation on the Rio Grande which causes the loss of traffic to it, instead of benefits both to itself and to some communities that it serves. Speaking first of westbound movements only, for the purpose of illustration, some of the drawbacks of the present situation for the Rio Grande are:

1) the non-availability of competitive joint through rates from points east of Colorado Common Points by way of Pueblo, Colorado Springs, and Grand Junction, Colorado; also Price, Utah, when ultimate destination is a point north or west of Ogden, Utah, on or via the Union Pacific. Pueblo

[fol. 134] is a city of 75,000 population, Colorado Spring 50,000, Grand Junction, 17,500, and Price 5,000. Each of these points (as well as other points which I have not named) is a potential stopping point and thus a market for shippers who might want to ship their cars via these points —various transit reasons, with final destination in Idaho or other states reached via the line of the Union Pacific beyond Ogden.

Exam. Mullen: May I ask a question at this time: Are those transit services available in the points you named there?

The Witness: Yes sir.

Exam. Mullen: All right.

The Witness: (reading)

2) The non-availability of competitive joint through rates from Colorado Common Points by way of Grand Junction, Colorado and/or Price, Utah when ultimate destination is a point north or west of Ogden, Utah on or via the Union Pacific. What has been said in paragraph (1) is likewise pertinent to this situation.

3) The non-availability of competitive joint through rates from Colorado Common Points and east thereof by way of the Rio Grande through Provo, Salt Lake City and Ogden, Utah when final destination is a point north or west of Ogden, Utah on or via the Union Pacific. In paragraphs (1) and (2) the situation complained of deals with a total lack of transit at certain points via which there is an absence of [fol. 135] through competitive rates; here the distinction is that there is a lack of transit via the Rio Grande route at certain points at through competitive rates. Obviously, the need for transit on traffic moving under situations covered by paragraphs (1) and (2) might well also be present on the same traffic covered by this paragraph, for example:

A carload of freight containing tonnage for Pueblo, Colorado and Boise, Idaho can be advantageously forwarded by a shipper in Chicago, Illinois. Due to present routing restrictions in Agent L. E. Kipp's tariff covering (W. T. L. No. 120-I, I.C.C. No. A-3560), there is no way that the car can be forwarded and the through competitive rate to Boise, Idaho protected if partial unloading at Pueblo is accorded

the shipment, but partial unloading at Denver, Colorado, a point on the Union Pacific Railroad, can be had if desired.

The disadvantage at Pueblo is thus apparent. Also, if further stops at Grand Junction, Colorado, Price and/or Provo, Utah were desired, the through competitive rate could not be protected via the route the shipment would have to move.

Exam. Mullen: Just to clarify something there: Under your Heading "No. 3," you spoke about a distinction there, that there is a lack of transit via the route. Does that mean what transit you have cannot be availed of, or do you mean it has no transit privileges at those points?

The Witness: No, I thought, Mr. Examiner, that my testi-
[fol. 136] mony was clear that all of the transit arrangements listed on pages 1 to 4, in Section H, were and are available at points on our line, when the competitive through rates are available. The series of numbered paragraphs that I am now reading has a heading which says—I will read it—"Speaking first of westbound movements only, for the purpose of illustration, some of the drawbacks for the Rio Grande are"—and I am attempting to show the disability of the Rio Grande, due to the lack of competitive through rates.

The transit privileges are there, are published, are available, but the traffic just won't move through these points for transit because there are no through rates into Idaho or the northwest by our route.

Exam. Mullen: Well, the use of the expression "lack of transit" via your route, I did not quite understand that.

The Witness: I see. Have I made it clear now?

Exam. Mullen: Yes, you have made it clear now.

The Witness: (reading)

4) The non-availability of through competitive rates from Utah Common Points on the Rio Grande south of Ogden, Utah when destination is a point on or via the Union Pacific north or west of Ogden, Utah. Shippers located in the Utah Common Point territory frequently find it necessary or desirable to forward shipments to Salt Lake City or Ogden, Utah, via the Rio Grande, and after transit at those points, find it further necessary to ship the trans-
[fol. 137] ited shipment to an Idaho point or some destina-

tion in the other states north and west of Ogden reached via the Union Pacific.

While perhaps there would be no original intention on the part of the shipper to so handle his shipment, nevertheless it frequently happens that he finds it necessary for him to do so. Not all places in Utah Common Point territory enjoy reciprocal switching—many of these places, while served by both the Union Pacific and the Rio Grande, are without interchange tracks and, consequently, shippers are forced to pay combination rates over the transit point on such shipments as have been described in this paragraph, if the shipper is served exclusively by the Rio Grande.

Prior to July 15, 1946, Utah Common Point territory south of Salt Lake City was also served by an electric line—the Salt Lake & Utah Railroad Corporation—which line enjoyed through competitive rates via Salt Lake City between its points south of Salt Lake City and Union Pacific territory north and west of Ogden.

In Utah Common Point territory, Salt Lake City and north, the Bamberger Railroad, also an electric line, has for years enjoyed, and still enjoys, joint competitive through rates from and to its points on the one hand, and points on or via the Union Pacific north and west of Ogden, on the other. In the circumstances outlined above in the para- [fol. 138] graph, a shipper served by one of the electric lines in this territory was and is more fortunate than shippers who, from necessity, must use the Rio Grande for the handling of their traffic.

5) The situations outlined in preceding paragraphs operate to deprive the Rio Grande of certain traffic which it would otherwise enjoy. In the case of shippers who do not know, at the time of shipment, the ultimate destination of their shipments, it is natural that they protect themselves by using the route into the transit point which will afford them the widest range of distribution territory.

Since there are only two lines into Utah Common Point territory from the east, viz., the Union Pacific and the Rio Grande, and since the former offers, in addition to practically all that the latter can offer, routes at through competitive rates into Northern Utah, Idaho, Montana and the North Pacific Coast, it can be readily seen that the rate dis-

ability of the Rio Grande militates against the use of its line.

In the case of shippers located on Rio Grande rails in Utah Common Point territory, the hardship is more severe, in many instances, the choice of routes is not theirs unless they choose to haul their shipments to Union Pacific loading facilities or pay combination rates over the transit point.

Instances of movements involving transit heretofore referred to have dealt with westbound and northbound shipments, where the Rio Grande would deliver the traffic to the [fol. 139] Union Pacific at Ogden. In the reverse direction, the same disadvantages to the shipper and the Rio Grande are present, though the different character of the prevailing traffic would reveal different transit problems.

In the case of westbound traffic, which would be largely manufactured or partially manufactured articles, storage, fabrication and partial unloading would appear to be those privileges which would be used the most, with, of course, diversion and reconsigning privileges always in demand. Eastbound shipments are largely of perishable commodities, other agricultural and milling products, lumber and its related commodities, and livestock. All of these have their own peculiar transit requirements.

We have had some experience with an eastbound routing application which has been in effect for years. This publication is presently found in Union Pacific Tariff No. 6085-B, I.C.C. No. 4783, Item 85. It was originally designed to accommodate shipments of sheep which were to be grazed in transit at points adjacent to the Rio Grande under the provisions of Rio Grande Tariff No. 7035-D, I.C.C. No. 829.

Item 85 of U.P. Tariff No. 6085-B, I.C.C. No. 4783, reads:

"Application of Rates Via D. & R.G.W.

"Carloads of Sheep or Goats, (double deck) originating at stations on:

[fol. 140] "Butte, Anaconda & Pacific Ry., Oregon and Northwestern R.R., Union Pacific R.R. (except stations Donovan, Wyoming, to Topas, Idaho, Index Nos. 2216 to 2324, inclusive), and destined to Missouri River (see Item 70), Mississippi River (see Item 75), Saint Paul, Minnesota (see Item 50), Peoria, Illinois or Chicago, Illinois

(see Item 55) may be routed via U.P.R.R., Ogden or Salt Lake City, Utah and D. & R.G.W., Denver, Colorado, and U.P. R.R., thence via routes provided in pages 156 to 166, incl., at rates provided in tariff, plus an arbitrary of *19 cents per 100 pounds."

An investigation into the extent to which this route has been used reveals that practically no traffic has moved thereunder. The penalty over the going through rate has been sufficient deterrent to any substantial use of the Rio Grande, although its route offers splendid grazing territory, especially for summer feeding in the high mountain forests in western Colorado. Feeders have found it more profitable to secure herd replacements in other territories as western Utah and Nevada from which through rates with no penalty apply via the Rio Grande.

If markets such as Price, Utah, Grand Junction, Glenwood Springs and Canon City, Colorado were on a route [fol. 141] over which the through competitive rates apply on perishables moving eastward from Idaho and the Northwest, there would exist both a motive and an opportunity for billing cars to and through these points, with the knowledge that through competitive rates from origin to destination would apply in the event no sale was consummated at the first destination and it became necessary to reconsign beyond these points.

A substantial volume of California and Utah perishables, including citrus fruits, deciduous fruits, grapes, potatoes, etc., are annually handled via the Rio Grande and there appears to be no reason why, with the existence of suitable routing over the Rio Grande at competitive through rates, the same situation in regard to traffic from Idaho and other states hereinbefore mentioned should be not developed.

It would increase the fluidity and regularity of the movement of such seasonal crops that today are denied this outlet and thus benefit the shippers in the territory now foreclosed to the Ogden route by way of the Rio Grande.

(*This arbitrary is 19 cents on shipments to Missouri River, but may be different when to other destinations because of the different percentages of increase under X-166 and X-168.)

and its connections to the east, southeast and southwest. In a similar fashion, shippers of non-perishable commodities, such as lumber, would also benefit.

Finally, the jobber and wholesaler in the Intermountain territory is vitally affected by railroad transit rates, privileges, practices and restrictions. In the history of the Intermountain West, the jobber has played an important [fol. 142] part. In the early days of development, his was primarily a wholesaler's role, importing into such natural marketing centers as Salt Lake City and Ogden, merchandise in carload lots and disposing of it in L.C.C. quantities to his customers in the surrounding area.

For years, the same policy of distribution between the manufacturer and the consumer served to meet the requirements of the trade in the West; gradually, however, some of the consumers, or retailers, began to buy directly from the manufacturer, thus by-passing the jobber and wholesaler. Improved transportation also enabled many firms to reduce inventories by ordering more frequently, which encouraged movement by motor truck where lower minimum weights prevailed.

All of these conditions brought about changes, and some of the larger jobbing houses established branch houses in their trade territories to be closer to their customers and to meet the competition of local wholesalers. It has become the practice to ship carloads to be split up among two or more such branch houses. One large dealer in hardware and building supplies, with headquarters in Salt Lake City, has a branch at Grand Junction, Colorado and another at Boise, Idaho. Many times it would have been possible for this concern to split cars between its Grand Junction and Boise branches had the through competitive rates to Idaho applied through Grand Junction.

[fol. 143] Despite the vigilance of this consignor, many cars moved each year with stops at Grand Junction and or Salt Lake City destined to Boise. Frequently this concern has elected to fully unload these cars at Salt Lake City and truck the Boise portion of the load to that destination to avoid payment of the Ogden combination.

The necessity of transit at competitive through rates being available on their inbound shipments naturally influences and controls the choice of inbound routing to that

line which offers the widest range of outbound movement. The restricted application of competitive joint rates via routes of the Rio Grande operates to deprive shippers of the advantages of transit arrangements at points on the line of the Rio Grande, when point of origin is, or ultimate destination may become, a point on or via the line of the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington or British Columbia.

Additionally, such restricted application not only operates to deprive the Rio Grande of through freight traffic which it might obtain if equal rates applied in connection with it, but by virtue of the transit arrangements the Rio Grande is likewise deprived of a haul on an unknown volume of competitive traffic. The availability of through rates by way of the Ogden interchange would remove the impediment that now exists to free and unrestricted use of the Rio Grande as an inbound carrier.

[fol. 144] Some additional instances of transit situations which operate to the disadvantage of shippers located on Rio Grande rails are:

a) Sugar storage at West Jordan, Utah: West Jordan, Utah is a local point on the Rio Grande south of Salt Lake City and is the location of a sugar factory with available sugar storage space. A sugar manufacturer with plants in northern Utah and Idaho, operating also the West Jordan plant, cannot store sugar manufactured at his Idaho or northern Utah factories at West Jordan and re-ship east at through rates via the Rio Grande.

b) A processor of frozen foods, located at Delta, Colorado on the Rio Grande, annually procures cherries and peaches from points on the Union Pacific in northern Utah, principally from Brigham. Before the abandonment of the Utah Idaho Central Railroad (July 25, 1947), this operator could process the fruit at his plant in Delta under the provisions of Rio Grande Tariff No. 7283-A, I.C.C. No. 792, and re-ship from Delta to destinations in Colorado Common Point territory or east thereof and enjoy the through rate. Since the above date, the origin territory has been served exclusively by the Union Pacific; consequently, this shipper has to pay the local rate of the Union Pacific into Ogden, resulting in higher charges for the through movement via Delta, Colorado to destination.

[fol. 145] c) A shipper of carload shipments of unfinished furniture whose factory is located at Pendleton, Oregon has a customer located at Grand Junction, Colorado. In his own words, he "cannot put straight cars into this point because there is not enough demand and we cannot ship cars to Pueblo or Denver and stop them at Grand Junction because routing is not provided via the Ogden gateway."

d) Flour mills located at points in Kansas south of the line of the Union Pacific would like to secure wheat of a desirable type in Idaho and the Northwest and mill it at such points as Wichita, Hutchinson, Great Bend, etc., forwarding the flour to destinations beyond Kansas City, which they cannot do today at through competitive rates since the rates on the wheat in question must be applied via Union Pacific into Kansas City to enjoy the lowest through charges.

Establishment of through competitive rates via Ogden and the Rio Grande, thence via Prairie Lines from Denver or Pueblo to the Missouri River, would put these southern Kansas mills in line of transit and made them competitive with mills in Kansas located on the Union Pacific.

e) A transit operator located at Fruita, Colorado wants to mix Idaho beans (of a variety not grown in Western Colorado) with beans produced in his locality. Because of the absence of joint competitive through rates via the Rio Grande through Fruita, he cannot ship mixed carloads [fol. 146] of Idaho and Colorado beans, although this is highly desirable from a trade standpoint and this man's competitors at Denver and points in eastern Colorado served by the Union Pacific can do so.

Numerous carloads of canned goods originate annually at Tremonton, Utah, a local point on the Union Pacific north of Odgen, and are shipped to Manti and Ephraim, Utah, local points on the Rio Grande for storage in transit. Such of these cars as are reshipped to eastern markets via the Rio Grande and its connections on transit billing are then subject to combination rates over Ogden.

Numerous other transit situations exist which operate to the disadvantage of shippers and receivers at various points. Some of them will be explained in detail by other witnesses.

Section I, Statement showing rates, routes and mileages from and to points north and west of Ogden, Utah:

Section I, consisting of 121 pages, is a comprehensive statement of representative rates on various commodities in effect on September 1, 1949, between points in northern Utah, Idaho, Montana, Washington and Oregon on the Union Pacific (also Anaconda, Montana on the Butte, Anaconda & Pacific Railway), on the one hand, and representative points in the United States, Denver and east, on the other hand.

It also includes some representative rates between Utah Common Points and points north and west of Ogden, Utah. This statement shows the rates in effect via the line of the [fol. 147] Union Pacific, as well as the combination rates which would be charged if a shipment moved through Ogden in connection with the Rio Grande. Also shown are the mileages via both routes and the selected tariff routes used to determine such mileages.

Exam. Mullen: Gentlemen, we have reached our usual time to adjourn. Do you want to proceed longer?

We will recess, then, until 9:30 tomorrow morning.

(Whereupon, at 4.55 o'clock p.m., the hearing was recessed, to reconvene at 9:30 o'clock a.m., Tuesday, December 13, 1949.)

[fols. 148-149] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., Defendants

Transcript of Testimony—Salt Lake City, Utah, Tuesday, December 13, 1949

Met, pursuant to adjournment, at 9:30 o'clock a. m.

Before Frank E. Mullen, Examiner

ADDITIONAL APPEARANCES

Reginald T. Titus, 704 US National Bank Building, Portland, Oregon, appearing for Western Forest Industries Association.

[fol. 150] Proceedings

Exam. Mullen: Come to order, please, gentlemen. The hearing will be resumed.

Mr. Quirk.

T. K. EARLEY resumed his testimony as follows:

Direct examination (cont'd.)

By Mr. Quirk:

Q. Mr. Quirk: Mr. Earley, will you resume your statement where you left off last evening?

A. Before I resume discussion Section I of my exhibit, I think it would be well to explain Notes A to F as they are shown on the top of most of the pages throughout the section. It is true at the bottom of each page reference is made to Page 118 for the explanation of those notes, but I think that a brief summary of what they say would be helpful.

Note A, as referred to throughout this section, appears at the top of each column, under which is shown the through competitive rate applicable via the route of the Union Pacific. These rates are those in effect September 1, 1949. In other words, they include all of the Ex Parte 162, 166, and 168 increases.

The rates appearing under Note B are those applicable via the route of the Rio Grande through Ogden. In other words, combination rates. The distances appearing in the column headed Note C are the distances via the route of the Union Pacific or the Union Pacific and its connections.
[fol. 151] In the column headed Note D are the distances over the route of the Rio Grande and its connections. The selected tariff routes used to obtain the distances shown under Notes C and D, are explained on Page 119 of the exhibit. The key to the route appearing in Note E is that route embracing the Union Pacific, and the key to the route under Note F refers to the routes embraced by the Rio Grande.

I think that is briefly enough of an explanation to enable you all to follow the arrangement of the section.

With respect to the selected tariff routes listed on pages 120 and 121 of Section I, the underlying rule which was observed in making these selections was to be consistent. The routes selected are short, direct tariff routes. When comparing distances via competing routes, such distances should be determined according to the same plan and we have selected those tariff routes which, in fairness, represent the best potentialities of both sides. There would be no point in this case to use distances over the shortest routes which carload traffic may be moved without transfer of lading since the level of existing competitive freight rates is not assailed herein and traffic does not move over such routes.

Q. Mr. Earley, I suggest you explain a little more clearly what you mean by this last statement.

A. I wanted to bring out the fact that in this proceeding the level of the going through competitive freight rates which we are attempting to have made applicable over our [fol. 152] line is in no manner assailed by us. Another way of stating it would be that if any rates are assailed in this proceeding, the rates that are assailed by the Rio Grande

are those combination rates which must be used today, if our line is used in connection with the Union Pacific through Ogden.

Mr. Collins: If I might inquire for further clarification, are you in doubt as to whether you are assailing even the combination rates?

Mr. Quirk: I will answer that, Mr. Collins: We are in no doubt at all about it. We say the combination rates over the existing routes which the Rio Grande participates with the other carriers, including the Union Pacific in traffic, are unreasonable.

Mr. Collins: That is what I thought.

Mr. Quirk: I thought he was going to explain about the distance he used. I didn't quite understand him myself.

Mr. Collins: The reason I asked my question was because he said "if any rates are assailed."

Mr. Quirk: He should not have said that.

Mr. Collins: It is all right, thank you.

By Mr. Quirk:

Q. Proceed.

A. This latter method of computation is usually followed when determining the level of class rates, but the short [fol. 153] workable route has been used frequently by the Commission for rates involving long distances such as are here under consideration. As previously stated, the important thing is consistency and, as long as the comparisons are based on distances via routes which treat each side fairly, the conclusions to be drawn from such comparisons are, in my opinion, based on solid ground.

In order to point up the showing which I wish to make under this section, I shall deal with several examples. In connection with the carload movement of apples from Boise, Idaho to Chicago, Illinois, as listed on Line 4, page 1 of Section I, reference is made to Route No. 7 under Note E for selected tariff route via the Union Pacific and connections, and to Route No. 8 under Note F for selected tariff route via Union Pacific to Ogden, thence Rio Grande and connections.

Route No. 7 calls for movement via Union Pacific through Kemmerer, Wyoming to Omaha, Nebraska, thence C&NW, a distance of 1781 miles. Route No. 8 calls for movement via

Union Pacific to Ogden, D&RGW to Denver, thence CB&Q, a distance of 1992 miles.

Later, under the discussion of Section K of this exhibit, wherein comparisons of the lengths of haul involved are set forth in considerable detail, the distance via the Rio Grande route from Boise to Chicago is shown to be 112 per cent of the distance via the Union Pacific route.

[fol. 154] On page 3 of Section I, line 20, the rate on prunes and plums from Milton, Oregon to Detroit, Michigan is shown, together with distances via the selected tariff routes, which, in this instance, are shown to be via UP through Kemmerer, Wyoming to Omaha, C&NW to Chicago, thence NYC; and UP to Ogden, D&RGW to Denver, CB&Q to Chicago, thence NYC.

On page 4 of Section I, line 26, rates and distances are shown in connection with the movement of fruit from Malad, Idaho to New Orleans, Louisiana. In this instance Route 19 is shown for account of the Union Pacific, which calls for movement via UP through Evanston, Wyoming to Kansas City, KCS to Shreveport, Louisiana, thence L&A, while Route 20 for account of the Rio Grande calls for movement via UP to Ogden, D&RGW to Pueblo, C&S to Sixela, N. M., FW&DC to Fort Worth, thence T&P.

On Line 9, page 7, comparative rates and distances are shown on lettuce from Wilder, Idaho to Boston, Massachusetts, with routing via the UP to Omaha, Nebraska, C&NW to Chicago, thence NYC (2817 miles); and via the UP to Ogden, D&RGW to Denver, CB&Q to Chicago, thence NYC System (3028 miles).

On sugar from Burley, Idaho to Oklahoma City, Oklahoma, rates and distances are shown via the two routes on page 9, Line 7. Route 23, as will be noted by reference to page 121, provides routing via the UP through Kemmerer, Wyoming to Denver, thence AT&SF (1457 miles); while Route 24 calls for routing via UP to Ogden, D&RGW to Pueblo, thence AT&SF (1491 miles).

[fol. 155] On page 13, Line 10, rates on potatoes from Idaho Falls, Idaho to Atlanta, Georgia are shown via UP through Kemmerer, Wyoming to Kansas City, Missouri, Wabash to St. Louis, L&N to Nashville, Tennessee, NC&StL; also via UP to Ogden, D&RGW to Denver, CRI&P

to Kansas City, Wabash to St. Louis, L&N to Nashville, thence NC&StL.

Line 11, page 15, contains an example of the comparative rates and mileages on canned goods from Boise, Idaho to Jacksonville, Florida via Routes 15 and 16. Route 15 calls for routing via UP through Kemmerer, Wyoming to Kansas City, Missouri, Wabash to St. Louis, L&N to Nashville, NC&StL to Atlanta, Georgia, thence ACL (2644 miles); and Route 16 covers routing via UP to Ogden, D&RGW to Denver, CRI&P to Kansas City, Wabash to St. Louis, L&N to Nashville, NC&StL to Atlanta, thence ACL (2844 miles).

Line 4, page 23, contains the comparative rates on apples from Yakima, Washington to Salt Lake City, Utah, and Line 1, page 24, illustrates the situation on canned goods from Boise, Idaho to Provo, Utah, via the routes of the Union Pacific direct and via the UP to Ogden, thence Rio Grande.

Now, dealing with westbound movements, on page 33, Line 36, rates and distances are shown on iron and steel articles from Atlanta, Georgia to Spokane, Washington, via NC&StL to Nashville, Tennessee, L&N to St. Louis, Missouri, Wabash to Kansas City, Missouri, thence UP through Kemmerer, Wyoming, a distance 2870 miles, and via the [fol 156] same routing to Kansas City, CRI&P to Denver, Rio Grande to Ogden, thence Union Pacific (2980 miles).

Canned goods from Pittsburgh, Pennsylvania to Portland, Oregon, shown on Line 7, page 41 of Section I; call for routing via Pennsylvania Railroad to Chicago, C&NW to Omaha, thence Union Pacific through Kemmerer, Wyoming, and PRR to Chicago, CB&Q to Denver, D&RGW to Ogden, thence UP.

Line 29, page 42, shows the comparative rates and mileages on alcoholic liquors from Cincinnati, Ohio to Seattle, Washington, via B&O to St. Louis, Missouri, Wabash to Kansas City, thence UP through Kemmerer, Wyoming (2680 miles), and via B&O to St. Louis, Wabash to Kansas City, CRI&P to Denver, D&RGW to Ogden, thence Union Pacific (2881 miles).

The situation on tires and tubes from New Orleans, Louisiana, to Logan, Utah, is illustrated on Line 40, page 44. Route 19 calls for movement via L&A to Shreveport, Louisi-

ana, KCS to Kansas City, Missouri, thence UP through Evanston, Wyoming (2051 miles) while Route 20 provides routing via T&P to Fort Worth, Texas, FW&DC to Sixela, New Mexico, C&S to Pueblo, Colorado, Rio Grande to Ogden, Utah and Union Pacific (1951 miles.)

Line 13, page 52, shows the comparative rates and distances on roofing and building material from Fort Worth, Texas to Malad, Idaho, via FW&DC to Sixela, New Mexico, C&S to Denver, UP through Evanston, Wyoming (1449 miles) and via FW&DC to Sixela, C&S to Pueblo, D&RGW [fol. 157] to Ogden, thence Union Pacific (1418 miles).

On page 58 of Section I, Line 17, the rates and distances for a movement of paint from St. Louis, Missouri to Butte, Montana are shown. This calls for movement via Wabasli to Kansas City, Union Pacific through Kemmerer, Wyoming (1713 miles), and Wabash to Kansas City, CRI&P to Denver, Rio Grande to Ogden, thence Union Pacific (1913 miles).

Line 5, page 66, shows the rates and mileages on malt liquors from Minneapolis, Minnesota to Boise, Idaho, via GStPM&O to Omaha, Nebraska, thence Union Pacific through Kemmerer, Wyoming (1653 miles), and via CStPM&O to Omaha, CB&Q to Denver, D&RGW to Ogden, UP (1872 miles).

On page 68, Line 5, rates and distances are shown on iron and steel articles from Geneva, Utah to Seattle, Washington. On the same page, line 8, rates are shown on agricultural implements, other than hand, from Salt Lake City to Butte, Montana. On page 69 comparative merchandise rates are indicated. Routing, in all cases, is via the line of the Union Pacific direct and via the Rio Grande to Ogden, thence the Union Pacific.

In addition to domestic rates shown, a few comparative examples on import and export traffic are to be found on pages 25, 26 and 27 and on pages 70, 71 and 72 of Section I.

Obviously, the rates which would be charged for movements via the Rio Grande through Ogden are sufficiently high to discourage any movement thereunder. This higher [fol. 158] charge, of course, is applicable even in those instances where the Rio Grande's route operates over the shorter distance. To return to the example mentioned on page 47 of this testimony, covering the comparative rates

and distances on roofing and building material from Fort Worth, Texas to Malad, Idaho (Line 13, page 52 of Section I) where the Rio Grande route is shorter than the Union Pacific route by 31 miles, the rate is 49 cents per Cwt. higher via the Rio Grande's route. Naturally, no shipper would knowingly or willingly pay any such premium for using the Rio Grande; in fact, any charge over the lowest going rate would result, and has resulted, in precluding the Rio Grande from hauling such traffic.

The situation which Section I is intended to show is that the disparity in rates via the route of the Rio Grande vs. the going competitive through rate via the route of the Union Pacific is so great as to preclude any thought of shippers knowingly or generally using the Rio Grande route. Section I is a very comprehensive study of this situation and, to a large degree, is self-explanatory. As I have previously stated, it also forms a basis for subsequent discussions. Furthermore, Section I gives a fully authenticated cross-section of the rate structure to and from the territory served by the Union Pacific north and west of Ogden, Utah.

Comparison of car-mile and ton-mile earnings on various [fol. 159] commodities from and to representative points on the Union Pacific north and west of Ogden, Utah, via route of Union Pacific, vs. route of Rio Grande through Ogden:

Section J has been prepared to show comparisons with respect to car-mile and ton-mile earnings under the rates in effect on September 1, 1949, via selected routes, including the Union Pacific, and via selected routes including the Rio Grande through Ogden, Utah in connection with the Union Pacific. It also shows the earnings that would result if the rates applicable via the Union Pacific are established for application in connection with the Rio Grande. All rates and mileages used, with the exception of lumber shown on page 11 and iron and steel articles from Minnequa, Colorado on page 14, have been extracted from Section I.

Section J is self-explanatory; nevertheless, I would like to make a little comment on the comparisons. In connection with the examples dealing with selected commodities shown on pages 1 to 11, all of which are eastbound domestic movements to Colorado Common Point territory and points east

thereof, the Union Pacific's average car-mile revenue is shown to be higher than for the Rio Grande, but not materially so, the smallest difference being 1.54 cents on lettuce and the greatest difference being 5.84 cents on hops; the difference on the lettuce is 8.6 per cent and 6.8 per cent on the hops. These differences have been determined by computing [fol. 160] the average car-mile earnings for each commodity via the Union Pacific vs. those via the Rio Grande, the latter being obtained by using the rate applicable via the Union Pacific for the Rio Grande's route.

In connection with the import commodities shown on page 13, the car-mile earnings on wool via the Rio Grande route are 1.25 cents less than via the Union Pacific route, or a difference of 6.5 per cent; on fish or sea animal oils the average car-mile earnings are 1.53 cents less via the Rio Grande than via Union Pacific, or 6.3 per cent; on canned fish the average car-mile earnings are 3.03 cents less, or 8.5 per cent.

In the westbound movements outlined on pages 14 to 18, the Union Pacific's average car-mile revenue is again shown to be moderately higher than the Rio Grande's. The smallest difference is 1.33 cents on furniture, or 5.5 per cent, while the greatest difference is 7.80 cents on chemicals, or 8.8 per cent. These average differences have been determined in the same manner as described above in connection with the east-bound situation.

In the export items shown on page 20, the average of the various examples produce car-mile earnings on machinery via the Rio Grande of but 2.20 cents less than the Union Pacific, or 7.8 per cent, and on rubber products of 3.66 cents less, or 8.6 per cent.

The above remarks are pertinent to the showing made [fol. 161] in this section on the car-mile earnings for the two routes. A similar showing is available by using the ton-mile figures, but I consider it unnecessary to outline these ton-mile comparisons in detail. It appears sufficient to say here that, if competitive through rates in connection with the Union Pacific via Ogden, Utah are made available to the Rio Grande, the average car-mile and ton-mile yields to the Rio Grande route will not be materially lower than the yields to the Union Pacific route.

The per-ton-mile earnings on the selected commodities from the Northwest to Utah Common Points or from Utah Common Points to the Northwest, which, as are shown on pages 12 and 19, respectively, are approximately the same, or greater for the Rio Grande than for the Union Pacific. Where the difference is in favor of the Rio Grande, such difference is brought about by the fact that the distance via the Rio Grande's route is less in those instances.

Comparisons of distances via Rio Grande routes with other routes:

In Section K a comparison has been made of the mileages via the lines comprisong certain routes to and from representative points in the Northwest on the Union Pacific, including the route of the Rio Grande through Ogden. In presenting these comparisons, the per cent of circuity via the longer routes over the short route has been indicated.

On pages 2 to 6 of Section K, the examples have been con- [fol. 162] fined to Union Pacific stations where routing at the present time is restricted via the UP long-haul routes through Kemmerer or Evanston, Wyoming. It will be noted that in those instances on pages 2 to 6 where the mileage via the Union Pacific is shorter than that via the Rio Grande, the per cent of circuity via the Rio Grande route ranges from 102 per cent to 116 per cent. The latter instance represents the mileage between Idaho Falls and Kansas City, as shown on Line 2, page 3.

On pages 7 to 13 the comparisons deal with routes via the Union Pacific, via the CMStP&P, via the Great Northern and via the Northern Pacific, including, of course, the route via the D&RGW. At the outset it might be well to state that the routes via the carriers shown do not constitute all of the lines that the Union Pacific joins in competitive joint rates from and to its stations, but they do comprise, as stated above, the direct routes.

Furthermore, to avoid misunderstanding, it might be well to mention that, while the comparisons are shown as applying between the various representative points, that is, in both directions, there are instances where the rate applies in one direction only, but such cases have not been indicated in Section K as reference to Section F will disclose the rate application.

There are some interesting observations that can be made in considering pages 7 to 13. Out of the examples [fol. 163] there shown, the route having the greatest circuity is via the Northern Pacific from Elgin, Oregon to Fort Worth, Texas. In this instance, as will be observed by reference to Line 13, page 13, the distance via the Northern Pacific route is 151 per cent of the short route, namely, the Union Pacific. It will be noted also that the amount of circuity via the route of the Rio Grande is only 102 per cent.

Distances via the Union Pacific route run as high as 124 per cent of the short route. This situation exists between Yakima, Washington and Minneapolis, Minnesota, as shown on Line 5, page 12. Between these points also prevails the greatest per cent of circuity (137 per cent) via the Rio Grande Route.

Circuity via the CMStP&P ranges as high as 139 per cent of the short route between Elgin, Oregon and Fort Worth, Texas, and as high as 142 per cent between the same points via the Great Northern route, as shown on Line 13 of page 13, Section K.

On pages 14 and 15 the stations selected are Kent and Seattle, Washington, from and to which points the Union Pacific at the present time short-hauls itself only in connection with the Southern Pacific via Portland. It will be noted that the circuity via the SP route through Ogden ranges from 109 per cent to 121 per cent, whereas the range via the route of the Rio Grande is but 101 per cent to 110 per [fol. 164] cent; yet the Union Pacific declines to join the Rio Grande in establishing competitive rates via Ogden.

I have previously had something to say regarding the selection of tariff routes used in this exhibit. The routes indicated on pages 16 to 19 of Section K do not necessarily reflect the short-tariff routes in all instances, but they do, in my opinion, reflect the short workable and service routes. Distances via the short workable routes, rather than via the shortest route over which carload traffic may be interchanged without transfer of lading, represent the generally recognized and preferred measure of computation in cases, other than class-rate proceedings, involving long distances.

In addition, the Union Pacific participates with the

Spokane International Railroad—Canadian Pacific Railway—Soo Line in a route through Canada—via which route the distances approximate those of the Northern Pacific route—and with the Southern Pacific via both its central and southern routes. The circuity via the southern route of the Southern Pacific to and from most, if not all, of the representative points, naturally would be greater than that via the SP through Ogden.

As an example, from Seattle, Washington to Kansas City, Missouri, via the Union Pacific to Portland, Oregon, Southern Pacific to Santa Rosa, New Mexico, and Rock Island to destination, the distance is substantially greater than the distance via the route of the Southern Pacific through [fol. 165] Ogden, as well as via the route of the Union Pacific through Ogden in connection with the Rio Grande.

This is another example of the many examples in this section, to which I have referred, of the Union Pacific short-hauling itself via a route which is substantially longer than via other available routes, including its own, while refusing to join the Rio Grande through Ogden, which route is also substantially shorter than the route of the Union Pacific—Southern Pacific through Portland, etc.

In many of its Fourth Section Orders, such as in FSO No. 11135 of January 10, 1933, as amended, the Commission has prescribed a maximum circuity of 133⅓ per cent where the distance involved exceeds 1125 miles. This Fourth Section Order was issued in connection with the distance rates on livestock prescribed in Rate Structure Investigation, Part 9, Livestock, Western District Rates (176 ICC 1).

There are only two instances shown in Section K where the circuity via the Rio Grande route exceeds this figure. One is in connection with the example from Milton, Oregon to Minneapolis, Minnesota, Line 5 of page 8; the other is in the distance from Yakima, Washington to Minneapolis, Minnesota, Line 5 of page 12, the Great Northern being the short route in both cases.

While the circuity via the Rio Grande is 134 per cent and 137 per cent, respectively, it will be noted that the circuity [fol. 166] via the Union Pacific amounts to 120 and 124 per cent. As compared with the two cases where the circuity via the D&RGW exceeds 133⅓ per cent, an examination

of the examples in Section K will disclose two such instances via the CMStP&P, four via the Great Northern, and eleven via the Northern Pacific.

Estimated annual traffic potential for Rio Grande:

In Section L is submitted the results of a comprehensive study made to determine the potential amount of traffic for the Rio Grande each year in the event of the establishment of competitive through rates with the Union Pacific via Ogden. This study covers only the states of Idaho, Montana, Oregon and Washington and was undertaken to give us some definite idea as to the traffic to and from those states included in our petition.

From this study it has been determined that there exists for the Rio Grande an annual traffic potential of 157,762 cars of carload traffic originated and terminated by the Union Pacific in Idaho, Montana, Oregon and Washington. Of this total traffic potential. 101,476 cars represent traffic originated by the Union Pacific and 56,286 cars represent traffic terminated by the Union Pacific in those states.

This Union Pacific traffic, susceptible to Rio Grande routing, which is termed traffic potential, represents a conservative estimate of business available to our solicitation. [fol. 167] I have not attempted an estimate of the amount of traffic which would actually move over the Rio Grande should we achieve what we are seeking in these proceedings.

Any such estimate would be, in my opinion, nothing more than guesswork, until such time as we might have the benefit of some actual and recent experience with an open gateway. The experience of forty years ago when we enjoyed through rates via Ogden cannot be considered a reliable guide as to what we may expect today.

In those days the Rio Grande could not have been called a service route, yet we did handle considerable competitive traffic from and to OSL and OWR&N points.

As previously stated, I believe this determination of traffic potential to be conservative. We have included in our study only Union Pacific traffic originating and terminating in the northwestern states. There are no figures included in our estimate to cover Union Pacific shipments from or to points in Utah north of Ogden, inasmuch as we

have no way of separating traffic within that state, or any state.

Likewise, no attempt has been made to include traffic which the Union Pacific handles as a bridge or intermediate line to or from the Northwest. Here again, we know of no method by which we can determine the amount of such traffic. Nor have we attempted to measure traffic which might result from the general growth of the northwestern states.

[fol. 168] In preparation of this study, all sources of data available were in the form of public records. This information was not always in such detail, nor as up-to-date as we would have liked, but we have made the best possible use of the limited material at hand. The public records which were used to develop the estimate produced under Section L are:

1. Annual reports filed by the Union Pacific with the Public Utilities Commission of Idaho, the Public Utilities Commissioner of Oregon, the Washington Department of Public Service and the Montana Railroad Commission;

2. Comparative car loading report for the State of Idaho, compiled and issued monthly and annually by the Public Utilities Commission of Idaho;

3. "Freight Commodity Statistics—Class I Steam Railways in the United States," issued annually by the Interstate Commerce Commission Bureau of Transport Economics and Statistics;

4. "Tons of Revenue Freight Originated and Tons Terminated in Carloads by Class of Commodities and by Geographic Areas—Class I Steam Railroads," statements numbered Q-550 and M-550, issued by the Interstate Commerce Commission Bureau of Transport Economics and Statistics;

5. "Interregional and Intraregional Traffic of the Mountain-Pacific Area in 1939," published by the Office of Domestic Commerce of the United States Department of Commerce;

[fol. 169] 6. "Carload Waybill Analyses—State to State Distribution of Tonnage by Commodity Groups," for the years 1947 and 1948, issued by the Interstate Commerce Commission Bureau of Transport Economics and Statistics,

statements numbered 484, 486, 4814, 4825, 4838, 492, 498 and 4920;

7. "Carlot Unloads of Certain Fruits and Vegetables in 100 Cities—1948," issued by the Production and Marketing Administration of the United States Department of Agriculture.

An examination of Section L will show that the Rio Grande's traffic potential follows the plan of the Interstate Commerce Commission five commodity group classifications —Products of Agriculture, Animals and Products, Products of Mines, Products of Forests, and Manufactures and Miscellaneous. Traffic originated—eastbound—and terminated —westbound—is treated on separate pages.

Within a particular commodity group, where a specific commodity accounted for a substantial volume of Union Pacific traffic, a separate analysis was made of that commodity. For example, page 8 of Section L deals with potatoes, a crop of major significance in the Union Pacific territory north and west of Ogden.

The number of cars of potatoes originated by the Union Pacific in the states of Idaho, Montana, Oregon and Washington during the years 1944 through 1948 is shown, together with the total number originated by all lines in those states for the same year.

[fol. 170] This latter information for all lines is shown as a matter of general information; and since these figures were developed from sources different than those from which the Union Pacific carloadings were obtained, they also provide a check upon our data. Likewise, for reference, and to portray long-term traffic trends, the same information for the Oregon Short Line and Oregon-Washington Railroad and Navigation Company for the years 1929, 1933 and 1935 is shown where such information has comparable value.

1935 was the last year in which traffic data for the OSL and OWR&N were reported separately. Thereafter, operations of these two railroads have been included in the reporting of the Union Pacific System's operations.

In the case of potatoes, mentioned above, as is also the case with most of the individual commodity movements analyzed, a five-year average of the Union Pacific's car-

loadings served as a basis for determining the traffic susceptible to Rio Grande routing. In a few instances, less than a five-year average was used, either because of a declining trend, the effect of the war years, or because the data for all five years were not comparable.

To these averages were applied percentages representing our view as to the portion of Union Pacific traffic susceptible to Rio Grande routing. The percentages were [fol. 171] determined in accordance with the methods explained either footnotes "e", "g" or "j", depending upon the commodity being analyzed. For potatoes shown on page 8, footnote "g" applies, resulting in an estimate of 25,247 carloads annually available for routing through Ogden.

It should be pointed out that three different governmental studies were used in the determination of the percentages of Union Pacific traffic susceptible to Rio Grande routing. In the case of fruits and vegetables, the Department of Agriculture publication entitled "Carlot Unloads of Certain Fruits and Vegetables in 100 Cities—1948," was used. The 100 cities named in this publication blanket the country and give a comprehensive picture of the flow of this type of traffic.

On other commodities, the US Department of Commerce publication entitled "Interregional and Intraregional Traffic of the Mountain-Pacific Area in 1939," was used as a basis for determining the applicable percentage of Rio Grande routing susceptibility. Rail transportation data used in this study were obtained from tabulations made by the Board of Investigation and Research—established by authority of the Transportation Act of 1940—in its waybill studies of 1939.

Quoting in part from the Commerce Department study: "By providing information on intrastate and state-to-state rail traffic, the BIR sample makes it possible to estimate the traffic flow between any given state and each of the [fol. 172] other 47 states, as well as the traffic originating and terminating in the same state. That information is important for many purposes. It shows the volume of carload rail transportation which was required during the sample year to satisfy the economic activities of the state and it provides a rail traffic pattern for the commodity

movements into and out of the state. That traffic pattern also reveals the extent of the market areas of the individual commodities produced or manufactured in the state."

Our final source of data upon which our percentages of susceptibility were based is the Interstate Commerce Commission Bureau of Transport Economics and Statistics "Carload Waybill Analyses—State to State Distribution of Tonnage by Commodity Groups" for the years 1947 and 1948. These studies are the results of a one-per-cent waybill sample from all Class I railways, as required by the Commission's order of September 6, 1946.

As stated in the Commission's 61st Annual Report, dated November 1, 1947, page 142, "The primary objectives of this work (waybill studies) are to portray the traffic patterns and rate structures of the United States in terms of (1) groups and classes of commodities, (2) intra-territorial and interterritorial movements, (3) short-line distances, (4) type of rate, (5) rates charged, and (6) relation of the rates charged to the first-class rate."

As to the value of the waybill studies, the Commission in [fol. 173] its 62nd Annual Report, dated November 1, 1948, page 128, has this to say: "Our expectation with regard to the value of these waybill analyses from the standpoint of regulatory work has already demonstrated itself in the use which we are able to make of tabulations from these data in connection with various proceedings."

From the summaries of eastbound carload traffic on page 31 of Section L, and westbound carload traffic on page 32 of Section L, the following schedule has been extracted:

Annual Traffic Potential for the Rio Grande on Total Carload Traffic Originated and Terminated by the Union Pacific in the States of Idaho, Montana, Oregon and Washington:

	Cars Originated (Eastbound)	Cars Terminated (Westbound)	Total Cars (Eastbound and Westbound)
Products of Agriculture	51,305	5,145	56,450
Animals and Animal Products	9,376	5,868	15,244
Products of Mines	703	2,204	2,907
Products of Forests	23,713	220	23,933
Manufactures and Miscellaneous	16,379	42,849	59,228
Grand Totals	101,476	56,286	157,762

Again, I wish to emphasize the point that the foregoing traffic potential represents to a considerable degree less

traffic than what I believe would be actually available to our solicitation for the reason that our study included only the amount of traffic loaded and unloaded on the Union Pacific in the four northwestern states.

[fol. 174] I also wish to point out with additional emphasis that this estimate of the traffic possibilities for the Rio Grande route is not an attempt to show the number of cars which we think will actually move through Ogden via the route of the Rio Grande in connection with the Union Pacific in the event of the establishment of competitive through rates via that junction.

Mr. Gibson: Mr. Examiner.

Exam. Mullen: Mr. Gibson.

Mr. Gibson: With Mr. Collins' approval, I would like to ask Mr. Earley to step down at this time and we would like to place another witness on the stand who has a business engagement outside of Utah, and would like to leave Salt Lake as soon as possible.

Exam. Mullen: Is that agreeable to you, Mr. Collins?

Mr. Collins: I beg your pardon?

Exam. Mullen: Is that agreeable to you, to let this witness step aside for a moment?

Mr. Collins: Yes, I am agreeable.

Exam. Mullen: You may call your witness.

(Witness temporarily excused.)

Mr. Gibson: Mr. Reed.

DONALD L. REED was sworn and testified as follows:

Direct examination.

[fol. 175] By Mr. Gibson:

Q. Will you please state your name and address, Mr. Reed?

A. My name is Donald L. Reed. I live in Denver, Colorado.

Q. Mr. Reed, will you please explain your operation at Delta, Colorado, the plant you have at that location?

A. We operate a frozen food plant at Delta, processing mostly fruit.

Mr. Collins: Would you tell us is that operated in your name or is it in the name of some company?

The Witness: It is the Skyland Food Corporation.

Mr. Collins: Located at Delta?

The Witness: That is right.

Exam. Mullen: What is your connection with that company?

The Witness: I am the President.

By Mr. Gibson:

Q. Mr. Reed, is your plant located on the Denver and Rio Grande at that point?

A. It is.

Q. What is the capacity in pounds of your operation annually?

A. Our capacity is about 15 million pounds annually.

Q. Are you using that full capacity at the present time?

A. No, we are not.

Q. What is the average usage of your plant?

A. We run about 50 per cent of capacity.

Q. I see.

A. At this time.

[fol. 176] Q. What are the sources of the fruits that you use in processing at that plant?

A. We handle all the fruit in western Colorado, that is in the Palisade area, and the Paonia district.

Mr. Collins: Which?

The Witness: Paonia.

Mr. Collins: Where is that district?

The Witness: It is in western Colorado, about thirty miles from Delta.

Mr. Collins: Thank you.

The Witness: We also get fruit out of Provo, Utah, and Ogden, Utah.

By Mr. Gibson:

Q. I see.

Are there other areas in this Northwestern territory where you could procure fruit for processing?

A. Yes, Idaho is a big fruit growing—there are several big fruit growing sections in Idaho.

Q. What fruit could you use from Idaho?

A. Apples, mainly.

Q. Mainly apples.

A. Yes.

Q. Are there various grades of apples?

A. Well, in our business we use what they call "C" Grade Apples. On the fresh market there is Fancy, Extra Fancy and "C" Grade, the only differences being mainly [fol. 177] the color. The "C" Grade Apple does not have any color.

Q. For your purposes the "C" Grade Apple is just as good as a Fancy or Extra Fancy Apple.

A. That is correct.

Q. What benefit would that be to the fruit growers in Idaho if you were in the market for their "C" Grade Apples?

A. If we could buy the "C" Grade Apples, the fruit growers in the Payette district could eliminate these "C" grades from the apples they ship on the fresh market and enjoy a higher price from combination pack of Fancy and Extra Fancy with the "C" grade eliminated.

Q. At the present time, are you able to utilize "C" Grade Apples in Idaho?

A. No.

Q. Why not?

A. Well, on account of the freight rate. We can't afford to ship them from Payette to Ogden and then ship them again to Delta. We enjoy no through rate.

Q. Well, you mean by that that you would like to utilize the transit freight in your processing operation at Delta?

A. That is correct. We have a processing and transit rate as far as Ogden, but when we get to Ogden we are through. We can't go on through to Idaho on account of not having a through rate.

Q. I see.

[fol. 178] A. From Payette.

Q. Have you ever purchased applies in northern Idaho and used them in spite of this rate situation?

A. To a small extent. We have bought some apples out there this year.

Q. You know the apples would be usable in your operation.

A. Very definitely.

Q. What is the present rate situation if you ship apples from Idaho to Delta for processing and then ship them East?

A. We have to pay the rate from Payette to Ogden, which is 72 cents a hundred on fresh fruits, and then of course we rebill the apples at Ogden to use the transit privilege which we have on the Rio Grande.

Q. I see.

When you use the present rate situation that is available to you, you only have the transit privilege from Ogden?

A. That is correct.

Q. If the rates were available through the Ogden gateway you would have your transit privilege from Payette, would you not, to final destination?

A. That is correct.

Q. Are there other areas in this Northwestern territory where you could purchase fruit for processing at Delta?

A. Yes, in the Brigham area, we could buy fruit there if we had a through rate from Brigham to Delta, but as [fol. 179] it is now, if we had any fruit we buy there, we have to truck to Ogden and load on the cars at Ogden, and of course the expense involved merely keeps us out of that market.

Q. What are the fruits you could buy?

A. Apricots and peaches.

Mr. Collins: Where do you buy those, I didn't hear.

The Witness: We buy apricots and peaches in Colorado and also in Provo, and Ogden, but when we get to Ogden we are through. Anything we buy from Brigham we have to truck down to Ogden in order to use the processing in transit privilege.

By Mr. Gibson:

Q. Mr. Reed, what is your estimate as to the amount of apples you could use from Idaho of this "C" grade type annually?

A. Well, it would amount to several thousand tons. I

would assume somewheres between 1 and 2 hundred cars a year. It would depend on the crop condition.

Q. I see.

A. We could use all the "C" grades that were available from that point.

Q. Would that be new business for the apple growers in Idaho?

A. I don't believe it would be new business, but it would enable them to eliminate the "C" grade——

Mr. Collins: Mr. Examiner, I will have to object to the witness testifying to the apple growers.

Mr. Gibson: Mr. Examiner, this man buys apples, and [fol. 180] I think he is competent to testify to that question.

Mr. Collins: He can testify where he would like to buy, and how much he would like to buy, but as to benefits which he thinks might accrue to those people up there, it is obvious all they would get out of it would be to sell him some apples or fruits.

Exam. Mullen: I would like to ask a preliminary question.

What use is now made of the "C" Grade apples?

The Witness: They are shipped on the fresh market.

Exam. Mullen: Then according to your testimony, this would just give them an additional market?

The Witness: Yes.

Exam. Mullen: I think the witness is competent to testify to that, Mr. Collins.

Go ahead, sir.

The Witness: If we could buy the "C" Grade Apples, the apples that were shipped on the fresh market would be nothing but Fancy and Extra Fancy, thereby bringing a greater return to the grower than with the "C" grades included in the fresh pack.

By Mr. Gibson:

Q. Mr. Reed, would the movement of apples from Idaho to Delta be new business for the railroads?

A. Yes.

Mr. Collins: Well, now, you will have to explain that. How do you know that? Do you know that those Grade [fol. 181] "C" apples are not moving?

The Witness: Yes.

Mr. Collins: I don't want to interrupt you too much. They are not moving at all, they are lying in the ground?

The Witness: They are not moving as "C" grades, they are moving in combination with Fancy and Extra Fancy to the fresh market.

Mr. Collins: The railroads are hauling them.

The Witness: Yes.

Mr. Collins: Excuse me.

Direct examination.

By Mr. Quirk:

Q. They are not hauling them to Delta, though, are they?
A. No.

Mr. Collins: That is too bad.

By Mr. Quirk:

Q. Mr. Reed, these 100 or 200 carloads of apples that you referred to that you might purchase up there if you had the joint competitive rate through Delta from the Idaho point of origin to the other destinations in the East, processed under transit at Delta, would be new business so far as your company is concerned, wouldn't it?

A. Yes.

Q. Would you say that the existing combination rates on Ogden that you have paid in the past tends to restrict your purchase of apples in Idaho, for use at Delta?

[fol. 182] A. Very definitely.

Mr. Gibson: You may cross examine the witness, Mr. Collins.

By Mr. Collins:

Cross-examination.

Q. Where do you buy the fruits that you now freeze in this plant at Delta, Mr. Reed?

A. In Ogden, Utah, Provo, Utah, and the Grand Junction area in western Colorado.

Q. Do you have any competitors in your frozen food

business located on the Union Pacific or existing routes where the rates are lower than by way of the D&RGW?

A. I didn't get the last part of that question, sir.

Q. Do you have any competitors in the frozen food business located on the Union Pacific Railroad who have the so-called freezing in transit privilege at rates lower than yours?

A. Not that I know of.

Q. Your interest, then, is entirely in getting possibly, if you care to use it, Idaho or Oregon fruits or prunes, or whatever you might decide to use, at a rate lower than the rates now in existence to Delta and on out of Delta, after freezing, is that right?

A. I would appreciate your clarifying that again, sir.

Q. Let me try again.

What you really—rather the only thing you want here, if you want anything, is a lower rate on fruits from Idaho or Oregon to Delta with the freezing in transit privilege [fol. 183] at that point?

A. I don't want a lower rate, I want a freezing in transit privilege.

Q. I see.

Don't you have that on the D&RGW right now?

A. We do on anything that originates on the D&RGW, yes, sir.

Q. You mentioned, I believe, to your counsel, that the present use of your plant was about 50 per cent of its capacity, is that correct?

A. That is correct.

Q. And to what do you attribute the lack of use of the other 50 per cent?

A. Our inability to get sufficient quantities of fruit.

Q. Inability to get sufficient quantities?

A. That is correct.

Mr. Collins: OK, that is all.

Redirect examination.

By Mr. Quirk:

Q. That inability is due somewhat to the rate situation which confines your buying to the State of Colorado, they don't let you get out of the states, do they, the railroads?

A. I get up to Ogden, but I am through at Ogden.

Q. I see.

That is because the D&RG serves Ogden.

A. That is right.

[fol. 184] Q. Don't you have some competition in the sale of your commodities to the East?

A. Oh, yes.

Q. Where would they be located?

A. Well, on apples we compete with Virginia and Michigan mainly; some New York fruit.

Exam. Mullen: Mr. Reed, has your plant ever worked or utilized its full capacity?

The Witness: No.

Exam. Mullen: How did you happen to build a plant of such large capacity?

The Witness: Well, it's the length of time that we could run that we could increase our capacity. In other words, if we, on apples particularly, if we could run apples another 30 or 60 days that is where our increased capacity would come in.

Exam. Mullen: The length of time you keep it in full operation.

The Witness: That is correct, sir.

Exam. Mullen: All right.

Mr. Collins: May I ask a few more questions?

Exam. Mullen: Certainly.

Recross-examination.

By Mr. Collins:

Q. When did you construct this plant at Delta, Mr. Reed?

[fol. 185] A. 1944.

Q. 1944. Was it in a sense constructed because of war necessities?

A. I believe so, at the time.

Q. Are apples grown in Colorado?

A. Yes.

Q. From what other sources than Colorado could you get them than the sources you mentioned, Idaho, Oregon, or Washington?

A. There are no other sources that we could get apples from that I know of.

Q. Perhaps I was not paying proper attention when you started to speak, but do you handle any other, do you freeze any other fruits than apples?

A. Yes, we freeze peaches, apricots, plums, and cherries, in addition to apples.

Q. All of those are grown in Colorado?

A. Yes. Of course the quantities are limited.

Q. The quantities are limited?

A. Yes, sir.

Q. Do you mean by that that enough of those particular fruits that you mentioned, that the total of them would not be sufficient to occupy the capacity of your plant?

A. The total available——

Q. Total grown in Colorado.

A. The total grown might, but the total available to a [fol. 186] processing plant isn't enough to satisfy our demand.

Q. Are there other food freezing operators there in your neighborhood?

A. No, sir.

Q. I mean any place, not necessarily in Delta, but anywhere around in that part of Colorado, or anywhere in Colorado on the D&RG?

A. No, there are not.

Q. That is the only one.

A. Yes.

Q. You realize, do you not, Mr. Reed, that there are available to you through rates with the transit privilege from California, which opens to you the source of all of their fruits, produce of that sort?

A. It isn't the same type of fruit that we grow in this section of the country, namely, Colorado, Utah, and Idaho. There is a very great difference in the type of fruit. Consequently we couldn't use California in our operations.

Q. Why not?

A. Because the type and variety would not fit in with our Colorado fruit or Utah fruit.

Q. You mean you blend them or do something like that?

A. Well, when we are running, we run Colorado fruit and Utah fruit all at the same time.

Q. What do you mean by "running," putting it in the same can, or same vat, or place to freeze it?

[fol. 187] A. Well, I wouldn't say the same can, but we run it the same day, and probably put it in the same car going out, but it is the same type fruit. Take apricots, for example, they grow Blenheim variety of apricots in California, while in Colorado and Utah they grow what they call a Chinese variety, and it would not be practical for us to use the variety of fruits that are grown in California.

Q. What impracticability would there be in it, if I might suggest, is it because the California fruit won't freeze, is that it?

A. No, it will freeze, but it is just entirely a different type of fruit than we grow in Colorado, Utah, and Idaho from a variety angle.

Q. I wish you would help us out a little more than just to say it is not practical.

Exam. Mullen: Do you think that is necessary, Mr. Collins?

Mr. Collins: Sir?

Exam. Mullen: Do you think it is necessary to pursue that much longer?

Mr. Collins: I won't much longer.

Exam. Mullen: All right.

By Mr. Collins:

Q. Is it because of a particular marketing arrangement that you have that you don't care to use California fruits?

[fol. 188] A. To some extent.

Q. Could you suggest any other reason?

A. Well, it's mainly that the apricot that we pack, which is grown in Colorado and Utah, is much better than the apricot that is packed in California. We get a higher price for it.

Q. I see.

A. We enjoy a finer reputation on it.

Q. That is an excellent reason.

Mr. Collins: Thank you very much.

Mr. Gibson: That is all.

Exam. Mullen: That is all. Thank you, Mr. Reed.

Mr. Gibson: Thank you very much.

(Witness excused.)

Exam. Mullen: We will take a ten-minute recess.

(Short recess.)

Exam. Mullen: The meeting will please come to order.

Mr. Quirk: We have no further questions of Mr. Earley. You may cross examine.

Mr. Collins: Mr. Examiner, as you undoubtedly know, former Chief Examiner Butler promised me that an adjourned hearing would be arranged in this case, largely for —he didn't specify the reasons, but the reason I had for asking it was to enable us to see what the complainant put in evidence, and then endeavor to meet it, and give us time to do that.

Mr. Earley's testimony in particular is of such a nature [fol. 189] and covers such a long period of time, historically, and such a broad sweep of tariffs and technical information, 274 pages we count them, in his exhibit, and 60 pages of testimony and description, I feel indisposed to attempt to cross examine him at this time, and I am not sure of the extent of cross examination that might eventually be thought necessary, even after a chance to study his material. I make the request that we be allowed to reserve the privilege of cross examining him at the adjourned hearing to whatever extent we then see is necessary, which extent I am sure will be much less than if we undertake to ramble around now and go through this material that he has.

Mr. Quirk: Mr. Examiner.

Exam. Mullen: Mr. Quirk.

Mr. Quirk: My understanding of the basis for the request made by Mr. Collins for an adjourned hearing, and the basis on which the Chief Examiner, former Chief Examiner Mr. Butler, would be considered, was for rebuttal, and not for the idea they would have an adjourned hearing to rebut our case, but an adjourned hearing to cross examine our witness, I think that is asking too much.

Now I don't want to sound too unreasonable. If these gentlemen don't feel they can cross examine Mr. Earley now, I think they ought to cross examine him, they could determine whether they want to cross examine him before this hearing is over.

[fol. 190] Mr. Collins: I think that is a good suggestion. We will accept it that way then.

Exam. Mullen: All right. Then you may renew your request later on in the hearing this week.

Mr. Collins: That is to cross examine Mr. Earley. We are now accepting Mr. Quirk's suggestion to defer cross examination of Mr. Earley until later on in this hearing.

Mr. Quirk: I am not suggesting you do it, I would not object to it. The volume would not be unreasonable that you could cross examine him tomorrow sometime later in the week.

Mr. Collins: Sometime later in this hearing.

Mr. Quirk: You may decide after you consider this matter that you prefer to meet his testimony to such extent as you can by your own witness in rebuttal.

Exam. Mullen: Suppose you consider that, Mr. Collins, and then later on this week, before the hearing is concluded this week, you may again present your request.

Mr. Collins: All right. That will be OK.

Exam. Mullen: Mr. Quirk.

Mr. Quirk: May we go off the record?

Exam. Mullen: Yes, off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

Do you have another witness now, Mr. Quirk?

Mr. Quirk: Yes.

[fol. 191] R. K. Bradford was sworn and testified as follows:

Mr. Quirk: Before calling the next witness, I would like to offer in evidence Exhibits No. 1 and 2 by Witness F. C. Hogue, which I didn't offer yesterday. Are those received?

Exam. Mullen: Any objection, Mr. Collins?

Mr. Collins: To which ones?

Exam. Mullen: Receipt of Exhibits 1 and 2.

Mr. Collins: No.

Exam. Mullen: No objection, they are received in evidence.

(Complainant's Exhibits 1 and 2, Witness Hogue, received in evidence.)

Mr. Quirk: I now offer Exhibit No. 3 of Witness Earley.

Mr. Collins: Well, is the time ready for that?

Exam. Mullen: Do you wish to wait until the cross examination?

Mr. Collins: I think that would be more orderly

Exam Mullen: We will postpone it then.

All right.

Direct examination:

By Mr. Quirk:

Q. Mr. Bradford, have you been sworn?

A. Yes, sir.

Q. Will you give your full name to the Reporter, Mr. Bradford?

A. R. K. Bradford.

Q. What does "R" stand for?

[fol. 192] A. Richard.

Mr. Collins: What does the middle initial stand for?

The Witness: Knox.

By Mr. Quirk:

Q. Mr. Bradford, you have prepared your testimony in the statement form, and also had some exhibits prepared by yourself or under your direction, is that true?

A. Yes, sir.

Q. Will you proceed to give your testimony?

A. My name is R. K. Bradford. I am Vice President of the Denver & Rio Grande Western Railroad Company, with headquarters at 24 South Main Street, Salt Lake City, Utah. I have been in its employ since 1923, with the exception of 13 months, 1938-1939, during which time I was on loan to the Reconstruction Finance Corporation in Washington as special examiner, working on railroad loans.

Prior to being employed by the D&RGW I had one year's service with the St. Louis & Southwestern and nine years service with the Chicago, Rock Island & Pacific Railroads. Out of my more than 36 years of railroad service, practically 25 years of it has been in various capacities in the operating department. I served in the operating depart-

ment of the Rio Grande as Superintendent of Transportation and Assistant General Manager.

The main line of the Rio Grande extends from Ogden to Dotsero, 441 miles, where it divides and one main line proceeds through the Moffat Tunnel to Denver, 166.8 miles, and [fol. 193] the second main line proceeds through Pueblo and Colorado Springs to Denver, a distance of 342 miles. The main lines of the railroad are entirely protected by automatic block signals, and in addition to automatic block signals Centralized Traffic Control is in operation from Denver through the Moffat Tunnel to Orestod, from Niche, just east of Dotsero through to Salt Lake, with the exception of certain double track areas which while not controlled by Centralized Traffic Control are signaled for operation in both directions.

Ordinarily business for Denver and its connections is handled through the Moffat Tunnel route, while business for the connections at Pueblo moves over the Tennessee Pass route. From Ogden to Pueblo, via the Tennessee Pass route, the distance is 663 miles. From Ogden to Denver, via the Moffat Tunnel route, the distance is 607 miles.

From Ogden to Denver, via Pueblo and the Royal Gorge over the Tennessee Pass, the distance is 782 miles, so that the Moffatt Tunnel route from its first operation June 15, 1934, reduced the distance through the Denver Gateway by approximately 175 miles.

Both Pueblo and Denver Gateways are on a parity as to service both east and westbound. Trains are quite often consolidated between Grand Junction and Salt Lake and Ogden, both east and westbound, depending upon the type and amount of business.

Rio Grande Exhibit No. 4 gives data in detail as to rail, [fol. 194] grades, curvature, mileage, block signals, ballast, and other necessary and interesting data.

The Rio Grande is a party to through east and westbound freight train schedules and as I have stated, such schedules are identical as to delivery days, etc. through Denver and Pueblo. The Rio Grande has been a party to through eastbound schedules under 1924. Prior to 1923 the Rio Grande had no competitive through schedules.

Our first attempt to get into through eastbound schedules

started with perishable traffic in 1923 when less than 500 cars were obtained. In 1924 when there was a 154 hour schedule from California to Chicago it was decided that we could actively enter the competitive eastbound schedule picture through Pueblo, although not Denver, and in doing so we became competitors with the Union Pacific route and their eastern connections through Cheyenne.

At that time the only competitive schedule the Rio Grande had was in connection with the Western Pacific and Missouri Pacific; however, we and the Missouri Pacific solicited on the assumption that the 55 hour schedule of the Southern Pacific from the Roseville concentration yard to Ogden would apply via the Rio Grande and we built a schedule to Chicago via Ogden, Salt Lake and Pueblo on certain early arriving business. Later we were advised the 55 hour schedule of the Southern Pacific applied only to arrival at Ogden, and it [fol. 195] became our purpose to get such delivery arrangements as possible through the Ogden Union Railway & Depot Company.

The partial schedule line-up we operated during that year was hardly comparable with Union Pacific's; however, we obtained 2305 cars of California perishables. Schedules have changed from year to year. They have been speeded up. They have been lenght-ned. They have been adjusted; other lines have joined. It was not until 1930 that the Rio Grande was able to enter into full participation on traffic moving eastbound via the Southern Pacific.

In other words, to and through 1929 there was not a full competitive schedule between California and Chicago via the Rio Grande-Missouri Pacific and Kansas City lines and no comparable schedules through Denver, yet for the year 1929 we secured 9883 cars of perishable traffic, or approximately four times the amount obtained in 1924.

In 1930 the Southern Pacific route came into full participation via certain routes and business for 1930 nearly doubled due to a heavy grape crop in California and also due to a material increase in personnel in our California perishable agency. In 1929 the Rock Island came in on a partial schedule through Colorado Springs.

In 1931 the Santa Fe and Milwaukee came in on the schedule through Kansas City. In 1932 the Burlington came in

on the partial schedule through Denver, as did the Union [fol. 196] Pacific, although no formal schedule agreement was entered into at that time. In 1932 we handled approximately 18,000 cars. In 1934 the Dotsero Cutoff opened up which really put our route into the competitive picture through Denver as well as Pueblo. The business since that time has fluctuated and since then California Eastbound perishables approximate 16,000 to 18,000 cars a year.

To me the history of the Rio Grande and its California perishable business is indicative of two things—that additional routes and schedules are welcomed by perishable shippers and also that the establishment of such routes, regardless of the fact that they may not always offer a competitive schedule are beneficial.

Prior to 1930, as previously stated, the Rio Grande did not have a competitive schedule through Ogden on eastbound California perishable business, yet between 1924 and 1930 our perishable business multiplied six times.

The interchange of traffic at Ogden as between the Union Pacific and the Rio Grande would, of course, be handled by the Ogden Union Railway & Depot Company, which is an equally owned subsidiary of the Union Pacific and Southern Pacific. Our yard at that point is adjacent to the OUR&D yard. We are spending approximately $200,000 this year increasing our yard to improve our facilities and bring about a faster and better interchange of business at that point.

[fol. 197] The OUR&D yard is a modern yard and in our opinion is adequately capable of taking care of the additional Northwest business which might move through there; we do not at the present time, nor do our plans contemplate a classification by us of business received at Ogden. It is our practice to run trains out of Ogden as the business is received to Salt Lake where in our modern Roper Yard we do all of our eastbound classification work.

We also have a very modern yard at Grand Junction where consolidated Denver-Pueblo trains are split. We have just opened up our new North Yard at Denver which cost us $2 million, and this yard is modern in every respect.

We are equipped to and did handle through Ogden in

1948 a maximum of 1018 car moves a day. That is not the top capacity of the yard. During the war we got up to over 1200 moves a day. Likewise, during 1948 our top through Salt Lake was slightly under 2900 car moves per day, while during the war we handled approximately 3900 car moves a day. At Grand Junction in 1948 we reached a maximum of around more than 2400 car moves a day, as compared to 2950 during the war.

At Pueblo in 1948 we handled a maximum of 3,000 car moves a day, while during the war we handled approximately 3400 car moves. At Denver we handled 1506 in 1948 as compared to a maximum of 1762 car moves a day during the war period. These figures are not indicative [fol. 198] of the amount of traffic handled through Denver, because prior to the construction of the North Yard all of the Denver Gateway business interchanged with the Burlington was set out and picked up at Fox Junction by road crews, so there were many cars actually handled through Denver Gateway which did not move through our Denver yard. From these figures it can be plainly seen there is an available yard capacity on the Rio Grande at the present time.

As a matter of fact, during the war years we were never able to definitely establish the maximum handling capacity of our yards because while we handled an exceptionally heavy amount of traffic additional cars would have been handled through the yards had road crews and power always been available to move them as fast as we were getting them assembled and made into trains, assuming of course, that our connections at junction yards would have been able to take the business away from us as fast as we were able to bring it to them which, of course, was not the case.

Eastbound it is our practice, as I have previously stated, to classify trains at Roper which is our Salt Lake City, Utah, freight classification yard. If they are consolidated Denver-Pueblo Gateway trains they are then divided at Grand Junction and by a very simple switch move are consolidated with other divided trains and complete trains made up for Pueblo and Denver Gateways.

These eastbound trains all have as their objective, that [fol. 199] is, seventh morning from California concentra-

tion point. The trains have business for all points; the schedule is tied into Chicago seventh morning delivery. The condensed freight schedule which I now submit as Exhibit No. 5 gives not only the eastbound but the westbound condensed schedules.

Eastbound the schedule is of the run-off blocks, this being the last block out of concentrating point. We have many advance sections and it is by reason of these advance sections that we are able to have fills ready and available for the last section at Grand Junction. The last section ordinarily is a combined Pueblo-Denver train and by reason of advance planning we can put this last section into Grand Junction, separate it, fill it, and have both Pueblo and Denver trains moving within an hour. This is done with regularity.

As shown in Exhibit No. 5, the condensed freight schedule of the Rio Grande, effective May 15, 1949, which is still in effect, contemplates in addition to eastbound business competitive through schedules on westbound business. As is true of eastbound, the condensed westbound schedule shows the last or run-off schedule.

As to the classification of westbound business, prior to 1949 we were able to classify no business at Denver because of picking up all business by road crews at Fox Junction from the Burlington and the Denver stockyards. Denver trains were generally classified at Grand Junction; how- [fol. 200] ever, if conditions were right and the train stood in the proper condition on their schedule we might let them go unclassified to Roper, which is our Salt Lake yard.

Pueblo trains, however, were classified at Pueblo and blocked to and including Roper and connections. It was always our purpose to pock up in blocks or add in blocks at subdivision, nothing is done and if there is any new business therefore, which we receive and originate at Ogden are run out of there unblocked to Salt Lake Roper where the major blocking is performed. At Helper, Utah the next freight subidvision, nothing is done and if there is any new business it is added by a switch engine, but the run-off blocks are not touched except crews are changed.

At Grand Junction, Colorado, trains are divided as between Denver and Pueblo Gateways and we are able to get through that station in one hour with both Denver and

Pueblo trains. At Minturn, Colorado the next freight subdivision on the route to Pueblo, Colorado the run-off blocks are not touched except crews are changed.

The same thing is true at Salida, Colorado and at Pueblo the trains are broken up and business delivered to connections. On a Denver train it is progressed the same up to Grand Junction, but there is one less freight sub-division and the movement from Grand Junction to Bond, Colorado and thence to Denver corresponds with the move from [fol. 201] Grand Junction to Minturn, to Salida, to Pueblo. Nothing is done to the run-off trains at Bond except to change crews.

Therefore, on Pueblo Gateway business we pass through on our line seven yards and on Idaho business that we might receive from the Union Pacific from Idaho Falls, such business would move from Idaho Falls to Pocatello and Pocatello to Ogden. Considering Idaho Falls as one yard, there would be ten yard moves of more or less importance involved. Via the Union Pacific the same car, counting Idaho Falls as one yard, would move Idaho Falls to Pocatello to Montpelier, to Green River, Rawlins, Laramie, Cheyenne, Denver and Pueblo—nine yards as compared with ten via our lines. The difference, of course, is our short Ogden to Salt Lake move. The Union Pacific has a very wonderfully equipped hump yard at Pocatello where they do a very thorough job of classifying westbound business.

On their eastbound business they classify in three general blocks—cars for short points then Denvers and "North Platte". In other words, at Pocatello eastbound it is their general practice to only separate the shorts, the Denver business and move everything else to North Platte, Nebraska, where the final eastbound classification is made.

At Montpelier, Green River, Rawlins and Laramie their yard operation on through trains is comparable to our performance at Helper, Bond, Minturn, Salida, etc. in that [fol. 202] they change crews and go ahead. On Denver business that goes into Cheyenne they possibly do about the same work we do at Grand Junction. From the standpoint of the number of yards to move through the two routes may be considered as comparable.

By Mr. Quirk:

Q. Mr. Bradford, you have used some terms that might not be clear to the Interstate Commerce Commission. You have used the term "run-off blocks". Will you stop long enough to describe what you mean by that?

A. All California perishable business handled out of concentration points, Roseville, Sacramento, Colton, and other concentration points, on a basic 16-hour run off, which means that business leaving up to the cut-off time, and on a spread of 16 hours is all due at the terminal markets on the same day or the same day delivery.

Q. You have used the term "short points." What do you mean by that?

A. A short point is a point ordinarily between terminals or between classification yards where one classification yard would classify in block or in line all cars up to the next classification yard. I think that is as good an explanation as I might give you.

Q. All right.

Now proceed. What does "shorts" mean as distinguished from short points?

A. Those are cars for short points.

[fol. 203] Q. It means the same thing.

All right, proceed.

A. If the Ogden Gateway was available at equal rates, the movement of business to and from Idaho and the Northwest via the Union Pacific and the Rio Grande would, of course, not be a one-way street. The Rio Grande at the present time delivers the Union Pacific more originated business than it delivers to any of its other connections which, during 1948, totaled 466,477 tons at Denver and 1,573,474 tons at Utah junctions.

Actually we delivered the Union Pacific about 45.6 per cent, equivalent to 55,000 carloads, of all originated business delivered connecting lines during 1948. In the circumstances it will be seen that we are familiar with the problem of joint operation and interchange of business with that line, and any additional business which might be interchanged with the Union Pacific to and from Idaho and the Pacific Northwest would not present an operating problem.

The peak traffic year for the Rio Grande was 1944 and

there is attached hereto Exhibit No. 6 showing the business that was handled in 1948 in the same comparative territory and on the same basis of computation. You will note that this exhibit carries out the information given above so far as capacity of yards is concerned, and indicates that so far as road service is concerned there is definitely room on the Rio Grande at the present time for a considerable [fol. 204] amount of business even if 1944 is considered as a peak, and 1944 was not the peak of our capacity for various reasons.

The situation in 1944 at the peak of the war was a difficult one from the standpoint of personnel as we, at that time had many inexperienced men in our employ. In addition, since January 1, 1945 up to and including the 31st of August, 1949, improvements resulting in changes, additions and betterments of $41,400,000 had been made on the Rio Grande railroad and charges to operating expense incidental to this expense amounted to $19,800,000, so since the peak war year we have spent over $60 million in improvements to the property and enlarging the capacity thereof.

Items covered under this improvement program have been as follows: 3-5400 HP diesel freight locomotives; 10-6,000 HP diesel freight locomotives; 2-6,000 HP diesel passenger locomotives; 4-1,000 HP and 3-1,500 HP switch engines, so as a result of this there has been an increase of 15% in the available tractive effort on the railroad as compared to an increase of 13.6% in the country as a whole. During the same period we rebuilt and purchased 3,065 freight cars which has more than offset the retirements since January 1st, and we have increased the capacity of the railroad in freight cars 4.2%

Two main line bridges have been rebuilt and approximately four miles of line changes have been completed, re- [fol. 205] ducing curvatures; new tunnel construction at Tennessee Pass, and ten of the Moffat line tunnels have been concrete lined. Flood lights have been installed in yards at Pueblo, Minturn, Grand Junction, Helper and Roper. New yard offices have been constructed at Denver, Pueblo and Grand Junction and considerable space has been added to other yard offices.

The North Yard at Denver was constructed and this

constitutes about 18 miles of new track, a 16,000 ton capacity ice house, etc. Shops and engine houses have been improved, enlarged and modernized. Two-way systems have been installed at Denver, Pueblo, Grand Junction and Roper. Radios have been installed on switch engines in the territory Denved to Alamosa and Salida.

Pneumatic tube systems have been installed at Grand Junction, Salt Lake and Pueblo which expedites the handling of waybills, operating instructions, etc. Radio has been installed on main line freight diesels for en-to-end, train-to-train, and train-to-wayside communication. CTC has been installed between Denver and Orestod and automatic block signals from Denver to Pueblo and North Salt Lake to Ogden.

Slide detector fences have been erected where they would be advantageous. These among other improvements have resulted in an increased train speed on the main line territory involved in this case between 1944 and 1948 of from 2 to 4.5 miles per hour on all main line sub-divisions. This [fol. 206] represents an improvement of from 10% to 20% in train speed. At the same time the available gross tons per train mile have been increased about 400 tons which represents an increase in the train load of 15% or 16%.

There is another measure of capacity which might be used. In 1943, from a gross ton miles standpoint we handled 12,500,000,000 Gross Ton Miles. The heaviest month was August when we handled 1,100,000,000 Gross Ton Miles. As a result of our modernization and dieselization program our Gross Ton Miles per train hour changed from 29,747 in 1943 to 37,848 in 1948. In 1943 we operated 421,118 train hours. If this same number of train hours had been operated in 1948 our Million Gross Ton Miles capacity would have been 15,938,474,000 or about 27% over what we handled from a Gross Ton Miles standpoint in 1943.

Since January 1, 1949 we have increased our diesel ownership nine 6,000 HP locomotives which further increases our potential capacity. In August, 1949 our Gross Ton Miles per train hour was 43,714, so if we operated the same train hours in 1949 as we did in 1943 we would have a potential capacity of approximately 18,000,000,000 Gross

Ton Miles. Actually in 1948 we had a Gross Ton Mile figure of 10,800,000,000, which would indicate that we have a potential at the present time of approximately 70% in addition to our present business.

In addition to the improvements made on our own line we must not overlook the fact that improvements have [fol. 207] been made on connecting lines, which improvements enable them to take business from us currently, something they were unable to do in 1944. As a concrete example of this, there was a very serious congestion started in the fall of 1944 and during the months of September, October, and November we had to set out business on our line due principally to the inability of our connections to keep the flow current.

These railroads were working under war conditions just as we were. Their conditions have improved and they have likewise made improvements to their physical plants. It is inconceivable that short of another war a congestion of any consequence can occur. All of these things tend to show that while 1944 was the biggest year on the Rio Grande up to the present time it does not by any means indicate the potential capacity of the railroad.

We are not stopping with the work of improving the railroad because such things never stop. Our program for 1950 carries an estimated R&E charge of $2,500,000.

Exam. Mullen: Will you state what R&E means?

The Witness: Roadway and equipment charges to capital. Over $1 million of this is for heavier and improved rail.

At the present time we have an ownership of 215 steam and 67 diesel locomotives on our standard gauge lines. In addition to this ownership we have a contract with the American Refrigerator Transit Company, which company [fol. 208] has the responsibility of keeping us supplied with refrigerator cars, under which contract we have at our command a total of approximately 11,500 refrigerator cars.

The significance of this ownership is illustrated by the fact that during the past five years we supplied to our western connections, other than the Union Pacific, a total of 11,320 ART cars for return loading. These connections are usually supplied refrigerator cars by the Pacific Fruit Express. If the competitive rates which we seek in this proceeding are established to and from the closed door

territory north of Ogden, we would be in a position to contribute to the alleviation of any car shortage that might occur in that territory.

During the war years, as nearly as we can determine, we handled approximately 11% of all the east and west transcontinental traffic. There are seven routes involved and on an equal basis each of us should have handled slightly more than 14%. During this period we diverted under Kirk's Orders 19,075 cars to the Union Pacific's Northwest territory. These diversions took place principally in the years 1942, 1943, 1944 and 1945. In addition we handled many troop trains, military specials or freight billed from the east and south origins to and from the Northwest territory.

We delivered many cars to Clearfield and Ogden Storage Depots under transit because the war situation demanded free and unhampered transportation. As Mr. Hogue has [fol. 209] testified, another example of the ability of our railroad to keep on its feet and in a position to render service to the community, during last February's unprecedented blizzards we handled 4,208 carloads of diverted business for the account of the Union Pacific, of which 1,394 cars were Idaho and Northwest cars.

We handled 210 carloads of express, 276 carloads of mail and 44 Union Pacific passenger trains during this same period. The capacity of our railroad was not reached. The capacity of the power that was available and the power that we could rent from our connections was reached at the peak of this storm. Had the Union Pacific been able to turn over to us additional power, as at one time it appeared they could, we would have been in a position to have moved additional business during this trying period as our main line was at no time tied up.

During this period we rented 204 unit days diesels from the Union Pacific, February 11th to 24th, and had 4 of their 3900 series 97,000 tractive effort locomotives between February 13th and 23rd. We also had one 3 unit Missouri Pacific diesel for seven days and had two Western Pacific 99,000 tractive effort steam locomotives for about 20 days.

A good part of the business developed in Idaho and the Northwest is perishable business which requires ice. The Rio Grande owns natural ice storage capacity of 88,000

[fol. 210] tons; we have storage capacity of 4,000 tons of artificial ice and have standing contracts for 16,000 tons of additional ice. There is also available an additional 16,000 tons or a total of 124,000 tons of ice.

The largest single year we have had on the consumption of ice was 1947 when we consumed 81,070 tons. If we take the largest year from 1944 to 1948 we have a maximum usage of 89,094 tons. There appears to be no shortage of ice in our territory.

Mr. Quirk: I now ask that Witness Bradford's Exhibit 4, which is the condensed profile; Exhibit 5, which is the condensed freight schedule; No. 6, which is gross tons hauled one mile per mile of road, consisting of two sheets, and we are now asking that Exhibit No. 7, serviceable freight car miles per freight car day, be also identified.

Exam. Mullen: They will be so marked, Exhibits 4, 5, 6 and 7.

(Complainant's Exhibits 4, 5, 6 and 7, Witness Bradford, marked for identification.)

By Mr. Quirk:

Q. Mr. Bradford, do you have any comment to make about the significance of Exhibit 7?

A. Exhibit 7 shows the serviceable freight car miles per freight car day, the Rio Grande, the Western District, and the total for the nation as broken down to show the eight months of 1948, for the year '48, and for the eight months of 1949. It is simply indicative of the results of the im-[fol. 211] provement made on the Rio Grande and the effect of such improvements on our operations.

Q. For the first eight months of 1949, while shown on the exhibit, the Denver and Rio Grande serviceable freight car miles per freight car day exceeds all other railroads, the average of the other railroads in the Western District, does it not?

A. Yes, sir, 5.7 miles per day, and it exceeds the national average by 15.5 miles per day.

Q. From the standpoint of an operating man, what do these figures mean?

A. They are indicative of the movement of your general over-all business, empties as well as loads.

Q. Do they indicate the efficiency?

A. Yes, they indicate the efficiency in the movement of the business, and in the handling of cars, and speed.

Q. All right.

Exam. Mullen: Will you explain for the record at this point, what is a freight car day?

The Witness: One freight car, one day.

Exam. Mullen: That is actual use, actual movement?

The Witness: No. The cars that are serviceable. You take the total car miles made on any period and divide into it the number of cars on the railroad, multiplied by the days they are on the railroad, after eliminating the non-serviceable cars, and you will get the answer serviceable [fol. 212] freight car miles per freight car day.

Exam. Mullen: That note at the bottom, what does that mean?

The Witness: That is the source of it—source of these records, ICC M-20.

Exam. Mullen: The letters "OSF", I don't understand them.

The Witness: I don't remember just what they do stand for, but they are from an ICC form.

Exam. Mullen: Does somebody here know what they mean?

The Witness: I can find out and put it in the record for you.

Mr. Collins: Operating statistics for steam railroads, and it is like many of the Government organizations, we have to abbreviate.

Exam. Mullen: All right.

Mr. Quirk: That finishes with this witness. He may be cross examined.

Exam. Mullen: Do you have cross examination at this point, Mr. Collins?

Mr. Collins: I have a few questions, Mr. Examiner, but I unfortunately have a situation in which I feel compelled to ask for as early an adjournment and as long a recess as you can give us up to two o'clock.

Exam. Mullen: We will recess then until two o'clock.

Mr. Collins: Thank you very much.

(Whereupon at 12:02 p.m. the hearing was recessed to reconvene at 2:00 p.m. the same day.)

[fol 213] Afternoon Session 2 p. m.

Exam. Mullen: Are you ready to proceed, gentlemen? The hearing will be in order.

Mr. Bradford is ready for cross examination.

Mr. Collins: Yes, just a second, please.

R. K. Bradford resumed his testimony as follows:

Cross-examination.

By Mr. Collins:

Q. Mr. Bradford, on page 4 of your statement, at the beginning of the first full paragraph on that page you refer to—you say, "We are equipped to and did handle through Ogden in 1948 a maximum of 1,018 car moves a day." Was that what you would call a single car movement, I mean a movement in, or was it a movement in and a movement out?

A. Movement in and out, or interchange.

Q. In other words, it would have been——

A. It would not be 1018 individual cars.

Q. I see.

This is what you would call a double car count then?

A. It might be, yes, sir, of individual cars.

Q. Now on page 5 you refer to a "run of time" in connection with your mention of schedules, I believe, is the subject, and I believe you made some explanation to your counsel in which you mentioned a 16-hour run-off period. Do you recall that, Mr. Bradford?

[fol. 214] A. Yes, sir.

Q. Is that so-called run-off period still in effect, do you know?

A. I believe it is.

Q. I'm sorry I didn't hear all of your explanation about that period—explanation of the meaning of the 16-hour run-off period. Let me ask you, did you explain it in the record as to what it means in operation of the trains?

A. I thought I did. It simply means that a box leaving the concentration point as much as 16 hours after the first schedule is due out are entitled to the same basic arrivals

at Chicago, St. Louis, and other junction points as those that are leaving earlier.

Q. Well now, a block of cars leaving Oakland, Mr. Bradford, under this so-called 16-hour run-off period, isn't it a fact the block would be due to arrive in Ogden, or Salt Lake City, or wherever the interchange would be, at the same time?

A. No, sir, the blocks do not leave Oakland. The block leaves the concentration point and that territory would be either Sacramento or Roseville, and they are due at Chicago and the basic schedule points for the same deliveries.

They are spread out over different periods at Ogden and Salt Lake and other intermediate terminals.

Q. Well, would that 16-hour run-off period be of any benefit to the D&RG if cars were interchanged to it at [fol. 215] Ogden? In other words, would that mean any free time or extra time to the D&RG?

A. It does if the cars are in advance of the run-off block, yes, sir.

Q. I see.

Is there any division as among carriers, of this 16-hour run-off period, does so much of it belong to one carrier and so much to the other carrier?

A. There is between certain carriers on our line.

Q. But you don't know how it would work out as between the Union Pacific and your line if the Ogden gateway were opened?

A. There is no run-off involved from Idaho that I have ever heard of.

Q. I see.

A. This is California perishable and it is simply put in there to give you an indication of our eastbound perishable schedule.

Q. I see.

That part of your statement had no reference to the traffic involved in this case actually.

A. No, except those schedules, and all schedules prior to those schedules would be available for any business that comes to us from any connection.

Q. Well I thought you just said it would not be so if it came from the Union Pacific from Idaho through Ogden.

A. No, you misunderstood me. I said there was no run-
[fol. 216] off block arrangement that I knew of from Idaho.

Q. And you don't know how it would be, something would have to be worked out if the gateway were opened as a result of this case?

A. No, I said that the schedule given in my exhibit would be available to Idaho business and all of the schedules prior to those times would be available to that business, as they are available to other business that may develop in Utah, Ogden, Salt Lake, or any other point.

Q. Will you explain then—I confess I don't understand your explanation—will you explain how it might have some effect on Idaho traffic?

A. The schedule, for example, shows the run-off or last block is due out of Ogden at 9:40 p. m. the third day. Therefore, any business received up to that time could move on that schedule through to the destinations as shown and by connection to other destinations east of those river junctions.

Q. Well, then, whether that schedule would mean anything in connection with the Idaho traffic, would depend on when the Idaho traffic were delivered for interchange at Ogden, would it not?

A. Oh, yes. Any schedule from Idaho will be dependent entirely upon the type of service that your company renders up to Ogden, and the type of service your Ogden Union Railroad and Depot Company renders in delivering business to us at Ogden.

[fol. 217] Q. In connection with your Exhibit No. 7, as I have it numbered, showing serviceable freight car miles per freight car day, do you have that?

A. Yes, sir.

Q. You show for the Denver and Rio Grande in the first column 54 for the eight months of 1948, 54.9 for the year, and 57.5 for eight months of 1949. Then you make comparisons with the Western District and the national total freight car miles per freight car day. Would it affect your conclusion, whatever it is that you draw, to know that the freight car miles per freight car day of the Union Pacific is approximately 85?

A. I can give you exact figure for the eight months of '48 and the eight months of '49.

Q. Well, can you give them?

A. Eight months of '48 was 76.0; eight months of '49 was 66.9.

Q. Of the Union Pacific?

A. Yes, sir.

Q. And do you know what it is now, since we got past the blizzard and the block and all that?

A. I know what it was an October, 1949, it was 85.1.

Q. Now on the bottom of page 7 of your statement you are speaking about, as I understand it, a capacity on the Rio Grande now to carry additional tonnage?

A. That is correct.

Q. And your comparison, do I understand correctly, is [fol. 218] with your peak war year?

A. That is one of my comparisons.

Q. One of them, yes.

In the article in Fortune Magazine, in November, 1949, it is stated that—this article I refer to is concerning the Rio Grande Railroad—it is stated that the then tonnage of the railroad was only 11.5, as I recall it, under its peak war year, is that correct, do you know?

A. I don't know, sir. But the exhibit that I introduced with my testimony shows 1944, the peak war year, and 1948, the last complete year, and the percentages are mathematical.

Q. Yes.

A. Computations, you can probably get the correct amount.

Q. You don't know what the figure would have been for the period as of when this article was written, published in the November Fortune Magazine, do you?

A. I don't know what period they were covering in the article. I don't recall the figure that you quote, but I am willing to accept your statement that that was in the article.

Q. You have seen the article, haven't you?

A. Oh, yes, I saw it.

Q. Have you given any consideration in connection with this complaint as to what we might call the excess, unused or idle capacity of the Union Pacific Railroad to haul more tonnage?

A. None whatever.

[fol. 219] Q. You have not.

Now on page 8, Mr. Bradford, you refer to "expenditures in additions, betterments and improvements." Could you state about how much of that total expenditure has gone into main line, and how much has gone into branch lines of the Rio Grande Railroad?

A. Practically all of it has gone into main line expenditures, except, if you would enlarge that question to cover main line yards and supporting facilities for main line operation.

Q. I see.

But, essentially, it is main line expenditures?

A. Yes, it is, except to the extent that as the diesels have replaced steam locomotives from the main line, those steam locomotives are shoved back and placed over on certain of the more important branch lines, and thereby aided the branch lines to that extent.

Q. Now on page 10 of your statement you refer to the refrigerator car ownership and availability, and I see this sentence, "In addition to this ownership we have a contract with the American Refrigerator Transit Company, which company has the responsibility of keeping us supplied with refrigerator cars under which contract we have at our command a total of approximately 11,500 refrigerator cars."

Now isn't the American Refrigerator Transit Company a company that is jointly owned by the Wabash and the Mis-
[fol. 220] souri Pacific?

A. I believe so.

Q. I'm not positive of it, but that is the common understanding.

A. Yes, sir, I think that is right.

Q. And that is the total of the cars that they own, that the ART owns, isn't that correct?

A. Yes, sir.

Q. And does not that ART Company have contracts, so far as you know, with other railroads than the Denver and Rio Grande?

A. So far as I know they have no contract with anyone except the Denver and Rio Grande, but I imagine that they probably supply cars to others.

Q. Yes.

A. Under what arrangement I do not know.

Q. You don't intend at all to imply in saying that you have at your command this total of 11,500 cars that you can take any portion of 11,500 that you want at any particular time, do you?

A. Yes. I think that I intend just that. Under the contract we have with the ART Company they undertake to supply our demands and the demands of our connections.

Q. Do they always supply all that you ask them for?

A. They have done a very good job of it.

Q. You will have to be very specific about this, Mr. Bradford.

A. No, sir, I don't think they always supply every car we have asked for any more than any other car company, [fol. 221] or any more than we can supply every shipper every car he asked for.

Q. Then wouldn't this be a more nearly accurate statement that that company owns 11,500 refrigerator cars, and you have this contract with it, and you can ask for all you want, and they will do the best they can to supply all they can, and it doesn't mean at all they will supply all that you ask for or that you can come first in getting supplied out of 11,500?

A. Well, you become pretty involved in it. I will go to this extent, that I don't think anyone in the car supplying business can at any time guarantee they will furnish any customer all the cars they might order.

Q. As far as you know, though, there are other people who also draw on this—other lines, railroads, that draw on this 11,500 refrigerator cars?

A. Yes, as I stated in my direct testimony, the PFE contract lines drew on it to the extent of 11,320 cars over the past five years.

Q. Yes.

A. So presumably others are calling on them too.

Q. Yes, but I mean, though, in the first place, there are lines, railroads like the Wabash, the Missouri Pacific, and yourselves, and undoubtedly others, that have what we might call first call on the 11,500 ART cars, isn't that your understanding?

A. No, sir, I don't agree they have first call on them at all.

Q. You don't?

[fol. 222] A. Yes, sir.

Q. I named your line as one of them.

A. I agree we have, under our contract, we have a call on those cars. What their arrangement is with the other lines you will have to ask them, I do not know.

Q. Does your contract read to the effect that you do have first call on these cars?

A. No, I don't believe that that word "first" is used in there, Mr. Collins.

Q. Would it be asking too much of you to put a copy of that contract in evidence?

A. I would not object to putting that part of the contract that has to do with the supplying of cars, I think that would not be asking too much. There are other things in there I think might be immaterial to this case.

Q. Well, yes, I appreciate that. I would appreciate your putting in evidence——

Mr. Quirk: Wait a minute, Mr. Bradford.

Mr. Collins: Just that part.

Mr. Quirk: We will consider that.

Mr. Collins: He already said he has no objection to it.

Mr. Quirk: I may have an objection to it.

Mr. Collins: You are not a party to the contract.

Mr. Quirk: I am an attorney in this case.

Mr. Collins: Well, Mr. Examiner, I hope Mr. Quirk will [fol. 223] be rather lenient in his consideration of this, because I feel quite sure the record needs some clarification on it, and I appreciate that Mr. Bradford doesn't have knowledge, or could not be supposed to have knowledge of the immediate arrangements between the American Refrigerator Transit Company and other lines that I am sure he and all of us who are in that general field know there are other lines that draw on that supply of that group of cars.

Mr. Quirk: Just a moment. Mr. Examiner, I'm not sure that the contract is the pertinent thing here. The witness, in response to questions on cross examination, has testified as to just how the contract works, and how they work under the contract, and that is the important thing, nobody is chal-

lenging the contract as between the parties that have a right to challenge it.

Exam. Mullen: I assume Mr. Collins merely wants the exact terms of the contract governing the supply of these cars, that is all you desire, isn't it, Mr. Collins?

Mr. Collins: Yes.

Exam. Mullen: You are not interested in the entire contract, are you?

Mr. Collins: No, just that part. I don't want this record to be left in what I am quite certain is an erroneous, misleading impression, that the Rio Grande Railroad has command of 11,500 refrigerator cars.

[fol. 224] Exam. Mullen: Will you give consideration to that, Mr. Quirk, and let us know later?

Mr. Quirk: Yes. But let me make this one more observation. I don't want to have this case, Mr. Examiner, for the parties in this case to have an argument about what a contract means.

Mr. Collins: I'm not.

Mr. Quirk: Just a minute. I think the important thing is what the witness has said, that is the important thing. Are we in position to furnish cars in the manner he has indicated we are, and if that is what the contract has been applied as between the parties to the contract, then his testimony is competent to settle that question.

Exam. Mullen: Frankly, Mr. Quirk, when this testimony was given I was somewhat puzzled by that same expression, "We have at our command." I wish you would give consideration to that question, as to those particular portions of the contract only.

Mr. Quirk: All right. Maybe the witness can elaborate on that. I didn't understand him to mean he can command all the cars that are there at any moment. I don't believe he means that.

Exam. Mullen: That particular phase of the contract might clear that up.

Mr. Quirk: We will look at it.

Mr. Collins: Mr. Examiner, if they don't feel disposed [fol. 225] to alter the impression that the use of the word "command of 11,500 refrigerator cars," if they are not disposed to handle the matter, I—I mean to clarify it—give us a more definite picture on the record as to just

what they do mean—I may be able to find some information about it myself in the future, and put it in the record.

Exam. Mullen: Mr. Quirk will let us know about that later.

Mr. Collins: Yes, but I am anticipating his refusal.

Exam. Mullen: We have not had it yet, Mr. Collins.

Mr. Collins: No, that is right.

By Mr. Collins:

Q. In connection with the refrigerator car situation, Mr. Bradford, what was the refrigerator car situation during the so-called peach loading season in Colorado? I forget that area there, maybe you could mention it for us.

A. The Grand Junction area, Western Slope, Pallisade?

Q. Yes.

What was the refrigerator car situation then as to supply for Rio Grande loading in 1948, do you recall?

A. No, I expect it was rather tight right at that particular time. It generally is during the peach loading season because those commodities come on pretty fast and all at one time.

Q. Would you know whether your Superintendent of Transportation, Mr. Hale, called on the Union Pacific a number of times during that peach loading season in 1948 for PFE cars?

A. He probably did, there is nothing uncommon about [fol. 226] that. We call on them quite often when we get into a situation where we are short of not only ART's and where we are short of other cars, we call on them for help.

Mr. Collins: That is all; thank you. I had just one more question I wanted to ask.

By Mr. Collins:

Q. Page 11 of your statement, about the eighth line from the top, you have a sentence saying "We handled 210 carloads of express, 276 carloads of mail and 44 Union Pacific passenger trains during this same period. Will you tell us how long a period it was during which you handled these units you have mentioned?

A. I would say between February 13th and 23rd—about a ten-day period—1949. I am not quite sure of those particular dates, but it was about that time.

Q. Then in the second sentence from the one I read, you say "Had the Union Pacific been able to turn over to us additional power—" you could have handled additional business, and so on.

A. Yes, sir.

Q. Your own motive power was not sufficient to take—you had not a capacity of your own without help from the Union Pacific or some other railroad to handle these additional cars?

A. Not under those blizzard conditions at that particular time. We had plenty of railroad capacity, as I have ex-
[fol. 227] plained, and all of this business which has been backed up was dumped on us, you might say overnight. We did not have the power at our command, nor could the Union Pacific rentals have loaned us enough power to move it. We had to take what power we could get, and with that power we moved what business we could move with it. We had greater railroad capacity if we could have gotten more power.

Q. The Union Pacific, however, did turn over to you on some basis, rental or lease or something, a number of diesel units, and cooperated in that way, did it not?

A. Oh, yes, but the point I had in mind was the question of the capacity of the railroad, and a further point that at that time there was some discussion with the Union Pacific officers to see if we could get additional power from them. At one time it appeared they might be able to rearrange and help out in that respect, but they were not able to do so, so that the power, shortage of power, plus the heavy dumping of business at one time was the stopping point there, rather than the capacity of the railroad.

Q. Well of course is it not a fact that the capacity of the railroad to transport would be limited by the extent of its motive power to move trains?

A. That is correct, sir, but——

Q. Now——

A. May I add to something else?

[fol. 228] Q. Yes.

A. If you are seeking information in connection with that.

Q. Not on that feature, but you may certainly say what you wish.

A. The situation was a very unusual one. The Union

Pacific had hundreds of cars backed up, and numerous passenger trains, the night that they decided to divert business to us at Salt Lake for example, I think we handled 12 or 13 trains out of here during the night.

Q. Yes.

A. That disorganized not only their power but our power.

Q. Yes.

A. As I have stated, I cannot conceive of a thing like that happening again under those same circumstances, because I am satisfied that if the Union Pacific were unfortunate enough to be snowed in again, they would not wait quite as long as they did in time to let such an amount of business back up. An even flow of business is very important to keep it moving, and the even flow is what tests the capacity of the railroad, and not dumping stuff on it at very short notice as had to be done at that time.

Q. On the passenger trains, for instance that you handled, Union Pacific trains that you handled for them during that period, such as the City of San Francisco, and those streamlined trains in particular, didn't their own motive power [fol. 229] accompany the trains through?

A. Yes, sir.

Q. Now as I understand——

A. But we had to supply crews.

Q. Oh, yes.

A. And we had to supply motive power for the express trains, for the mail trains.

Q. Yes.

A. And for the approximately 5,000 carloads of business that—freight business that was diverted to us.

Q. Yes.

A. Including a trainload of Union Pacific oil.

Q. The fact is, though, the Union Pacific turned over to the Rio Grande during that period all of the motive power the Union Pacific officials said they could.

A. Yes.

Q. And your point is if they had turned it over to you, you could have handled even more traffic.

A. Yes.

Mr. Collins: That is all, thank you.

Exam. Mullen: Anything on redirect?

Mr. Quirk: No further questions.
Exam. Mullen: That is all, thank you.

(Witness excused.)

Mr. Quirk: Mr. Examiner, I offer in evidence Bradford [fol. 230] Exhibits 4 to 7, inclusive.
Exam. Mullen: No objection, they will be received.

(Complainant's Exhibits 4, 5, 6, 7, Witness Bradford, received in evidence.)

Exam. Mullen: Do you have another witness?
Mr. Quirk: Dr. Nelson.

El Roy Nelson was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your name, please, and your residence?
A. El Roy Nelson, resident of Salt Lake City.
Q. What is your address?
A. 1469 Princeton Avenue.
Q. Now at the request of the officers of the complainant here have you made an economic study and prepared some exhibits, and are you prepared to put your testimony in in this case in the form of a statement?
A. Yes, I have prepared an exhibit.
Q. You prepared a statement, your testimony.
A. A statement, and I am prepared to put this on the record.
Q. All right. Proceed to deal with your statement.

Mr. Collins: Before you do, I haven't any exhibits of Mr. Nelson. I have this pamphlet of the EXT here.

(Material furnished Mr. Collins.)

Mr. Collins: Is there just one?
[fol. 231] Mr. Quirk: I think you are the only one on the Union Pacific that doesn't have one. You ought to train your crew.
Mr. Collins: I have one.

Exam. Mullen: Go ahead, Dr. Nelson.

Mr. Collins: Mr. Examiner, I don't know when will be the right time to do it, but glancing at this gentleman's text, he apparently is going to show the growth of the Northwest, the increase in traffic, population, and all of that sort of thing, within the Northwest, and I presume would be ultimately laying the situation open to draw the conclusion that additional transportation facilities will be needed, but since I don't know when will be the right time, and I assume he will want to read this, I object to this sort of testimony on the ground of its irrelevancy, unless and until the Rio Grande Railroad shows that it proposes to furnish additional transportation facilities into this lush neighborhood, as they have called it.

In other words, my thought is it won't help the neighborhood, transportation-wise, just to have additional freight solicitors in there whose railroad line doesn't touch that area, and consequently, any information of this sort has no relevancy.

Exam. Mullen: Do you desire to say anything about that, Mr. Quirk?

Mr. Quirk: I doubt whether it is necesary, but I will just say this: The Commission is called upon to act in a case [fol. 232] of this kind, even Mr. Collins knows they have to look to the future.

Mr. Collins: Strike out "even."

Mr. Quirk: To the extent an economist can aid them getting together things that are generally known, but putting it in orderly fashion, is relevant material in a case of this kind.

Exam. Mullen: We will let the witness proceed, and if Mr. Collins has any objection to any particular portion of it, you may raise the point at that time. It seems at first glance to me to be relevant. But you may reserve the right to object to any particular portions of it as the hearing proceeds.

Mr. Collins: Thank you.

The Witness: My name is El Roy Nelson. For the past two years I have been associated with the Bureau of Economic and Business Research of the College of Business, University of Utah; as Director since 1949. From 1938 to 1947 I was associated with the University of Denver as

Professor of Economics. During that nine-year period I was, at times, also Director of the Colorado State, and the Tri-County Planning Commissions, Economist for the regional office of the National Resources Planning Board and for the Department of Commerce. During this 11-year period I have had considerable opportunity to observe economist trends, including production and trade in various areas and regions of the West. I am not, however, an authority on transportation, freight rates or traffic.

[fol. 233] My appearance before the Commission is at the request of the Denver and Rio Grande Western Railroad, a party to the action filed (ICC Docket 30297) against the Union Pacific Railroad.

Economic changes in the Pacific Northwest:

Dramatic changes in the economic patterns of areas and regions result from special causal factors. Since 1940 the biggest single factor has been war, which brought with it development of natural resources, use of special locational factors, use of power resources. To those who planned for war production, made decisions locating and constructing new plants must be given credit for capitalizing on natural mineral resources, locational advantages such as high productive labor forces, and available cheap power sources.

Aside from the exigencies of war, and viewed from the present, much of the government construction or sponsored construction of the arsenal of democracy, and subsequent sale of war built plants to private industry in portions of the west, hastened the economic development of the regions. In fact, such direct or indirect government sponsorship telescoped in less than a decade, a 30-40 year expectancy in industrial development of certain areas.

In no place in the nation is this more dramatically shown than in the Pacific Northwest. Readily available power from federally constructed hydro-electric projects on the [fol. 234] Columbia River was the most important foundational factor. Add to this the construction of industries dependent on cheap hydroelectricity—aluminum, chemicals, paper, products of electric furnaces. This combined set of forces based on cheap power overshadows all other economic development of the region. It is electric energy that

best exemplifies growth in the Northwest, especially in Oregon and Washington.

Population Growth in the Northwest:

Shifts in population from decade to decade have long presented intriguing patterns, and this is especially true since 1880 in the 11 western states. Interestingly enough, California has shown the most stable decade-to-decade percentage growth of any of the 11 western states. Montana and Nevada show the most violent reaction to local economic changes—and in and out migration of population. But violent fluctuations have also taken place in the Pacific Northwest. These are shown in page 1 of Exhibit 8.

Mr. Quirk: I offer this document of 11 pages as Exhibit 8 for identification.

Exam. Mullen: It will be received for identification as Exhibit 8.

(Complainant's Exhibit No. 8, Witness Nelson, marked for identification.)

The Witness: Completion of the transcontinental railroads to Washington and Oregon in the 1880's was at once [fol. 235] followed in that decade in doubling and trebling the total population of those states. The decade ending in 1900 was less dramatic. In fact, in that ten-year period, Idaho led the west in percentage increases in population.

In the next decade, ending in 1910, Washington shared with Idaho to lead percentage-wise population gain in the west. To 1920 Washington and Oregon did little more than hold their own in population and increased percentage-wise but slightly more than did the nation. To 1930 increase in population in Washington was below the national average, in Oregon but slightly above that average.

During the depression decade Oregon, Washington, and Idaho all increased in population somewhat above the national average due in part to the construction of hydro-electric projects in all three states and irrigation development in Idaho. The increase was not sudden. In fact, growth in the Pacific Northwest was generally undramatic from 1910 to 1940.

However, in that nine years since 1940, shifts in population to the west coast constitute one of the most significant

migrations in American History. Not only has the increase in numbers far outsripped that of any previous decade, but percentagewise the population growth of Washington and Oregon (like that of California) is greater than in any decade since 1910.

As shown on page 1 of Exhibit 8, Oregon leads the nation [fol. 236] in percentage increase from 1940-49, with a 59.3 per cent increase; Washington is reported to have a 48.7 per cent increase. Washington and Oregon have increased approximately four times as fast as has the nation as a whole. Idaho, in that decade, has increased by the same percentage as has the nation.

Montana shows a decrease in population since 1940. This latter is due primarily, like that in the extensive agricultural states, to mechanization in agriculture and consequent decreased need for agricultural workers.

Population and Employment:

Population shift to the Northwest from 1940 to 1949 has resulted from the obvious aftermath of increased economic activity in that region. We have been increasingly aware of the mobility of labor from region to region, to the extent that almost all population shifts can be accounted for by relative availability of jobs and employment opportunities. For recent decades and except for war periods, approximately 35 per cent of the total population is in the labor force; 52 per cent of the population over 14 years of age is at work or seeking work. So as nearly as can be determined from population and employment data, these percentages apply to the nation and to Washington, Oregon, Idaho, and Montana. Relative availability of jobs from area to area, state to state is a significant factor in population shifts.

[fol. 237] Employment patterns:

Now the pattern of total employment of a given area or region does not always provide the best key to measuring economic development. As of an earleir date, new land was important. Only to a minor extent has new land under irrigation projects been an important factor since 1940. The migration to areas is associated with industrial growth.

Of greater significance is the trend in employment in the basic or physical production industries.

In the Northwest, or in any other region, this basic principle holds true—the ultimate population growth of a region is determined by the employment opportunities in the physical production industries. These are catalogued to include agriculture, mining, manufacturing, transportation and construction. As of 1940 employment in the basic industries as a percentage of total employment in the Northwest states was approximately 50 per cent.

This is also true in 1948 and 1949. This is the same thing as saying that the total of the basic economic activities has developed since 1940 in a constant ratio to those activities in service industries.

New Patterns:

The war brought to the Pacific Northwest new fields of basic production activities, with various electro-process industries including aluminum production, the chemicals [fol. 238] and expansion of other industries including paper and steel. According to data from the War Assets Administration government and private investment provided 160 million dollars of new plants in electro-process industries alone. This marked a definite change from the natural resources type of opportunities to one of converting goods such as alumina into finished products, where power, rather than mineral resources found locally was the base. This was the first major step in the Northwest disassociated from distinct developments of the soil, forests, mines, and fishing waters of the region.

Industrial changes in the Northwest:

Hydro-electric power developments in the Northwest have been the most important factor in the wartime expansion and the post-war development in Washington and Oregon. This has been the causal factor in aluminum production and fabrication of this product.

New industries together with expansion of old ones made possible the condensing, in less than a decade, of industrial development that might have been spread over 40 to 50 years. It was based on power development, and on the sup-

plemental industries associated with this field. Nature had not favored the Northwest with large quantities of coal—of coking coal or with petroleum or natural gas. Although there is a possibility of gas and oil from Canada the large power resources of Washington and Oregon are water power and electricity.

[fol. 239] Industrial employment:

Industrial employment has kept pace with total employment and expansion of industrial activities throughout the Northwest area, extending through Oregon and Washington to British Columbia which, like the two states, has cheap electricity. Although current data are not readily available, a comparison of industrial employment in manufacturing industries of Oregon, Washington, and British Columbia shows the major changes that have taken place from 1940 to 1947 and 1948. These data are shown in pages 2-6 of Exhibit 8.

Exam. Mullen: When you use the expression "British Columbia," do you include that in your definition of the Pacific Northwest? Just what states are included in the Pacific Northwest?

The Witness: Specifically in the Northwest, Washington, Oregon and to a lesser extent Idaho and Montana.

Examiner Mullen: Just a minute, to a lesser extent, geographically?

The Witness: Geographically.

Exam. Mullen: Will you tell us just what portions of those states are eliminated, so that in reading the record we will know definitely the areas you are speaking of?

The Witness: For this particular point, production workers, '39 through '47, the four Northwest states previously listed, plus British Columbia.

[fol. 240] Mr. Collins: Excuse me, Mr. Examiner, do you mean all of Washington, all of Oregon, all of Idaho——

The Witness: These are total figures for the states, yes.

Mr. Collins: I want to get all of the states. All of Oregon, all of Washington, all of Montana, all of Idaho, is that it?

The Witness: For this exhibit I have taken the total data form each of those states.

Mr. Collins: I see. All right. Go ahead.

Exam. Mullen: In response to my question, I thought you said that it didn't include all of two states you named there. What did you mean by that?

The Witness: I thought you were asking for a definition of the Northwest.

Exam. Mullen: I'm asking for a definition of the Northwest as you use it in your testimony.

The Witness: As I use it in this particular testimony, it applies to all four of those states, and for this exhibit, British Columbia.

Exam. Mullen: So you do not eliminate any portion of those states in your testimony.

The Witness: That is right.

Mr. Collins: I thought he just said to a lesser extent, Idaho.

What did you mean by that?

[fol. 241] The Witness: That was where I was attempting to give another definition of the Northwest.

Exam. Mullen: That is the thing that confuses us somewhat. I want to know what you mean by the Pacific Northwest, when you use it in your testimony, not any other definition. I think you explained that, as including all of the states?

The Witness: That is right.

Exam. Mullen: All right.

The Witness: Data available for 1949 indicate some recession in Washington and Oregon from the peak of 1948. Decreases are apparently about the same as for the nation as a whole.

Manufacturing Industries:

Increase in population in Oregon and Washington since 1940 is best explained in the increase in basic productive industries, which not only provide employment in those industries, but provide the foundational income on which service industries, and employment in service industries are based. Oregon's population increase of 59 per cent since 1940 to lead the nation, and Washington's increase of 49 per cent are accounted for largely by the industrial development of those areas.

As an additional causal factor, the most important single

item in those two states is the availability of cheap electricity. Cheap power is associated first with the aluminum industry, but also effects other industries such as chemicals, iron and steel, machinery manufacture, paper production, and even furniture.

[fol. 242] According to the Federal Power Commission reports, generation of electricity in Washington in 1948 was 14.8 billion kilowatt hours. Compared with 3.9 billion in 1940, this was an increase of 279 per cent in eight years. Oregon's generation of electricity in 1948 was in excess of 5.5 billion kilowatt hours, compared with the 1.7 billion kilowatt hours generated in 1940. This was an increase of 220 per cent. The national increase in eight years was 132 per cent. These are shown on page 7 of Exhibit 8.

The Grand Coulee Dam, constructed from 1933 to 1940, is by all odds the biggest single source of power in the Northwest. The Bonneville Dam constructed in the 1930's, although small by comparison with the Grand Coulee, is still six times as big as the largest electric generating plant in Utah. The McNary Dam now under construction will add approximately one million kilowatt capacity to the Northwest, and will help to remedy in that area the lack of power which plagued the Northwest in the winter of 1948-49, and necessitated the transmission of power even from Utah through the regional interconnected power pool.

But for industrial purposes, such as the aluminum industry, firm power is available in the Northwest at 2.1 mills per kwh according to the Bonneville Power Commission, far below that of most other areas of the country excepting industrially owned plants which by now have written off the [fol. 243] capital cost of their generating equipment. Although temporary shortages of power such as occur with the freezing of streams in Washington last winter are to be expected for some time, including this week, the fact remains that the Northwest has approximately 76 per cent of the potential hydro-electric power of the nation, and this factor is the most important single additional industrial location factor in that area.

Aluminum

The aluminum industry of the Northwest is founded on one idea, cheap electricity, which became available with the

completion of the Bonneville and Grand Coulee projects after 1940. Government constructed plants for the production of pig aluminum from alumina and for rolling mills for bars and slabs have since been disposed of to private industries. In 1940 the aluminum industry of the state of Washington was begun with construction by the Aluminum Company of America of a 5,000 ton capacity plant in Vancouver, Washington, to use Bonneville power.

This was, in 1940, 2.4 per cent of the national total. As of 1948 the Northwest production of 295,000 tons was 47 per cent of the national total. In the meantime the United States production of aluminum had increased by 200 per cent over the 1940 total. Even during the peak of the war period the Northwest did not exceed 41 per cent of national [fol. 244] production, and is relatively more important in 1948 and 1949 than during 1943-1945.

In contrast to most other industries, as yet there is no real relationship in the Northwest between Aluminum and sources of raw materials or markets. The one factor is power, beginning with Alcoa's use of Bonneville dam power in 1940 and the use of up to 46 per cent of Bonneville Administration power generation's capacity for aluminum alone. According to data from the Bonneville Power Administration the aluminum industry in the Portland, Tacoma, and Spokane areas consumed in excess of 4.6 billion kilowatts of electricity in 1948. Reduction of alumina to aluminum requires almost 10 kwh per pound of aluminum, and additional power is required for rolling mill operations.

In addition to power, the aluminum industry of Washington and Oregon consumed in 1948 more than 800 million pounds of alumina (all from the Louisiana area), 5 million pounds of cryolite (mostly from Greenland), one million pounds of aluminum fluoride from Missouri. Petroleum pitch, petroleum coke, and soda ash in significant quantities were from Oregon, Texas and California.

In 1949 approximately the same quantities will have been used. The Northwest's aluminum industry must find most of its market outside Washington and Oregon. Some of the aluminum is shipped as pig, other as bar and sheet. So [fol. 245] nearly as can be determined, in 1948, only 6 per cent of the Northwest's aluminum products was used in

Washington and Oregon; ten per cent in California and Arizona, and the remainder shipped east of the Missouri River as pig aluminum or as rolled aluminum products ready for fabrication.

Construction in 1949 of Alcoa's seven million dollar bar and rod mill in Vancouver (Portland area) will consume some additional quantities of Northwest-produced aluminum. This plant will produce electric transmission cable and is expected to consume 15,000 tons of pig or bar aluminum per year (about five per cent of the Northwest production). But the plant will then have a product which will also be marketed primarily in the east.

According to data from the State departments of employment security in Washington and Oregon, the aluminum industry of those two states in 1948 directly provided employment for 5,700 people, with an annual payroll of eighteen million dollars. According to Maurice W. Lee of the University of Washington, derived industrial operations from aluminum provided employment for 22,000 people in 1948 in Washington and Oregon with an annual payroll of sixty-one million dollars.

Ferrous metals:

Rather significant steel production is also located in the Seattle and Portland areas. In the absence of low cost pig iron, the industry is based primarily on scrap, but more [fol. 246] significantly on the electric furnace. According to data from the Iron and Steel Institute, steel ingot capacity of Washington and Oregon was 170,000 tons in 1938, and in excess of 400,000 tons in 1948.

Most of this capacity is in the Seattle area, but significant quantities are also in Portland. Characteristic of the industry is the electric furnace. One problem in steel expansion in the Northwest has been the lack of firm power corresponding to that available on a contractual basis in the aluminum industry.

Rolling mill capacity in iron and steel, however, is significant, and includes heavy structural pipes, universal plates, splice bars and tie plates, track spikes, hot rolled bar steel, and concrete reinforcing bars. While a considerable portion of this industry's market is in the Portland and Seattle areas, significant quantities go into miscellaneous items, es-

pecially transportation equipment marketed both within the Northwest and other areas. Of significance are alloy steels, the production of ferro-silicon, again dependent on low-cost electricity.

This industry, in steel ingot capacity, as well as in fabricating plants, has expanded significantly since 1940. Data shown on pages 2, 3 and 4 of Exhibit 8 illustrate the growth, the number of establishments, and production workers in primary metals, fabricated metals, machinery, electric machinery, and transportation equipment in Washington and [fol. 247] Oregon—confined largely to the Seattle and Portland areas. Although total production workers in Washington increased from 1939 to 1947 by 50 per cent, workers in various metal industries increased from 87 per cent to 350 per cent.

In Oregon (largely confined to the Portland area), increases were just as significant as in Washington. Interesting also are the increases in production workers in these same industries in British Columbia. Although some of these industries are relatively small, the increase in the Northwest in number of production workers since 1939 is of significance.

This is especially true of electric machinery and transportation equipment in Washington; the primary metals, electric machinery and transportation equipment in the Portland area. Again the most significant key in this group of industries is the availability of power, to a lesser extent the immediate marketing areas.

Lumber and lumber products:

The largest manufacturing industries of the Northwest from a standpoint of employment are the lumber, paper, and related industries. As shown on pages 2, 3 and 4 of Exhibit 8 approximately one-third of production employment in manufacturing industries in Washington, Oregon and British Columbia are in these industries.

Percentage-wise, these industries increased much less than did those of the allied industries, such as furniture, [fol. 248] paper and paper products. Of interest is the growth in the plywood industry of Washington and Oregon, but centered largely in the Portland area. According to the Portland Chamber of Commerce, in the Portland area alone,

nineteen operating plants, in 1949 have a capacity for plywood of one billion square feet annually.

Thirty per cent of this is exterior grade, the remainder interior. This itself has grown up almost entirely since 1940. The market for 80 per cent of these materials is outside the Northwest.

Pulp and paper manufacturing is confined largely to the Portland area, about one-half in Oregon and the other half across the Columbia in Washington, and the capacity is in excess of one million tons, most of which is moved east to markets.

Food:

Second only to lumber and allied products from the standpoint of employment is that of food processing industries of Washington and Oregon, which increased from 1939 to 1947 in terms of production employment by approximately 50 per cent. These industries include fish, and the canning and freezing of foods and vegetables. The number of workers in this industry are shown on page 2 and 3 of exhibit 8 for 1939 and 1948. Rather obviously, the big market for these industries must be beyond the borders of the two states. [fol. 249] This is especially true of berries, but is true of most other fruits, and of peas and corn. In 1948 Washington and Oregon produced more than 13.4 million cases of canned vegetables (13 per cent of the US total); 3 million cases of canned fruit (9 per cent of the US total); a major portion of quick frozen fruit. Most of these products are marketed east of the area.

Miscellaneous industries:

Of importance primarily from a local market standpoint, but also for some national markets, are the textile and apparel industries of Washington and Oregon. Blankets, swimming suits, shirts and ski togs are produced. All of these have national markets.

Chemical Industries:

Chemical industries of the Northwest are associated rather distinctly with other manufacturing, such as paper, plywood, furniture, wood preservatives, with agricultural

and related industries such as fertilizers, insecticides, and fungacides. To a great extent, raw materials for these industries must be imported into the Northwest. Exceptions are lime and limestone, or products coming from by-product plants. Many of the chemicals, however, are related closely to electric power.

Chlorine and caustic soda:

Caustic soda and chlorine are produced in the Portland and Tacoma areas in sufficient quantities to satisfy the Northwest demands. The big customers are the wood pulp [fol. 250] and paper making industries. However, in 1948 approximately one-third of the chlorine production was marketed outside the area. Raw materials, primarily salt, are shipped into the region, but electrolytic processes from available cheap power are used. In this instance, despite the freight charges on salt from the San Francisco Bay area, the cheaper electricity is the important causal factor in establishing the industries in the Portland area.

Sulfuric Acid and other acids:

With completion of the American Smelter and Refining Company's 100 ton daily capacity sulfuric acid plant at Tacoma, the Northwest should have an adequate supply of sulfuric acid. The new supply will be added to that of a small unit plant which utilizes waste sulfuric dioxide gas. Other chemicals including hydrochloric acid, sodium silicates, ethel alcohol are of a size sufficient to satisfy the Northwest's basic demand. All of these are marketed to northwest industries to produce other items that are shipped east.

Trade—Northwest and other parts of the nation:

Specialization by areas of the United States in production of products in which comparative advantage is the rule remains a definite part of the economic pattern. The specialization is usually based on some comparative advantage such as climate, soil conditions, mineral deposits, and other factors such as cost of power and fuel.

[fol. 251] Although for manufacturing data alone there is evidence of considerable increase in production to satisfy

just a local demand, the greatest increase in processing is reflected in trade beyond the state borders. Historically, the Northwest, like most other sections of the West, is a producer of raw materials or small processed goods. This is fundamentally true today, although the new addition of power in the Northwest must be considered in its proper place as a significant industrial locational factor.

Changes in trade as among the states, both in total quantity and in specific types of goods, reflect the economic growth of those areas and are closely associated with total population growth as well as with industrial, agricultural, and other employment.

The trends in Northwest trade are best told from official publications or from data available from such publications. These include Interstate Commerce Commission quarterly and annual reports on Tons of Revenue Freight Originated and Tons Terminated in Carloads, by Groups of Commodities and by Geographical Areas, Class I Steam Railways. These are available from 1940 through the first quarter of 1949.

A second source of relatively greater value from the standpoint of a study of specific transportation by rail from state to state is found in the Interstate Commerce Commission, Bureau of Transportation Economics and [fol. 252] Statistics, Studies on Carload Way Bill Analyses, available for 1947 and 1948. These data, while including state to state relationships, did not identify the specific product but only the general class of agriculture, livestock and manufactured goods, and the two other classes. The data are from sampling including one per cent of the traffic of Class I railways.

A third source of data is available only for 1939, and is a carload traffic study based on way bill analyses for one day each month for that year.

These items are on a commodity basis, but show the trade originating and terminating for each major commodity item as among all of the states. A combination of these data reveals rather significant trends from pre-war to 1948. Shown on pages 8-11 of Exhibit 8 are total trade reported for 1939 and for 1948 between the four northwest states and the other states.

Originating and terminating traffic:

Class I railway freight tonnage increased considerably from 1939 to 1948. For the United States as a whole that originating increased by 49 per cent, that terminating, which theoretically should be the same as originating, increased by 40.6 per cent. The difference in these totals is explained by the fact that originating and terminating on smaller than Class I railways do not appear, nor does the freight forwarded traffic. There is also the lag at the [fol. 253] end of the year. Of significance, however, as shown in the exhibit, are the changes in trade as among the four states and the rest of the nation.

Northwest states' trade with other states 1939 and 1948 as shown by Class I railroad data:

As shown on Page 8 of Exhibit 8 freight originating in Washington and terminating in states to the south and east increased substantially from 1939 to 1948. The same is true of freight terminating in Washington and originating in states to the south and east. Of those states shown in the exhibit, Illinois, Minnesota and New York continue as the most important terminating states for Washington products. However, from the period 1939 to 1948, percentage increases were greatest in the south and east.

As shown by tonnage terminating in Washington, the states of Louisiana and Utah, of those shown, are the largest shippers. Percentage increases from 1939 to 1948 were greatest in Louisiana. Although details by commodities are not available (except for 1939) data on freight originating and terminating by commodities and by states reveal important changes. These data are not shown in the exhibit, but are readily available in the ICC quarterly and annual reports of "Tons of Freight Originated and Tons Terminated in Carloads by Groups of Commodities and by Geographic Areas—Class I Steam Railways." Generally the difference between amount originating and terminating indicates the net shipments into or out of the state. [fol. 254] Although increases are noted in agricultural and forestry products, the most significant increases are in manufactured goods: aluminum, newspring, woodpulp, and building woodwork shipped from the state. Significant in-

creases in goods entering the state (net terminating) are in machinery, iron and steel products, and alumina.

Oregon's trade with other states—shown on page 9 of Exhibit 8 is similar in trend to that of Washington. New York, Texas and Minnesota are the most important south and east terminating states for Oregon products. Percentage-wise increases since 1940 are most noticeable in Florida, Connecticut, and Virginia. As originating states for freight shipped to Oregon from the south and east, Illinois and Utah are the leading states. Percentage increases since 1939, however, are most noticeable in Kansas and Maryland.

Data from the ICC quarterly and annual reports by commodities indicate the same trends as Washington—significant increases in aluminum, woodpulp and paper shipped from Oregon, and alumina and machinery shipped into Oregon.

Idaho, chiefly dependent on potatoes as its "exported" product, ships chiefly to Utah, then Illinois, but markets significant quantities in other states to the south and east. These are shown on page 10 of Exhibit 8. Changes in amounts of goods shipped into Idaho from states to the east and south have not been so significant as in Oregon and [fol. 255] Washington. As to commodities, while potatoes dominate Idaho trade to the east, phosphates and fertilizers are of growing importance.

Montana's trade as shown on page 11 of Exhibit 8 has changed less than has trade of the other northwest states. However, significant increases are in phosphate rock and fertilizer (not shown specifically in the exhibit).

Trade among the northwest states and to the east and south is only a partial clue to changing economic patterns. However, significant changes are noted that indicate growing industrial development.

Mr. Quirk: You may examine the witness.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

Mr. Collins: Mr. Examiner, I suppose now after the wit-

ness—you told me I could object to any particular part of this, and I find that one part of it—each part of it is as irrelevant as every other part of it, so I now move to strike the testimony, the text, and if and when the exhibit is offered in evidence, to reject it on the ground that both are irrelevant and immaterial for particular reasons which I would like to state.

One is that since there has been no indication of the purpose of the testimony, it must necessarily undertake to show such increase in various industries and what not in the Northwest as necessitates greater transportation ca- [fol. 256] pacity. Now, Mr. Earley has testified with respect to the fact that to the territory, that part of the Northwest territory, which includes Portland, Seattle, and Tacoma and the area of western Oregon, all this lush area, or most of it at least, where the industries are, as recited by this witness, that the Rio Grande Railroad has that territory wide open to solicitation on joint through rates on an equality with other carriers.

Now if the testimony is intended to prove the need of additional transportation capacity to and from this growing area, then I suggest to you that since there is no proposal to add any trackage or any physical transportation to what the Union Pacific and the other lines have between that area, and speaking specifically with reference to the Union Pacific, from the Portland and Northwest area down to Ogden, there would be nothing added to transportation carrying ability, why the testimony then can have no possible relevance, because it is obvious the Union Pacific Railroad can haul whatever share of the stuff it gets from Portland to Pocatello, it can certainly haul it all on its main line to east or to the west.

In short, this is probably 800 or 900 miles from any of the points, the nearest point at which the Rio Grande Railroad could be of any assistance from a transportation standpoint. I move to strike the testimony, and to reject the exhibit on the grounds that I have stated.

Exam. Mullen: Do you wish to reply to that, Mr. Quirk? [fol. 257] Mr. Quirk: Do you think it is necessary?

Exam. Mullen: I thought perhaps you might want to say something on it.

Mr. Quirk: I would like to say this: Of course this case doesn't involve the building of new railroad facilities, but according to the premise assumed by Mr. Collins——

Mr. Collins: On the facts stated, not the premise assumed.

Exam. Mullen: We will let Mr. Quirk continue with his reply.

Mr. Quirk: Even with the railroad facilities that exist in the Northwest, each of the railroads in the Northwest, if they had this policy of closing the door to each other as to through routes and equal rates, the Northwest could not have developed. Therefore, it is relevant in a case of this kind to have before the Commission in an organized manner, not only the present, the past, but the prospective development and otherwise of this Northwest territory.

The Commission, of course, knows without being told by us that it is a growing territory. Therefore, it will be relevant in this case for the Commission to have before it in concrete form and manner that all the routes of the railroads will be necessary to this growing country.

I submit it is relevant and material, and the motion should be denied. I offer Exhibit 8 in evidence.

Exam. Mullen: It is the Examiner's opinion that the [fol. 258] facts stated here are relevant, and the Commission may give such weight to it as it desires in the light of all of the testimony in the record. The motion of Mr. Collins, therefore, is denied. The exhibit is offered in evidence. Is there any objection in addition to those you have already raised?

Mr. Collins: Do you say I renew it?

Exam. Mullen: Do you have any additional objection to the receipt of the exhibit in evidence other than the one you have already raised?

Mr. Collins: No.

Exam. Mullen: Then the exhibit is received in evidence.

(Complainant's Exhibit No. 8, Witness Nelson, received in evidence.)

Mr. Quirk: That is all, Dr. Nelson.

Exam. Mullen: Do you have some cross examination of this witness?

Mr. Collins: No.

(Witness excused.)

Exam. Mullen: We will take a recess for ten minutes.

(Short recess.)

Exam. Mullen: The hearing is ready to resume.
Do you have another witness, Mr. Quirk?
Mr. Gibson: Mr. Snooks.

LE ROY SNOOKS was sworn and testified as follows:

[fol. 259] Direct examination.

By Mr. Gibson:

Q. Will you state your full name, please.
A. Le Roy Snooks.
Q. Where do you live, Mr. Snooks?
A. 150 East Alberta Drive, Ogden, Utah.
Q. Do you live inside of the City of Ogden, or is that on a ranch or farm outside of Ogden?
A. North Ogden is a suburban town now of Ogden.
Q. I see.
Do you own ranch or farm property?
A. Yes, sir.
Q. What products do you raise on that property?
A. Cherries, apricots, peaches, hay, and grain.
Q. Do you have another occupation besides that of a grower of farm products?
A. Yes, sir.
Q. What is that?
A. Manager of a Co-op, North Ogden Fruit Exchange.
Q. How many grower members are there of the North Ogden Fruit Exchange?
A. About 70.
Q. And what area do the members cover geographically, with their ranches and farms?
A. The north half of Weber County and a good portion of the south end of Boxelder County.
[fol. 260] Q. Would you say the northern limit of that

area would be the City of Brigham or approximately in that area?

A. Yes, sir.

Q. What products do the members of your cooperative grow, Mr. Snooks?

A. Principally cherries, apricots, and peaches.

Q. Can you give us some idea of the carloads that are produced by these members in a year's time?

A. About from 20 to 25 cars of cherries, 50 or 60 cars of apricots, and the same amount of peaches.

Mr. Collins: How much?

The Witness: The same amount of peaches.

Mr. Collins: 50 to 60?

The Witness: Yes.

By Mr. Gibson:

Q. Where are the markets for the products you grow?

A. On what we call the fresh shipments, we ship to the Middle West and the Southeast, and a good portion of our apricots and peaches, when they get to the over-ripe stage, we ship to Delta, Colorado, a processing plant.

Q. That is a frozen fruit processing plant, isn't it?

A. That is right.

Q. Is that the same processing plant that Mr. Reed testified about this morning?

A. The Skyland Food Corporation, yes, sir.

[fol. 261] Q. How are the products of your grower members shipped into Delta, Colorado, Mr. Snooks?

A. Carload.

Q. Do they move from the vicinity in which they are grown, or are they trucked to Ogden and moved by rail from there? What is the process?

A. They are trucked to Ogden and shipped from Ogden.

Q. What is the advantage in shipping from Ogden?

A. The freight rates.

Q. Well, do you mean in shipping, or in transporting the fruits to Ogden, and then shipping into Delta, you are able to use a transit arrangement at Delta?

A. That is up to the processor. They insist that we load our fruits at Ogden on the Denver and Rio Grande, on account of freight rates.

Q. I see.

What is the relationship between the members in your organization that are close to Ogden and those that are farther away from Ogden with regard to the expense of trucking into Ogden and shipping on to Delta?

A. We load most all of the fruits in and around Ogden for Delta. Those who are farther out, a lot of their fruit goes to the ground on account of the transportation charges, especially this past year.

Q. In other words, they lose their crop because of the [fol. 262] high expense of trucking it into Ogden in order to ship it over the Rio Grande?

A. That is right, inasmuch as the price this past season was such that it didn't pay them to harvest and haul that far to load on the cars.

Q. Why can't you load these products on the Union Pacific, Mr. Snooks?

A. Because we are instructed from the buyer to load on the Rio Grande.

Q. Is that because he wants to use the Rio Grande, and thus enjoy the transit privileges at Delta?

A. Evidently so.

Q. To points beyond in the East?

A. That is right.

Q. Mr. Snooks, do you have any estimate as to the loss of crops that was suffered this year because of the high expense of trucking these fruits into Ogden?

A. Well, I would say that we lost between 2 and 3 hundred tons of apricots. The processing plant, Mr. Reed was asking for more apricots all the time, but we just couldn't get them trucked in from the Northwest district.

Q. What is the distance from Brigham to Ogden?

A. 18 miles.

Q. How close are these growers around Brigham to the Union Pacific tracks?

[fol. 263] A. Oh, the farthest of them away would not be over a mile and a half.

Mr. Gibson: You may cross examine, Mr. Collins.

Cross-examination.

By Mr. Collins:

Q. Mr. Snooks, I understand that the crop of your co-operative members was not marketed this year, in some one of these products? I didn't understand you.

A. I didn't understand your question correctly.

Q. Did you say that some of your members did not market a portion of their products at all this year?

A. Apricots?

Q. Apricots?

A. Apricots and peaches.

Exam. Mullen: Read the answer, please.

(Answer read.)

By Mr. Collins:

Q. Now, you are aware of the fact, are you not, in other apricot growing areas farmers did not market them because the price was too low?

A. I realize that they were not all marketed.

Q. Because the price was too low?

A. Because they didn't have a market.

Q. Well, all right.

Do these products, cherries, apricots, and peaches, or some of them, require pre-cooling or protective refrigerator service while they are in transportation by rail?

[fol. 264] A. Yes. Not all pre-cooling, they require refrigeration.

Q. Refrigeration, yes.

The Union Pacific has no machinery for that process in the beginning, at least, as I understood it they were pre-cooled. It has none of that machinery available there for pre-cooling at Brigham or that area, has it, or any place short of Ogden,—nearer than Ogden?

A. That is right.

May I correct that to a certain extent?

Q. Yes.

A. The shipments to the processor do not require pre-cooling.

Q. All the way to Delta, you mean?

A. That is right.

Q. Neither do the cherries nor apricots nor peaches?

A. I'm talking of apricots and peaches, because we ship no sweet cherries to the processor.

Q. Well, the ones you ship to Delta are over-ripe peaches?

A. They are ripe peaches, not over-ripe.

Q. Oh. What do they require, refrigeration?

A. Just standard refrigeration. We usually use Rule 247.

Q. You said your markets, the markets of your members, were in the Middle West. Would you mention some of the larger cities or towns within the area that you call the Middle West?

A. Topeka, Kansas, Omaha, Wichita, Kansas City, Sioux City, Dallas.

[fol. 265] Q. Do you go as far as Chicago?

A. No, we very seldom go to Chicago.

Q. Now in the Southeast, will you mention some of the principal cities?

A. We have gone to New Orleans this past season with some peaches, very few. Dallas is a common shipping point.

Q. Those are the——

A. Down in that area.

Q. I thought you said the Southeast.

What was the first town you mentioned besides Dallas?

A. New Orleans.

Q. New Orleans and Dallas.

A. Yes.

Q. Do you go any farther east than New Orleans?

A. No.

Q. Now, Mr. Snooks, who pays the freight charges on these shipments you ship out from the area that you have described to your counsel, of production of your commodities?

A. The buyer.

Q. On the shipments to the Skyland Food Corporation of ripe peaches, would that corporation pay the freight charges?

A. They pay the freight.

Q. None of these products you mentioned are processed at Delta, Colorado, or any other points on the Rio Grande except these ripe peaches?

[fol. 266] A. Peaches and apricots.

Q. Peaches and apricots.

Q. Do you grow either of these products yourself on your farmlands?

A. I grow all three.

Q. Do you operate the function yourself personally as sort of a buyer for this Skyland Food Corporation?

A. My products, do you mean?

Q. Not necessarily of your own, but from others. I suppose you sell your own direct to the Skyland?

A. No, everything goes through the exchange.

Q. I see.

Well, is it through you personally that the Skyland Food Corporation makes the transactions, or the deals?

A. They make the deal with me for the production from the exchange.

Q. Yes.

What per cent of the products of the North Ogden Fruit Exchange is shipped to Delta?

A. Well, I think over a period of ye-rs I would say about 50 per cent of the peaches and apricots.

Q. Yes.

And none of the cherries, of course?

A. No, none of the sweet cherries.

Q. Now when you market, when you have a high price [fol. 267] and a good demand for these products, they would go on to market, would they not, regardless of what you referred to as high truck rates?

A. On the fresh market, do you mean?

Q. Well, whatever way they are marketed. If the price is high——

A. The price fluctuates with the processor as well as on the open market, usually.

Q. Well, what happened to the portion that was not marketed this year?

A. They are still on the ground.

Q. Rotted on the ground we may say.

Now, if the price had been high, two or three times as high as it was, and there had been a demand, the entire crop would have been marketed, would it not?

A. No doubt, if the grower could deliver to that point at a profit.

Q. What I'm trying to ascertain is, whether this is the fact, that the market demand and market price are the controlling things insofar as the sale and disposition of the products of the North Ogden Fruit Exchange are concerned, aren't they?

A. Yes.

Q. Now you told your counsel that loss this year to members of your exchange, as I understood you, was the cause of the high truck rates from the Brigham area, or wherever [fol. 268] this land is into Ogden, is that correct?

A. Overhead expense, yes.

Q. Do you know whether the truck rates are lower or higher than the rail freight rates?

A. I am unable to answer that.

Q. Well, you just don't know. That is all right.

Mr. Collins: That is all. Thank you.

Redirect examination.

By Mr. Quirk:

Q. Mr. Snooks, I am told by our traffic man that the rail rate from Brigham and Ogden, to say, Chicago, is the same. Now if the Union Pacific had adequate service and gave joint and equal rates with the Rio Grande, would these producers up there, yourself, ship by the Union Pacific instead of trucking into Ogden?

A. No doubt.

Mr. Quirk: That is all.

Recross-examination.

By Mr. Collins:

Q. What would have to be done to make the service and rates adequate, do you know?

A. The rate on the Union Pacific would necessitate them cutting the rate to Ogden.

Mr. Collins: Will you read me the answer?

(Answer read.)

Mr. Collins: That certainly is not an answer. I asked him what would have to be done to make the rates and serv-

[fol. 269] ices adequate, to use the word Mr. Quirk, his counsel, used.

By Mr. Collins:

Q. What would the Union Pacific have to do, how far would it have to cut the rate? Let's strike that out.

I wish to remind you that a while ago, Mr. Snooks, you told me you didn't know whether the rail rate was lower or higher than the truck rate.

A. That is right.

Q. Then you don't know—do you know what adequate means, as your counsel used the term to you?

A. I might state that under the conditions of the past year that the truck or the rail must be cut in order for those people to deliver to the Denver and Rio Grande at Ogden, so as to cut their overhead, that they might make a profit on their fruit.

Q. In other words, when your market is dull, and your prices are low, then in order to make any money, all expenses including transportation charges would have to be reduced proportionately, wouldn't they?

A. Yes.

Q. Now, who is it that needs the lower rates, or the transit privileges on such of your products that move to Delta, is it you or your members, or is it Mr. Reed with his Skyland Food Corporation?

A. It certainly means to both, from my way of looking.

[fol. 270] Q. The needs you have, then, is it not, is that Mr. Reed and his food corporation might not buy them?

A. If the price is too high. He comes out with a price, and if we can't meet it, then the fruit is not harvested.

Q. Mr. Reed's food corporation buys the products, you might say, on the ground, or at your——

A. Loaded on the cars.

Q. At your produce exchange, and your people load them on the cars. They are FOB car at the point where they are loaded.

A. That is right.

Q. And the rest is up to him, including the routing of the shipments. That is, you ship them wherever he says to ship them?

A. It is understood we ship to the processing plant at Delta.

Q. All he buys from you, then, goes to Delta?

A. Yes.

Q. He pays the charges?

A. That is right.

Mr. Collins: That is all.

Mr. Gibson: I have one more question, Mr. Snooks.

Further redirect examination.

By Mr. Gibson:

Q. Isn't it true you have every year a certain part of your crop that is over-ripe and is for sale to only a processing plant?

A. Approximately 50 per cent over a five-year period.

[fol. 271] Exam. Mullen: That appears to be all, thank you, Mr. Snooks.

Mr. Collins: Just a minute.

Exam. Mullen: I beg your pardon.

Mr. Collins: This witness told me a while ago he didn't ship over-ripe, and I scratched out on my pad over-ripe. Which is it, is it over-ripe?

The Witness: May I correct that, we don't ship over-ripe, we ship ripe peaches to the processing plant.

Mr. Gibson: My mistake, Mr. Collins.

Mr. Collins: All right, thank you.

(Witness excused.)

J. Arthur Knudsen, was sworn and testified as follows:

Direct examination

By Mr. Gibson:

Q. Will you state your full name, please.

A. J. Arthur Knudsen.

Q. What is your address, Mr. Knudsen?

A. 1353 South 19th East, Salt Lake City.

Q. In what line of business are you engaged?

A. I'm President and General Manager of Knudsen Builders Supply Company.

Q. What products does your organizations have for sale, Mr. Knudsen?

A. We sell on a wholesale basis roofing, insulation, wall boards, hardwoods, plywoods, doors, windows, and a full [fol. 272] line of general building material.

Q. Is your main selling office at Salt Lake City?

A. Yes.

Q. From what points do you get your products that you wholesale?

A. We get them from Marrero, Louisiana.

Q. Would you give the product?

A. Cellotex Corporation. From Cincinnati, Ohio, roofing. From Minneapolis, Minnesota, asphalt siding. From St. Louis, Missouri, asbestos products. From Orangeburg, North Carolina, hardwood, plywoods. From Louisville, Kentucky, doors. From Algoma, Wisconsin, hardwood, plywoods. That is about the extent of our shipments from the East.

Q. How many customers do you have, Mr. Knudsen?

A. We have a customer list of about 500 with a substantial portion of that being bought by about 300.

Q. Can you give me general locations of your customers?

A. From St. George, on the south——

Q. That is in Utah?

A. Yes—throughout Utah. The western slope of Colorado, through to Rock Springs in southwestern Wyoming.

Mr. Collins: Through to Rock Springs?

The Witness: Yes.

Up to and including Jackson, Wyoming, on the western strip of Wyoming. Southeastern Idaho, as far north as Ashton, and as far west as Magic Valley, including Sho- [fol. 273] shone, Twin Falls, and Buhl.

Q. Do your customers buy the products you handle in carload lots or part carloads?

A. They buy three different ways: carload, pool car, and out of our jobbing stocks.

Q. In general, how is most of your freight handled, in part car lots?

A. It varies with the commodity involved. A low-co

high tonnage commodity such as roofing is best distributed on a pool car, or carload basis. Such items as hardwood, plywoods which might run $15,000 a car, and any fraction thereof, would be too large for any one single account that usually goes through a jobbing stock.

Q. Taking the product of celotex, which is shipped from Louisiana, would the orders you have been for part carloads to your dealers along the Rio Grande and Salt Lake and northeastern Utah and into Idaho?

A. We have a manufacturer's specification of 7,000 feet per stock. A carload involves 56,000 feet. Theoretically we could have seven stops and one destination. Practically, we often have four or five stops to destination.

Q. How would you handle an order of 7,000 feet of celotex to your customer in Durango, Colorado, for instance?

A. I could not at the present time, if the car was going to move into Idaho. It would have to be a car which I [fol. 274] could stop before it got north of Ogden.

Q. I see.

And a dealer in Grand Junction, who wanted 7,000 square feet, could you handle that?

A. We couldn't handle that. When you mention Durango, Colorado, we couldn't service Durango out of here, because of the fact that I have been told it is a narrow gauge railroad going down there.

Q. That is right.

A. We have customers who want to haul by their own truck from Grand Junction to Durango, but the complicated shipping situation, and our being unable to time every shipment with cars that are not going to go north of Ogden, often precludes the possibility of our including such customers in cars.

Q. If you had through rates available, over the Rio Grande in connection with the Union Pacific, then you could handle these various customers in Colorado and Idaho with one car, unloading a part of the car at various stations, could you not?

A. Yes.

Q. Mr. Knudsen, how many cars do you ship over a year's time?

A. In our entire operation, and depending upon whether we use maximum car weights on it, we will run from 4 to

5 hundred cars a year. That number, however, includes some cars coming out of the Northwest. From the East [fol. 275] I would say we would run 150 to 200 cars a year.

Q. Do you have customers along the Rio Grande at Glenwood Springs, Price, Grand Junction, Ephraim, Manti, Provo?

A. Yes, we have customers in all those places.

Q. And if the rates were available in connection with the Union Pacific, you could handle part carloads to those customers as well as to customers in northern Utah and Idaho?

A. Right.

Mr. Collins: Mr. Examiner, I object to counsel making the statement and having the witness just agree with him. The question is leading.

Exam. Mullen: The question is leading.

Mr. Gibson, you will have to direct your questions directly to the witness without leading him.

Mr. Gibson: Yes, sir.

By Mr. Gibson:

Q. Mr. Knudsen, you are familiar with the complaint of the Rio Grande in this case, are you not?

A. I have not read the complaint, nor am I entirely familiar with it other than my understanding is that the net result will be that shippers will be able to ship into Idaho without having the Union Pacific carry them from either, in my case, Kansas City, or Omaha. We can bring them in by the D&RG and serve customers on the western slope of the Rockies, and in eastern Utah on the D&RG, and still have the Union Pacific take them into Idaho at the same transcontinental rate.

[fol. 276] Q. If these competitive rates were established, would you be able to expand your business, in Idaho, and Colorado?

A. We would be able to give better service to our customers in the western part of Colorado, and effect savings for them on numerous occasions which would build up their financial capacity, increase their efficiency, and enable us to do more business with them, and by the same token, we are shut out from aggressively soliciting business of

certain customers over there, because the few cars we have coming into Salt Lake City that we are sure Salt Lake City is going to be the eventual destination, there are so few that we don't always like to include the D&RG routing on those cars.

We have to remain flexible enough in our schedules to permit us to either divert or place on original routing so those cars end up at our Pocatello warehouse.

Mr. Quirk: I would like to ask one question, Mr. Examiner, if I might.

Exam. Mullen: Go ahead.

Direct examination

By Mr. Quirk:

Q. Is the inference correct, although you have competitive rates, equalling the Union Pacific in its connections to Salt Lake City, you don't dare use the Rio Grande to Salt Lake City unless you are sure that there will be no partly unloading or any other transit arrangement, is that right?

A. That is right. If I am 100 per cent sure, a car is [fol. 277] going to end up in Salt Lake City. I have no reason why I can't route it by either railroad, but if there is a slight possibility that that car might have to go to Pocatello, in order that we might have to take care of either our own warehouse stocks, or some customer in Idaho, we have to keep our routing such that we can divert that car.

Q. And did I understand you correctly to say that in these circumstances, you ship very few cars over the Rio Grande to Salt Lake, although its rates are equal and the same as the Union Pacific?

A. That is right.

Q. You lose all that business because of the existing——

Mr. Collins: I object. That is the most leading on yet.

Exam Mullen: That is leading.

Mr. Quirk: I admit that is leading.

Exam Mullen: Do you want to reframe the question, Mr. Quirk?

Mr. Quirk: I think the witness has answered my questions all right that were not quite so leading.

Mr. Gibson: You may cross examine, Mr. Collins.

Cross-examination

By Mr. Collins:

Q. I take it you don't pay the freight charges on the shipments that you were speaking of, do you?

A. The freight is often billed to the receiving yard. Supposing a yard is on a tail end of a series of pool car [fol. 278] deliveries, that customer might be billed the freight. We usually instruct the agent if the customer does not desire to pay the freight to forward it to us and we will pay it. In most cases we will pay the freight.

Q. You gave the street address of your Salt Lake City——

A. That is my residence address.

Q. Oh,

What is your business house address here?

A. 203 West 5th South.

Q. What is that, Mr. Knudsen, is it a warehouse, or storage place?

A. It is on premises 198 by 165, with 30,000 feet of storage space, and office and accounting office.

Q. And aside from the office portion, what goes on in the rest of the building?

A. We have a spur facility where we can unload four cars at a time and we handle all types of building materials from that location.

Q. As stated, indicated by carloads, from what origin point would you say the greater number of carloads move toward you and your customers in this area?

A. I think it would be a toss-up, varying according to the seasons, between Cincinnati, Ohio, and Marrero, Louisiana, and Minneapolis, Minnesota.

Q. And out of the sum, say 500 cars a year, approxi- [fol. 279] mately, that you might ship, about how many would that total be from these three points you mentioned? Would that be most of the 500?

A. There would be from those three points about 150

cars a year. I amended my testimony to read that while we ship 500 cars, only about 150 to 200 came out of the East.

Q. I see.

What portion of your total volume of business is transacted at these points along the Rio Grande Railroad in Colorado or in Utah?

A. I don't have a complete analysis of the percentage. We have three very fine dealers in Price, Utah, one in Helper, a very small one in Green River. We have one resident—one dealer who has headquarters at Grand Junction, and another with large operations at Durango and Cortez, who is often called upon to truck his materials clear from Salt Lake City to his point of use, due to the fact that we are unable to stop cars in Durango.

We have had to pass up business as far East as Glenwood Springs, due to the fact that we couldn't so route the cars in order to accommodate those customers with the tonnages they could accept and pay for.

Q. You say you could not so route the cars?

A. That is right.

Q. Well, why not?

[fol. 280] A. Well, rather than theorizing, I have this one account, who I would not trust for over $1200 worth of merchandise, unless we wanted to go through an involved procedure of sight draft bill of lading and so forth, which are clumsy. The car originates in Minneapolis, Minnesota. We must keep flexible enough to get merchandise into Pocatello and other southeastern Idaho points. Those cars do not always move right on the dot, as far as our ability to order them, or the manufacturer's ability to ship them.

We must keep our shipping schedules as flexible as possible to meet the needs of our customers. They cannot always accept material exactly when it is our convenience to ship. We would increase our percentage of being able to accommodate those customers and get the material to them at exactly the time when they are best able to pay for them, if we could route every car, or a reasonable number of those cars, to include those points in western Colorado in order that we might serve those accounts and get the merchandise to them when they most need it.

Q. Why can't you route them that way now?

A. I can, if I want to pay local freight from here to Pocatello, but it isn't economically sound for us to penalize our customers, nor is it economically sound for us to take a loss on that.

Q. You mean that you are saving money by not routing [fol. 281] them that way, is that it?

A. We save some.

Q. You are avoiding the loss of money.

A. Yes.

Q. You do serve these customers now, don't you?

A. Not as efficiently as we could if we had a more flexible shipping schedule.

Q. Do you mean if you had lower rates?

A. I am not asking for lower rates than we have, all I want is the privilege to so route a car that it can come into say Denver and be given to the D&RG for a stop or two on the western slope of Colorado, or in the eastern part of Utah, and then to be given to the Union Pacific to be taken on up to Pocatello at our prevailing rate.

Q. At through rate.

A. Right.

Q. It is of no benefit to you to have the present rates and privileges by way of the Union Pacific from the East to Salt Lake City and stop to partly unload and thence to points in Idaho?

A. It is a benefit to have that.

Q. Then would the desirable situation that I understand you to describe, result from having the same privilege at these various points to stop off and partly unload on the Rio Grande in Colorado and maybe Utah?

A. I would like to hear that question again.

[fol. 282] (Question read.)

The Witness: Yes.

Exam. Mullen: May I interrupt at this point: How many stop-off privileges do you have on the D&RGW?

The Witness: Providing Ogden is the eventual destination, we have the same number of privileges as far as railroad regulations are concerned, with the exception of lumber products, there we get only one stop in destination. But on miscellaneous products, we can get a number of stops.

Exam. Mullen: Suppose the stop is beyond Salt Lake City.

The Witness: Then I have no stops—pardon me, did you say beyond Salt Lake City?

Exam. Mullen: Ogden, rather.

The Witness: I have no stop-off privileges. I have no way of even routing that at the same rate if the D&RG par-icipates in the haul.

Exam. Mullen: You mean you cannot use thos- stop-off privileges and joint through rate at the same time, is that it?

The Witness: No, Union Pacific has to get that car from the way we ship it at either Kansas City or Omaha.

Exam. Mullen: All right.

Mr. Collins: That is all.

Exam. Mullen: Anything further?

Redirect examination.

By Mr. Quirk:

Q. Mr. Knudsen, if the car moved say from Minneapolis [fol. 283] or Chicago, via the Rio Grande, via Denver, or Pueblo, and it was destined at the time it started say to Los Angeles on the Union Pacific or to some points served by the Southern Pacific or Western Pacific, could you then stop at the D&RG points?

A. I am not involved in that routing privilege, because sometimes if the manufacturer has such a shipment, I leave it to their traffic men, who are full-time in their capacity, to wrangle that out with their own shipping line. We have had complications, though, where they have been shipped, and then we have not been able to get them stopped.

Mr. Quirk: All right.

Recross-examination.

By Mr. Collins:

Q. Just a moment.

Could you tell us about what percentage of your shipments, carload shipments I guess they would be, do you think you would partly unload at these various points named

in Colorado on the D&RG if you had this privilege that you speak of?

A. Of that 150 cars, I think the maximum that we would exercise that privilege in that area would be approximately 25 per cent, roughly.

Q. Per year?

A. Yes.

Mr. Collins: All right, that is all.

Exam. Mullen: That is all, thank you, Mr. Knudsen.

(Witness excused.)

[fol. 284] Exam. Mullen: Do you have another witness?

Mr. Quirk: Mr. Examiner, there is a gentleman here from Portland who would appreciate it very much if he could take the witness stand. He should not be longer than ten minutes or more on direct. If there is no serious objection to that we can put him on.

Exam. Mullen: I hope we can finish in 15 minutes, because we have to give up the room at five.

Mr. Quirk: We have to give up the room at five?

Exam. Mullen: Yes.

Mr. Quirk: You can make no promises about cross examination, can you?

Mr. Collins: What did you say?

Mr. Quirk: Get on the witness stand.

REGINALD T. TITUS was sworn and testified as follows:

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

There has been filed with the Examiner a petition for leave to intervene, filed by the Western Forest Industries Association, which has been presented by Mr. R. T. Titus, Executive Vice President. Is there any objection to the petition?

Mr. Collins: I would like to know if this is the action of [fol. 285] his association, or whether he is just acting individually, using their name.

The Witness: No, it is the action of the association Board of Directors at a meeting on September 13th, authorizing our applying for a petition to intervene.

Mr. Collins: Do you have a lot of members?

The Witness: Yes.

Mr. Collins: Is this the result of membership action, or just what is this?

The Witness: No, it is membership in our association, the Board of Directors is the governing organization, and they take action after considering the problem without referring the matter to the members, individually.

Mr. Collins: They have that authority.

The Witness: Yes, sir.

Exam. Mullen: Mr. Titus is appearing here as a witness.

Mr. Collins: But not necessarily on this intervention.

Exam. Mullen: No. No objection?

Mr. Collins: No objection.

Exam. Mullen: It will be received, and the association is permitted to intervene.

Do you wish to be noted on the record as appearing in a representative capacity for the Western Forest Industries Association, in addition to signing this document?

The Witness: Yes. I didn't understand what you meant. [fol. 286] Exam. Mullen: You will file your appearance then with the Reporter after you finish your testimony.

The Witness: Yes, sir.

May I proceed with my statement?

Exam. Mullen: Go ahead.

For the record, in addition to filing the petition, Mr. Titus is appearing here as a witness, has been sworn, and is prepared to give his testimony.

The Witness: My name is Reginald T. Titus. I am the Executive Vice President of Western Forest Industries Association, office address at 704 US National Bank Building, Portland, Oregon.

In accordance with action of the Board of Directors of our association on September 13th, we wish to indicate that we believe the action requested by the DR&G Western in this case is necessary to carry out the national transportation policy to provide transportation at reasonable rates and without undue advantages or discrimination. There are

only two or three items in which we as lumber shippers or shippers of forest products are concerned.

We are vitally interested in having a flexibility in the routing of your products to all parts of the United States. We believe that the lack of competitive through rates, via the Ogden gateway and the D&RGW, discriminates against the lumber shippers in some areas in the territory north and [fol. 287] west of Ogden.

That discrimination I might say is primarily because they are denied the privilege of selecting their own route, inasmuch as the rates by way of Ogden and the D&RG to certain points are higher than the rates via the Union Pacific and its connections. The result is that these lumber shippers do not always have the privilege of choosing their rates economically, and we would like to see that condition eliminated.

Another important factor is that under the present situation these lumber shippers do not enjoy the same transit privileges on the D&RG that they do on the Union Pacific, and by transit privileges, I have in mind particularly stopping of a car to partially unload or to be remanufactured, or to be treated, preservatively treated, and then to continue its journey. Another important factor is the inability under present conditions to reconsign a car, and by that I mean this: It frequently happens that a seller of lumber from some part of the territory north and west of Ogden will sell a car of lumber to a dealer on the D&RG. When that car arrives, for some reason, the dealer is not able to take it, and the car must be reconsigned to another destination.

Now, if it is necessary to send that car beyond the limits of the D&RG lines, the shipper must pay a combination rate which is higher than the through rate, and that may make the difference between a profit and loss on the transaction. [fol. 288] Because of the fear that that may happen, a good many of our shippers of lumber just do not take a chance and do not ship into the territory that is served exclusively by the D&RG. We believe that if the petition of the D&RG is granted, that it will give us more flexible routing, it will increase the lumber consuming territory that our shippers have in which to market their lumber.

That is all.

Direct examination.

By Mr. Quirk:

Q. Mr. Titus, are there markets on the D&RG and Colorado such as at Salida, that your lumber might reach if the equal competitive rates were established by the Union Pacific and the D&RG?

A. Yes, we believe so.

Q. What caused you to believe that? What is there at Salida, Colorado?

A. I mentioned the fact that one of the transit privileges that we desire is that of stopping to treat lumber preservatively. There is a wood preserving plant at Salida, and material coming from the Northwest could stop there for treating in transit and then be reshipped to points east and south of Salida.

Q. Is it a fact that market at Salida is now closed to your shippers to the extent they use the Union Pacific?

A. Yes.

Mr. Quirk: I have no further questions.

[fol. 289] Exam. Mullen: Mr. Collins.

Cross-examination.

By Mr. Collins:

Q. Is that market also closed to the extent that you use the Southern Pacific?

A. No.

Q. Western Pacific? Any other railroad?

A. No, the only one I know it would be closed to would be the Union Pacific.

Q. Have you had anyone request you to stop a car at Salida to have this wood preserving process inflicted upon it?

A. Nobody asked me. I don't sell lumber. I'm the Executive Officer of the association.

Q. I see.

A. I do not know what the members have requested.

Q. As a matter of fact, you don't know whether any requests have been made, do you?

A. I assume they have, from the desire of the members to have the privilege of stopping at that plant.

Q. The desire of the members.

A. Members of our association.

Q. Where are they located principaly, Mr. Titus?

A. They are scattered from British Columbia, through Oregon, Washington, Idaho, Montana, New Mexico, northern California. I would say there were more—I should say there are more in Oregon and Washington than in any other of the states I mentioned.

[fol. 290] Q. Would that include the area around or near Seattle, Tacoma?

A. Yes.

Q. Down to Portland and west?

A. West and east.

Q. What?

A. West and east.

Q. You know, don't you, as to all of that area from somewhat east of the towns I mentioned that the Rio Grande Railroad had joint through rates over its line?

A. Yes, sir.

Q. You know that?

A. Yes.

Q. Do they use that route, do you know?

A. Oh, yes.

Q. Has there been any inadequacy in that route, doesn't it serve the purpose of your membership?

A. It doesn't serve the members who are not on the Southern Pacific, or who do not connect with the Southern Pacific.

Q. Do any of your members actually sell any lumber at any point on the Denver and Rio Grande Railroad, do you know?

A. Yes.

Q. They do?

A. Yes.

Q. How does that move, do you know?

A. It moves in various ways. Some of it moves by way of [fol. 291] the Southern Pacific, and then D&RG, and some of it moves by way of the Union Pacific, and the D&RG. They are sales which are to points on the D&RG, not for transit purposes.

Q. In other words, that is its destination at those points.

A. Yes.

Q. And at those points you have joint through rates.

A. Yes.

Q. How many carloads do you suppose, or if you know, would your members ship if there were joint through rates between the Union Pacific and the D&RG for transit at some point on the D&RG?

A. I do not know.

Q. Have you given any consideration to that?

A. I have no way of ascertaining that.

Q. Has any of your membership ever given you any idea as to what they need in that respect?

A. No, I don't think anyone knows, until the situation is such that it could be utilized, no one is going to develop the territory.

Q. Then what gives rise to your thought they might want to use that privilege?

A. Our shippers like to be free to ship in all directions, and over all lines.

Q. What brought this situation to your attention?

A. Oh, I suppose that some of our members read in the [fol. 292] newspapers about the case, and what was being proposed, and as shippers naturally they are interested in improving the facilities that they have for serving their customers.

Q. And if, as you just said, without knowing whether or not, or having an idea whether or not they might use the privileges?

A. There is no way they can tell whether they would use it until the privilege existed.

Q. How many of your members indicated to you a desire to have these through routes and rates as requested in this complaint?

A. I do not know, because the information was brought to the Board of Directors by our traffic committee.

Q. I see.

A. And the traffic committee is the one that receives the reports, I suppose, from the members.

Q. From your testimony here, then, the record must show that you don't know whether a single carload might avail

itself of this more flexible transportation arrangement that this complaint talks about.

A. Of my own knowledge, I don't know. As I say, I do not ship the lumber.

Mr. Collins: That is all.

Redirect examination.

By Mr. Quirk:

Q. The factor of reconsignment and treating lumber in transit, is that an important factor in the lumber business? [fol. 293] A. Yes, it is.

Q. Do you have what you call in the trade "distressed cars" frequently?

A. Yes, we do.

Q. What happens in connection with these distressed cars of lumber?

A. A distressed car is a car of lumber which has been consigned to a customer and which for some reason or other has not been accepted by the customer. It then must be resold. When one has a distressed car on his hands, he sells it as quickly as possible to avoid paying the demurrage. There is a large volume of lumber business which is handled on what we call a transit basis. In other words, cars start rolling from the mill unsold, and the efforts of the shipper are to sell that car before it reaches certain points, and when you have the privilege of reconsigning on a through rate, if you don't sell it at one point you can divert it to another point, but when you do not have that privilege of reconsigning, then the car is distressed and you have to sell it to the best of your ability in the territory that is available, which may be restricted to a single town, or a few towns in that vicinity.

Mr. Quirk: That is all.
Mr. Collins: That is all.
Exam. Mullen: That is all.
The Witness: Thank you.

[fol. 294] (Witness excused.)

Exam. Mullen: We will recess until 9:30 tomorrow morning.

(Whereupon, at 5:04 p. m. the hearing recessed to reconvene at 9:30 a. m. on Wednesday, December 14, 1949.)

[fol. 295] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., Defendants

Transcript of Testimony—Salt Lake City, Utah, Wednesday, December 14, 1949.

Met, pursuant to adjournment, at 9:30 o'clock a. m.

Before Frank E. Mullen, Examiner

ADDITIONAL APPEARANCES:

Lowe P. Siddons, P. O. Box 1052, Colorado Springs, Colorado, appearing for the Holly Sugar Corporation, Colorado Springs, Colorado.

Jefferson C. Church, Public Service Commission of Wyoming, Supreme Court Building, Cheyenne, Wyoming, appearing for the State Board of Equalization and Public Service Commission of Wyoming.

[fols. 295a-296] Chas. E. Blaine, 900-1-2 Title & Trust Building, Phoenix, Arizona, appearing for American National Live Stock Association and Colorado Cattlemen's Association, Intereveners in support of Complainant.

[fol. 297] Proceedings

Exam. Mullen: The hearing will come to order, please. Are there any additional appearances?

Mr. Siddons: Lowe P. Siddons, Holly Sugar Corporation.

Exam. Mullen: What is your position in this proceeding?

Mr. Siddons: We have an intervening petition in support of the petition so far as it pertains to livestock.

Exam. Mullen: Did you file it?

Mr. Siddons: Yes sir.

Exam. Mullen: Any other appearances?

Mr. Church: Jefferson C. Church, Supreme Court Building, Cheyenne, Wyoming, State Board of Equalization and Public Service Commission of Wyoming, intervenor in opposition to the complaint.

Exam. Mullen: Any other appearances?

(No response.)

Exam. Mullen: That appears to be all.

M. S. ROSENBLATT was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Will you give your name to the reporter?

A. M. S. Rosenblatt.

Q. You have been sworn, have you?

A. Yes sir.

Q. State your address and your business.

[fol. 298] A. President and General Manager of the Structural Steel and Forging Company of Salt Lake City, Utah.

Q. Do you have a warehouse or some plant served by the Denver, Rio Grande, Western Railroad?

A. We have a warehouse and fabricating plant served by the Denver and Rio Grande Railroad.

Q. Describe the character of your business.

A. Our business is divided into two departments; one is the warehousing of all types of steel, and the other is the fabrication of steel buildings, bridges, tanks, and various items of steel fabricating work.

Q. Where does your steel originate that you get at this plant in Salt Lake City?

A. We have a number of places or origin. The Pacific Coast, Geneva Steel Company, Geneva, Utah, and points in

Chicago, Pittsburgh, Youngstown, Sparrow's Point, Kansas City, and numerous other suppliers or producers of steel in eastern United States.

Q. Approximately how many carloads of steel do you receive from the East?

A. This year, we have received approximately up to November 1st, 105 carloads.

Q. Are you interested in fabrication in transit?

A. Very much so.

Q. Where does the fabrication occur?

[fol. 299] A. At our plant here in Salt Lake City.

Q. Where are some of your markets?

A. Our markets for fabricated and prepared steel are in Utah, Idaho, Wyoming, Montana, Nevada, western slope of Colorado—they are the substantial portion of our markets.

Q. How does most of the steel that you receive at Salt Lake City reach Salt Lake City, by rail—from the East I am speaking of?

A. Entirely by rail.

Q. Does it come in over the Denver and Rio Grande?

A. Yes, it does, at Salt Lake City.

Mr. Collins: Excuse me. Would you read that question, please?

(Question read.)

By Mr. Quirk:

Q. Now, by that, do you mean that the Union Pacific transports the steel into Salt Lake City and then delivers it to your plant over the Switching services of the Denver and Rio Grande?

A. All steel originating in the east comes over the Union Pacific Railroad and is transferred here at Salt Lake City to the Rio Grande for delivery at our plant.

Q. Now, I presume, Mr. Rosenblatt, you are familiar with the fact that the rail rates on steel from the eastern points to Salt Lake City as destination apply by the Denver and Rio Grande and its connections, eastern connections, as well [fol. 300] as via the Union Pacific at its eastern connections?

A. I am fully aware of that, yes, sir.

Q. Then, in the circumstances, why does your company

route or cause to be routed all of the business to Salt Lake City via the Union Pacific?

A. Primarily because we have no transit privileges for fabrication on any steel moving from eastern points via the D&RG. I mean by that, transit privileges into areas which take approximately 50 per cent of our business, Idaho particularly, and parts of Montana. It is impossible for us to use tonnage coming in on the D&RG, fabricating that steel, and then competing in the Idaho or Montana markets.

Q. Is Salt Lake City the final destination as to some of the steel you receive at your plant in Salt Lake?

A. Some of it is probably used here for fabrication, but when the steel is ordered, both as to structural shapes and sheets and other types of steel, we have no way of knowing where the final destination is likely to be. Therefore, we can't take a chance on bringing in steel which we might have to fabricate and furnish in markets to which the D&RG tonnage would carry no fabrication in transit privileges.

Q. If the competitive rates which the complainant here seeks should be established in connection with the Union Pacific to points northwest of Ogden, Idaho, and other states, would your company benefit thereby?

[fol. 301] A. Only to the extent that we would be in position to repay the D&RG and their urgent solicitation for our business as a reward for the very good service they give us for handling in and out cars at our plant.

Q. And it would give you another route that you could safely use to Salt Lake?

A. There are times when one railroad is in position to give better and quicker service than the other, and vice versa.

Q. That happened last January and February, didn't it, on the Union Pacific?

A. Yes, that was——

Q. One example at least?

A. One example, yes, sir.

Q. Now, have you any other comment to make, Mr. Rosenblatt, concerning this question we are talking about?

A. No, I don't think so.

Mr. Quirk: You may cross examine.

Mr. Collins: No cross examination.

Exam. Mullen: That is all, Mr. Rosenblatt. Thank you, sir.

The Witness: Thank you.

(Witness excused.)

Mr. Quirk: Mr. Davis.

Cy Davis was sworn and testified as follows:

Direct examination.

[fol. 302] By Mr. Quirk:

Q. Will you state your name?

A. Cy Davis.

Q. Where do you reside, Mr. Davis?

A. I reside at Idaho Falls, Idaho. I am manager of the Idaho Falls Chamber of Commerce.

Q. How long have you been manager of that chamber?

A. Since the first of April, 194[illegible].

Q. What was your business before that?

A. I was manager of the Dawson Chamber of Commerce in Montana for approximately three years, and the previous ten years I was in the newspaper business, editor and business manager.

Q. What is the position of your Idaho Chamber of Commerce in this proceeding?

Mr. Collins: Of what?

Mr. Quirk: What is the position?

Mr. Collins: Of what?

Mr. Quirk: Idaho Chamber of Commerce.

The Witness: Idaho Falls Chamber of Commerce.

By Mr. Quirk:

Q. Idaho Falls Chamber of Commerce.

A. By unanimous vote of the board of directors, they have taken the position they favor the operation of the Ogden gateway.

Q. What is the composition of that chamber, so far as membership is concerned by economic groups?

A. It might be said to be divided into half a dozen or more

[fol. 303] groups, comprising agriculture, industry, professional men, service. Ordinarily we don't classify them, but it is a general cross section of the community. It is definitely an agricultural community, and represents all phases of the economy of the area.

Q. Is there a large movement of agricultural products out of the Idaho Falls area?

A. Very definitely.

Q. And Idaho Falls is served by the Union Pacific exclusively; is it not?

A. Yes sir, in rail cases; yes sir.

Q. How many members are there of this Idaho Falls Chamber of Commerce?

A. It fluctuates; more than 618 at the last count we made of the roster of our membership bulletin mailing in November.

Q. Is Idaho Falls, Idaho one of the largest agricultural shipping points in the state?

A. I think that is true. We consider that to be very true.

Q. Mr. Davis, you are in touch with the membership and quite familiar with their problems, I take it?

A. Yes, we attempt to represent the problems of the community on a community-wide basis.

Q. Have you any comments to make in addition to what I have questioned you about?

A. That is a little difficult, I believe.

[fol. 304] Q. You don't have to make it unless you want to.

A. None occurs to me right at this moment as being outstandingly important in clarifying the position that we have taken.

Q. I suppose your membership does believe in competition, does it not?

A. Yes sir, they do.

Q. Does it believe that all existing rail facilities should be made available at equal rates to the shippers?

A. Very definitely. The resolution passed by the Idaho Falls Chamber of Commerce by unanimous vote of its members was in favor *or* opening all gateways that restrict the economy of Eastern Idaho.

Mr. Quirk: That is all I have. You may cross examine.

Cross-examination.

By Mr. Collins:

Q. Mr. Davis, was there a meeting of the full membership of the Idaho Falls Chamber of Commerce preceding the adoption of their resolution or whatever it was they adopted?

A. I doubt if there has ever been a full meeting of all membership of the Idaho Falls Chamber of Commerce. I don't believe there is a place in the city where we could accommodate 618 persons.

Q. How did they communicate their vote or attitude on this question?

A. By various means. When the question came up early [fol. 305] in August, they deferred any action on it until the membership could hear both sides of the question, which was presented in two public meetings, one conducted by the officials of the Union Pacific Railway Company, and the other conducted by the officials of the Denver and Rio Grande.

Q. How many members were recorded, if you recorded them, how many members out of your 600 recorded themselves as favoring the side of the Rio Grande Railroad in this law suit?

A. There is no official figure to my knowledge. They were contacted in a number of different ways.

Q. Wait a minute. I do believe that is a fair question and I think you can answer it. You must know.

How many members, if any, recorded themselves as favoring the Rio Grande side of this case?

A. They were contacted in three different ways, and I don't——

Q. I don't care how they were contacted; I just want to know the results. Isn't that a fair question?

A. Not if I am unable to give you the complete results.

Q. Just say you don't know, then. Do you know?

A. Not the complete vote of the 618 members, not the complete thinking down to the last man.

Q. I didn't say anything about the thinking. How many, to your knowledge, recorded themselves in favor of the Rio Grande's position in this case, if you know?

A. I don't believe I could answer that in the way it was put.

[fol. 306] Q. How do you know you said to your counsel there was a unanimous approval of the Ric Grande side of the case? How do you know that?

A. By the board of directors. We are a corporation, and a non-profit corporation, and the Board of Directors are fully qualified to pass on any matter of policy which they believe, and they were very conscientious in making an inquiry into the full membership to make sure they were representing the feeling of the majority of the group.

Q. You say you have 618 members. Are all of those shippers?

A. Certainly not.

Q. How many of them are shippers, would you say?

A. I would not know.

Q. Then you are not representing a shipper's organization, as such?

A. No, it is the Chamber of Commerce of Idaho Falls. It is not a shippers' organization.

Q. Oh, it is not?

A. No.

Q. What would be their interest in taking a stand on this?

A. We feel we have a very definite interest in the basic economy of the community. It is an agricultural economy definitely. The board of the membership feels it would be advantageous to this agricultural economy. They would be possibly very inclined to base their decision somewhat on that premise.

[fol. 307] Q. You are not speaking for the State of Idaho here?

A. We are speaking for the Idaho Falls Chamber of Commerce.

Q. And its members, or including its members?

A. I don't believe you can exclude its members. I am representing the board of directors, who are authorized to make policies and decisions for the whole membership.

Q. Are you speaking for the members?

A. I am speaking for the directors of the Idaho Falls Chamber of Commerce, who make the policies and decisions of the chamber.

Q. Is this it, then, the Board of Directors has acted on its own and without regard to the wishes and desires of the shippers?

A. No sir, they feel they have very definitely investigated and are acting the way the majority of its members wish them to act.

Q. Then how many of the members told the Board of Directors to come down here and testify for the D&RG in this suit?

A. I don't have any figures on that.

Q. You don't know?

A. No.

Q. You don't know whether it was a majority vote, or a majority expression or not, do you?

A. I am quite confident the Board would not back a minority decision.

Q. But you don't know, do you?

A. I would not care to give any figures.

[fol. 308] Q. I say, do you know or don't you know?

A. I don't have any figures to offer, no.

Q. Isn't the answer that you don't know, but you won't admit it?

A. I don't know, but I won't admit it?

Q. Yes, won't admit that you don't know?

A. I told you I had no figure on that. You asked me for a number or a percentage.

Q. I asked you two or three times if you knew how many members recorded themselves or expressed themselves in favor of the Rio Grande Railroad in that law suit.

Mr. Collins: Now, Mr. Examiner, I call upon you for help. That is certainly a fair question. If he doesn't know, he should say so.

Exam. Mullen: I think so. You should know the number or state that you do not know the number.

The Witness: I offered to give three ways in which this answer was propounded.

Exam. Mullen: No, the question is confined to the number of persons who favored the D&RG in this proceeding. Do you know the manner in which they expressed their agreement?

The Witness: I don't know how many——

Exam. Mullen: You do not know?

The Witness: No.

Exam. Mullen: That is the answer, you do not know.

[fol. 309] The Witness: That is correct.

Mr. Collins: That is all.

Redirect examination.

By Mr. Quirk:

Q. Mr. Davis, did I understand you to say a representative of the Union Pacific was given an opportunity to present what you call——

Mr. Collins: Mr. Examiner, that is not proper redirect questioning. Nothing was said about that in his direct testimony, except that wrangled over both sides of this.

Exam. Mullen: I would like to have the thing clarified.

Mr. Collins: All right.

By Mr. Quirk:

Q. Did the Idaho Board of the Chamber of Commerce listen to everything the Union Pacific representative had to say concerning this question?

A. I am sure they did. They went into it with an open mind. They didn't consider it as an issue in which they would take sides between litigants, but as what was the best for the community.

Q. And despite what they heard, the board of directors of the Idaho Falls Chamber of Commerce decided to participate in this case and demanded that you participate, is that right?

A. Yes sir.

Mr. Quirk: That is all.

Recross-examination.

By Mr. Collins:

Q. Who listened to these both sides? How many mem-

[fol. 310] bers of the Chamber listened?

A. I have no figures on that either. It was a community meeting.

Mr. Quirk: There was enough to make a defense, anyway.

By Mr. Collins:

Q. You don't know how many members were informed about both sides of this, or either side?

A. No, I would not know how many members.

Mr. Collins: That is all.

Further redirect examination.

By Mr. Quirk:

Q. By the way, what is the population of Idaho Falls?

A. Something between 22 and 25 thousand. The R. L. Polk Company says the Chamber of Commerce figure of 22,000 is conservative.

Mr. Quirk: All right.

Further recross-examination.

By Mr. Collins:

Q. What portion of that population consists of railroad employees and employees of the Union Pacific Railroad, do you know?

A. No, I would not. I would not make a guess.

Q. You would—know at all?

A. No.

Q. And yet you are Secretary or something of the Chamber of Commerce of Idaho Falls?

A. We don't have access to the files of the Union Pacific [fol. 311] and their employees or any other matters.

Q. Would you be surprised if a third of the population, or a fourth of it, were railroad employees?

A. I would be very surprised, yes sir.

Q. What did you think, a dozen of the railroad employees would be there?

A. Would you want me to hazard a guess?

Q. I won't be bound by it, but I would like to have you make it.

A. I would say 250, possibly.

Q. 250?

A. Yes. That is purely a guess. I have not been interested enough to attempt to make any investigation.

Mr. Quirk: Are you finished?
Mr. Collins: I want to continue, Mr. Quirk.
Mr. Quirk: That is all.
Mr. Collins: Wait a minute.

By Mr. Collins:

Q. Is the Chamber of Commerce of Idaho Falls—just what are its interests? Is it interested in the community generally?

A. Definitely. Their slogan is to make Idaho Falls a better place in which to live and make a living.

Mr. Collins: All right, that is all.
Exam. Mullen: That is all. Thank you, Mr. Davis.

(Witness excused.)

[fol. 312] C. A. Harris was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your name?
A. C. A. Harris.
Q. Mr. Harris, are you engaged in farming and in business in Idaho?
A. Yes sir.
Q. At what point are you engaged in business?
A. Rexburg and Saint Anthony, Idaho.
Q. What business are you engaged in?
A. The implement and hardware business at Rexburg and Saint Anthony, and the wholesale agent of the Standard Oil Company of California in Madison County and part of Jefferson.
Q. And are you also engaged in farming?
A. Yes sir.
Q. Where is your farm; what is the size of it?
A. I own a 400-acre farm, and grow wheat, dry land wheat on the farm.

Q. Have you been authorized to speak for any other organization besides yourself in this proceeding as a witness?

A. Yes sir.

Q. Name them, please.

A. The Ashton Chamber of Commerce, the Saint Anthony Chamber of Commerce, the Rexburg Chamber of Commerce, The Idaho Falls Chamber of Commerce, the Intermountain [fol. 313] Hardware and Implement Dealers' Association, and the Upper Snake River Valley Grain Growers Association.

Q. How long have you been engaged in business in Idaho as a farmer?

A. I have been a farmer since 1912, owning my own farm, and I was born and reared on a farm prior to that time.

Q. By reason of the length of time you have been in the State, and by reason of your business activities, do you feel that you are familiar with the business problems of these various groups that you refer to?

A. Yes sir. I feel that I am very much familiar.

Q. Speaking for the time being about the implement business you are engaged in, are you a dealer or a jobbler?

A. A dealer.

Q. You sell—where is your principal market?

A. My principal market is Madison and Fremont Counties.

Q. In other words, you sell to the farmers and others in Idaho?

A. Yes sir.

Q. What particular commodities do you handle?

A. We handle the entire International Harvester Company Line, and some sidelines we buy such as Eversman scrapers and other sidelines that the International Harvester Company do not manufacture.

[fol. 314] Q. Are those shipments made to you from Chicago and other eastern points?

A. Yes sir.

Q. Do you receive anything that is shipped from Pueblo, Colorado?

A. No sir, not up to this time.

Q. What is your position and the position of these other organizations in this case?

A. Speaking for myself and these other organizations,

we feel and have all gone on record for the opening of the Ogden gateway. We feel that when the gateway is closed to one railroad, that the road that it is open to immediately has a monopoly on our haul, and that a monopoly upon our haul creates a monopoly among our buyers.

It closes in our markets to the direct connections over the line that holds the monopoly. We feel that we, as growers, and buyers, and in many cases growers decide that they want to sell to the open market themselves in order to get and open up competition; we feel that we should have the right as individual citizens, as individual growers, as individual buyers, to choose a railroad over which we desire the haul of our products to be made to destination. We feel——

Mr. Collins: Mr. Examiner, I object to any more of this speech. It is not testimony. He wants competition of the D&RG in there. That is answer enough to the question, but we don't need any more of this.

[fol. 315] Exam. Mullen: Well, so far this is just an expression of opinion. How much more of that statement do you wish to make? You might get some facts in the record.

The Witness: We would like to clarify and make some general statements, and then clarify with an actual operation, and the way it does affect our economy.

Exam. Mullen: Suppose you give us that now.

The Witness: We feel that the gateway problem, the transit and diversion problem are barriers entered against our freedom of competition when applied against us and our competitive producing communities in the same line——

Mr. Collins: I interrupt to object again. This is more of the same thing. It is not getting near any facts.

Exam. Mullen: It seems to me the objection is well taken. I think Mr. Harris has stated quite generally his opinion in this matter. I would like to get some facts as to just how it affects your operations and the operations of those whom you represent here.

By Mr. Quirk:

Q. Mr. Harris, the group that you are interested in, and yourself, are interested in attempting to sell wheat wherever the market is good, is that correct?

A. Yes sir.

Q. Are you familiar with the testimony in this case, where you can't dispose of wheat in an area of Wichita, Kansas at the present time under competitive rates?

[fol. 316] A. Yes sir.

Mr. Collins: I object to that. This record doesn't show that.

Mr. Quirk: Yes, it does.

Exam. Mullen: The witness is competent to testify to that. Will you give us the facts, Mr. Harris, as to that kind of a shipment?

The Witness: We understand that under the gateway being closed to the Denver and Rio Grande, that our shipment must go over from an economic point of view where there is no graded rates of combination rates, but on direct rates over the Union Pacific into Kansas City or Wichita, Kansas. When our grain reaches there, there is no outlet.

The gateways are closed there unless an additional penalty is to be paid to get out into the open markets in the southern territory.

Exam. Mullen: Which gateway are you speaking of there?

The Witness: The gateways in Kansas, in Nebraska, and in Colorado.

Exam. Mullen: That moves over what?

The Witness: They cannot go south, because the barriers are there against us. We feel that the buyers of that section of the country will not come into Idaho and bid for our wheat by reason of the fact that they can't get out with our wheat or our products by the fact that the gateways are [fol. 317] closed at the terminal ends south of the Union Pacific into the south part of our country.

Exam. Mullen: Why is it closed?

The Witness: We claim that these gateways are closed for the purpose of directing and limiting our marketing area.

Exam. Mullen: No, my question was, how is it closed? What are the circumstances which lead you to believe that the gateway is closed?

The Witness: Yes sir. The through rate on a car of wheat today from Pocatello, Idaho to Denver by the Union Pacific is 59½ cents, and it is a direct through rate. Over the

Denver and Rio Grande it is 86½ cents, or a 27½ cent differential penalty. The penalty against the Denver and Rio Grande forces us to ship the wheat over the Union Pacific or else the grower must sell his wheat to the buyer for 27½ cents less per hundred in order to use the Denver and Rio Grande, who now have open gateways in the southern territory.

Exam. Mullen: You get your wheat to Denver on this rate of 59½ cents over the U.P.?

The Witness: Yes sir.

Exam. Mullen: Then what do you do with it?

The Witness: When the buyers get it there, they can't get it out.

Exam. Mullen: In Denver?

[fol. 318] The Witness: They can't get it to the south.

Exam. Mullen: Why not?

The Witness: Only because the barrier is there, the gateways are closed there to our wheat; therefore, that market is closed to us.

Exam. Mullen: Just a moment. Let me get this straight. You say you have a movement over the Union Pacific from Pocatello to Denver of 59½ cents?

The Witness: Yes sir.

Exam. Mullen: Why can't the wheat go from Denver to the points you mentioned?

The Witness: It can go; the economic term of the closed gateway is that the barriers, or the combination of the rate is higher than over a through rate, and that combination rate closes the opportunity of the buyers to get the benefit of the demand in all sections of the country.

Exam. Mullen: Over what railroad?

The Witness: Beyond where the barriers are effective.

Exam. Mullen: What railroad would the wheat move from Denver—to what ultimate destination do you have in mind? Pick out an ultimate destination point.

Mr. Quirk: Mr. Examiner, could I interrupt?

Mr. Collins: Mr. Examiner, please carry on. This witness is doing very well with your questions.

Exam. Mullen: Just a minute, gentlemen. I am trying to [fol. 319] get a matter clarified.

Mr. Quirk: I am going to try to do that if I am permitted. I asked this witness on that question about Wichita.

Exam. Mullen: It isn't clear to me and I would like to clear it up. What is the ultimate point of destination you have in mind on this movement of wheat from Pocatello to Denver?

The Witness: Wichita.

Exam. Mullen: Wichita, Kansas? Over what route would it move from Denver to Wichita?

The Witness: It would move over the Union Pacific for 68½ cents. If we use the Denver and Rio Grande, it would be 96 cents to Wichita.

Exam. Mullen: And what is the disadvantage to you?

The Witness: The advantage to us——

Exam. Mullen: You are speaking of the disadvantage.

The Witness: The disadvantage to us is we have a closed market after our wheat gets to Wichita. In other words, the buyer at Wichita, Kansas will not buy our wheat because he can't get it out without these additional barriers or additional combination rates.

Exam. Mullen: Then there is a combination rate on the Union Pacific, is that it?

The Witness: What we are asking is that we may have the privilege to ship our wheat into Wichita and encourage Wichita, Salinas and those southern points to buy our wheat to a free and open market, which they will if they are not [fol. 320] penalized with these combination rates that now exist with the Denver and Rio Grande.

Exam. Mullen: I understood from your testimony you have a combination rate over the Union Pacific to Wichita.

The Witness: Yes sir.

Exam. Mullen: And also a combination rate over the D&RGW?

The Witness: No, we don't have a combination rate over the Union Pacific.

Exam. Mullen: You have a joint rate—I mean a through rate?

The Witness: A direct rate.

Exam. Mullen: You have access to Wichita with a direct rate?

The Witness: Yes. We have access anywhere in the United States over any railroad if we pay the price.

Exam. Mullen: I still don't understand you, Mr. Harris. Maybe Mr. Quirk could straighten this out.

Mr. Quirk: Well, Mr. Examiner, you just don't recall Mr. Earley's rate testimony. There is no competitive rate through that Wichita area via any of the routes today if the wheat is going beyond Wichita.

Exam. Mullen: I would like to get this witness to state it specifically so it is clear. It is not clear in my mind from this witness' testimony.

[fol. 321] Mr. Quirk: He is not a technical rate man, he only knows what happens to it when he is trying to market the wheat.

Mr. Collins: Mr. Examiner, I submit he doesn't know what happens to him or why he is on the stand.

Exam. Mullen: Let the witness proceed.

Mr. Quirk: I will put Mr. Earley back on the stand to clear up this rate problem before we are through.

Exam. Mullen: I would like to get Mr. Harris—he is the witness now—to state how he is affected. He is a farmer, he is a shipper.

The Witness: If I sell, or if I seel a carload of my wheat and I desire to sell it direct to a Wichita buyer, I am denied at the present time the privilege of using the Denver and Rio Grande Railroad by reason of a 27½ cent penalty over what I would pay the Union Pacific. That penalty, or that additional charge to get it into Wichita denies me that rate.

Now then, the Kansas City buyer will not bid for our wheat in our territory, or for my wheat, because when he gets it to Wichita he can't get it out without similar penalties. The gateways are closed. Therefore, he couldn't sell my wheat down into the south and be competitive on the wheat market. Understand, the nucleous of what I am talking about is that I understand it is an accepted rule that a fraction of a cent price on our commodities will turn a trade, either to a territory or against a territory, even a [fol. 322] fraction of a cent, and that is why the economy of the grower and the buyer and his position to get our goods out to the markets of the country is so vital.

Exam. Mullen: Very well.

Mr. Quirk: Well, you may cross examine this witness.

Cross-examination.

By Mr. Collins:

Q. Mr. Harris, I understand you were speaking for the Saint Anthony Chamber of Commerce—first, the Ashton Chamber of Commerce.

A. Yes sir.

Q. How many members has it?

A. I imagine 50, around there. I don't know the exact number.

Q. What generally are the occupations of the member, what businesses?

A. They are merchants and farmers and shippers. I think there is a combination of the industry and economy of the upper territory.

Q. How many of the 50 asked you to speak for them in behalf of the Rio Grande Railroad?

A. The Board of Directors of the Chamber of Commerce gave me their authorization.

Q. But not the members?

A. I——

Q. The members did not?

A. They usually have meetings with their members be- [fol. 323] fore they make up their decision.

Q. You didn't know——

A. I could not say they had called a membership meeting at Ashton. They may have done so, they may not have done so.

Q. How about Saint Anthony: How many members do they have?

A. At Saint Anthony, I would say approximately 75 to 100, possibly 150. I am not familiar with the exact number.

Q. These chambers of commerce are not shippers in their own names, as Ashton Chamber of Commerce and Rexburg Chamber of Commerce, are they?

A. They don't ship goods in the name of the chamber of commerce, but their individual members are shippers. Some of their individual members are shippers.

With respect to all of these chambers, would your answer be the same as it is with respect to the Ashton Chamber?

A. No.

Q. It would not?

A. No sir, it wouldn't.

Q. What about Saint Anthony?

A. I will read my authorization.

Q. Is that authorization from the members?

A. It clarifies your question.

Q. Well, is it from the members?

A. It is from the Board of Directors.

Q. But it is not from the members?

[fol. 324] A. And the members.

Q. And the members?

A. Yes sir. This will clarify that point.

Q. Is it from a majority of the members?

A. Yes sir.

Q. That is all right. How about Rexburg?

A. Rexburg, the Board of Directors gave me their authorization of the chamber.

Q. And that one is similar to Ashton?

A. I have not been present to know whether they called the entire membership on this question. I think both organizations have presented the question to these chambers. I know that. I know that these chambers have received the Union Pacific point of view as well as the Denver and Rio Grande point of view.

Q. Well, you don't know——

A. Before they made up their mind definitely in this case, and in the case of authorizing me to speak for them.

Q. Yes, but you are in the same position with respect to Rexburg as you told me you were with respect to Ashton?

A. I know that the Saint Anthony comes from the body of the membership——

Q. I am not speak of Saint Anthony.

Exam. Mullen: Just a minute, Mr. Collins. Let him finish his answer.

[fol. 325] Mr. Collins: I would like to have him come nearer the question if he would.

Exam. Mullen: Let him clarify it; it is confusing on the record.

The Witness: I advise, I don't know whether the Ashton Board of Directors called in their membership or not. I

now advise that I do know the Saint Anthony Board of Directors put the question to their members.

By Mr. Collins:

Q. I told you that was all right and went to Rexburg. Now, is Rexburg in the same position as Ashton? What about Rexburg?

A. Rexburg, I don't know as to whether they called in the members at this particular time when they issued that authorization, but they have discussed the matter with their members pro and con for two months.

Q. All right, sir. How about Idaho Falls Chamber; I understood you were also speaking for them?

A. Yes sir.

Q. You are speaking in addition to Mr. Davis?

A. Yes sir.

Q. How does your situation differ, if any, from his?

A. I would be glad to read the authorization, if you desire to clear that.

Q. You don't need to read anything. Are you in the same position that Mr. Davis was in with respect to rep-
[fol. 326] resentation of the Idaho Falls Chamber here?

A. The Idaho Falls Chamber appointed Mr. Davis and myself to represent them at this hearing.

Q. I see. All right. That is talk enough about that then. Now, would you tell us, Mr. Harris, in about what part of Idaho these two counties are located, Madison and Teton? I am not familiar with the locations there.

A. Madison County is in the southeast.

Q. Southeast, and——

A. And bounded on the north by Teton County, which county is bounded on the Wyoming line east.

Q. And Teton County is in the southeast?

A. Teton County and Madison County joint together.

Q. Is your wheat farming operation conducted in one of the other of those counties, that is, either Madison or Teton County?

A. I grow wheat in Madison County.

Q. How many carloads of grain did you ship over whatever period you can indicate? Have you shipped this year's crop, 1949?

A. Of my own crop?

Q. Yes.

A. Yes sir, it has been sold, and shipped out.

Q. How many carloads?

A. I grow on an average of five thousand bushels per year.

Q. How many carloads would that be?

[fol. 327] A. I understand a carload is around five hundred bushels. The carloads will vary with the size of the car.

Q. Yes. How do you sell your wheat, Mr. Harris? Is it sold to some buyer at some point near you?

A. I have sold it for years either to General Mills or to Sperry, or the Colorado Mill and Elevator Company because they are almost the only buyers that are in our territory bidding for our wheat.

Q. They do come in the territory and bid for it?

A. They are established in the territory.

Q. They are established. Well then, is this it: They buy it from you at your farm or an elevator?

A. We deliver it to their elevators.

Q. To their elevators?

A. Where they are set up.

Q. And from there on, you don't own the wheat or have anything more to do with it, do you?

A. Not after it is sold.

Q. Now; with respect to the agricultural implements, Mr. Harris, those come in, do they not, from, I believe you said, International Harvester; you represent that company?

A. Yes sir.

Q. And those implements are shipped by the Harvester Company to you at some place of business?

A. Our place of business at Rexburg and our place of [fol. 328] business at Saint Anthony.

Q. And from those places of business, do you sell direct to the farmer?

A. Yes sir.

Q. And they are farmers located in the general area around Rexburg and Saint Anthony?

A. It is wholly an agricultural community—both of them.

Q. I have information, whether it is right or wrong, to the effect that for eight months of 1919 you had shipped in, or there were shipped in to you, your place of business, eight cars of implements. Would that be about *gith*, do you think during this eight months of 1919?

A. We have had shipped into us a monetary value of around two hundred thousand dollars in 1919. Just how that would be divided up into number of cars, I am not familiar.

Q. My information is that the eight carloads that we know about that were delivered to you came from Rock Island, Illinois, or Chicago, Illinois; would that be correct?

A. I think that is correct, over the Union Pacific. The Union Pacific picks up the haul at Omaha.

Q. Yes. Now, you have a good many carloads of shipments of gasoline. That comes from where?

A. The bulk of it comes from Salt Lake City. Some of it, at times, is shipped from the factory in California.

Q. From a factory in California?

[fol. 329] A. The processing plant of the Standard Oil Company; Kennington Field, I believe it is.

Q. Would that be at Richmond, California?

A. Yes.

Mr. Collins: That is all, Mr. Harris.

Mr. Quirk: That is all, Mr. Harris.

Exam. Mullen: Thank you, Mr. Harris.

(Witness excused.)

Mr. Quirk: Mr. Bass.

M. M. Bass was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Will you give your name, Mr. Bass, and spell it to the reporter?

A. M. M. Bass.

Q. Where are you located, Mr. Bass?

A. Idaho Falls, Idaho.

Q. In what business are you engaged?

A. I am potato sales manager for the Idaho Falls Bonded Produce and Supply Company.

Mr. Collins: Would you say that again?

The Witness: Potato sales manager for the Idaho Falls Bonded Produce and Supply Company.

By Mr. Quirk:

Q. Describe the composition of the members of that organization.

[fol. 330] A. That is an incorporated firm engaged in a number of businesses. The produce line probably accounts for approximately 50 per cent of our volume. In addition, the firm handled Purine feeds, Link Belt or Timken stokers, Williams automatic furnaces, and Anaconda fertilizers. They have a processing plant for turkeys and raise their own turkeys. They have a retail store. I think that pretty well covers the nature of the business.

Mr. Bass, are you also an officer or director of the Idaho Potato-Onion Shippers' Association?

A. Our firm is a member of the Idaho Potato and Onion Shippers' Association, and I am vice president of that organization.

Q. What is your own position and the position of your company in this proceeding?

A. We are in favor of the opening of the Ogden gateway.

Q. Why are you in favor of it?

A. We feel that closed gateways restrict our markets. In fact, we are in a position where we can't sell in certain markets with safety. We are also very much in favor of free enterprise, and we think the closed gateways restrict our freedom.

Q. Are potatoes reconsigned or diverted in transit frequently?

A. Very often. It depends on market conditions. We are allowed three free diversions, or reconsignments, and two additional at a certain figure.

Q. If you ship from some point in Idaho to Grand Junc-[fol. 331] tion, Colorado, on the Rio Grande as an original proposition, and something should cause you to divert that

car to points east of the Colorado Common Points, what would happen?

A. It is my understanding we would be paying a combination of local rates.

Q. Does that tend to restrict your market on the Denver and Rio Grande?

A. Yes.

Mr. Collins: Just a minute. Would you read that question?

(Question read.)

Mr. Collins: I move the question be stricken, Mr. Examiner, because Mr. Quirk has now jumped from the hypothetical—if so and so in his other question—and now he says "does that tend?".

Exam. Mullen: I think the question is proper, Mr. Collins.

Mr. Collins: If he said "would that tend," it would be one thing.

Exam. Mullen: I think the witness understands the question. You may answer.

Mr. Quirk: He did answer.

Exam. Mullen: Will you read the answer?

(Answer read.)

Mr. Quirk: You may cross examine.

Cross-examination.

By Mr. Collins:

[fol. 332] Q. How long have you been in this business of the Idaho Falls bonded warehouse and supply company, Mr. Bass?

A. The name is Idaho Falls Bonded Produce and Supply Company. I have been engaged in my present occupation since June 1, 1947.

Q. When did you come to the conclusion that you wanted the Ogden gateway opened?

A. After hearing arguments put forth by Union Pacific employees, by the Rio Grande employees who were in Idaho.

Q. That is since this complaint was filed in this case, August 1st?

A. At the time the complaint was filed, I notified representatives of both railroads that I was taking a neutral position at that time.

Mr. Collins: Just a moment, Mr. Examiner.

That is all.

Redirect examination.

By Mr. Quirk:

Q. Mr. Bass, I forgot to ask you, the company you are directly connected with, as distinguished from the association, is a shipper, is it not?

A. Yes, that is my relationship with the firm I am employed by.

Q. What does it ship; what is the principal commodity?

A. Principally potatoes, some onions, and dressed poultry.

Q. Do you know what the volume would be in a year?

[fol. 333] A. I can say that last season, the season beginning with July 1, 1948, and terminating June 30, 1949, we shipped both carload, truck, and lcl, 1063 units of potatoes and onions. Those are the only commodities that I can give you definite figures on.

Q. What do you call a unit?

A. Some LTL truck units amounted to only 10,000 pounds, some up to 50,000 pounds. The rail shipments were generally in accordance with the O.D.T. minimum in effect at that time.

Q. Do the members of the Idaho Potato and Onion Shippers' Association also ship potatoes and onions?

A. All members are either active shippers or there are a few holding associate membership. The active shippers are engaged in the shipping of potatoes and onions. The associate members are bag companies and, I believe four Idaho banks who hold membership in our association.

Q. The shipments made by the members of that association, does that amount to a large percentage of all shipments made out of Idaho, do you know?

A. In excess of 90 per cent of the potatoes and onions

shipped from Idaho are shipped by members of our association.

Mr. Quirk: That is all.

Exam. Mullen: Where do you ship the commodities by rail, to what destinations?

The Witness: Idaho is in a position where, from an economic standpoint, they must export their produce. Our [fol. 334] local market takes a smaller percentage of what we produce. Therefore, the shipments are made to all sections of the United States, some exported to Canada, to the South Pacific, to South America, and to Cuba. We have inquiries from African and other points——

Exam. Mullen: We were only interested in the United States movements.

Mr. Quirk: How is that?

Exam. Mullen: We are interested only in the movements to points in the United States.

Mr. Quirk: The complaint is filed for export-import traffic as well as domestic traffic.

Exam. Mullen: I am interested in where these shipments move to in the United States.

Mr. Quirk: I see.

The Witness: I might say further, to the entire forty-eight states.

Exam. Mullen: How many move to the Pacific Coast states?

The Witness: Well, I am not in a position to give you any accurate figures. I would suggest if that is required for the record it be secured from——

Exam. Mullen: I am merely asking you if you know.

The Witness: I do not know.

Exam. Mullen: All right.

Mr. Quirk: That seems to be all.

[fol. 335] Exam. Mullen: Is that all, Mr. Collins?

Mr. Collins: It is, unless Mr. Quirk asks some more.

Exam. Mullen: Pardon me, I am asking you.

Mr. Collins: That is all.

Exam. Mullen: All right. The witness is excused.

(Witness excused.)

L. E. STEPHENS was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your full name, Mr. Stephens?

A. L. E. Stephens.

Q. Mr. Stephens, where are you located?

A. I am located at Blackfoot, Idaho.

Q. In what business are you engaged?

A. At the present time I am engaged in potato shipping business. I am also in the feed and grain business.

Q. Are you engaged in these activities as an individual or as a company?

A. The ptotato shipping business is operated under the name of L. E. Stephens. The grain and feed business is operated under the name of Stephens Bond, Incorporated.

Q. Are you a shipper—are each of these companies shippers?

A. Yes sir.

Q. Where are your principal markets?

A. The principal markets cover the entire United States [fol. 336] with the exception of Maine. I never shipped any potatoes to Maine.

Q. Did Maine ever ship any out here?

A. Yes sir.

Q. They do?

A. They have in the past.

Q. Do you, as a shipper, and as an individual, favor the competitive rates which this complaint seeks?

A. Yes, I do.

Q. In what respect will such a rate system benefit your activity?

A. At the present time, there are certain markets in the United States which are termed closed markets due to the application of the tariff as it stands at the present time.

Q. Do you ship any of your commodities to local points on the Denver and Rio Grande, potatoes or onions?

A. I don't recall of any specific market that I have shipped to other than Denver.

Q. Are onions diverted in transit frequently?

A. Yes, I handle very few onions, though.

Q. Potatoes are diverted, aren't they?

A. The potatoes are diverted. That is a normal procedure in handling potatoes. Many potatoes are shipped with the idea in mind of diverting in transit on sales that are made.

Q. Have you had any car difficulties on the Union Pacific?

A. You refer to——

[fol. 337] Q. Boxcars. Do you always get the cars you need from the Union Pacific when you need them?

A. No sir, I definitely do not. I have not in the past. As a matter of fact, this is the first year since I have been in business that I have ever been able to operate my warehouse to capacity.

Q. Has the car service improved on the Union Pacific since August 1, 1949?

A. I have partially answered that question. This is the first time in 11 years that I have ever been able to operate my warehouse to capacity, and the reason I have not, in most instances, during the harvest season, is because of a car shortage.

Q. Did you have one period where you got only a small proportion of the cars ordered per day for a sustained period?

A. Yes sir, I think—I believe it was two years ago. I can't recall whether it was two or three years ago, but it was during the harvest time, when our business is the heaviest, and our profit most, I believe the record will show that I received less than one car per day for a period of 60 days, and I have a potential capacity of from seven to nine cars daily.

Q. When that situation occurs, you simply lost money, didn't you?

A. Yes sir, I am at a standstill.

[fol. 338] Mr. Quirk: That is all.

Cross-examination

By Mr. Collins:

Q. Mr. Stephens, isn't it a fact that during the grain harvesting season, I suppose it must have been cars for

grain loading that you wanted and did not get, was it not?

A. It has been both, principally potatoes.

Q. Potatoes, yes. Well, during the grain and potato harvesting season, isn't it a fact that every shipper of those commodities is seeking what we might call a peak load of cars, or a greater number then than at any other time of the year?

A. In most instances, that is the case, yes sir.

Mr. Collins: That is all. Thank you.

Exam. Mullen: Mr. Stephens, what will be the benefit to you of the establishing of joint rates over the D&RGW, via Ogden?

The Witness: Well, I would say I can answer that in a general way. There are certain markets which we term closed, and in many instances a shipper is not too familiar with the tariffs, and will get into a market of this type unknowingly, and then be unable to get out.

Exam. Mullen: What market do you refer to now, specifically, that are closed to you as a shipper?

The Witness: I can't give you those markets off hand. I know there are several of them. One particularly is Wichita, Kansas. Once you are in there the only place you [fol. 339]can go then is Kansas City without paying the local freight rate beyond.

Exam. Mullen: I see. That is all.

Redirect examination

By Mr. Quirk:

Q. If you had a car at Grand Junction or any other point, on the Denver and Rio Grand-, and you desire to reconsign it to a point east, what would happen?

A. I don't believe that would be possible.

Q. You would have to pay the combination rates, wouldn't you?

A. Yes sir.

Mr. Quirk: That is all.

(Witness excused.)

Mr. Quirk: May we have a recess, Mr. Examiner?

Exam. Mullen: Yes, we will take a ten-minute recess.

(Recess taken.)

Exam. Mullen: We will resume the hearing. I understand Mr. Harris desires to make a correction in his testimony.

C. A. Harris resumed the witness stand and testified further as follows:

Direct Testimony.

The Witness: I testified five hundred bushel was an average carload. I meant to say five hundred sacks, which would be approximately one thousand bushels and up, according to the size of the car.

(Witness excused.)

[Vol. 340] A. G. STANGER was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your full name?

A. A. G. Stanger.

Q. Mr. Stanger, where are you located?

A. Our place of business is at Idaho Falls, Idaho, Idaho Falls Bonded Produce and Supply Compan:.

Q. Are you an officer or director of that company?

A. Both.

Q. What office do you hold?

A. I am executive vice president and manager of this company.

Q. Are you engaged in any other business under any other name?

A. I am engaged in farming on my own farm, livestock feeding, and also president of the Rexburg Feed and Supply Company, Rexburg, Idaho.

Q. In what commodities are the companies you referred to interested, in transportation?

A. Shipping of produce consisting mostly of potatoes, some onions, receiving and shipping of feeds, and the heating business, fertilizer business, the receiving of coal, the handling of feeds and grain.

Q. Under produce, what do you include under produce?

A. Mostly potatoes and onions.

Q. You didn't mention turkeys. Do you ship turkeys?

[fol. 341] A. That is right, we do ship and process turkeys.

Q. Now, where is your market, principal market, for the potatoes, first?

A. Our principal market for potatoes is in the southwest, Texas, Oklahoma, Louisiana, into the Middle West, into the West, and some into the East.

Q. Just state in your own way what your interest is in this proceeding.

A. We feel as shippers and producers of the commodities mentioned, that we should have the right, inasmuch as we own and have our investment in these products, to route them as we see fit. As the situation now stands, there is only one way in which we can route them, speaking of produce, without being penalized, unless we use exclusively the Union Pacific facilities.

Q. Have you ever had any car problems with the Union Pacific?

A. Yes, we have had many car problems.

Q. How recently?

A. Well, particularly prior to the presidency of Mr. Stoddard. In other words, prior to the present regime.

Q. Have you found from experience in dealing with certain markets on certain commodities that competition is beneficial to you?

Mr. Collins: Just a minute. I object to that question. It is vague.

[fol. 342] Exam. Mullen: I think you might clarify it.

By Mr. Quirk:

Q. I will ask another question: Where do you ship your turkeys?

A. Most of our turkeys go to Philadelphia, New York; some into Chicago.

Q. What is the rate on turkeys from Idaho Falls to New York?

A. I think at the present time, and although our Mr. Keyes is handling the turkey end of our business in charge of that, I think at the present time the freight rate to New York from Idaho Falls is $4.31 per hundred.

Q. What is the rate on turkeys from Cedar City, Utah, on the Union Pacific?

A. I think the freight rate on turkeys from Cedar City, Utah, and I might say also Richfield, Utah, would be, one being on the D&RG, and the other being on the Union Pacific, would be $3.51, or approximately 80 cent differential, and the only reason we can figure out why this differential exists is because of competitive services which can be had on either line.

Q. You mean in relation to Cedar City and Richfield?

A. Correct.

Q. Idaho Falls is served exclusively by the Union Pacific?

A. Idaho Falls is served exclusively by Union Pacific.

Mr. Collins: Before you leave it, may I inquire, Mr. Stanger, you mentioned Cedar City, Utah and Richfield, Utah?

[fol. 343] The Witness: Yes.

Mr. Collins: Which place is on which railroad?

The Witness: I think you will find Richfield is on the D&RG.

Mr. Collins: Yes.

The Witness: And Cedar City undoubtedly is on the Union Pacific.

Mr. Collins: Thank you.

By Mr. Quirk:

Q. It has already been testified that potatoes are reconsigned in transit quite frequently; is that your experience, too?

A. What do you mean by "reconsigned"?

Q. Diverted. Maybe you call it diversion.

A. That is correct. Potatoes—it is a frequent practice to divert potatoes while in transit.

Q. Do you sell potatoes at times, do you ship potatoes at times that are not definitely sold at the time they start rolling?

A. Yes sir, we do.

Q. Does that mean you need a very flexible market diversion privilege at equal rates over various routes?

A. Especially when we have a buyer's market we need flexible conditions, and by that I mean we need diversions, and oftentimes we need routes which are not now granted to us.

Q. Do you have a buyer's market now on potatoes?

[fol. 344] A. Yes, sir, definitely a buyer's market.

Q. Have you had experience with potatoes being in a pocket so that they could not get out except on combination rates?

Mr. Collins: Mr. Examiner, I think before he answers we might have the record show what Mr. Quirk means by a "pocket". I am frank to state I do not.

Mr. Quirk: Everybody else knows.

Mr. Collins: I do not know. I am in this law-suit.

Exam. Mullen: Does the witness know?

The Witness: Yes sir.

Exam. Mullen: Will you explain it, sir?

The Witness: The general explanation of a pocket, using Wichita as an illustration, if a car of potatoes is billed, or sold, rather, in Wichita, and that car happens to be rejected for some unknown reason, then there is only one place that that car can be diverted on a through rate, and that is into Kansas City, Missouri. If you tend to divert that from Wichita, as an illustration, into Fort Worth, or Dallas, then you are penalized with a combination of freight rates.

Mr. Collins: That is enough for me. Thank you.

By Mr. Quirk:

Q. If you shipped a car of potatoes to Grand Junction or some other local points on the Rio Grande, and you had to divert it, the same thing would happen, wouldn't it?

A. I am not a freight rate man, but it is practically an impossibility to bill a car into Grand Junction with through [fol. 345] rates applying over the D&RG. It is my understanding that if you go into Grand Junction, over the D&RG,

a combination of local rates apply, which makes it almost prohibitive to ship in there without being penalized.

Mr. Collins: Well now, for further clarification, you don't mean just to ship into Grand Junction as a destination point, do you?

The Witness: I mean to go into Grand Junction and then try to get out of there on diversion privileges.

Mr. Collins: I see.

By Mr. Quirk:

Q. I believe that is all, Mr. Stanger, unless you have some comment to make yourself.

A. I would like to make this comment, that we have many friends, particularly on the Union Pacific system, and we are not prejudiced in this thing in the least. We appreciate that friendship. But we do believe that after 40 years of being denied the privilege of routing the products that we own, that we should have the right and the privilege, if conditions exist which shouldn't, and they have in the past in some instances, that we as owners and shippers of this merchandise should have the right to route it, inasmuch as it is our merchandise and our responsibility to deliver to destination.

Furthermore, it seems to us that in principle, which I have just mentioned, has founded and helped to build this country by free enterprise, which we should cherish and help [fol. 346] to maintain.

Furthermore, I think that if this privilege of diverting and handling our products over a different route will tend to give us better service by the line that is serving as due to the fact that competition exists which at the present time does not, in fact, is a monopoly, and inasmuch as we are all human, and particularly in view of the fact we have past history to back us up on these things, there is a possibility in the future that some mismanagement might take place in the Union Pacific which will be detrimental and harmful as it has been in the past because of inefficient and mismanagement.

Mr. Collins: I move to strike all of that statement on the ground it is irrelevant, incompetent and immaterial.

Exam. Mullen: That seems to me to be a sound objection,

taking the latter portion of it. However, we will let it stand.

One question I wanted to ask you: You were asked about the cost situation on the U.P.

The Witness: Yes sir.

Exam. Mullen: How will the opening of this ro[illegible]e by the D&RG better or help correct the cost situation with respect to furnishing you with cars?

The Witness: May I give our experiences, in answer to the question?

Exam. Mullen: I would like you to answer this question [fol. 347] specifically.

The Witness: We have found in the past, in fact we have been penalized severely in not being able to ship our perishables because of lack of equipment.

Mr. Collins: Well now, Mr. Examiner, I am sorry to interrupt on what ought to be an answer to your question, but which is not. I object to his speaking of having been penalized unless he states what he means by "penalized."

The Witness: I can give you a definition of "penalization."

Exam. Mullen: Don't let us get too far from the question I asked. How will the opening of this route help you out on the car situation? Can you tell us that?

The Witness: Yes. We think if these freight rates over the D&RG are the same as they are over the Union Pacific, that competition will become a factor whereby the Union Pacific will see that the cars are furnished to shippers when the shippers needed them, which has not been the case in the past because they knew that if they didn't get the freight today, it would move over their line tomorrow, inasmuch as a monopoly exists th[illegible]

Exam. Mullen: That's all I have.

Mr. Collins: Are you finished, Mr. Quirk?

Mr. Quirk: I have not said a word.

Mr. Collins: I said "have you finished?".

Mr. Quirk: Yes.

[fol. 348] Mr. Collins: Thank you.

Mr. Quirk: That answer was in answer to the Examiner's question.

Mr. Collins: Thank you for that, too.

Mr. Quirk: I thank you.

Exam. Mullen: Let's proceed.

Cross-examination.

By Mr. Collins:

Q. What competition, Mr. Stanger, do you have in mind that would result if the Rio Grande succeeds in this law suit?

A. I don't understand your question.

Q. What competition do you think would result if the Rio Grande prevails in this law suit?

A. I take it, in trying to answer the question, which I don't understand fully, I think in answering it that I have already stated that competition is the life blood of American business.

Exam. Mullen: We would like to have the answer more specific than that.

Mr. Collins: If he doesn't answer the question, let me start over again.

The Witness: If you will rephrase it, I will appreciate it.

By Mr. Collins:

Q. Let me start over again.

You spoke of car supply, and you also spoke of the benefits of competition, did you not?

A. No, I spoke of the benefit of service through competition.

[fol. 349] Q. Through competition?

A. That is correct.

Q. Now, what competition will be added to the picture insofar as your shipping is concerned if the D&RGW prevails in this law suit?

A. I don't—the competition so far as we are concerned?

Q. Yes.

A. It will be the competition between the Union Pacific and the D&RG, and other railroads that are soliciting our business.

Q. I see. Can you state how that will give us more cars at times that are more suitable for your purposes?

A. Only from past experience, which I will be glad to elaborate on if you want me to.

Q. No. Won't you just tell us how you anticipate your

car supply will improve if the Rio Grande prevails in this law suit?

A. Yes.

Q. Just tell us what you expect.

A. If the Rio Grande prevails in this law suit, it will mean that we have, as a shipper, the opportunity of routing our merchandise over the Union Pacific or the D&RG.

Q. Yes.

A. If the Union Pacific or the carriers fail to give us cars with which to move this produce, then, as retaliation, or to help to put the Union Pacific on their toes, we can take the freight away from them and ship it over the D&RG, which [fol. 350] at the present time we cannot under circumstances unless we are penalized.

Q. Penalized by the combination rate?

A. By the combination of freight rates.

Q. Yes. Now, you haven't overlooked the fact, of course, that your cars will still be delivered to you by the Union Pacific, and your actual physical transportation services will still be Union Pacific?

A. I have not overlooked that at all. As a matter of fact, in the past, I think your own records will show it, you have diverted cars from Idaho that should be shipped and loaded by shippers in Idaho to other lines where you had competition simply because you needed cars in that district in order to take care of business because of competitive purposes where we sit high and dry in the past not having the cars to load the merchandise out, knowing that you would get it, if you didn't get it today, you would get it tomorrow.

Q. You think the Union Pacific would not be able to do that after the Rio Grande might prevail in this law suit?

A. I am definitely sure the Union Pacific would pay more attention to the shippers' requests, if we had the opportunity of routing it over both lines, they would pay more attention to it than they do at the present time.

Q. How do you know that?

A. I say I don't know that. I feel that, I think that.

[fol. 351] Q. You think if you had this club to use over them, they would come nearer giving you exactly what you want?

A. I would not call it a club at all. I would merely say it is competition.

Q. Then to use your word, retaliation?

A. I can strike that from the record. I didn't mean it in that manner at all.

Q. All right. We will leave it as it is.

In the instance you mentioned, of not getting the cars that you wanted, did you have knowledge then of the available car supply of the Union Pacific Railroad for distribution?

A. In a limited way, yes. We have often been told that there would be cars loading for this day, the next day, and so forth, but many, many times we were disappointed and did not receive the cars that had been promised. I can tell you why in some instances.

Q. Just a minute now. You can tell me that later. Haven't other shippers throughout Idaho had the same disappointment in the receipt of car supply in proportion—receipt of cars in proportion to the cars ordered by them?

A. Oh, I think that is true.

Q. Yes.

A. We have all been handicapped.

Q. And those disappointments in receipts of cars ordered have been generally at what periods of the year?

[fol. 352] A. Your records show that, sir.

Q. Well, yes, that is the reason I can depend on asking you.

Exam. Mullen: Speaking of your own experience.

The Witness: Well, we have been disappointed in receiving cars——

By Mr. Collins:

Q. Let me strike out that question, and ask you, isn't it at the season that potatoes, onions, grain, whatever are the products that are harvested at particular times of the year, that this, what you would term, I suppose, an inadequate supply, is felt by you and other Idaho shippers?

A. I don't understand your question; I am sorry.

Q. Isn't the shortage of cars that you speak of at the time of the year when your potatoes, onions, and all of those things are harvested, right at that peak harvest period?

A. Not necessarily.

Q. You don't feel it at that time?

A. We feel it sometim at that time, and other parts of the season as well.

Q. Have you ever gotten the cars you wanted from the Union Pacific Railroad?

A. Have we ever?

Q. Yes.

A. Oh, yes.

Q. What time of the year was that?

A. We are getting enough at the present time.

[fol. 353] Q. Well, in 1946, how did you fare then? That is, at any period you pick out?

A. Well, I would have to go back into the record, and I haven't them with me, but it seems to me, without the records at hand, that we had a period in 1946 that we didn't have adequate supplies.

Q. Yes.

A. May I explain why we didn't have adequate supplies at times?

Q. Well, you can explain from your standpoint, but the Union Pacific Railroad won't be bound by it.

A. That is correct.

Q. If you won't make another speech.

A. Then maybe I hadn't better say anything.

Exam. Mullen: If you have something to clarify on the record, you may do so.

The Witness: There have been cases, and the record will bear us out on this, at Idaho Falls, where we have needed cars and needed them badly. The Union Pacific had cars on their so-called tracks, but they had not been serviced. By that I mean that had not been cleaned.

We needed those cars so badly that we offered to clean them ourselves at our own expense in order to rush and expedite those cars into service so that they could be loaded. But we have been refused that, and the reason that those cars, in my opinion, have not been available to us when we [fol. 354] needed them is because of the lack of facilities that the Union Pacific and the PFE failed to have at that loading point.

Q. Now, is it your understanding that the Denver and Rio Grande Railroad will come up to Idaho Falls and clean those cars and spot them for you?

A. Definitely not, sir.

Q. So that the situation would not be necessarily changed, would it?

A. That situation would not be necessarily changed except in this, that if we failed to receive the service which we are entitled to, then I am sure the shippers would say that if the Union Pacific is going to take the attitude and not service the shippers as they should, then in some cases those shipments would move over a line that does appreciate business.

Q. In other words, you would route against the Union Pacific?

A. That may be the case in some instances.

Q. That really is all you have in mind as a possible benefit?

A. Oh, no, that is not all.

Q. Is that so?

A. No.

Q. Do you have something else?

A. Yes.

Q. What else?

A. Do you want me to make a speech?

Q. What other benefits do you have in mind?

[fol. 355] Exam. Mullen: You can answer the question.

The Witness: The other benefits I have in mind is this: We have in Idaho a very productive territory, and if the Union Pacific will help develop that territory, that much more tonnage can be grown and produced in that territory.

By Mr. Collins:

Q. Wait a minute. You promised to answer by stating what other benefits you and the business at your end would derive.

A. I am getting to that.

Q. Getting to that?

A. By increased production, we would have greater tonnage to give to you and other lines.

Q. If the Union Pacific would build up Idaho, you say?

A. If they would help build it up.

Q. Have you helped build it up?

A. Certainly.

Q. Do you realize the Union Pacific Railroad, or what is now the Union Pacific Railroad, was constructed in Idaho in 1881?

A. I do, but not by the Union Pacific.

Q. It is a subsidiary or forerunner of the Union Pacific, and we need not explain that on the record.

A. That is right.

Q. Do you know what the population of Idaho was at that time?

A. No, I don't.

Q. Would you be surprised if I told you it was only 34,000 people?

[fol. 356] Exam. Mullen: I don't think we need to go into that. I don't think we need to pursue that, Mr. Collins.

Mr. Collins: No, I didn't think so either

That is all I want to ask Mr. Stanger.

Exam. Mullen: Anything on redirect?

Redirect examination.

By Mr. Quirk:

Q. Do you know enough about the way railroads interchange cars between each other to answer a question like this: If competitive rates were established in connection with the Denver and Rio Grande, wouldn't you expect in the course of events, that some of the cars offered by Rio Grande would go up to the Union Pacific and thereby increase the supply of the Union Pacific.

A. I certainly would expect it.

Mr. Quirk: All right, that is all.

Mr. Collins: That is all.

Exam. Mullen: That is all. Thank you, sir.

(Witness excused.)

BERT HIGGINS was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your full name, Mr. Higgins?
A. Bert Higgins.
Q. Where do you reside?
A. 265 East 21st Street, Idaho Falls.
[fol. 357] Q. Mr. Higgins, are you on the executive committee of the Idaho State Grange?
A. Yes sir.
Q. What is that membership composed of?
A. Composed of farmers and shippers—shipper farmers, or grower dealers. We have some grower dealers that ship quite a lot of produce that are members. In order to qualify for membership in the Idaho State Grange, they have to be agricultural workers or producers, or till the soil.
Q. Is that a state-wide organization?
A. Yes sir.
Q. How many members are in the Grange?
A. We have at present some small number over 12,000, just right around 12,000 members—adult members.

Mr. Collins: How many, 12,000?
The Witness: Yes, 12,000.

By Mr. Quirk:

Q. Have you been a farmer for a long time?
A. I came to Idaho in 1907, and bought a farm on the 8th day of August, 1907. I came to Idaho and bought a farm, and I farmed continuously then until 1945.
Q. During that period, you were a grower of grain, I take it, fruit and vegetables?
A. Not any fruit. We didn't raise much fruit, but I grew potatoes, grain, and hay, principally.
Q. Did you ever bring up lambs and ship them?
[fol. 358] A. No sir, I never shipped any lambs myself.
Q. Well now, what is the position of the Idaho State Grange in this proceeding?
A. The Idaho State Grange, after considering both sides of the proposition, and getting what information that they

could assemble, decided that it would be to the best interests of Idaho, as an agricultural state, to not have the Ogden gateway closed, or to have it opened, rather.

Mr. Quirk: You may take the witness.

Cross-examination.

By Mr. Collins:

Q. Mr. Higgins, you yourself are not a shipper any more, are you?

A. I haven't been a shipper for two and a half years or more—nearly three years.

Q. Yes. Now, you said that the Idaho State Grange, after considering both the Rio Grande's situation or position, and the Union Pacific's position in this case, the Idaho State Grange—I guess that is correct—decided the Ogden gateway should be opened; is that what you said?

A. Yes sir. We didn't make that decision until after 51 per cent, about, or 51 per cent of the Grange itself, had sent in resolutions to the state secretary asking that the state grange present that at the State Grange session in Idaho Falls.

Q. Do you know about what date that this decision was made?

A. The executive committee decided that they were in favor of the opening of the Ogden gateway, I think it was on [fol. 359] October 20.

Q. 1919?

A. Yes sir.

Q. That was how long after hearing both sides, or considering both sides of the controversy in this law suit?

A. We heard the Denver and Rio Grande's side I believe it was in September.

Q. The exact date is not of particular importance, Mr. Higgins.

A. It was around about September 20, or somewhere along there, right at that time somewhere. It was in the month of September, anyway.

Q. You said there was 12,000-some members of the Idaho State Grange, and that they are shippers or dealers?

A. Or producers. They are not all shippers and dealers. They are producers of agricultural products.

Q. Do you know whether those members expressed themselves before the controversy in this case?

A. I know that Pomona Granges, which are county organizations, and 18 subordinate granges, the Pomona Granges have for their membership about from seven to twenty, the suburban granges, and they were at that time—the State Secretary reported that there was ten of those granges, Pomona Granges, that had sent in resolutions or signed resolutions that had been sent in which would, taking the number of Granges into consideration, be practically 50 per cent.

[fol. 360] Q. Maybe I don't understand the way the Idaho State Grange is constituted, Mr. Higgins. Would *the* be it, that the state-wide grange is constituted by, or is made up by local granges like the Pomona, and other granges?

A. Yes sir, we have 167, I think it is, at present, subordinate granges.

Q. Then there is no direct shipper membership, that is a person, there is no person who is a member of the Idaho State Grange, but instead the membership of that grange is made up by other local granges, is that correct?

A. Yes sir. The State Grange is, yes sir.

Q. Now, the 12,000 members you mentioned constitute membership of local granges, which local granges are in turn members of the Idaho State Grange, is that correct?

A. Correct.

Q. Is that it?

A. Yes sir.

Q. You don't know, then, do you, whether the individual people who make up the local granges expressed themselves, or how many of them expressed themselves about the controversy in this law suit, do you?

A. I don't know exactly the personal number, but I know the number of granges that had sent in resolutions to the State Secretary, or else had signed resolutions. In the Pomona Granges, the subordinate granges that are usually in there sign the resolutions that are sent by the Pomona [fol. 361] Grange to the State Grange.

Q. Yes. So that the actual vote, if any, of the membership of the local grange, would not come to your attention,

would it? You would get your authority here from a local grange in one county and another county by resolution of that local grange sent up by an officer, wouldn't you?

A. Yes sir.

Q. Then, Mr. Higgins, you don't know, do you, how many of the 12,000 people in this entire grange set up might favor or not favor the Denver and Rio Grande's position here, do you, as individuals?

A. No sir, only that we are expected to know that a majority of the grange favored the resolution, or else it would not be sent in; it would be turned down.

Q. You assumed that the heads of the local granges had a majority of their members of each local grange; that is what it is?

A. That is right.

Q. All right. Do you know if these local granges stated why they wanted the Ogden gateway opened, or what benefits they expected?

A. Usually the resolutions sent in covered it generally. They thought for the benefit of the State of Idaho, for the shippers and producers that ship, they should have the right to ship over any road they saw fit.

[fol. 362] Q. In other words, they thought the greater the number of possible routes, the more benefit there might be to them?

A. They figured in their resolutsion, some of them stated it would open up new markets, possibly open up new markets and create better facilities for handling their produce.

Q. Well, did they indicate what new markets would open up?

A. They never specified any particular markets.

Q. All right. Understand, Mr. Higgins, if the membership, or individual members of these Idaho granges, which constitute the state-wide grange, rather, think that they will get lower freight rates if the Ogden gateway is opened than they now have?

A. No sir, they didn't think that, because they had to be told by the Union Pacific people in almost all of the granges south of the Salmon River, I think, that they would not, and they had to be told by the D&RG people that possibly it might not affect freight rates in any way.

Q. Yes. They understood, I suppose, that if the Rio Grande prevailed here, that what they would get would be the same rates by the D&RG, approximately the same rates as they now have; is that what was understood, if you know?

A. Well, I think that was the misunderstanding. They might not have cheaper rates, but they would possibly have better service.

Q. And how do they think that better service would come about; was that stated in the resolutions?

A. No sir, they didn't state in the resolution why they thought they would have better service.

[fol. 363] Q. They just expressed a general desire that the gateway be opened for whatever it might benefit them in the future: is that about the substance of it?

A. I didn't happen to be able to advise or visit many of the granges, I only visited two or three where I talked with the masters, the head of the granges, or the members. They thought competitive effort would be better for the transportation than to have it in one railroad alone.

Q. Well, did they know that the Rio Grande Railroad was not going to furnish any transportation services in Idaho?

Mr. Quirk: I object to that.

Mr. Collins: Just a minute.

Exam. Mullen: I think the cross examination is proper. Go ahead.

The Witness: They knew that the Rio Grande wouldn't build any tracks into Idaho.

By Mr. Collins:

Q. That is a sufficient answer to me. Now, as a matter of fact, Mr. Higgins, didn't you send out a letter to all local granges, advising them to take a stand against the Union Pacific Railroad in this case?

A. I sent out letters to almost all the granges south of the Salmon River.

Q. Yes.

A. I didn't particularly urge them to take a stand.. I [fol. 364] urged them to send a resolution to our utilities commission at Boise, to intervene in the case.

Q. You did tell them, though, did you not, that in your

opinion this closed Ogden gateway was a great detriment to shippers and producers in Idaho?

A. Yes sir.

Q. And it was your view, was it not, that the gateway should be opened to eliminate that detriment? Now, I wish you would state exactly what benefits you expected to accrue to any of the 12,000 members of the Idaho State Grange, if the gateway were opened?

A. I want to state first, to clarify that just a little bit, that we had 50 per cent of the granges south of the Salmon River that had sent in resolutions prior to the time that I sent out this letter.

Q. Yes.

A. The benefits that I figured or studied out that would accrue was that it would give us competitive rates to markets that were not now open to the shippers of Idaho, and also that competition, in my estimation, does a lot of things, and I thought possibly it would help to eliminate the shortage of cars and give us better service than we had previously.

Q. Well, would this be a correct statement of the position that you took——

Mr. Quirk: Mr. Examiner, I suggest Mr. Collins ask [fol. 365] questions instead of summing up now. If he is going to sum up, I object.

Mr. Collins: This gentleman is under cross examination.

Mr. Quirk: I know. You are not asking questions, you are stating something. You are summing up. You are going to sum up his position now. He answered your question.

Mr. Collins: I am entitled to sell him my position.

Exam. Mullen: Go ahead, Mr. Collins.

Mr. Quirk: Mr. Examiner, I object to Mr. Collins summing up the man's position.

Exam. Mullen: The question is not complete. I don't know what the question is, or what it is going to be. Go ahead, Mr. Collins.

By Mr. Collins:

Q. Is this a correct statement of your position, and of those whom you represent, that you think that there may be

some benefit derived if the route and rates are opened up by the Rio Grande Railroad?

A. According to the evidence that I have been able to get——

Q. No, wait a minute.

Exam. Mullen: Let him answer.

By Mr. Collins:

Q. Go ahead.

A. I know that there will be certain benefits.

Q. You know; what are they?

A. I just stated them prior to this time, that there would be other markets opened up, and possibly competitive service would give us better service than we had in the past.

[fol. 366] Q. Well now, where are you lacking in competitive routes other than the Rio Grande Railroad?

A. We only have the two railroads, the Rio Grande and the—we only have the Union Pacific. We don't even have the Rio Grande yet.

Q. They don't intend to build up there, do they, as far as you know?

A. No.

Q. Don't your members ship stuff as far as Chicago, do you know?

A. I think possibly our members ship into every state, I think.

Q. Do you know whether any one of the members of the Idaho State Grange has had any occasion to ship via the Denver and Rio Grande Railroad?

A. No sir, I don't. I know of occasions where livestock has been shipped via the Denver and Rio Grande Railroad, the north section; my son-in-law ships a lot of lambs in Colorado and Kansas, which are shipped via the Denver and Rio Grande.

Mr. Collins: That is all.

Mr. Quirk: That is all, Mr. Examiner.

Exam. Mullen: All right. Thank you, Mr. Higgins.

(Witness excused.)

Exam. Mullen: Do you have another witness?

Mr. Quirk: Mr. Examiner, I believe Mr. Siddons is here, who represents the Holly Sugar people, who would like to proceed.

Exam. Mullen: Is Mr. Siddons here? You may proceed [fol. 367] now, sir, if you wish.

Roger S. Smith, was sworn and testified as follows:

Mr. Siddons: Mr. Examiner, my name is Lowe P. Siddons. I am an attorney for the Holly Sugar Corporation. We will have two witnesses; Mr. Roger S. Smith, and Mr. Worth Stimits.

Direct examination.

By Mr. Siddons:

Q. Mr. Smith, have you been sworn?

A. Yes.

Q. Will you state for the record your name, address and occupation?

A. Roger S. Smith, superintendent, livestock operations, Holly Sugar Corporation, Denver, Colorado.

Q. How long have you been employed by the Holly Sugar Corporation?

A. Since 1926.

Q. During that time of employment, have you been engaged wholly in the livestock department?

A. Yes sir.

Q. How long have you been the superintendent of their livestock operations?

A. For the past six years.

Q. The Holly Sugar Corporation, as indicated by the name, is primarily engaged in the manufacture of sugar, is it not?

A. Yes.

[fol. 368] Q. How do they happen to be in the livestock business?

A. Well, in order to utilize their beet and molasses by-products, to enable the farmers to feed these cattle and lambs on their own farms, and by doing so increase the

fertility of their soil, and also increase the tonnage of sugar beets.

Q. You mentioned beet pulp and molasses. Where are these two commodities obtained, or how are they obtained?

A. Well, they are obtained at each one of our factories, and the tonnage of the beet pulp produced amounts to about 25 per cent of the tonnage of the beets sliced at each factory.

Q. Does Holly Sugar have a sugar factory on the Rio Grande Railroad where they carry on livestock operations?

A. Yes sir.

Q. Where is it located?

A. Delta, Colorado.

Q. Will you tell us more particularly where Delta is located on the Rio Grande, with respect to Grand Junction, Colorado?

A. Well, it is about 35 miles southeast of Grand Junction.

Q. During a normal year of beet sugar production, about how many tons of beet pulp would you have available for feeding at Delta, Colorado?

A. Well, that would vary all the way from 25 to 60 thousand tons. That, of course, depends on the tonnage of beets raised in the community.

Q. About how much molasses would be available?

A. That is a question that I couldn't answer at this time.

[fol. 369] Q. It would be several thousand tons; you know that, do you not?

A. Yes sir.

Q. Will you tell us, Mr. Smith, about how many pounds per day of pulp that you would feed to cattle, we will say, on feed?

A. Well, an average steer will consume from 70 to 100 pounds of beet pulp per head per day.

Q. About how much molasses?

A. Oh, from two to five pounds.

Q. Where are these livestock pens of Holly or these operations carried on, with respect to the sugar factory?

A. They are immediately adjacent to the factory.

Q. How is the beet pulp accumulated at the factory?

A. Well, it is accumulated in pit silos, large pit silos.

Q. And is there made available for your livestock feeding?

A. Yes sir.

Q. What other factories in Colorado do you have where you feed livestock?

A. We have one at Swink, Colorado.

Mr. Colorado: Swink?
The Witness: Yes.
Mr. Collins: S-w-i-n-k?
The Witness: Yes sir.

By Mr. Siddons:

Q. Do you have any at any other other place?
[fol. 370] A. South Torrington, Worland.

Mr. Collins: What was that?
Mr. Siddons: Worland.
The Witness: Sheridan, Wyoming.

By Mr. Siddons:

Q. Do you have factories in Montana where you feed livestock?

A. Yes sir, we have two. One is at Hardin, Montana and one at Sidney, Montana.

Q. The factory that you mentioned at South Torrington, Wyoming, what railroad is located there?

A. Union Pacific.

Q. Mr. Smith, do you have charge of the buying of the livestock for all of these feeding operations?

A. Yes sir.

Q. What two classes of livestock do you feed?

A. Lambs and cattle.

Q. Where do you buy this livestock?

A. Well, we buy it in most all the western states. Do you want the states?

Q. No, I will go ahead. About how many head in a normal year of cattle do you buy for livestock feeding at the factories?

A. Well, it will vary, depending upon the amount of beet pulp available, but I would say approximately ten to twelve thousand cattle, and from fifth to sixty thousand lambs.

Q. Do you have livestock feed on hand now at the Delta, [fol. 371] Colorado factory?

A. Yes sir.

Q. How many head of cattle and how many head of lambs do you have there?

A. We have approximately five hundred cattle, and a little over five thousand lambs.

Q. Are these animals now in the feed lots or are they in the hands of the farmers?

A. Well, a very small percentage of the lambs are in our feed lots, the balance are out on the different farms.

Q. Will you explain that operation a little more fully.

Q. Well, we allow the beet farmers to take our lambs, or cattle, out on a contract basis, whereby, when they are returned to us we pay them for the gain they have put on these lambs or cattle.

Q. Why do you do that?

A. To enable the beet farmer to produce more fertilizer for his farm.

Q. Do we restrict that operation to farmers who raise sugar beets?

A. Yes, we do.

Q. Why do we do that?

A. Well, it is in order to keep the fertility of the soil up to the maximum production.

Q. Would you say that encourages sugar beet growing by the farmers?

[fol. 372] A. Yes, it does.

Q. Now, Mr. Smith, in past years, has it been your experience to purchase livestock in both sheep and cattle on the Union Pacific in Idaho and Montana?

A. Yes sir.

Q. Would you tell us about what quantity you purchased there last year?

A. I don't remember exactly the number we purchased in Montana last year, but considerable number of cattle and lambs.

Q. Where did you ship this livestock when you purchased it in Idaho and Montana?

A. Do you mean this fall?

Q. Yes, and as a rule, generally, in other years?

A. Most every year we purchase cattle originating on the Union Pacific, and they are shipped to some of our

west coast feed lots, also to South Torrington, Wyoming.

Q. What are some of the points from which you purchase this livestock on the Union Pacific in Idaho and Montana?

A. Well, from Divide, Melrose, Armstead, Dillon, Dell, and Monida.

Q. That is known as the Big Hole country, is it not?

A. Yes sir.

Q. Have you shipped any of this livestock to the Delta, Colorado factory for feeding?

A. No, we have not.

[fol. 373] Q. Why haven't you shipped to Delta, Colorado?

A. This fall I investigated the possibilities of shipping some cattle from Western Montana to Delta, Colorado, and I found the freight rates would be local from points of origin on the Union Pacific to Salt Lake, then local from Salt Lake to Delta, Colorado.

Q. Did you make any comparison of the through rates on the fat cattle via the Union Pacific from these Montana, Idaho points, for example, Dillon, Montana, to Omaha, for example, when moving Union Pacific direct, when feeding at South Torrington, Wyoming, to Delta, Colorado?

A. Yes.

Q. Could you give us some of those comparisons?

A. Well, the notes I have on this is cattle shipped from Dillon, Montana, via Union Pacific, and D&RG; the sheep rate from Dillon to Denver was $1.31, that is, via the D&RGW, and from Dillon to Denver, via Union Pacific, it is 97 cents, making a difference of 34 cents a hundred. And then sheep from Dillon to Omaha, $1.31 via D&RG, and $1.12 Union Pacific, making a difference of 19 cents. Cattle from Dillon to Omaha, $1.61 D&RG, and $1.12 Union Pacific, making a difference of 49 cents.

Q. What would be the difference at Chicago on cattle?

A. On cattle from Dillon to Chicago, via D&RG would be $1.94, and via Union Pacific $1.42, or a difference of 52 cents.

[fol. 374] Q. And you attribute those differences in rates as the principal reasons why you have not shipped the Idaho and Montana stock, originating on the Union Pacific Railroad, to the Delta, Colorado feed lots for feeding in transit?

A. Yes.

Q. What are your usual markets east of the Delta, Colorado factory for shipping cattle and sheep?

A. Denver, Omaha, Kansas City, Chicago.

Q. Have you anything further to state?

A. I prepared a small summary that I would like to read. We have found from several years' experience that more efficient and more favorable economic conditions are promoted among our sugar beet farmers in a beet sugar factory territory if the wet beet pulp and beet sugar final molasses, by-products of beet sugar manufacture, are fed to livestock in the territory instead of being shipped to eastern purchasers.

I know from experience that livestock feeding is more efficiently operated and economies experienced when the best grade of feeder is used. The livestock in the Northwest, particularly in Idaho and Western Montana, on the Union Pacific Railroad, is of excellent grade for use in our feeder operations on the D&RG Railroad and elsewhere.

The Union Pacific Railroad does not publish as an originating carrier in connection with the D&RG, thence U.P., or U.P. and connections to the eastern livestock markets joint through rates and routes on livestock from [fol. 375] the Northwest, including points on the Union Pacific Railroad in Idaho and Montana on as low a basis as is available to livestock feeders on the Union Pacific Railroad, for example, in the states of Wyoming and Nebraska.

This has hindered us and other livestock feeders in the efficient and economical operation of livestock feeding on the D&RGW Railroad.

I request that this Commission order that the same rates, single or joint lines, applicable on livestock from points on the UP, above described, and joint routes in connection therewith be established via the UP-D&RGW to Denver, Colorado, and UP-D&RGW, UP or UP and connection to livestock markets east of Denver, such as Missouri River markets and Chicago.

Q. Do you have anything further?

A. No.

Mr. Collins: Mr. Examiner, we would like to defer cross examination of this witness until after lunch, if we might do that.

Exam. Mullen: Can you be back at 1:30?

Mr. Collins: I will be glad to take the time off at the other end of the recess.

Exam. Mullen: We will make it 1:45.

Mr. Collins: Very well.

[fol. 376] Exam. Mullen: We will recess until 1:45.

(Whereupon, at 12:20 o'clock p.m., the hearing was recessed, to reconvene at 1:45 o'clock p.m., the same day.)

[fol. 377] Afternoon Session, 1:50 p. m.

Exam. Mullen: Come to order, please.

Mr. Collins.

Mr. Siddons: Just a minute, please. I believe Mr. Smith wants to add to his testimony.

ROGER S. SMITH resumed the stand and testified further as follows:

Direct examination (cont'd):

The Witness: I misunderstood Mr. Siddons when he inquired regarding the number of cattle and lambs that we had purchased in Montana and points of origin on the Union Pacific. I was under the impression that he meant the whole state of Montana. I remember now that in the year 1948 we purchased approximately 440 or 450 head of cattle at points of origin on the Union Pacific and shipped them to South Torrington. In the year 1949 we purchased approximately 500 steers in the western Montana District and shipped them to Hardin, Montana. In addition, we purchased about 450 steers and shipped them to the west coast points.

By Mr. Siddons:

Q. These head of cattle were purchased on the points of Union Pacific in western Montana?

A. Yes.

Mr. Siddons: That is all.

Do you gentlemen over here want to ask questions before cross?

[fol. 378] Mr. Gibson: No.

Cross-examination.

By Mr. Collins:

Q. Mr. Smith, I understood your company, the Holly Sugar Company, had factories at several points, I won't rename them unless it is necessary, but do you have feed lots at or near each of these points at which you stated you have factories?

A. Yes, sir.

Q. Now, are the cattle or sheep, or both cattle and sheep, raised and are available for sale near these feed lots at these several points where you have factories?

A. Yes, sir.

Q. And I take it you do buy, perhaps, what you can locally, as nearby those feed lots at the several points as possible?

A. That is correct.

Q. If at Hardin, Montana, for instance, you bought cattle in the general area of Hardin, Montana, they would be trucked in, would they not, to the feed lot?

A. No. Ordinarily they are either driven in or shipped in by rail.

Q. I see.

You have feed lots, if I had it correct from your testimony, at points in three different states: Colorado, Wyoming and Montana?

A. And California.

[fol. 379] Q. And California. And each of those states that I named is a rather important cattle-producing state, is it not?

A. Yes, sir.

Q. Also sheep?

A. Yes, sir.

Q. You feed many, many times more sheep than you do cattle, do you not?

A. That is correct.

Q. Do you buy these cattle at their weight at origin points—that is, at the points where you buy them?

A. Yes, sir.

Q. That is, whatever they weigh there?

A. That is right.

Q. They become your cattle, then, at the origin points?

A. That is right.

Q. Is there any significance in the customary matter of shrinkage in cattle during transportation from the standpoint of your company from the point of origin, where you buy them, to the feed lots?

A. Yes, there is.

Q. You prefer to have as little shrinkage take place as you can, I suppose, do you not?

A. That is right.

Q. Is that shrinkage considerable, say, in a 28 to 36-hour time of transportation?

[fol. 380] A. Well, of course that depends on the weighing conditions you have when you purchase the cattle.

Q. I see. You mean they shrink more when they are real full when you put them on the train?

A. That is right.

Q. Is it the practice of your company to try to avoid shrinkage as much as you can?

A. Yes, sir.

Q. And that, of course, will be particularly true when you ship them out of the feed lots to the markets where you hope to sell them, would it not?

A. Yes, sir.

Q. Well, then, it would be to your advantage, would it not, to buy your feeder cattle at origins as near as you can to the respective feed lots?

A. That is right.

Q. Is time in transit—that is, the time that cattle are on the train en route to market—of particular importance from the standpoint of your company?

A. Yes, it is.

Q. Ordinarily, isn't it true that once you have them fed up to the point where you want to pass them on from the feed lots you then want to get them to market as quickly as possible?

A. That depends on your markets, of course.

Q. Well, yes. But if your markets are satisfactory, [fol. 381] then the faster you can get the cattle there the more satisfactory it is to you from the standpoint of transportation, is it not?

A. That is right.

Q. Aren't cattle to markets like the Omaha market, from points like South Torrington, Wyoming, and Sheridan, Wyoming, and this other place you mentioned—was it Worland?

A. Yes, sir.

Q. W-o-r-l-a-n-d?

A. That is right.

Q. Worland, Wyoming—aren't cattle from those points trucked largely to Omaha rather than taken in by rail?

A. No, I don't think they are. I think the majority of them move by rail.

Q. I have heard it said so often in these increased rates cases that such a large percent of cattle are trucked—as much as several hundred miles. I wondered if that were your experience.

A. We prefer to ship our cattle by rail.

Q. I see.

Where have you been buying cattle for feeding at Delta—cattle and sheep, if you will, please?

A. Well, we naturally prefer to buy them as closely as we can to our feed lots.

Q. Yes.

A. But this year we purchased some cattle here in Salt Lake City to go to Delta.

[fol. 382] Q. Where did they come from?

A. They were purchased here through an order buyer. I don't know where the point of origin was.

Q. How long have you had this operation at Delta—this feeding operation?

A. I think it was one of the first operations the company entered into.

Q. About how long ago?

A. Oh, I would say it was 25 years ago.

Q. Well, now you have told us this year you bought some cattle for feeding at the Delta feeding area in Salt Lake City. Where else did you buy, and where else have you been buying cattle for feeding at Delta?

A. Well, we have been buying them around Paonia, Delta, Montrose, Gunnison and as nearly as possible to our feed lots.

Q. How about sheep?

A. The sheep are purchased at about the same localities.

Q. I see. And would there be about the same situation as to your purchases for these other feed lots?

A. Well, we try to purchase as closely as possible, but at times we have to reach way out in outlying districts away from our feed lots to make our purchases—well, in comparison to prices we feel we can afford to pay for these cattle.

Q. Is it correct to say that the number of cattle and sheep you purchase would be more or less in proportion [fol. 383] to the amount of this beet pulp and molasses that you have available for feeding?

A. That governs entirely the number of live stock we feed.

Q. Do you ship to Los Angeles and other California points, or other Pacific points, including perhaps Portland, cattle that you feed at Delta?

A. Yes, at times.

Q. You buy those, as you have just described, as near to Delta as you could?

A. That is correct.

Q. Do those cattle go on to these destination points I mentioned—San Francisco, Los Angeles, or Portland? Is their entire movement on what we call transit billing?

A. If we do have transit billing? Yes. But in the majority of cases we don't have transit billing there.

Q. Would those cattle move into Delta, as you bought from around nearby neighborhoods—would they move in by rail?

A. Part of them move in by rail and part are driven in.

Q. Then it follows that when you don't have transit

billing the cattle move on out at a rate that would be higher than if you had transit billing: is that correct?

A. Yes, sir.

Q. Perhaps we misunderstood one thing you said, Mr. Smith. We thought you said you would have to pay local rates on cattle from Idaho to Delta. If Delta were the [fol. 384] destination, you did not mean to say that you would have to pay combination rates in such a movement as that, did you?

A. Well, what I meant was that feed-in-transit benefits would not apply on any live stock originating on points of the Union Pacific to our Delta, Colorado, feed lots.

Q. It would not apply at any joint through rates. That is really a correct statement, isn't it?

A. I think so.

Q. In other words, if you did feed cattle at Delta that came in from Idaho you would have to pay the inbound through rate and then an outbound rate to California, or wherever they move?

A. That is right.

Q. Now, I understood you to say that this fall, 1949, you looked into the possibility of purchasing cattle at Montana and found this rate situation what it is and did not buy the Montana cattle or sheep.

A. Yes, that was my statement.

Q. And, of course, you did not buy the Montana cattle or sheep because the transportation charges would cost you more; is that correct?

A. That is right.

Q. Had you examined into this rate situation on cattle from Montana prior to this fall?

A. No, I had not. But evidently my predecessor had because in previous years I do not have any knowledge [fol. 385] of any cattle purchased in western Montana having been fed at either our Delta or Grand Junction feed lots.

Q. I see.

A. At the present time we have discontinued the Grand Junction feed lots, but I do know we used to purchase lots of cattle up there.

Q. How long ago?

A. Most every year, along from 1926 on, is when I am more familiar with it.

Q. Since 1926 you purchased lots of cattle in Montana and Idaho?

A. Yes, sir.

Q. The cattle and sheep you purchased since 1926 in Montana and Idaho and fed at Delta moved on combination rates rather than on through rates, so far as the movement inbound to Delta and the movement outbound from Delta is concerned; would that be correct?

A. We have never fed any cattle at Delta that originated in western Montana.

Q. Oh. Oh, I see.

Would you say you have incurred any loss or injury—and when I say "you" I mean the Holly Sugar Company—because you could not purchase cattle in Montana or Idaho and ship them on a joint through rate for feeding at Delta and then out to California or to the East at the same rates [fol. 386] you could purchase and ship over the Union Pacific?

A. It is difficult to say whether there would be any loss; but I might say that it would be quite convenient for us, especially so when we have buyers in the Western Montana territory purchasing cattle there at considerably less money than what we had to pay for feeder cattle adjacent to the Delta factory this fall.

Q. What are the facts about that? Are you always assured of being able to buy for less in Montana and Idaho than you are in nearby Delta, for instance?

A. Not always, no. It happened to be the case this fall.

Q. Well, then, I take it the desire or wishes of the Holly Sugar Company is to have all possible routes open and available so they can go to the markets or to the purchasing areas where they can get the lowest price?

A. That is correct; yes, sir.

Q. Well, wouldn't they consider the amount of transportation charges from the point at which cattle were purchased to Delta as compared with transportation charges from a point nearby Delta?

A. Yes, we take that into consideration, naturally.

Q. Have you, in connection with your appearance in this

case, given any thought, or have you any way of estimating the extent, if any, of any benefit the Holly Sugar Company might derive if the gateway were opened as sought in this complaint?

[fol. 387] A. Well, yes, it would enable us to purchase cattle most any place in the districts where we prefer to purchase cattle without competing against the rates in other localities, or on the main line of the Union Pacific Railroad.

Q. You have operations—feeding operations—on both the D&RG and the Union Pacific?

A. Yes.

Q. Now, wouldn't such use as you would make of the routes and rates sought by the complaint in this case depend entirely on the price of cattle—the price at which you could buy cattle and sheep at the various origin points in these western states?

A. Yes.

Q. Has the Holly Sugar Company made any complaint to the Interstate Commerce Commission about this situation?

A. Well, I think they are intervening in this case. That is all I know.

Q. I mean any complaint to the Interstate Commerce Commission on its own initiative.

A. I think Mr. Siddons would have to answer that question.

Mr. Collins: Would it be permissible for Mr. Siddons to state that now, Mr. Examiner?

Exam. Mullen: If he knows.

Mr. Siddons: Since we have not made any shipments there would not be anything to file a complaint about. [fol. 388] No, we have filed no complaints.

By Mr. Collins:

Q. Have you made any complaint to the Union Pacific Railroad about it?

A. No, sir; I have not.

Q. On outbound cattle, after they are fed at Delta, Mr. Smith, that you might ship to Chicago, to that market who would pay the freight charges?

A. Well, if we consign them to a commission firm we would pay the freight charges.

Q. Do you sell that way to any great extent?

A. Yes, practically all of our cattle that go to the eastern markets are consigned to a commission firm.

Q. Don't you sell in rather large volume to Swift & Company?

A. Not cattle.

Q. Sheep?

A. Yes.

Q. Who pays the freight charges on those you ship to Swift?

A. We sell the lambs f.o.b. cars at our feed lots.

Q. Yes. I see.

That is all, Mr. Smith. Thank you.

Redirect examination.

By Mr. Siddons:

Q. Maybe you didn't understand the question a moment ago. Mr. Collins asked you, where you ship cattle from Delta that came in by truck, if you would pay a higher rate than you would if you applied transit. You said "yes." In fact, your rate would be lower, would it not, [fol. 389] from Delta, where your cattle came in by truck, than it would if it came in by rail from some more distant point?

Mr. Collins: No, Mr. Siddons. Pardon me for interrupting you. If that is what you understood me to say, either I didn't state what I had in mind or else it didn't get across. I meant the rail movement out of Delta would be what we term a local rate, or it would not be a part of a joint through rate, on the outbound trip from Delta, being no portion of a joint through haul.

Mr. Siddons: That would depend on the destination, would it not?

Mr. Collins: It might be a joint rate outbound, but not on the inbound, would it not?

Exam. Mullen: Does the witness understand that?

The Witness: I don't believe I do.

Mr. Siddons: I didn't think he did.

Exam. Mullen: As I understand it, the question was directed to movements by truck into Delta and the outbound rate by rail from Delta. Would that be a joint through rate?

The Witness: I wouldn't think it would be a joint rate that way.

Exam. Mullen: Then, as you say, it depends on the destination?

The Witness: That is right.

Exam. Mullen: Do you have any destination in mind, Mr. Collins?

[fol. 390] Mr. Collins: No, Mr. Examiner. As usual, I am afraid I didn't make it clear, but the truck feature hadn't really anything to do with that question.

Here is what I intended to direct his attention to, or rather inquire of him: If he brought cattle inbound from points near Delta and shipped them, after feeding, on out to Los Angeles, San Francisco or Portland on transit billing.

As I recall it, you did ship it on transit billing if you had it?

The Witness: That is right.

Mr. Collins: If they were trucked in, you would not have transit billing?

The Witness: No, sir.

Mr. Collins: If they were moved in by rail to Delta from other points on the Rio Grande, would you have transit billing there, do you know?

The Witness: Yes, sir.

Mr. Collins: And then the outbound movement to Los Angeles, San Francisco or Portland of those cattle that came in to Delta by the D&RG would be on transit billing, would it not?

The Witness: If it was not a backhaul. I might add that we do purchase lambs, a considerable number of lambs in Utah, and we have feed-in-transit billing on them, and that applies on any lambs we move east.

[fol. 391] Mr. Collins: You purchase those at origin points on the Denver and Rio Grande?

The Witness: Yes, sir.

Mr. Collins: I would like to inquire of Mr. Siddons if

my question or purpose is as much in the dark as it seemed at first.

Mr. Siddons: It is immaterial.

Exam. Mullen: That point seems to have been clarified.

Mr. Collins: All right.

Exam. Mullen: Any more questions, Mr. Siddons?

Mr. Siddons: I would like to ask Mr. Collins a question in response to his question to my witness about filing a case.

Do you wish to imply, by that, that if we made some shipments and filed a case—or, if we didn't file a case you would give us these rates?

Exam. Mullen: We needn't indulge in that. The question was whether your company had filed a complaint with the Interstate Commerce Commission against the Union Pacific. What is the answer?

Mr. Siddons: No, we have not.

Exam. Mullen: Anything more from this witness?

By Mr. Siddons:

Q. Mr. Smith, just one question: In these inter-mountain factories where we feed these cattle—for instance, Sheridan, South Torrington, or Delta—do we do any trucking, outbound, of cattle at all?

[fol. 392] A. Very little.

Q. It is a rail shipment for us?

A. Yes, sir.

Mr. Siddons: That is all.

Exam. Mullen: Is that all, Mr. Collins?

Mr. Collins: That is all.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

Mr. Siddons: I call Mr. Stimits.

WORTH STIMITS was sworn and testified as follows:

Direct examination:

Mr. Siddons: Mr. Examiner, may I point out that our intervening position is here also in the nature of a complaint because it is filed against both of these railroads due to their failure to maintain joint through rates.

Mr. Collins: Is that an amendment to the intervention?

Mr. Siddons: That is in the intervention petition.

Exam. Mullen: Let me see the intervention petition.

(Document handed to Examiner.)

Exam. Mullen: All right. What is your point?

Mr. Siddons: This point I am making in paragraph 4 of our petition is in the nature of a complaint, too.

Exam. Mullen: What is the point you desire to make? Do you want to offer some evidence?

[fol. 393] Mr. Siddons: He mentioned whether we filed any complaints here before.

Exam. Mullen: He meant prior to this case.

Mr. Siddons: Yes, sir. But this intervention is in the nature of a complaint itself.

Exam. Mullen: As I understand it, there is an allegation in the complaint of the Rio Grande that the combination rates are unjust, unreasonable and discriminatory.

Mr. Quirk: That is right.

Exam. Mullen: I understand that in your intervention you join in that and you wish to support that.

Mr. Siddons: Yes, sir.

By Mr. Siddons:

Q. Will you state for the record your name, address and present occupation?

A. My name is Worth Stimits. My address is the Golden Cycle Building, Colorado Springs, Colorado.

Q. How long have you been connected with the Holly Sugar Corporation?

A. I have been employed by the Holly Sugar Corporation for the past 8 years.

Q. What are your duties?

A. For the past 6 years I have been chief rate clerk in

the traffic department, in which capacity my principal duties are the rating and routing of all shipments made by the company, which include the live stock we purchase at country points which are then shipped to the factories for feed-
[fol. 394] ing, and also the rating and routing of the outbound shipments after the stock is fattened and re-shipped on to market.

Q. Do you feel that, based upon your experience, you are acquainted with the freight rates on the live stock that Holly ships, to a reasonable degree?

A. I do.

Q. Have you two exhibits we would like to identify in the record at the present time?

A. I have.

Q. Will you please identify them?

A. The first exhibit which I would like to have identified——

Exam. Mullen: Exhibit No. 9. Is that the comparison of rates, or is it the picture?

The Witness: This is the picture.

Exam. Mullen: The picture will be marked Exhibit No. 9.

(Interveners' Exhibit No. 9, Witness Stimits, marked for identification.)

By Mr. Siddons:

Q. What is the heading of the exhibit, at the bottom of the page?

A. The heading is "The Story of Sugar."

Q. What is the next exhibit you wish to review?

A. The next exhibit which I would like to have identified——

Exam. Mullen: That will be marked Exhibit No. 10.

(Interveners' Exhibit No. 10, Witness Stimits, marked for identification.)

[fol. 395] By Mr. Siddons:

Q. That is the rate exhibit?

A. Yes, the rate exhibit.

Q. Referring to Exhibit No. 9, will you state briefly the purpose of that exhibit?

A. The purpose of the exhibit is to show the integral part that the feeding operation conducted by the beet sugar manufacturers plays in the whole sugar manufacturing process.

The whole lower picture shown on the exhibit graphically portrays the beet pulp coming from the factory and going to the feed pans, and also shows the molasses in the same operation.

Q. Now we take up Exhibit No. 10. Do you have any comments to make on it?

A. I believe the exhibit is largely self-explanatory. However, there are one or two statements that I would like to make concerning it.

It is a comparison of the rates applying on cattle and sheep, double deck, which originate on the Union Pacific in Idaho and Montana and fed in transit at Delta, Colorado, on the Denver and Rio Grande Western, with the rates applying Union Pacific direct.

In connection with the rates to Denver, shown under Column, via UP direct, and under Column 3, via UP-D&RGW, the penalty, the rates under Column 3 over the rates under Column 2, varies from a high of 35 cents from Divide, Montana, Line 6, to the low of 31 cents per 100 pounds from [fol. 396] Idaho Falls, Idaho, line 8.

Q. That is when the feeder cattle are bought at Divide, for example, and fed in transit at Delta and then shipped to Denver to market?

A. That is correct.

Q. Union Pacific as compared with the UP-D&RGW?

A. Yes.

Mr. Collins: That is the difference between the two respective rates?

The Witness: That is correct.

The rates on sheep, doubledeck, to Omaha, Nebraska, Column 5(a), to Kansas City, Missouri, 7(a), to Chicago, Illinois, Column 9(a), are uniformly 19 cents higher than the rates applying via Union Pacific direct or via UP to Missouri River and connections in case of rates to Chicago. These rates are in the form of a published through rate via the Union Pacific plus an arbitrary 19 cents when the haul is from Ogden to Denver via the Denver and Rio Grande Western.

To Omaha, Nebraska, the rates on cattle, shown under Column 3(b), via Union Pacific-D&RGW are from 53 cents, from Divide, Montana, to 33 cents from Idaho Falls, Idaho, higher than the corresponding rates under Column 4, which apply via Union Pacific direct. The same is true with respect to rates to Kansas City in that the rates via Union Pacific-Rio Grande, shown under Column 7(b), range from [fol. 397] 45 cents from Divide to 33 cents from Idaho Falls, higher than the rates via Union Pacific direct under Column 6. The same situation prevails with respect to the rates to Chicago on cattle, shown under Column 9(b). The difference there is 57 cents higher from Divide, which is the highest penalty, to a low of 33 cents from Rogerson, Idaho.

By Mr. Siddons:

Q. Mr. Stimits, do we have feed lots on the Union Pacific at South Torrington, Wyoming?

A. Yes, we do.

Q. Now, when we buy cattle at these points shown under Column 1 and they are shipped to South Torrington, Wyoming, on either cattle or sheep which are destined to Omaha, Kansas City, or Chicago we pay the rates shown under Columns 2, 4, 6 or 8; is that true?

A. That is correct; yes.

Q. Then if we ship via the UP-Rio Grande Western or the UP-Denver and Rio Grande Western and connections we pay the rates under Columns 5, 7 and 9?

A. That is correct.

Q. Columns 5(b), 7(b) and 9(b) apply, however to cattle only?

A. Yes.

Q. Did you hear Mr. Smith testify that this fall he shipped some four or five hundred head of cattle from points shown on Exhibit 10 in Idaho and Wyoming to your factory at Hardin, Montana?

[fol. 398] A. Yes.

Q. Did any of those cattle move from Divide, Montana?

A. A portion of them did come out of Divide, yes.

Q. What rate was paid out to Union Pacific on the movement of those cattle from Divide to Hardin?

A. The UP received the feeder rate—their local feeder

rate—from Divide to Butte, and that was the extent of it.

Q. About how long a haul is that?

A. It is 27 miles from Divide to Butte.

Q. Now, if we had shipped those cattle to Delta, Colorado, for feeding in transit, and moving east, what kind of a haul would the UP have enjoyed?

A. The Union Pacific would have received the haul for the maximum length of its railroad, with the exception of the haul from Ogden to Denver, which of necessity would have been via D&RGW.

Q. Do you have anything further?

A. The previous witness, Mr. Smith, stated that on the sheep we sold to Swift and Company they were sold f.o.b. cars at point of origin of our feed lots. I would like to make the statement that that is true, but Swift & Company reimburse the Holly Sugar Corporation for the value of the feed in transit billing which they surrender on those shipments when it is compared with the local rate they would have had to pay if the billing had not been available.

[fol. 399] Q. Is there anything further?

A. I believe that is all.

Mr. Siddons: Any questions?

Mr. Quirk: No.

Cross-examination.

By Mr. Collins:

Q. Mr. Stimits, Mr. Siddons asked you what would have taken place, or what kind of a haul the Union Pacific would have had, if you had shipped to Delta the cattle that had been bought at Divide, Montana. I believe you said you heard Mr. Smith's testimony?

A. Yes.

Q. And you heard him say that it was the practice to send cattle to the feed lots from the nearest available area of purchase to the feed lot?

A. Yes.

Q. It is quite unlikely, then, that you would have sent this shipment on to Delta even if you had had the rates sought in this complaint, is it not?

A. No. As I understood Mr. Smith's testimony, if the

cattle available in the Delta area, and if the price on those cattle compared with that on the cattle at Dillon or other points on the Union Pacific in Montana—if the price situation were such that it would pay us to bring the cattle from Dillon into Delta, we would then do so.

Q. In other words, the only circumstance under which the cattle bought at Divide would have been shipped to [fol. 400] Delta would have been because they would have been bought for a lesser price there, or, rather, a price at Divide sufficiently low to enable them to be transported to Delta at equal or maybe something less than you could have bought or shipped cattle into Delta from a nearby point?

A. That is true; unless other conditions prevailed, you understand.

Q. Yes.

Now, Mr. Stimits, you several times mentioned the penalty you would have to pay if you shipped via the D&RGW. Each time you mentioned that you were referring merely to the differences in the amounts of rates, isn't that correct?

A. The amount of the combination rate versus the competitive joint through rate.

Q. Yes.

Mr. Collins: Thank you very much.

Exam. Mullen: Do you have anything further?

Mr. Siddons: That is all.

Exam. Mullen: That is all. Thank you Mr. Stimits.

Mr. Siddons: That is all of my witness.

(Witness excused.)

Exam. Mullen: Mr. Siddons, do you desire to offer Exhibits 9 and 10 in evidence?

Mr. Siddons: Thank you, Mr. Examiner. May I now [fol. 401] offer Exhibits 9 and 10 for the record?

Exam. Mullen: Any objection?

Mr. Collins: No.

Exam. Mullen: They will be received.

(Interveners' Exhibits Nos. 9 and 10, Witness Stimits, received in evidence.)

C. R. HOLDEN was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your name?

A. C. R. Holden.

Q. You are located where, Mr. Holden?

A. Idaho Falls, Idaho.

Q. In what business are you engaged?

A. Growing and shipping.

Q. Of what?

A. Mostly potatoes. We do grow and ship some live stock and grains, but mostly potatoes.

Q. How long have you been in Idaho Falls in that business?

A. About 15 years.

Q. Did you have experience in buying and selling potatoes and onions prior to your present business?

A. I have handled potatoes and onions since 1920. I spent several years in a wholesale market in Chicago and some time in St. Louis and Kansas City, Missouri.

[fol. 402] Q. And in that business of buying and selling during the past nearly 30 years, did you acquire a working knowledge, at least, of the methods that are involved in routing potatoes and onions, or converting them, etc?

A. I am quite familiar with the rules and regulations in reference to routing on potatoes and onions out of the West; yes, sir.

Q. Where is your principal market for potatoes or onions which are shipped from Idaho Falls, Idaho?

A. Our principal market varies some time from year to year, because practically all potatoes are more or less competitive, but our large markets are in the central states; also in the south and southwestern states and southeastern states.

Q. How do potatoes move to the southwestern states at the present time?

A. Potatoes moving to the southwestern states can move over most any route out of Denver into the southwestern state, such as going into Tulsa, Oklahoma City, Fort Worth,

Dallas, as far east as New Orleans. In case you have any business east of New Orleans into the southeast you cannot move on through without a combination rate.

Q. That is under the existing rates.

A. Under the existing rate; that is correct.

Q. Now, of course the potatoes have to move via the Union Pacific up to Denver, don't they?

A. The potatoes must move Union Pacific to Denver; [fol. 403] that is correct.

Q. We will probably shorten this up. Will you state in your own way, first, in what respect you are injured by the existing situation and in what respect you would be benefited if the complainant here should prevail?

A. We have many markets we could get into south of Denver on potatoes moving east if the gateway was opened so that we could go through there without being penalized if we happened to get into any so-called pocket markets. We could move on east to the river. At the present time you can go as far as the river on cars moving east from Denver unless they move over the Union Pacific. From there on you have to pay a combination or penalty rate to move these cars on east, unless they move into Kansas City over the Union Pacific.

Q. In what respect would you be benefited if the rate sought by the Denver and Rio Grande should be established through Ogden, Pueblo, Denver, etc.

A. Well, for instance, cars designated to the southeast, which we could move through there on an open gateway, we could move through the central states markets into Texas; and in case of a lower market or in case of a troubled car, we would not run into any dead-end markets. We could move the merchandise on east into Florida, the southeastern states on a through rate the same as we can now if we would move them east through Omaha, Kansas City, St. Louis or Chicago.

[fol. 404] Q. Is there a substantial volume of potatoes shipped by your company? Do you operate under your own name?

A. We operate as "Holden Brothers."

Q. I see. Well, is a substantial part of the potatoes

shipped by Holden Brothers from Idaho Falls, subject to diversion in transit?

A. I would say possibly 50 per cent of our potatoes are billed and then diverted in transit. Ma-y cars move direct.

Q. Open routes at competitive rates are, therefore, very important in your business?

A. It is very important in all lines of business, particularly in the produce business.

Mr. Collins: Are you in that?

The Witness: I happen to be in the produce business.

Mr. Collins: Good.

The Witness: It would be a big benefit to eastern Idaho if we had these gateways open.

By Mr. Quirk:

Q. If, for any reason, a car reaches a point where it is called a distressed car—when that happens, is the owner of the potatoes in the car more or less at the mercy of the buyer?

A. When you get a car of perishable commodities into a so-called dead-end market the receiver of the merchandise it was originally sold to, or even if it rolled in unsold, knows immediately that you are at the end of your line, as far as free movement of the car is concerned, and it is the policy of [fol. 405] the buyer to try to reduce the price according to the two rates had you not gotten into one of these pocket markets. In other words, if you had to move south through Denver off of the Union Pacific you would be able to maintain your price in case of trouble because you could sell it to some one else further down the line; but when you get into the end-of-the-line market you are immediately taken advantage of due to the fact that they know you can't move the merchandise on to the eastern markets.

Q. Mr. Holden, have you had experiences, in recent years, of inability to obtain sufficient cars to ship your commodities from Idaho Falls, to the east in particular?

A. We had considerable difficulties on cars, particularly during '36.

Q. Do you mean '46?

A. '46, yes. And we felt like we were more or less discriminated against because in talking to many of our com-

petitors in Nebraska they would tell us they were receiving their fair allotment of cars.

Mr. Collins: Mr. Examiner, I object to this on the ground of pure hearsay.

The Witness: I think that——

Exam. Mullen: Just a moment. Will you read that statement again?

(Answer read.)

[fol. 406] Mr. Collins: Read the question.

Exam. Mullen: Read the question and the answer.

(Question and answer read.)

Exam. Mullen: That seems to me to be hearsay. The objection is sustained.

Mr. Quirk: All right.

By Mr. Quirk:

Q. Now, Mr. Holden, the competition in selling potatoes in particular, and onions, during the past several years has been very keen, hasn't it? There is a buyer's market now?

A. The past several years it didn't take very much of a salesman to sell potatoes and onions because we had a seller's market. For the past few months they are running into what you might term as a normal procedure market in marketing produce. It is a buyer's market. We are now running into lots of difficulty in competition in moving potatoes and onions out of Idaho.

Q. In the process of selling and finding customers, is it necessary for you to keep in touch with what goes on in the competing producing sections?

A. It is very important that we know what is going on in competing areas. We have people we work with over a period of years in other areas that are more or less our competitors as far as price is concerned, and we keep in constant contact with them, both by telephone and wire.

[fol. 407] Q. Is Nebraska one of your competing producing sections?

A. Nebraska is a very important producing section, especially for our lower grades, such as no. 2.

Q. In the nature of things, do you know, by this daily or

weekly contact, whether your potatoes are being shipped in larger volume from one section than from another?

A. I think your Government reports will substantiate the shipments of potatoes out of both Nebraska and Idaho, and I think your Government will show that, in proportion to past history, your Nebraska shipments were heavier than they were out of Idaho during the period I speak of.

Q. Which is 1946?

A. Correct.

Mr. Collins: Do you mean heavier in proportion to the amount produced in Nebraska?

The Witness: I mean heavier in proportion to the amount of potatoes shipped out of Idaho. In other words, if Nebraska shipped 50 cars, on an average, two or three years previous to '46, and Idaho shipped 200 cars, I think the record will show that Nebraska possibly shipped 80 or 100 cars against the Idaho's 100 to 120, in many days less than 100.

By Mr. Quirk:

Q. What Government reports did you have in mind when you mentioned Government reports a while ago, Mr. Holden?

A. There is a Government bulletin put out by the Department of Agriculture that shows the shipments by states [fol. 408] of all potatoes and onions from each state daily. They also report the number of cars.

Q. I understand that is called the "Daily——

A. Daily Market Report, put out by the Department of Agriculture.

Mr. Quirk: You may examine.

Just a minute——

By Mr. Quirk:

Q. Mr. Holden, are your Idaho potatoes sold in competition with potatoes grown in the San Luis Valley on the D&RG and around Greeley, Colorado, on the Union Pacific and the Colorado and Southern?

A. Idaho potatoes are sold in competition with all potatoes, particularly in that area; yes, sir.

Q. Mr. Holden, are you also a farmer or a grower of potatoes?

A. We have been growing, up until this past season, around 300 to 350 acres of potatoes a year. This last season we cut our acreage some.

Mr. Quirk: All right. You may cross examine.

Cross-examination.

By Mr. Collins:

Q. I have information before me, Mr. Holden, to the effect that in 1948 you forwarded—or your company, Holden Brothers—is that the correct name?

A. That is correct.

Q. —forwarded 335 cars of something. Could that have been potatoes?

[fol. 409] A. It possibly could have been.

Q. To the Missouri River and points east of the Missouri River. That would have been potatoes, do you say?

A. I presume the largest portion of them were potatoes.

Q. Would you say where those were ultimately marketed?

A. That would be very difficult to give you, that information where they were marketed, because we market them over a large territory.

Q. What cities do you consider your principal market points east of the Missouri River?

A. East of the Missouri River I would say Kansas City—I presume you would call it east—St. Louis, Chicago and your cities on down through the southeast.

Q. Well, Baltimore?

A. Very few potatoes go into Baltimore, as far as we are concerned.

Q. Washington, D. C.?

A. A few into Washington, D. C., but most of them are in the central and intermediate states and south and southwest—southeast and southwest.

Q. You do ship quite a few to New York, don't you?

A. A few.

Q. In what general area of the country are the bulk of your potatoes sold?

[fol. 410] A. I thought I just answered that question for you.

Q. Well, that is all right. That is O.K. Thank you.

Then you brought in the southwest. What proportion would you say, of your 335 cars in 1948, were sold in the southwest—that is, New Orleans, west?

A. I would say a smaller portion of them were sold in that particular territory in '48 due to the fact that we had a market where we didn't have to go to that territory and take a chance on getting into a pocket market, so to speak.

Q. I see.

A. So we naturally moved the potatoes where we could sell them without that difficulty.

Q. How much did you lose last year on potatoes that got into a pocket market?

A. Our loss was very small, because I just mentioned we stayed out of the pocket-market territory. We will have to go into it probably from now on because we are running into marketing conditions that happen to be a buyer's market instead of a seller's market.

Q. Now, a distressed car is, as you call it, a car which you have sent to some one whom you think will buy it and then he refuses when it gets there; is that right?

A. Not necessarily. A distressed car is generally a car you sold to a party.

Q. Yes.

[fol. 411] A. Or it could be the fact that you rolled cars into a certain market expecting to sell them when they arrived, and, when you get a car into a market of that nature, and if the car should happen to be rejected or an unscrupulous buyer wanted to take advantage of you, you are at a disadvantage in moving out.

Q. Do you know how many cars out of your 335 last year developed into distressed cars?

A. As I told you, a very small percent because we were not forced to go into those markets.

Q. I see. Well, you haven't had very many. In fact, I guess you had practically no distressed cars for quite a few years, inasmuch as the war has made this seller's market.

A. In years past we have had lots of them. In recent years, as far as we are concerned, we have stayed out of

those markets because we were not compelled to go into those markets.

Q. I understood you to tell your counsel that it had been a seller's market.

A. That is correct.

Q. Until the past few months.

A. The past season. We are now going into what is known as a buyer's market, which is normal procedure in marketing potatoes. We very seldom have a seller's market, but we have had during the war; that is correct.

Q. And down to a few months ago?

[fol. 412] A. Yes, sir.

Q. Is this year's crop of Idaho potatoes—or of your own, at least—sold?

A. A portion of them.

Q. When are they harvested?

A. They are harvested mostly in October.

Q. How long a period of time does the harvest take?

A. About four to six weeks.

Q. Four to six weeks?

A. Yes.

Q. Then is it a practice to sell and ship them as rapidly as possible during the harvest season?

A. Many years it is. It so happened this year that a large portion of them went into storage.

Q. I see.

A. There was no ready market at harvest time.

Q. Was that not so last year, too?

A. You mean a year ago you are speaking of?

Q. Yes.

A. A year ago we had a very good market at shipping time, a good demand. The Government was taking a large percentage of the potatoes, so we didn't have much trouble selling them.

Q. You count them sold when the Government takes them?

A. They pay for them; yes, sir.

Q. It is not just a loan; it is a purchase for the Government?

[fol. 413] A. No, it is strictly a purchase program.

Q. I see.

Now, isn't it a fact, Mr. Holden, that Idaho potatoes are

selling, have been selling in the mid-Western markets, at least, at a price considerably above potatoes grown near to those markets?

A. It is a fact that we so happen to have a potato that they don't grow in those markets, and we are fortunate enough to be able to sell them for considerably more; otherwise we could not ship them there with our present freight rates.

Q. Then I have not misrepresented the situation.

How much more do you get for your potatoes, for instance, in Chicago than, say, for potatoes grown in the Chicago area? That is, Illinois and Indiana.

A. At the present time the average potatoes in Chicago are selling for around $3, and Idahos from $4.00 to $4.35 at the present time.

Q. I understood you to say that you sell them throughout the United States—practically all over.

A. I didn't say throughout the United States, but they are sold pretty much throughout the United States. We sell ours mostly through the central states and through the south and southeast.

Q. I have heard it said that you find Idaho potatoes in Boston, which is as you know, not very far from the Maine [fol. 414] County potatoes. Do you know about that?

A. Occasionally a car goes to Boston. That would be some fancy car for hotel or restaurant trade. We have very few cars going to Boston.

Q. It is a fact that the Idaho potato is considered as the rather higher grade potato than potatoes produced generally elsewhere in the country?

A. Well, Idaho considers them that. I hardly think the other states would agree with you.

Q. Other producing states, but doesn't your market situation that you just described bear that out?

A. It so happens, yes, that we are the only state growing any quantity of russets and we are able to demand a small premium on our russets.

Q. Now, you haven't, for your firm, filed any complaint with the Interstate Commerce Commission with respect to your ability to get cars, have you, in the last five years?

A. No, we have not. We have not filed any complaint.

We have been a party to quite a few complaints with the Idaho potato shippers' organization. I happen to be a director and past president of that association, so naturally I was acquainted with the complaints that came in on the car situation.

Q. Did the Idaho Potato Shippers Association file a complaint with the Interstate Commerce Commission?

A. We filed lots of complaints with the O.D.T. during the [fol. 415] car shortage.

Q. I mean you didn't file a complaint in the sense that the railroad, the D&RGW, has filed one here—that is, a formal complaint.

A. Not to my knowledge.

Q. You took it up with the O.D.T., as many people did, the matter of car supply?

A. Right.

Q. You also took that matter up informally with the Union Pacific Railroad—or some one for you—did you not?

A. Naturally.

Q. Now, isn't it a fact, within your knowledge, that generally speaking the other Idaho potato, onion and other perishable-product producers throughout the Idaho area were in about the same situation that you were in for cars at any given time?

A. I couldn't answer that. At that time of year the heavy tonnage out of Idaho is potatoes, so potatoes were the ones that were particularly short of cars.

Q. That would be the only one. I see. All right.

What is your answer as to potatoes? It was so as to potatoes?

A. It was very serious on potatoes, and naturally all potato men that sell on the wires were in touch with the car situation all over the country.

Q. Yes.

[fol. 416] A. That is why it was our knowledge that we were not geting our proportion of the cars.

Q. What was your proportion of the cars?

A. I would say our allocation during the——

Q. I mean, what proportion of the cars do you think you were entitled to?

A. You are speaking of the state of Idaho now?

Q. No, you yourself.

A. Well, I don't think that question could be answered because the cars were originally allocated by the O.D.T. and then they were broken down by the Union Pacific and then distributed from there. Some days we didn't get any cars—many days.

Q. Didn't other shippers fail to get any cars some days?

A. Some days they did; some days they were in the same situation we were in.

Q. Yes.

Mr. Collins: That is all.

Exam. Mullen: Anything on redirect?

Mr. Quirk: No.

Exam. Mullen: Thank you, sir.

(Witness excused.)

Exam. Mullen: We will recess for 10 minutes.

(Short recess taken.)

Exam. Mullen: Let us proceed, gentlemen. Call your next witness.

[fol. 417] L. L. Belcher was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Will you state your name?

A. L. L. Belcher.

Q. Mr. Belcher, you are located in Pueblo, Colorado?

A. Yes, sir.

Q. What is your business address?

A. 511 Elizabeth Street.

Q. And with what organization are you connected, and in what capacity?

A. I am the president and general manager of the Mountain Ice & Coal Company.

Q. In what business is that company engaged?

A. In the ice, coal and cold storage business.

Mr. Collins: The manufacture of ice?
The Witness: Yes, sir.

By Mr. Quirk:

Q. Are you also an officer or director of the Pueblo Chamber of Commerce?
A. Yes—treasurer.
Q. Are you a member of the board of directors, too?
A. Yes, sir.
Q. The Pueblo Chamber of Commerce is an intervening complainant here, isn't it?
A. Yes, sir.
[fol. 418] Q. Now, will you describe more or less in your own words the storage facilities and storage arrangements of the Mountain Ice & Coal Company in Pueblo?
A. Our cold storage facilities consist of a plant for both high and low temperature storage. The capacity is 75 cars.
Q. What commodities are you equipped to store in cold storage?
A. We store most all perishable commodities, the major ones being apples, potatoes, onions, frozen foods, frozen poultry, butter and eggs.
Q. Are you equipped to store turkeys, butter, cheese, onions?
A. Yes, sir.
Q. Now, are you familiar with the issues in this case, at least in a general way?
A. Yes, sir.
Q. Will you state your reasons why you favor the complaint, if that is your position?
A. Our location—being on the four-way railroad center, north, east, south, and west—is one of the advantages of our location for cold storage.

Mr. Collins: You say four-way?
The Witness: Four-way. The free movement in all directions is naturally ideal for a storage customer, to have access to as many markets as possible.
The combination of rates applicable via the UP and Rio Grande limits the flow of northwest products through our

[fol. 419] town, which naturally limits our ability to obtain storage.

Q. Are many of the commodities which are stored in your company so-called transit commodities?

A. A great number, and a great per cent of our business is transit business.

Q. Do you store any commodities that originate or terminate on the Union Pacific north of Ogden?

A. We do store a limited amount of potatoes, onions, apples that originate on the Union Pacific, but are limited

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Q. Wait a minute. You have answered.

They move via Denver and thence to one of the three railroads to Pueblo, do they not?

A. In the majority of cases. Only when a mis-routing occurs do we receive them over the Rio Grande.

Q. Through Ogden, you mean?

A. Yes, sir.

Q. What commodities that could be moved from points on the Union Pacific north of Ogden that you cannot now store, even through the Denver gateway at the through rates under the transit arrangement, would you like to have that privilege on?

A. The frozen food industry, with the advances it is making; is becoming quite a sizable tonnage for cold storage, and a bigger operation in frozen foods is developing in the Northwest in Oregon-Washington to be moved to the eastern markets which we are interested in, but are not in line or a storage location due to the combination of [fol. 420] rates by going through the Ogden gateway or the limitation to this side of the Missouri River if coming via Denver.

Q. On such transit as exists today there is a limitation as to the destination territory, isn't there?

A. Yes. Even those commodities that originate on the UP that come via Denver are limited to disposition west of the Missouri River.

Q. Under the existing transit tariffs of the Denver and Rio Grande would you be able to store not only those commodities but such other commodities as turkeys, butter, cheese, and so forth, which originated on the Union

Pacific and moved through Ogden and Pueblo if the rates sought by the complaint should be established?

A. Yes, we would have transit privileges on those commodities if we had a competitive rate.

Q. The Union Pacific doesn't run south of Denver? It does not reach Pueblo?

A. No, sir.

Q. Have you any other comments to make, Mr. Belcher?

A. Even with the present routing being available, via Union Pacific through Denver to points in the south, southwest, and up to the Missouri River, we are at a disadvantage in having to pull those commodities through Denver, which is a competitive point with us. We have to pull them through and pass cold storage houses in order [fol. 421] obtain it in our facilities, where, if we had an equal chance by coming direct from the west via the Ogden gateway and Rio Grande, we would have the same opportunity as our competitors in Denver. We would then have an access market to the south, to the east and to the north.

Q. Are you at a disadvantage now as compared with your competitors at Denver?

A. Yes. On all originating on the UP it would have to come via Denver to Pueblo, 100 miles south, for storage. We would be losing the Denver market from those commodities stored in Pueblo. It would be a necessary backhaul.

Q. Would the rates which the complainant seeks, which would allow the business to move from Ogden to Pueblo, remove that disadvantage?

A. Yes, sir.

Mr. Quirk: That is all.

Exam. Mullen: Cross examination.

Cross-examination.

By Mr. Collins:

Q. Your company is the Mountain Ice & Coal Company?

A. Yes, sir.

Q. When was it established at Pueblo?

A. 1897.

Q. 1897?

[fol 422] A. Yes, sir.

Q. On what railroad is your trackage? What trackage serves your plant?

A. Santa Fe and Colorado & Southern.

Q. The D&RGW does not?

A. No, sir.

Q. If it hauled anything to you at Pueblo it would have to be interchanged for a switch movement there, would it not?

A. Yes, sir.

Q. It isn't clear to me just how you have this disadvantage with Denver. Are there other storage companies in Denver?

A. Yes, there are two large storage houses.

Q. It isn't clear to me just how this disadvantage you said you have as with them works out. You have no storage plants yourself at Denver, have you?

A. No, sir. These people that store, as referred to, are attempting to keep as many markets ahead of them as possible.

Q. As many markets?

A. As many markets ahead of them as possible. When they, by the present arrangement, whereby they have to pass up the possibility of the Denver market, the Colorado Springs market, to store with us without an opportunity to return to those markets without a backhaul——

Q. You mean, in order to remove the disadvantage, that you would have to have rates which would be applicable to your plant at Pueblo and then back to Denver equal with [fol. 423] the rates that the Denver cold storage people have; is that right?

A. If the rates were applicable through the Ogden gateway, via the Rio Grande, Pueblo is an intermediate point between the Ogden gateway and Denver.

Q. And in that way your shipments would really be en route to Denver, if you wanted to ship them on up there?

A. That is right. It leaves the entire markets to the north, east and south all open.

Q. What is the product, the single product that produces or affords the greatest volume of your storage in the perishable class? Would fruits be it?

A. It varies so greatly on account of the three seasons that we get into. Fruits are one of the heavy items, I would say.

Q. Isn't it a fact that you have joint through rates on fruits enabling you to store there at Pueblo and ship on in any direction you see fit beyond?

A. The through rate privilege we have now on the apples and pears is the one which must come UP to Denver, through Denver to Pueblo, for storage, which eliminates the north market because it has already passed that market.

Q. I see. But that is a through rate that is as low as—as far as reaching your plant—as you would have if you got the rates that are sought in this complaint, is it not?

A. Yes, that gives us the territory, with the exception [fol. 424] of the north, on a competitive rate, but only on those two commodities.

Q. Just apples and pears?

A. Yes, sir.

Q. It doesn't apply to fruits generally?

A. Well, those are the two major fruits that we store. It may apply to others that we have no demand for storage on.

Q. I think you need have no hesitancy in going into other fruits because I believe the tariff classification is "fruits".

A. All fruits?

Q. Then what marke north of Pueblo, through which the Union Pacific would have passed with your shipments, other than Denver—what other markets would there be?

A. Colorado Springs is the intermediate between Denver and Pueblo. That means passing up Denver and Colorado Springs.

Q. I meant those possible markets through which the Union Pacific would have passed with your shipments.

A. Those are the points that they would have passed.

Q. Now, you say that you are located at a four-way railroad center.

A. Yes, sir.

Q. That includes all points of the compass, I take it—north, east, south and west?

A. Yes, sir.

Q. Is the situation you have described with respect to what would now involve this backhaul of about 100 miles [fol. 425] to Denver, and some kind of a haul—It wouldn't be a backhaul to Colorado Springs, would it?

A. Yes, sir; it would.

Q. Well, wouldn't it be what you would call a side-haul? The Union Pacific would not have passed through there with the commodities.

A. No, but the commodity on some railroad would pass through there.

Q. I see. It is those markets that constitute the basis of your interest in this case?

A. No, it is just those two markets on your fruits.

Q. Oh, I see.

A. Your other commodities, we are limited to the Missouri River and cannot cross the Missouri River, even though we come through Denver on the other commodities.

Q. Your purpose in appearing here, Mr. Belcher, is your interest in additional transit availability or privelege, isn't it?

A. Opening up a wider territory which we might serve.

Q. But serve only through the exercise of the transit privilege; isn't that correct?

A. Yes; with equal rates.

Q. Yes. Yes, of course.

Just a moment please.

(Conference between counsel.)

Mr. Collins: That is all. Thank you.

[fol. 426] Redirect examination.

By Mr. Quirk:

Q. Mr. Belcher, if the rates which this complaint seeks, and which you would like to see established, were established, then you would be on an east-west railroad which would give you transit and competitive rates to practically every place?

A. That is right.

Q. That is what you want, isn't it?

A. That is right. We are entitled to it.

Q. There would not be any question of backhauling between Pueblo and Denver at all in those circumstances, would there?

A. No, sir.

Recross-examination.

By Mr. Collins:

Q. You have not filed any complaint with the Interstate Commerce Commission about this situation, have you?

A. No. I am just a storage man that battles his problem without knowing the entire technicalities of tariffs which are so hard to buck.

Q. Have you raised a complaint to the Union Pacific Railroad?

A. No, sir.

Mr. Collins: All right.

Further redirect examination.

By Mr. Quirk:

Q. The Pueblo Chamber of Commerce filed an intervening complaint on your behalf, didn't they?

[fol. 427] A. Yes, sir.

Mr. Quirk: That is all.

Further recross-examination.

By Mr. Collins:

Q. In this suit, but not previous to this suit?

A. In this suit.

Mr. Collins: That is all.

Exam. Mullen: Thank you.

(Witness excused.)

Mr. Quasey: Mr. Examiner, I will call Mr. Jacob.

I. H. JACOB was sworn and testified as follows:

Direct examination.

By Mr. Quasey:

Q. What is your name?

A. I. H. Jacob.

Q. Where do you live?

A. Salt Lake City.

Q. What positions do you hold at the present time, and how long have you held them?

A. I am general manager of the Producers' Live Stock Marketing Association, which position I have held since its organization in 1935. I am president and general manager of the Wasatch Live Stock Loan Company. I became general manager of that organization in 1930 and president in 1945.

Q. What experience and interest did you have in the live [fol. 428] stock business prior to that time?

A. I have been connected with the live stock business all my active life. I grew up with live stock. I have actively operated live stock since 1915.

Q. In what part of the country was that?

A. In Utah.

Q. What is the Producers' Live Stock Marketing Association?

A. The Producers' Live Stock Marketing Association is an association of producers incorporated to market their live stock. This association, incorporated at Salt Lake City in 1935, has offices at Ogden, North Salt Lake, Los Angeles, Denver and Billings, Montana.

Q. Where is the main office located?

A. The main office is located in the First Security Building, Salt Lake City.

Q. What general area does your organization operate in?

A. It operates in what is generally called the 11 western moutain states.

Q. What is the Wasatch Live Stock Loan Company?

A. The Wasatch Live Stock Loan Company is a company organized by live stock producers to take advantage of the discount facilities of the intermediate credit bank, and loaned to live stock producers.

Mr. Collins: That is a Federal intermediate credit bank, isn't it?

[fol. 429] The Witness: That is right.

By Mr. Quasey:

Q. What general area does the company operate in?

A. Wasatch has loans in Nevada, California, Utah, Idaho, Wyoming, Colorado, and some in Arizona.

Q. Are you familiar with the production, grazing, feeding, and movement of livestock within the area you described and also the other livestock areas of the country?

A. Yes.

Q. What is the National Live Stock Producers Association?

A. The National Live Stock Producers Association is an association made up of member agencies, producers' agencies such as ours, some 19 of them, scattered throughout the country, serving on all principal live stock markets of the United States.

Q. Are there any other credit organizations that are members of the National Live Stock Producers?

A. There are five other corporations similar to the Wasatch that are affiliated with National Live Stock Producers.

Q. What volume of live stock did your association handle during 1948?

A. We handled approximately 30,000 carloads of live stock valued at about $110,000,000.

Q. Can you state, in an approximate way at least, how many of those consisted of rail cars?

A. I do not have any breakdown study on that, but I would assume we handled around 15,000 rail cars.

[fol 430] Q. What is the volume handled during this year to date?

A. It is running about 8 per cent higher than it did a year ago.

Q. Is the number of rail cars in about the same proportion as last year?

A. I would assume so.

Q. Will you describe in a general way the nature and

extent of the marketing service performed by your association?

A. We operate market agencies on the posted markets, under the Packers and Live Stock Act, at Ogden, North Salt Lake, Los Angeles, and Denver; and we operate out of offices at Billings, Montana—which is also a posted market—and the Trovea Yards at Phoenix, Arizona.

Q. Do you perform any sales service off the market range factors, country points?

A. Yes, we have a sales service at country points which we call our direct movement, going direct to feeders, packers; and we also have an order-buying service which is performed by a subsidiary, the Western Live Stock Order Buyers, a subsidiary of the Producers.

Q. Is live stock grazed and fed along the lines of the Union Pacific and D&RGW between Ogden and Denver?

A. Yes.

Q. Is the nature and extent of these operations generally the same in these two areas?

[fol. 431]. A. I would say, generally speaking, yes.

Q. Where is the live stock that is grazed and pastured and fed in the territory served by the D&RG produced?

A. A large part of it is produced locally on the ranges and the farms in that area, but there is a substantial amount that is annually shipped into that territory from other areas, both live stock to go feed in the feed lots and pastures there and live stock to be ranged on the ranges during the summer grazing season.

Q. What areas does this live stock come from to the D&RG?

A. Well, I would think that the live stock in there would come from nearly all areas, immediate areas, within the Rocky Mountain country. The breakdown is a little different on different species of live stock. With respect to sheep, the majority of the sheep goint into that territory for either replacements or pasture and feeding comes from the northwest—Idaho, Oregon, Montana and Washington—that territory.

Q. Are we to understand, Mr. Jacob, that your most important supply area is that north of Ogden?

A. That is for replacement and pasture sheep, yes.

Q. What makes that territory so important, as far as sheep are concerned?

A. Well, in that area, in the northwest area, to get the type of sheep they like in eastern Utah and western Colorado grazing territory, they get the replacements at the time of year that they like, and it just fits in with their [fol. 432] natural operating conditions there.

Q. Where does the live stock move to from the D&RG?

A. Live stock coming out of the Colorado and eastern territory over the Denver and Rio Grande moves both east and west; to slaughter points and feed yards and feed pasture, both east and west.

Q. Does this live stock sell in competition with live stock from points on the UP north of the D&RG?

A. Yes, that is right.

Q. Is the pasturing of live stock on wheat a general practice in the wheat-growing states at the present time?

A. Pasturing of lambs on wheat and, to some extent, the pasturing of breeding stock on wheat, is becoming more general—that is, it is an operation that has grown up in the last few years, and it is an operation that has shown considerable expansion.

Q. Does the pasturing in wheat play an important part in the raising of wheat?

A. Yes, the pasturing off of wheat acreages is beneficial to the production of the wheat crop; and that is the reason for the wheat acreage being made available to the live stock feeder.

Q. Do the wheat pastures of Kansas, for example, offer an important outlet for sheep or lambs on points on the D &RG?

[fol. 433] A. Wheat pasturage in Kansas is a very important factor in determining the feeder live stock market —to a large extent lambs, and to a very great extent cattle. It is a fairly cheap feeder operation, and when the conditions are good a feeder is very anxious to operate in that territory; and the fact that wheat is good in Kansas, and the pasture good in the wheat area, has a very decided stimulating effect on the price of feeder lambs, and to a certain extent feeder cattle also, from the southwest and the northwest territory.

Q. Is freight billing of any value in the sale of live stock from Denver or other markets, like Omaha?

A. The cost of putting live stock to the ultimate market is always a factor in determining price, and if on a shipment of live stock from one particular place you have a feed-in-transit billing available, the extent that feed-in-transit billing reduces the cost of that shipment over the combined rate has a bearing on determining the price paid for that live stock. In a large number of cases the owner of the live stock is recompensed directly to the extent of that feed-in-transit billing value.

Q. I think you stated that you have sold some live stock at country points. That is true, is it not? Some live stock is sold at country points?

A. Yes, we handle a lot of live stock at country points.

Q. And does freight billing have the same effect in connection with the sales at country points as when sold at [fol. 434] market?

A. The usual practice is to allow the owner of the live stock the value of his feed-in-transit billing.

Q. You are familiar with what has been testified to here as the 19¢ arbitrary that applies on and in connection with the movements of live stock off of the UP via the D&RG from Ogden to Denver, are you not?

A. Yes.

Q. Is that 19¢ arbitrary, or, in the case of combination rates applying on a movement, does that have any effect on the operations of the live stock men on the D&RG?

A. Well, that would just have to be figured in as part of your cost of operation, part of the production of your live stock, whether it was grazed on the range, fattened on the range, or fattened on the feed line. That would be one element of the expense of operation.

Q. How would that play a part in the case, for instance, of live stock moving from the D&RG, going up on the UP north of Ogden, and buying replacement stock, or pairs? Would it have any bearing on that deal?

A. Well, that wouldn't enter into the cost of putting the replacement stock or the breeding stock, landing it on the buyer's range; and that is what he is concerned with: how much is the live stock going to cost him landed on his

range. Whenever anybody buys any live stock in the country they want to know what the freight rates are [fol. 435] and what it is going to cost him to land it. If there is an additional charge, or something arbitrary there, that would certainly have to be taken into consideration when he is buying the live stock.

Q. It would also have an effect when the live stock was sold, would it not?

A. Yes, it has a decided effect. As I said before, when you buy live stock in the country, if they have a billing—a billing that can be used on them—they are just worth that much more money, and usually the owner of the live stock is paid direct for that billing.

Q. Mr. Jacob, what do you believe should be done in this case?

Mr. Collins: Well, now, Mr. Examiner, that is what you are here for.

By Mr. Quasey:

Q. All right.

We will say, do you support the position of the complainant in this case, Mr. Jacob?

A. I represent a group of producers, and the producers certainly are interested in seeing low freight rates and increased service. I think that would give them both.

Q. Is there anything else you care to add, Mr. Jacob?

A. No, I have nothing.

Mr. Quasey: That is all. You may cross examine.

Cross-examination.

By Mr. Collins:

Q. How many producers do you serve, Mr. Jacob—do [fol. 436] you represent?

A. Around 30,000. We had 25,000 shippers last year, and I assume, with our increase, it will run around 30,000 this year.

Exam. Mullen: I think the witness is speaking of shipments?

Mr. Quasey: No.

The Witness: No, those are patrons; those are members of our organization.

Mr. Quasey: It is just a mathematical coincidence, Mr. Examiner.

Exam. Mullen: All right.

By Mr. Collins:

Q. Do those 30,000 people, or whatever they are, all produce cattle?

A. Yes, that is right.

Q. Or see that the cattle are produced?

A. That is right—cattle and sheep and hogs.

Q. They are located in the territory that you describe here, throughout these 11 western states?

A. Yes, that is right.

Q. Are the 11 western states the producing territory? That is the producing territory, and it is not related at all, necessarily, to the marketing territory, is it?

A. Well, 11 western states is a substantial producing territory of the United States, but I would not say that it was the producing territory.

Q. But I mean, is it the producing territory for your organization?

[fol. 437] A. For our people; that is right.

Q. You do some marketing in some of those states, do you?

A. That is where most of our marketing is done; in those states, yes. Practically all of it.

Q. Now, your association is a marketing agency for all of these producers?

A. That is right.

Q. Do you buy the cattle and sheep from the owners, or are the cattle and sheep put in your charge and you market them as best you can. How is that done?

A. Most of them are turned over on consignment to us. All of the stuff we market on these posted markets are on consignment. They are just consigned and we charge a straight commission, under the P & S Administration, the Packers and Stock Yards Administration—a joint commission for that service. We have a lot of consignments, a lot

of live stock that is turned over to use in the country to market.

Q. Yes.

A. Then we have, as I said, our order buying department; that fills eastern orders, western orders, packers and feeders, and that live stock is bought direct.

Q. Your association is not at all a cooperative, then, is it?

A. Yes.

Q. Is it?

A. Yes; we are a cooperative, yes; with the exception of [fol. 438] the order buying department.

Q. I see.

A. The order buying department is strictly a purchasing department—purchasing on eastern and western orders.

Q. That is a kind of cattle trading side line in connection with the association's other work, is it?

A. That is right. It is to fill our orders that come in on an order basis.

Q. Well, when you said that in 1948 you handled—I have here—30,000 live stock, that would not be right, would it?

A. No. There were over 2 million live stock, but 30,000 carloads.

Q. I see. When you said you handled that many in 1948, did that mean that you simply marketed that many?

A. Yes, that is right.

Q. You spoke of sheep, I guess principally for replacement and summer pasture purposes in Colorado, did you not?

A. Yes.

Q. Is that replactment just for fattening sheep, or is it used for breeding, or what is it for?

A. That issued for breeding. There is a lot of the Northwest that is white-faced lamb district. What I mean by white-faced lambs is that they are not cross-bred black-faced. The white-faced are the mutton type, Colorado and Utah having an excellent summer area to produce the white-faced mutton lambs. To do that they have to go out of the [fol. 439] state for their replacement ewes. These white-faced cross-bred and Rambouillet types are the kind of ewes they want in the eastern Utah and Colorado district

for breeding purposes, and the best source of supply they have had for those has been the Northwest.

Q. Now, what is the progam? You go up northwest and buy those ewes and bring them down to Colorado and breed them and lambs are born, and then that is considered a transit operation. They move on out to some other part of the country.

A. That is right.

Q. Both the lamb and the ewe?

A. When the ewes are old they go to market, but the lambs move out or the transit billing.

Q. Does that co[illegible]e under the head of feeding in transit?

A. Yes.

Q. Well, what leaves Colorado when you get done there? Is it the lamb or the mother?

A. Both.

Q. Both go. Don't the ewes stay there sometimes for 6 years?

A. Your feeding-in-transit billing doesn't apply that long. The old lamb goes out; if you have a few more lambs come in on that bill you use that billing and go on with them.

Q. You can ship out anything that you call a sheep that has not been there more than a year; is that right?

[fol. 440] A. That is right.

Q. What determines, Mr. Jacob, whether your association succeeds in its business, from a financial standpoint?

A. Whether we can do a better job than the other fellow in marketing live stock.

Q. And make more money; isn't that it? Isn't that the ultimate goal?

A. We have to make expenses. We don't have to make anything above that.

Q. You have to make something for the members, don't you? You have to have something to turn back to them?

A. No. We do if we happen to make it. If we ran along for years and met expenses, and rendered a good service and made expenses, our service would be justified.

Q. I thought you said your service was cooperative, in the main?

A. It is.

Q. In that operation don't you try to do the best you can for marketing the cattle for the producers?

A. That is right.

Q. And pay them?

A. Pay them back any savings in the operation.

Q. Any savings?

A. If there are no savings, we give them service instead of savings. We think that is a good operation.

[fol. 441] Q. If you sell a cow for $100 for one of these producers, don't you give him 90-something dollars?

A. Not if it cost him 90-something dollars to sell a cow. We give him back what we sell the cow for, less the expense of marketing.

Mr. Quasey: Including the freight.

The Witness: Including all marketing costs.

By Mr. Collins:

Q. You would not suggest that you charge him sometimes 90-something dollars to market the cow, would you?

A. Between us and the railroads he doesn't have much left when he gets the cow to market.

Q. Do you reduce your rates?

A. No, but we give him something back over the cost in the end.

Q. Your interest in this case is to obtain for your producers more transit privileges at lower rates. Isn't that the interest of ~~your association~~? At lower rates on the D&RG in transit?

A. In this particular case. It is our interest to see that the stuff moves in to feed on the Denver and Rio Grande territory or to range there without any penalty.

Q. You mean at rates equal——

A. At rates the same as if they came over the Union Pacific the other way.

Q. Yes.

A. And then that gives us what we think is a very valu-

[fol. 442] able thing from the standpoint of a live stock producer.

Q. Yes.

A. That gives us competition in service.

Q. So far as rates are concerned, you- association would like to have all rates brought down to the equal of the lowest rate that you use, wouldn't you?

A. Yes, we would like to see all gateways opened, as a

matter of fact, so the live stock would move whichever way it wanted; then we figure the railroads would be on their toes in giving us that service.

Q. Suppose the Union Pacific raised its rates up to and equal to the D&RG? Would that suit you?

A. That would be bad.

Q. The one thing that would suit you would be equal rates.

A. I assume they are charging rates now to make a living.

Q. Would you answer this: The only thing that would suit you is a reduction in the rates by the D&RG with the privilege that you would have then?

A. Yes, at this present hearing.

Q. Now, Mr. Jacob, is the matter of time of transit of cattle of any importance or signficance to your association and the producers who are its members?

A. You mean the speed of moving the livestock to market from origin point?

Q. That is right.

[fol. 443] A. Very.

Q. Have you considered the extra time that it would take to get cattle into Colorado on the D&RG and the extra time it would take to get them out of there compared with the time consumed by the D&RGW?

A. I don't believe I get your question.

Q. Have you made any comparison of the length of time the cattle would be in transit, or on the train, moving into points on the D&RGW and moving out from those points by way of the D&RGW interchanged to other connections? Have you made any comparison of that situation with the time consumed in train movement by the Union Pacific?

A. Yes, I have observed that over years past. I have observed it was not until recently that either the Union Pacific or the Denver and Rio Grande moved stuff between Denver, Ogden and Salt Lake without feed, without stopping for feed and rest. Today that service is the usual thing.

Q. What service?

A. Of moving the stock from Denver to Ogden or North Salt Lake, either over the Union Pacific or over the Rio Grande, without stopping for feed, which is very beneficial to the live stock shipper.

Q. That is, they have speeded up their trains?

A. That is right.

Q. Do you have occasion to ship from this area here, [fol. 444] around Salt Lake City, to Los Angeles?

A. Yes.

Q. I ive cattle?

A. Yes.

Q. Then you must know about that special train the Union Pacific has to Los Angeles?

A. Which is very wonderful.

Q. What did you say?

A. Which is very wonderful.

Q. Thank you. Thank you. But I don't think you answered my inquiry, Mr. Jacob. Do you know whether your cattle would move or, rather, would be on the trains, in the course of movement, the same time or a greater time if they opened up this route to you and you shipped them by way of the D&RGW into Colorado points and then on out when you got ready to go to market?

A. You mean the combination of the two movements—that it might be all summer between?

Q. No. I mean the time of actual movement.

A. Well, you have a certain time going in, and then you feed or summer the stuff there for two or three months; then you move it out again.

Q. Yes. I am speaking of the train movements.

A. You mean a combination of those two movements?

Q. Not necessarily. I am speaking of each one separately. If you fed cattle, if you grazed cattle on the Union [fol. 445] Pacific, then loaded them and headed for the Omaha market, how would that time compare, if you know, with the time to get to the Omaha market, from a point, a grazing point on the D&RG? Do you know about that?

A. You mentioned to Omaha, Denver, Kansas City.

Q. You have not looked into that?

A. No.

Q. Have you filed any complaint with the Interstate Commerce Commission for your association of producers, Mr. Jacob?

A. In this case, you mean?

Q. Sir?

A. In this case?

Q. No, not in this case. Other than this case.

A. We have filed no complaints that I can remember, but we have, and do have continual contacts with the personnel of the railroads that are in charge of the shipping operations, and we register complaints and requests with them continuously.

Q. What railroads?

A. With the personnel of the railroads handling the transportation end of it.

Q. All right. How about the Interstate Commerce Commission? You have filed no complaint with them?

A. No.

Q. Have you filed any complaint with either the Interstate Commerce Commission or the Union Pacific Railroad [fol. 446] concerning the establishment of joint through rates by way of the D&RG for the purposes sought in this case?

A. Except indirectly, as we have membership in the National Live Stock Producers, and they have intervened.

Q. That is your intervention in this case?

A. That is right.

Q. But nothing previous to that?

A. No.

Mr. Collins: That is all. Thank you, Mr. Jacob.

Mr. Quasey: I have another question, Mr. Jacob.

Redirect Examination.

By Mr. Quasey:

Q. The organizations that you described, being organizations composed of live stock producers, are, in fact, cooperative associations, are they not?

A. That is right.

Q. And all officers and directors, according to the requirements of the by-laws, must be producers of live stock?

A. That is right.

Q. Now, as far as this case is concerned, is to be understood that your position is that you want the Ogden gateway opened, as far as livestock movements are concerned,

so that the live stock may move on the same basis via either route going to Denver or eastern connections?

A. Yes; that is right.

Mr. Quasey: That is all.

[fol. 447] Recross-examination.

By Mr. Collins:

Q. You want all of the routes that you might have possible occasion to use in the future, don't you?

A. Yes.

Q. That is your position?

A. Yes.

Mr. Collins: All right.

Exam. Mullen: Anything further?

Is that all, Mr. Collins?

Mr. Collins: Yes.

(Witness excused.)

Mr. Quasey: Mr. Clyde.

Don Clyde was sworn and testified as follows:

Direct Examination.

By Mr. Quasey:

Q. What is your name, Mr. Clyde?

A. My name is Don Clyde.

Q. And where do you live?

A. I lieve at Heber City, Utah.

Q. Can you describe where that is located?

A. It is located about 50 miles directly east of Salt Lake City.

Q. On what road?

A. You mean railroad?

Q. Yes.

[fol. 448] A. It is on the Denver & Rio Grande. They run a branch into the town.

Q. All right.

What is your business?

A. My business is a live stock operator. I am engaged in running cattle, but principally in the production of sheep.

Q. What is, briefly, the extent of your operation—acreage and average number of head a year?

A. I graze on approximately 15 to 20 thousand acres of private land. I have forest permits and Taylor grazing rights. I operate about 4,000 breeding ewes and 200 head of cattle.

Q. How many other live stock men are there in your locality?

A. Well, in the county in which I live it is rather an intensive live stock-operating vicinity, and I suppose we have approximately 50 sheep men and probably a couple of hundred small cattle operators.

Q. What is the estimated number of head that you and these other men handle a year?

A. You mean the number of breeding ewes we operate?

Q. Yes.

A. I would judge approximately 100,000 breeding ewes are in that vicinity.

Q. Where do you market the live stock you produce

A. Most of the lambs we produce are marketed at the country point at which we live, and some of them, of course, [fol. 449] are shipped to markets such as Denver and Kansas City.

Q. Do you know where those sold at the country points move to?

A. They move both west and east, depending, I think, on the years. Usually the majority of them move east to Denver and river-markets.

Q. Do all these sheep that are either sold locally or moved to markets—are they slaughtered or are some of them sold and used as stockers and feeders?

A. The majority of them are sold as slaughter lambs, because we have a high range which produces an extraordinarily good fat lamb. There is a percentage in every man's output which are sold as feeders. These lambs usually go east and to Mid-western states, in the corn belt, —such states as Kansas, Iowa, Nebraska.

Q. Now, in Kansas do they generally move to what has been referred to here as the wheat pastures?

A. I think that is correct.

Q. Do you bring any live stock into your territory from points off the D&RG?

A. Yes, we bring most of our breeding stock in from states such as Idaho and Montana. In our locality, as I stated before, we have a very high, good range which produces prime lamb, and consequently we run black-faced rams and Suffolk. Consequently we go out of our immediate vicinity and buy replacements which are usually ewes or ewes and lambs, what we call pairs. These are shipped [fol. 450] in from points which I specified, usually Idaho and Montana, and are used for replacements.

Q. Do you also purchase any lambs alone?

A. No, I would say not.

Mr. Collins: Lambs what? Without the ewes?

Mr. Quasey: Without the ewes.

Mr. Collins: Excuse me.

By Mr. Quasey:

Q. Now,——

A. Could I amplify that just a little more?

Q. Yes.

A. Usually an individual sheep man, or a group, moves up into these states in the spring of the year and purchases several thousand ewes and lambs, which are shipped into Heber under feed-in-transit billing, and then later, when the lambs are fattened, they are sent on to Denver or to the river markets. On the replacement of the ewes, that usually happens in the fall of the year, usually through the months of August and September, and a sheep man knows, by mouthing his flock, about how many aged ewes he has to take out; and so he goes out and purchases about the number which will maintain his economic unit. These ewes are shipped in under a transit billing, and then the billing is picked up by him in sending his lambs to market.

Q. Now, in case he sells any of the *shipe* at his ranch, is that billing also used in that kind of a transaction?

A. Well, when you are dickering with a buyer, if the [fol. 451] lambs suit him about the next thing he asks you is whether you have any freight benefits; and if you have it usually adds that much on to the value of the lamb, be-

cause he will take over the benefits and reimburse the grower for the amount he has already in the freight bill—the amount the grower already has in the freight bill.

Q. Mr. Clyde, do you know whether there is any grazing of lambs along the Union Pacific between Ogden and Denver, or Cheyenne?

A. I don't believe I quite understand your question.

Q. I mean, are sheep raised and fed along the UP similar to the way they are grazed and fed in your territory on the D&RG?

A. I think pretty much the same.

Q. And on those that are shipped to Denver, those coming off of the UP and the D&RG would be in competition with each other in the Denver markets, would they not?

A. That is right.

Q. And if there is any difference in the freight rate, such as the extent of the arbitrary charge of 19 cents, as has been testified to, would that mean that the return that the man from your territory would get would be any less than the return the man on the UP would receive?

A. Well, yes. The man who is located off of the UP would be penalized to the amount of the freight, additional freight, which the adjoining lines charge.

[fol. 452] Q. You mentioned there was some movement of feeder lambs into the Kansas wheat pastures. Do you know that the charges on the movement of those shipments would be on a combination basis of rates?

A. I think they are.

Q. Assuming that that were true, would that have any effect upon your situation as to the price you might receive for the sheep you sell?

A. Well, of course. Any differential in the freight would just be that much reduction in the value of what you sold the lamb for.

Q. And any operator who had an advantage in freight billing would just be that much better off, would he not?

A. That is right.

Q. Is there anything else you would like to add here, Mr. Clyde?

A. Well, our interest in this case perhaps is a little bit selfish. We are good friends with both of these roads. They give us a lot of good service. But we have conditions and

emergencies at times, particularly last winter when we were caught in severe weather conditions, and men had to ship their breeding ewes out to where the feed was not snow covered.

We would be interested in a freer movement of live stock at all times. Regardless of who is impeding that movement, we would like to eliminate anything which doesn't give for freer competition; and if here are any restricted areas, or [fol. 453] any restrictions, we would be interested in their removal. Live stock is a very perishable product, very similar to fruits and vegetables, which have been mentioned here today, and it needs to be moved in the shortest manner possible and as quickly as possible because lambs shrink when they are held on railroad cars or when they are held in feeding lots; and also if you are shipping pairs, particularly if the lamb is kept away from his mother for any appreciable — ; the mother weans him and then he is just reduced 50 per cent in value.

Exam. Mullen: Does that complete your testimony?

The Witness: I think so.

Mr. Quasey: You may examine.

Exam. Mullen: Cross examination.

Cross-examination.

By Mr. Collins:

Q. You say your residence is Heber City?

A. Yes, sir.

Q. That is about 50 miles east of Salt Lake, you said, on the D&RGW?

A. Yes.

Q. Is your cattle and sheep operation located immediately by Heber City—near there?

A. Within a distance of perhaps 10 or 12 miles.

Q. Yours is a grazing proposition and not a feeder operation, is it?

A. That is right.

[fol. 454] Q. You said you are a live stock operator. Does that mean just raising cattle?

A. Cattle and sheep.

Q. Then you said running cattle, but principally the pro-

duction of sheep. I was wondering if in there you have a buyer's and seller's business, something of the order of a combination business.

A. No, sir. I am merely a typical operator. In saying "running cattle," that is a merely a term of breeding them.

Q. Yes. But actually—Well, you do raise cattle there in this grazing area where you have these Taylor grazing rights and others?

A. Yes.

Q. How are your cattle and sheep sold, Mr. Clyde? On what basis? Do you sell them to somebody at this ranch and then they take over from there and go on with them?

A. They are sold principally at the ranch, or sometimes at the railroad yards, and they are sold—Maybe I could make it a little clearer. They are sold in various ways; usually through some commission firm; sometimes through an order buyer, as we call them. A man who comes out in the country and has an order for so many sheep and so many cattle; and we merely trade on them, weigh them up and load them on the cars and get paid for them.

Q. He may look at your cattle either on the ranch or even [fol. 455] after you have put them—You mean there are loading pens at Heber, the railroad yards? Is that what you mean?

A. Yes.

Q. When he makes the deal with you you see no more of the cattle. You have no further interest in them, have you?

A. In the cattle, I think that is pretty much true. In the sheep the only interest we would have would possibly be the thing which I said a while ago, if we had some freight benefits——

Q. Yes.

A. —on the sheep which had been shipped in.

Q. You would want that paid back?

A. That is right.

Q. And either the sheep or cattle, when he paid back your freight benefits, would be his from the point where the deal was made, whether on your ranch or in the railroad yard?

A. That is right.

Q. How far is Heber City from Keetley?

A. About 10 miles.

Q. Keetley is on the Union Pacific?

A. That is right.

Q. I would gather, Mr. Clyde, that you must ship or graze most of your sheep or cattle, one or the other, or both, in Colorado; is that so?

A. No, that isn't so. I graze them and operate them [fol. 456] entirely in Utah.

Q. Well, perhaps I didn't catch your situation. What use would you make of the routes and rates sought in this complaint?

A. Well, the use I would make would be principally in the billings which we have in shipping breeder ewes and pairs into Heber and thence east to market.

Q. It would be this freight benefit that you might have in your hands at the time you sold your cattle to somebody else?

A. That is correct.

Q. That would be your interest in the situation?

A. Yes, sir.

Mr. Collins: That is all. Thank you.

Mr. Quasey: That is all.

(Witness excused.)

Exam. Mullen: We have time for another witness, provided it is short.

Mr. Blaine: Mr. Examiner, the first petition I file is in behalf of the American National Live Stock Association and the Idaho Cattlemen's Association in behalf of complainant. We adopted the complaint as our own as far it involves live stock.

The second petition is in behalf of the Colorado Cattlemen's Association. That is also in behalf of the complainant.

Exam. Mullen: Is there any objection to these petitions?

Mr. Collins: Well, no, I guess not.

[fol. 457] Exam. Mullen: The petitions will be received and leave to intervene is granted.

Are you appearing for these associations, Mr. Blaine?

Mr. Blaine: Yes, sir. I am appearing at this time in

behalf of these associations, and I will have a later appearance to enter tomorrow.

Exam. Mullen: Will you file your appearance with the reporter, please?

Mr. Blaine: I will—a written appearance?

Exam. Mullen: That is right.

Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

We will recess, then, until 9 o'clock tomorrow.

(Whereupon, at 4:50 p. m., the hearing was recessed until 9 o'clock a. m., Thursday, December 15, 1949.)

[fols. 458-459a] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., Defendants

Transcript of Testimony—Salt Lake City, Utah, Thursday, December 15, 1949.

Met, pursuant to adjournment, at 9:00 o'clock a.m.

Before Frank E. Mullen, Examiner

Frank E. Mullen, Examiner.

Additional Appearances:

E. E. Kohlwes, 715 East 13th Street, Wichita, Kansas, appearing for the Kansas Milling Company, et al.

[fol. 460] Proceedings

Exam. Mullen: Gentlemen, we are ready to proceed.

Mr. Blaine has some witnesses to present.

Mr. Blaine: Mr. Examiner, and gentlemen: Briefly it is the position of the American National Livestock Associa-

tion, and the other livestock producers for which I speak that the railroads have no private or proprietary rights with respect to the traffic which they originate, and railroad lines are built to furnish transportation service for the public. These lines ought to be used to the best possible advantage in the public interest and the Commission, in cases of this nature, should require that their joint use with that view in mind.

T. HARRY BENTON was sworn and testified as follows:

Direct examination.

By Mr. Blaine:

Q. Please state your name and address.

A. T. Harry Benton, Burns, Colorado.

Q. In what business are you engaged?

A. We have been engaged in the cattle business at Burns, Colorado, since 1908.

Q. Are you President and General Manager of the Benton Land and Livestock Company?

A. Yes, sir.

Q. What is that company?

A. Well, it consists of 16,000 acres of patented land.

[fol. 461] Q. Pardon me, I didn't make myself clear.

Is that company a corporation? If so, under what laws of what state is it organized?

A. It was incorporated under the laws of Colorado in 1912.

Q. Just describe briefly your spread.

A. The property consists of 16,000 acres of patented land of which approximately 5,000 are irrigated farmlands, and about 25 or 30 thousand acres of leased lands, and forest permits for 970 cattle.

Q. When did your family establish the ranch?

A. My father established it in 1908.

Q. How long have you been in active charge thereof?

A. Since 1920.

Q. Do you breed your cattle or do you purchase them annually?

A. We have no breeding herd. We purchase our supplies wherever we can obtain them and fatten them.

Q. What do you produce on the irrigated land you referred to?

A. Principally hay, some alfalfa, but mostly native hay.

Q. How do you market that hay?

A. Through the cattle.

Q. What is the shipping point on the Denver and Rio Grande Western hereinafter referred to by me as the Rio Grande?

A. Our shipping point is Burns, in Eagle County.

Mr. Collins: What was the place?

The Witness: Burns. That is in Eagle County, Colorado.

[fol. 462] By Mr. Blaine:

Q. Where do you endeavor to purchase your annual requirements of cattle?

A. Whereever we feel we can get our supplies in the most advantageous way in regard to price and cost of transportation.

Q. Do you take into consideration quality?

A. Yes, very definitely.

Q. What disposition is made of the cattle after you have fattened them for market?

A. The most of our cattle I would say 90 per cent of them go into the New York Kosher trade. They are heavy steers weighing 1300 to 1500 pounds.

Q. Through what public markets are they sold?

A. Denver and Chicago.

Q. That is 90 per cent of them.

What becomes of the other 10 per cent?

A. They are sold on orders to interior Iowa plants, and we have had some go to Pueblo. There is a packing plant in Pueblo.

Q. Are you interested of necessity in competitive through rates? If so, please state why.

A. Yes, sir. We like to purchase our cattle if we have some freight benefit to go on east whenever we can.

Q. Are you particularly interested in the opening of the Ogden gateway? If so, why?

A. Well I feel it would be advantageous to us if we could go into that territory and purchase our supplies on a feed in [fol. 463] transit basis.

Q. When you refer to that territory, do you mean Idaho, or Oregon, Washington, and Western Mon[illegible]?

A. Yes.

Q. The record shows that you now have sale in transit at the through rates, which is permitted by the railroads. What benefit, if any, is that to the livestock producers?

A. He can move his cattle along on the same billing and the same rate.

Q. Does sale in transit usually attract buyers at all markets?

A. It seems to me it does, Mr. Blaine. I have noticed it on the Denver market that cattle that were brought in on the railroad sold higher than those brought in on trucks, where they had the feed in transit advantage.

Q. Is it for that reason that you endeavor to purchase cattle that have through freight rates with transit balances?

A. Yes, when I can.

Q. Now as to this Northwest territory I have just defined, what has been your experience in attempting to purchase cattle therein?

A. Well, I have been under the impression, I am not familiar with all these rates, but——

Mr. Collins: Mr. Examiner, I think the question ought to be directed to what the witness knows, and not what seems to him, or what he is under an impression about.

[fol. 464] Exam. Mullen: Perhaps Mr. Blaine could direct his questions more directly to the witness.

Mr. Blaine: I withdraw that question.

By Mr. Blaine:

Q. From what general territory or states have you purchased your cattle in the past?

A. Utah, Colorado, Wyoming, New Mexico, Arizona, Old Mexico, Texas.

Q. Have you made any purchases in Nevada?

A. No.

Q. You have from Utah and Nevada through rates via

the Rio Grande to eastern markets, and the record shows that you have no such through rates from the Northwest via the Rio Grande to eastern markets. Have you been able to purchase any cattle in the Northwest?

A. No.

Q. This last season, did you make a special trip to the Northwest in an endeavor to purchase cattle there?

A. Yes.

Q. Not having through rates from that territory, why did you make that trip this last year?

A. We had quite a drought in Montana, and grasshoppers infestation, and I thought I might be able to purchase some distressed cattle out there at a favorable price.

Q. What was the result?

A. I found that the buyers from Iowa, St. Paul, could [fol. 465] afford to pay more for the cattle than I could.

Q. Do you have in your business of producing cattle competitors or other parties engaged in the same business located on the Union Pacific in Wyoming, Nebraska, Colorado, and Kansas?

A. Oh, yes, definitely.

Q. Are your livestock, when sold in competition with the livestock of competitors in the states I named—when you sell your livestock do they come in competition with the livestock produced in Wyoming, Nebraska, Colorado, and Kansas?

A. Yes, we sell our cattle on the open market in competition with other operators.

Q. Now you said you couldn't purchase in the Northwest under the present freight rates. Are transportation charges classed by the producers as a production cost?

A. Yes, they are.

Q. If you incur increased expenses in the form of higher transportation charges or any other factor, can you recoup that excess cost when you sell your cattle on we'll say the Denver or the Chicago market?

Mr. Collins: Will you read that, please.

(Question read.)

The Witness: No.

By Mr. Blaine:

Q. What factor or factors make up livestock prices?

A. Supply and demand.

[fol. 466] Q. Mr. Benton, is your company a member of the American National Livestock Association?

A. Yes.

Q. How long has it been a member?

A. I think since 1920.

Q. What is the American National Livestock Association?

A. It is a non-profit organization made up of a group of livestock operators in the various western states, mostly west of the Missouri River.

Q. You have testified that you do not produce any of the stock which you fatten for market, but you purchase them. Are there other persons, firms, or individuals, likewise engaged on the Rio Grande between Ogden and Denver?

A. There are a few. Most of the operators are in the breeding business, but due to the reduction on the forest ranges, more of them having to go into the feeding business.

Q. Now are there some of those latter that produce some of their requirements and purchase the balance in the open market?

A. Yes.

Q. Now are there on the Rio Grande and on the Union Pacific, between Denver and Chicago, persons who graze their own young stock for conditioning for slaughter?

A. Yes, there are.

Q. The price of livestock being made, as you have testified on supply and demand, what effect, if any, does the inability of you and others similarly situated have when you [fol. 467] cannot go to the Northewest to purchase livestock? What effect, if any, does that have on the producers in the Northwest?

Mr. Collins: Just a minute.

Mr. Examiner, this witness has not qualified himself to know all about the causes and effects of the things that might concern the Northwest producers.

Exam. Mullen: There seems to be merit in that objection, Mr. Blaine.

Just what effect are you referring to?

Mr. Blaine: I will rephrase the question and possibly make it clearer.

By Mr. Blaine:

Q. If, for any reason, the number of buyers for livestock in any territory are curtailed, what effect, if any, does that have on the price of livestock?

Mr. Collins: On the price?

By Mr. Blaine:

Q. On the price of livestock.

A. Well, I would say it would depress the prices.

Q. Is it necessary in the livestock industry that livestock have the freest flow possible?

Mr. Collins: Just a minute, Mr. Examiner, it has not been shown this witness is a student of the whole livestock industry. He is qualified to speak about himself, but certainly he has not been qualified to speak for the industry as a whole.

[fol. 468] Exam. Mullen: The question is quite general, Mr. Blaine. Can you be more specific?

Mr. Blaine: Yes.

By Mr. Blaine:

Q. In the sale of your livestock, is it essential that you have the greatest number of markets available to you, if so, why?

A. Could I have that again, please?

Mr. Blaine: Will you read it to him, please, Mr. Reporter.

(Question read.)

Exam. Mullen: Do you mean in the purchase, or in the sale?

Mr. Blaine: In the sale of his livestock, is it necessary he have available the greatest number of markets possible?

Exam. Mullen: All right.

The Witness: Yes, I feel so. We patronize whatever market has the greatest and the best price.

By Mr. Blaine:

Q. Now, you referred to the reduction in the numbers of livestock on the forests. How long has that policy been in effect, to your knowledge?

A. I think we had our first forest reduction on our permits in about 1925.

Q. Just what has been the trend since that time?

A. There has been a gradual reduction as the ranges, the Forest Department felt were being depleted.

Q. About how long do you hold your livestock on the forest permit that you referred to in your early testimony?

[fol. 469] A. Approximately 75 days.

Q. And how are they sustained and fattened the remaining portion of the year?

A. During the winter months we have them in our meadows, and feeding them hay and cotton seed cake, and during the spring months they are on our privately-owned pastures and the public domain.

Q. Generally speaking, are the forest ranges higher altitudes than your meadows, and other pastures?

A. The forest land that we have our cattle on is at an altitude of 9 to 10 thousand feet. Our meadow lands are at 6 thousand feet.

Q. Have you any other medium through which you could market your grasses, other than through your own cattle?

A. Not that I know of.

Q. Do you feel that the opening of the Ogden gateway on cattle from the Northwest to your ranch would be a benefit to your company?

A. Yes, I do.

Q. Why?

A. Well, it would open up a territory for us to try and purchase our young stock in.

Q. Do you feel that it would be a benefit to the producers in the Northwest?

Mr. Collins: I object to that.

[fol. 470] Mr. Blaine: We won't press it, Your Honor.

Exam. Mullen: All right.

Mr. Blaine: You may cross examine.

Cross-examination.

By Mr. Collins:

Q. Mr. Benton, did you originally graze your cattle there in Colorado to a very considerable extent? In other words, was their feed largely from grazing at some time several years ago, say 20 or 30 years ago?

A. Yes.

Q. Why have you, you might say, converted over to feeding almost entirely, as I understand you now?

A. When we first went to Burns it was a rather primitive country, and we have developed a lot of these lands through ditches and irrigation until we have produced considerable feed. Originally it was just ordinary range land.

Q. I understood you to say there had been a rather constant reduction in the available grazing lands, or the use that might be made of grazing lands since 1925 in your neighborhood?

A. Yes. As the grazers in that territory produced more winter feed, than there was summer pasture for the livestock they were handling, it of course has gone more into a feeding operation.

Q. It is a fact, though, is it not, that the acreage made available to grazing has been gradually restricted and is shrinking because of this, that or the other thing, governmental policy, and regulations, and things like that, isn't that true?

[fol. 471] A. Yes, sir.

Mr. Blaine: I object to the question, Your Honer, unless it is restricted to the forest ranges.

Exam. Mullen: I think the question is permissible, Mr. Blaine.

By Mr. Collins:

Q. You said you produced native hay. Just what is native hay, is it that which grows wild?

A. That is the natural hay of that country. It is made

up of timothy, red top clover, and various other kinds of grasses that come in where there is water for the land.

Q. And your alfalfa, of course, that has to be cultivated.

A. That is a cultivated crop.

Q. About how many cars of cattle do you ship from Burns per year, Mr. Benton?

A. I think in late years it has been around 50 to 75 cars the year round.

Q. Do you ship a considerable portion to Denver?

A. Yes.

Q. Is that shipped by rail?

A. Always.

Q. Always.

Do you transport any portion of your cattle by truck inbound or outbound?

A. No.

Q. You do not.

[fol. 472] A. No.

Q. I understood you to say you buy wherever you can at the lowest price, cattle and lowest price transportation charge. In other words, the lowest cost to you is what governs in your purchases, is that true?

A. Yes.

Q. So that in that phase of your business, total cost is your governing factor, is it not?

A. Yes, it is.

Q. I understood you to say you had competitors located on the Union Pacific in I suppose you mean in the cattle feeding and selling and shipping?

A. Yes.

Q. The same kind of business you are in.

A. Yes, that is right.

Q. Do you have such competitors on the Burlington?

A. We are all competitors, that are in the business.

Q. As a matter of fact, isn't it true that almost every cattle feeder and seller in the country is in a sense a competitor of all others in that business?

A. Yes, that is right.

Q. In an over-all way?

A. Yes.

Q. Would this be true, that the sellers on the Denver

market are in the sense that we are discussing it, also com-
[fol. 473] petitors of sellers in the Omaha, Kansas City, or Chicago market.

A. That is right.

Q. If you can't sell in one market you may go on to another.

A. Yes.

Q. There you meet competition from other and different parts of the country in the form of cattle feed in those parts of the country.

A. Yes.

Q. You wouldn't know, Mr. Benton, would you, of any sale of which you have been deprived specifically because of your competitors located on the Union Pacific?

A. No, I would not have any sale I have been deprived of.

Q. I understood you to say, or rather your counsel said it was your advantage to have the greatest number of markets. Do you know just what is meant by that term "greatest number of markets"?

Mr. Blaine: Available.

Mr. Collins: I'm sure you know, Mr. Blaine, but I wanted to see if your witness knew.

Mr. Blaine: I think he does.

Mr. Collins: All right. Let him have a chance.

The Witness: Our cattle move to whichever market it is to be sold on the most advantageous. We have had cattle move to San Francisco, Omaha, Chicago, or Denver.

Does that answer your question, Mr. Collins?

[fol. 474] Mr. Collins: Yes, that at least gets us on the way.

By Mr. Collins:

Q. Now if there developed another market at some place, a great selling market like Omaha, Kansas City, or in a great consuming market like the San Francisco or Los Angeles area, then you would want to get into the newly developed market, wouldn't you, if a new consuming center or marketing area developed, you would want rights to get into that, too, wouldn't you?

A. Yes, I would.

Q. In other words, so far as your individual welfare and

benefits of your company is concerned, it would be to your advantage to be able to get into every market so that you could pick out the one at any time where you could sell at the best price advantage.

A. Yes.

Q. That would be an ideal situation for you, wouldn't it?

A. Yes.

Q. Then your real interest in this situation here, in controversy in this case, is largely one, if not entirely one of the possibility that if the Rio Grande succeeds in the case, it might enable you to buy cattle at a lower price at some times than you are able to buy them now. That is the inbound end, isn't that true?

A. Well, I would have the advantage of going into a new territory where I might be able to buy at a price that would [fol. 475] benefit us over what we are able to do now.

Q. Yes.

Of course you understand you can go to Montana and Idaho now and buy, but the reason you don't is the transportation costs for one thing are higher than they would be if you—that is to your place, and out from your place, located on the D&RG, than they would be if you were located on the Union Pacific.

A. Yes.

Q. So that the reason you don't buy in this territory now, unless as you said a while ago you might pick up some distressed cattle at a particularly low price, is that the total cost to you is more than you can buy cattle for and transport them to Burns and then on out from other areas, isn't that correct?

A. Yes, sir. Comparative cost is higher than it would be.

Q. That is the governing thing.

A. Yes, that is the governing factor.

Q. You told your counsel, I believe, your company is a member of the American National Livestock Association?

A. Yes.

Q. Do you know whether that association is composed of actual shippers? Are you a direct member of the American National Livestock Association?

A. Yes.

Q. Then you are a shipper and a member.

[fol. 476] A. Yes.

Q. Do you know whether, or will you tell us whether that association obtained expressions from its members before filing this petition for intervention?

A. No, I don't.

Q. You don't know?

Mr. Blaine: I will answer it if you want to know.

Exam. Mullen: The questions are confined to this witness. Go ahead, Mr. Collins.

Mr. Collins: Yes, so far.

By Mr. Collins:

Q. You don't know whether, then, the petition for leave to intervene here for the American National Livestock Association was authorized or not?

A. No.

Q. So your testimony, then, is in your own behalf only, isn't that true?

A. Yes.

Mr. Collins: That is all, Mr. Benton.

Redirect examination.

By Mr. Blaine:

Q. Mr. Benton, because of this differential in the freight rate against you, when you go to the Northwest to buy cattle, can you pay as much for those cattle as a man similarly situated on the Union Pacific that has through rates, for sale in transit?

A. I would say not.

Q. Counsel asked you about the reduction in the numbers [fol. 477] of livestock on the forest ranges?

Mr. Collins: No, Mr. Blaine, I didn't ask him that. I asked him about the reduction in grazing area.

Mr. Blaine: All right.

By Mr. Blaine:

Q. Has there been any reduction in your grazing area, other than on the forest?

A. No.

Q. Do you know of any reduction in the grazing areas other than on the forest?

A. No. As a matter of fact some of us have had to turn our irrigated meadows into summer pasture in order to continue to use the properties most advantageously.

Q. Will the reductions in your opinion that you referred to on the forest require men that are now raising some of their requirements of young stock to discontinue that practice and go out in the open market and buy the live-stock for fattening?

A. In our area the ranchers are finding that they have to go more into the feeding business each year in order to consume their crops because of reduction of range allotments, which is making this change-over from a breeding to a feeding operation.

Q. And in that change-over, are they producing as many cattle as formerly, or are they going out and purchasing as you are now doing?

A. They are being forced to go out and buy their supplies.

[fol. 478] Mr. Blaine: That is all.

Recross-examination.

By Mr. Collins:

Q. Mr. Benton, has there been for say 20 years, as far as you know, any large amount of, or area of grazing lands in Colorado, except in what you call the forest areas?

A. I would like to have the question again, please.

Q. Well, as I understand it from your counsel, he wanted you to say that the grazing lands in Colorado now are confined almost entirely to forest areas, he called them. Is that what you understood him?

A. Yes, I think I did.

Q. Does the term "forest area" have any particular meaning in reference to grazing lands?

A. I had reference to the national forests of the United States.

Q. Well, has there been, for the last several years, any large area of grazing lands that were not in these forests?

A. Yes. There is the public domain, which is a very substantial area.

Q. Apart from the national forests?

A. Yes.

Q. And that area of public domain is being further restricted and reduced, is that the situation?

A. Not on the public domain, just on the forest.

Q. I see.

[fol. 479] But there is enough reduction in grazing area, or in the restrictions in the grazing privilege to drive you more and more into the feeding business?

A. Yes. Of course the people in our area are all affected the same way.

Mr. Collins: Yes. That is all. Thank you.

Mr. Blaine: That is all.

Exam. Mullen: Thank you.

(Witness excused.)

Mr. Blaine: Mr. David G. Rice, Jr.

David G. Rice, Jr. was sworn and testified as follows:

Direct Examination.

By Mr. Blaine:

Q. Please state your name and address.

A. David G. Rice, Jr., Denver, Colorado, 411 Cooper Building.

Q. What official position, if any, do you hold with the Colorado Cattlemen's Association?

A. I'm Secretary of the Colorado Cattlemen's Association.

Q. How long have you held that position?

A. Since December 1, 1949.

Q. Prior to your appointment, what was your vocation or profession?

A. For the past ten years, preceding the time I went to work for the association, I was County Agricultural Agent, working for the Extension Service of the Colorado A&M [fol. 480] College, Fort Collins, Colorado.

Q. Entirely within Colorado?

A. That is right.

Q. Do you hold a degree from the University, if so, what?

A. I have a BS degree in Animal Husbandry from the Colorado A&M College.

Q. What were your duties as County Agricultural Agent in the State of Colorado?

A. Agricultural Advisor to farmers and ranchers in the counties in which I worked, and also as Advisor for commodity groups, such as livestock associations and other groups pertaining to agriculture.

Q. Having served as County Agricultural Agent, as well as being reared in Colorado on a cattle and fruit ranch, are you acquainted with the problems of the Grande River Valley and the North Fork Valleys?

A. I was raised in Mesa County, Grand Junction, and for the last two and one-half years have been County Agricultural Agent for Delta County, which of course is also in the North Glen Valley area of Colorado.

Q. Do you feel that qualifies you to testify that you are acquainted with the problems of those valleys?

A. I do.

Mr. Collins: What problems?

Exam. Mullen: I assume all probems.

[fol. 481] The Witness: All agricultural problems pertaining to the livestock industry, and your farming industry.

By Mr. Blaine:

Q. What is a representative shipping point for livestock in Delta County?

A. Delta is a big shipping point, Paioni and Hoskiss are two other points.

Q. Hotchkiss, isn't it?

A. Yes.

Q. What is the Colorado Cattlemen's Association?

A. It is a non-profit voluntary organization, organized to promote, protect, and develop the livestock industry.

Q. Of what is this membership composed?

A. Livestock men, and all phases of the livestock industry, from your feeders to your operators who raise cow herds and sell calves, and those who derive part of their

income from the raising of calves and purchasing of feeder stock, and those who produce calves and yearlings and send those animals out as feeders.

Q. Then they are producers that condition their own livestock for market and in addition, what you term feeders. Are those pen feeders?

Mr. Collins: Pen?

By Mr. Blaine:

Q. P-e-n.

A. We have in a class like you referred to, there is a group like Mr. Benton, who feeds and grows his animals [fol. 482] out on pastures, in both private and public lands.

Mr. Collins: Mr. Blaine, would you excuse me for a little information. Is this witness supposed to testify as a shipper or as an officer of the Colorado Cattlemen's Association only?

Mr. Blaine: As an officer of the Cattlemen's Association, based on his experience as a Cattlemen's Association member.

By Mr. Blaine:

Q. Do some of the members of the Cattlemen's Association specialize or emphasize in the running of cow herds, or the raising of calves for market?

A. That is right. We have a number who derive their income from that.

Mr. Collins: I didn't understand the answer.

The Witness: That is right.

Mr. Collins: You added something else.

The Witness: Their income is from the calves sold from the cow herds.

By Mr. Blaine:

Q. What is the general practice of the others of the membership?

A. They purchase either calves or yearlings and feed and fatten those for markets and other feed lots.

Q. Is transportation of considerable importance to the cattle producers and feeders?

A. That is right.

Q. How does the membership of the association now purchase their requirements?

[fol. 483] A. These calves are purchased—are you speaking of—the livestock man who purchases calves and yearlings to feed out, they are purchased in Colorado wherever possible, and surrounding states. It has gotten to be where they have to go out more and more out of Colorado to purchases these animals.

Q. When making those purchases, do they take into consideration the freight rates from the point of purchase through their ranches to the ultimate market?

A. They are all interested very much in the feed in transit privileges, that is right.

Q. You heard the testimony of Mr. Benton to the markets through which he sold his livestock.

What is the principal market through which Colorado cattle are sold?

Mr. Collins: Just a minute. Is this witness familiar with the details of the selling of all of the members of this—50,000 members of this association? Are you?

The Witness: On a general basis, yes.

Mr. Collins: What I mean is, do you have actual knowledge? Do you see their shipping papers and sales papers and all that?

The Witness: We do not have any access to the shipping papers, other than the ones which go through the Denver yard.

Mr. Collins: I object to Mr. Blaine trying to stretch this witness too far. He will thin him out too much.

Exam. Mullen: The question I think was a general one. I [fol. 484] think this witness is competent to answer it.

Mr. Collins: It is general, Mr. Examiner, because he doesn't have a witness to testify specifically, I suppose.

Mr. Blaine: Oh, yes.

Exam. Mullen: That is not the point here, Mr. Collins. I think the witness can answer that question. He is competent to answer that.

Do you recall what the question is? Suppose you repeat it, Mr. Blaine, if you remember it.

By Mr. Blaine:

Q. Through what market, generally, is the preponderance of the Colorado cattle sold?

A. I would say Denver, Chicago, and other eastern markets.

Q. Do the cattle feeders you referred to in Colorado, particularly the larger operators, find it necessary to buy replacement stock from the surrounding states?

A. They do. A majority of the big operators go out of Colorado to buy at least a portion of their numbers which they feed.

Q. With respect to your two years and a half service as County Agricultural Agent in Delta County, what was one of the main programs that was conducted?

A. One of the main programs was the development of the feeding program for the North Fork Valley. It is a program that is sponsored by your farmers and your cattlemen.

Q. Is that all?

A. I might add that farmers are interested in a program [fol. 485] of this kind, due to the fertility and soil building program which we have in that area.

Q. What, if any, was the main obstacle confronting you in developing that program?

A. One of the problems that came up almost every time we met on this subject was where we would get our cattle to feed with the forest service numbers being cut down as they are in that area, and the same all over Colorado from the national forest grazing areas.

Q. Did you go to the Northwest, by that I mean Idaho, Oregon, Washington, and Montana, in your purchase of cattle?

A. These programs were handled through committees of livestock men and farmers, and they did investigate, and are investigating at this time purchasing cattle in other states than Colorado, which includes the Northwest area.

Q. Just briefly, what was their findings with respect to the Northwest under the present freight rate situation?

A. It was hard for them to purchase cattle in this area and be on a competitive basis, due to their feed in transit rates. The cattle is being bought and brought in at the

present time from southern Utah, and other points of Colorado, for this reason.

Q. Is there more than one railroad serving the larger portion of the forest section of Colorado?

A. D&RG services, I would say, 80 per cent of all national [fol. 486] forests.

Q. How many per cent?

A. A good 80 per cent by themselves, and they serve all of the national forests, but your eastern forests in eastern Colorado are also served by other railroads which would be somewhat in the neighborhood of 20 per cent of the forests.

Q. By the railroads, you mean the Santa Fe, the Missouri Pacific, C&S.

A. That is correct.

Q. You have been speaking of the livestock fattened in Colorado for market. Do you also produce some feeder cattle that must be further fattened before ready for market?

A. That is correct.

Q. How are those disposed of?

A. They're sold at the country points, they're sold in the Denver markets, and back in other eastern markets for feeders, or buyers also play a part in this program.

Q. Then it is proper to say there is a substantial movement of cattle both into and out of Colorado.

A. I would say so, yes.

Q. What is the interests of the Colorado Cattlemen's Association in this proceeding?

A. We're interested in furthering all phases of livestock industry—which Colorado has—complete round picture in the industry, from the breeding, feeding and raising and [fol. 487] marketing of the livestock.

Q. What are the views of your association respecting the opening of the Ogden gateway here concerned?

A. They are very much interested. In fact, they would like to see competitive—the possibilities of our members buying on competitive basis for feed in transit basis, especially for the western Colorado areas, and Arkansas Valley areas.

Q. Referring for a moment in the diminution in the num-

bers of livestock permitted on the forests. Are you familiar with the program generally in the last ten years?

A. I work very closely with the livestock men in the forest service problem, especially in the last two and one-half years. I have been acquainted with it prior to that.

Q. Can you give us a yardstick to measure the general decrease in numbers of livestock permitted by the forest service?

A. I think our best example of the trend is on the examination of the national forests on the point allotment. Your national forests are divided into allotments, with so many livestock men operating in this given area, which is an allotment. On this point of allotment ten years ago, ran some 5,000 head of livestock, with 30 livestock men operating or running this number of cattle.

At the present time there are 16 operators left in this area, and about a month ago the number was cut to 1250 head, which shows the trend we are up against all through [fol. 488] Colorado of going out of the—we are just going to be forced to stop using our national forests for grazing, which means our members, and other livestock men, are going to have to go into a feeding program to use their grass and their commensurate property, or the property they own adjacent to the national forest. One thing of specific example of one man, a Mr. J. B. Claybaugh, of the White Water Shipping Point, his permit has been cut from some 1200 down to 200, so last year for the first time he is purchasing feeder cattle to graze on his grass land and farm land, and I have been advising with Mr. Claybaugh on his farm land and grass land, and I happened to be there when he received his first shipment of cattle of 500 head. He plans to run some 1500 head in a feeding operation. Today he hasn't been able to fill his requirements in western Colorado, and he is going to other points to fill his ranch, and as I said, he is filling it with calves growing out with yearlings and two-year olds.

Q. Mr. Rice, this diminution in the number of animals that can be run on the forest range, does that necessitate the permit-ees discontinuing raising a large portion of their own cattle and going out to purchase cattle for feeding?

A. That is right. They can operate more efficiently with

feeders. They get more returns from the hay and grass if they are going to use the private lands from a feeder standpoint rather than raising a cow and calf program.

[fol. 489] Q. Just one further question.

Then are we correct in understanding that this reduction in the forest pasture has increased the number of cattle necessary to be brought into Colorado for feeding?

A. I don't think there is any question about it. We also have our pen feeding program in your farming areas, and that is on the increase each year. That is going to be another demand on us, a reason for the purchase of outside cattle.

Q. Have you anything further, Mr. Rice, that you feel would be helpful in the disposition of that proceeding?

A. I don't think so, Mr. Blaine.

Mr. Blaine: You may inquire.

Cross-examination

By Mr. Collins:

Q. Mr. Rice, you are familiar, I take it, with the governmental policies concerning grazing in the national forests.

A. That is right.

Q. That is the source of your information.

A. Yes.

Q. I mean insofar as the Government itself is concerned, and apart from your local information there in Colorado.

A. Did you say what is my——

Q. What I was really asking was, I wanted to determine on this record whether you were familiar.

A. That is correct.

[fol. 490] Q. With the national, the Federal Government's policy, with respect to grazing on national forests.

A. That is correct.

Q. That policy is not restrictive to just Colorado, is it?

A. That is on all national forests in the United States. We seem to have a little more sever policy in Colorado than in other states.

Q. Well the policy is enforced, *it is* not, with reference to the type of grazing land, and it's the ability of grazing lands in the forest to support a given number of cattle or sheep.

A. That is correct.

Q. And if the grazing becomes skimpy—well, if the feed becomes reduced to the point it wouldn't support 10 head per acre, they reduce it to 8 head per acre, or some such thing as that, just to get an idea on the record, is that about it?

A. Yes. There seems to be quite a bit of difference of opinion on this grass count, but that is the basis.

Q. Just generally.

A. Yes.

Q. That policy also is enforced, so far as you know, by the Government, in Colorado, Utah, Idaho, Montana, and any other states where there are national forests?

A. Yes, wherever they have national forests it has been the policy, to have the same regulation policy.

Q. Yes, so the restrictions and the consequent reduction [fol. 491] in the numbers of animals produced, partly at least, or raised partly on the grazing lands, is widespread, as far as there are national forests?

A. That is correct.

Q. I understoood you to say, Mr. Rice, that you are particularly familiar with the marketing problems of the members of the Colorado Cattlemen's Association, and say transportation, as a part of the marketing. Are you?

A. I am familiar with the markets they ship to, but the actual transportation detail problems I would say no.

Q. Isn't it a fact that to the Denver market by far the greater portion of the cattle are trucked?

A. No.

Q. And not hauled by rail?

A. We have members trucking cattle in, but the railroad still has the majority of the hauling.

Q. Do you think the Rio Grande Railroad—as I understood you, the Rio Grande has at least 80 per cent of a monopoly on the cattle producing areas, that is the cattle produced in the national forest areas.

A. That is right, national forest areas.

Q. It is from that area that you say the bulk of the cattle, more than 50 per cent, are hauled in by rail?

A. That is correct.

Q. Are you familiar with these big cattle show events

[fol. 492] at the Union stockyards at Denver, do you attend those?

A. That is correct.

Q. Do you have any knowledge as to where the cattle come from to the Denver market, the over-all picture?

Mr. Blaine: Pardon me, I would like to have that question clarified. Does he mean to the show, or to be marketed?

Mr. Collins: To the market, to be marketed.

Mr. Blaine: All right.

The Witness: It is an international show.

By Mr. Collins:

Q. Let's leave the show.

I just wanted to center your attention on that locality; and stick to the market. Do you know in general where the cattle come from to be marketed there at the Union stockyards in Denver?

A. It is still open to the United States.

Q. You don't know whether they come from any place except Colorado, then, do you?

A. I assume——

Q. You can speculate with me as safely as you can with your counsel, Mr. Rice.

Exam. Mullen: Just a minute, Mr. Collins. Do you mean the Denver market as a sales market?

Mr. Collins: Yes.

Exam. Mullen: And you want to know from this witness if he knows where the cattle come from that enter into that sales market?

[fol. 493] Mr. Collins: Yes.

Exam. Mullen: Do you know?

The Witness: You want, then, what comes from other than Colorado.

By Mr. Collins:

Q. Yes, generally from what areas. If you don't know, don't bother with it, just say you don't know.

A. I will say I don't know on that.

Q. All right.

I understood you to say to your counsel that the Colorado Cattlemen's Association desires to purchase on a competitive basis the cattle that they need in their operations.

Now, don't they now purchase on competitive bases from numerous places nearby or within or adjacent to Colorado?

A. Wherever there are areas where they can, yes.

Q. Where are the areas that they can't purchase on what you call a competitive basis?

A. In the Northwest territory, from north Utah, Idaho, up in that section.

Q. Yes.

Where are any other areas in which your purchasers would be at a competitive disadvantage?

A. Oh, I would say California.

Q. Is that because of freight rates?

A. That is because of California being a consumer state [fol. 494] of its own, and cattle going the other way, cattle going west to their own consuming areas on the West Coast. We can't compete under those kind of conditions.

Q. Well, your inability to compete in that situation is not because of the difference in freight rates, is it?

A. That is right.

Mr. Blaine: Your question was not restricted to differences in freight rates, I point that out at this time.

Mr. Collins: Will you read my question.

(Last three questions read.)

Mr. Blaine: Mr. Collins had restricted his question to freight rates, and the witness answered it as asked.

Exam. Mullen: Well it seems to me to be OK. I don't see anything wrong with the question or answer. I think it is clear enough on the record.

Mr. Collins: I want to apply it to freight rates, and I eventually did, which Mr. Blaine didn't enjoy.

Exam. Mullen: I don't think we need these comments.

Mr. Collins: No, I'm sure.

By Mr. Collins:

Q. Your inability to compete or to purchase or deal with California is not because of a difference in freight rates.

A. That is right.

Q. Mr. Rice, I would like to come back to something I spoke of just a while ago. I am not sure whether your answer, finally that you didn't know, would cover this phase [fol. 495] of the activities at the Union stockyards in Denver.

Do you have any knowledge as to enable you to say approximately the portion of the cattle that come into the Denver stockyard by truck, as against railroad?

A. No, I don't.

Q. Mr. Rice, I take it you are in agreement with Mr. Benton's testimony, as I understood him, that Colorado is becoming more and more a pen feeding area, as the Government restrictions on grazing become tighter.

A. Pen and pasture.

Q. Do you have any particular knowledge of transportation and tariffs and so forth? Your counsel said you were familiar with all the problems affecting the members of this association.

Exam. Mullen: I think that was corrected by the witness, as I recall. He said agricultural and livestock problems.

By Mr. Collins:

Q. But not transportation.

A. That is correct.

Q. I see.

Have you been authorized, Mr. Rice, to speak for all or a majority of the members of the Colorado Cattlemen's Association?

A. That is correct.

Q. In this case?

A. I am representing the association, and that was decided on by the Board of Directors, the Board of Control [fol. 496] of the association, which represents all parts of Colorado—all sections of Colorado.

Q. The Board of Directors, as such, are not shippers in their capacity as a Board of Directors, although individuals may be, but not as a Board.

A. That is correct.

Q. Did they present this problem to the individual members?

A. It was up to the individual direct or from the various sections——

Q. I am having difficulty hearing. Could you talk a little sort of past the microphone. It would be more distinct, I believe.

A. The Board of Control had the right to take it up with their individual members. A. P. Starr from the southwest corner of Colorado for that district did, and I assume that the same thing happened with the other members of the Board of Control.

Q. You say he had the right to take it up.

A. And Mr. Starr took it up with a number of members and local associations in his area.

Q. But you don't.

A. Mr. Bledsoe of the southeast section of Colorado took up with the members of the association, and local associations in his area. Your Colorado Cattlemen's Association is made up of individual members and affiliated local livestock associations, and the state as a whole is divided [fol. 497] into four districts, each district having a member on the Board of Control.

Q. You don't know, then, of your own knowledge, whether the five thousand members, or a majority of them, of the Colorado Cattlemen's Association favor the filing of this petition for intervention, do you?

A. Your local associations.

Exam. Mullen: Just a moment, the question was merely, do you know whether or not there was a majority of members that authorized it?

The Witness: No.

Mr. Collins: What was the answer, if any?

Exam. Mullen: He said no.

Mr. Blaine: What was the answer?

Exam. Mullen: He answered no.

Mr. Collins: That is all, thank you. Thank you, Mr. Rice.

Redirect examination

By Mr. Blaine:

Q. Mr. Rice, you stated that the reason you couldn't purchase cattle on a competitive basis in California was not due to the freight rates. What is the reason you can't purchase in the Northwest in competition with Union Pacific producers?

Mr. Collins: We'll admit, Mr. Examiner, the combination rates that are sought in this case are higher than the through rates direct by the Union Pacific.

[fol. 498] Exam. Mullen: Is that all you wanted to develop, Mr. Blaine? That seems to be obvious.

Mr. Blaine: Yes.

By Mr. Blaine:

Q. Mr. Collins has addressed some questions to you respecting a monopoly that the Rio Grande had on the mountains of Colorado. Doesn't the forest service have a monopoly on the Rio Grande?

Mr. Collins: I meant just for clarification, so I believe you can understand it, Mr. Examiner, and for Mr. Blaine's benefit, I was speaking of monopoly of transportation and not of land.

Exam. Mullen: The Examiner so understood it.

By Mr. Blaine:

Q. Another question: Mr. Collins spoke of 10 animals per acre on the forest range. Doesn't he have that reversed? Isn't it one animal for 10 acres?

Exam. Mullen: Mr. Collins was speaking as an example. I don't think you need to press that.

By Mr. Blaine:

Q. Do you know if cattle from Wyoming are sold on the Denver market?

A. That is correct.

Q. Are cattle from Nebraska sold on the Denver market?

A. That is correct.

Q. Are cattle from Utah sold on the Denver market?
A. That's correct.

Mr. Collins: Just a minute now. You don't want to put [fol. 499] this witness on the hot spot, do you?

Mr. Blaine: I'm not. I just asked if he knew.

Mr. Collins: He said he didn't know where the cattle came from for the Denver market when I asked him. Now what does he know and what doesn't he know?

Exam. Mullen: Maybe the witness would rather explain that in his own language. How much do you know about the sales of livestock on the Denver market, from the states from which the cattle come?

The Witness: Just from special contact in talking with various livestock shippers.

Exam. Mullen: This witness doesn't seem to be informed on that, Mr. Blaine.

Mr. Blaine: That is all, Your Honor.

Mr. Collins: Thank you, that is all.

(Witness excused.)

Mr. Kohlwes: My name is E. E. Kohlwes, 715 East 13th Street, Wichita, Kansas.

I would like, with your permission, Mr. Examiner, to offer a petition of intervention in support of the complainant in this proceeding, on behalf of the group of mills located in south-central Kansas.

Exam. Mullen: Any objection to this petition?

Mr. Collins: No, I think not, Mr. Examiner. I might want to ask some questions about it.

[fol. 500] Exam. Mullen: The petition is received, and leave to intervene is granded.

This petition is filed by the Arnold Milling Company and other elevator and milling companies. Do you want to take the witness stand, Mr. Kohlews?

E. E. Kohlwes was sworn and testified as follows:

The Witness: My name is E. E. Kohlwes. My address is 715 East 13th Street, Wichita, Kansas. I am employed as Traffic Manager of the Kansas Milling Company at Wichita,

Kansas, which position I have held for the past eight and one-half years. Previous to that time I was employed as Executive Secretary of the Board of Trade of Wichita for a period of about four years.

Prior to that I was associated with the Traffic Department of the Merchants Exchange of St. Louis, in St. Louis, Missouri, during all of which time I have been closely associated with the marketing and merchandising of grain, and particularly with respect to the rates and transit arrangements applicable to grain and the milling and transit of grain.

Mr. Collins: Mr. Examiner, this may sound a little queer, but if the witness can indicate he is acquainted with Mr. Walter Scott, I will concede his qualifications for the purpose of this testimony.

The Witness: I am personally acquainted with Mr. Scott, [fol. 501] and I have appeared with him in numerous cases.

Mr. Collins: You are qualified as far as I am concerned. Thank you.

The Witness: In addition to being Traffic Manager for the Kansas Milling Company, I also hold the office of Vice President of the Lawrence Milling Company, one of the parties intervening in our petition of intervention.

I should like to add that I am also authorized to appear here and speak in behalf of the various mills listed in our petition of intervention previously submitted.

Exam. Mullen: Did you say the Lawrence Milling Company?

The Witness: The Lawrence Milling Company.

Exam. Mullen: That company is not included in your present petition.

The Witness: I might offer a correction in the petition, Mr. Examiner, if you please.

The Lawrence Milling Company is listed in the Appendix A attached to the petition, but is not included in the signatory mills on page 3 of the petition, and I should like to have the record include the Lawrence Milling Company as a signatory to the petition, if you please.

Exam. Mullen: That may be done.

The Witness: The interests of these mills in this proceeding lies in their disability to purchase wheat in the Pacific

Northwest, and particularly the origin territory located in [fol. 502] Utah, north of Ogden, origins in Idaho, Oregon, and Washington, located on the Union Pacific, for movement from such points of shipment into these various milling points in Kansas for processing or for storage, and subsequent reshipment from such processing or storage points in Kansas to Kansas City or beyond, on the basis of the direct through rate.

Grain that is purchased by these mills from origins located north of Ogden on the Union Pacific, moving through Utah, Colorado, or interior Kansas gateways, are subject to a combination of local rates which exceed the direct through rate applicable over the Union Pacific direct to Kansas City, or to points beyond Kansas City.

A specific situation that came to my attention within the last month was a movement of some nine carloads of wheat that were purchased by the Moundridge Mill and Elevator Company, of Moundridge, Kansas, which is a trade name for the Lawrence Milling Company, and upon shipment from Ogden to Moundridge, Kansas, the shipper at Ogden applied inbound transit billing on these nine carloads of wheat originating at Idaho Falls, Idaho.

The cars moved into Moundridge routed from Ogden by the Union Pacific, Denver, D&RGW, Pueblo, Missouri Pacific. I might say that Moundridge is a local point on the Missouri Pacific, and of course being such, traffic can only move into this point over the Missouri Pacific.

[fol. 503] This wheat was ground and milled at Moundridge, and the inbound transit covering this inbound movement of wheat was subsequently applied against an outbound movement of flour that was shipped to New Cumberland, Pennsylvania. The outbound routing from Moundridge was via the Missouri Pacific to St. Louis, A&S, Wabash, Pennsylvania. Because of the routing into Moundridge, in connection with the D&RGW from Denver to Pueblo, and thence on the Missouri Pacific, the rates on the through movement from the original point of shipment from the wheat from Idaho Falls, Idaho, to the final destination of the flour at New Cumberland, Pennsylvania, aggregated $1.33 and a half cents.

Mr. Collins: Per hundred.

The Witness: Per hundred pounds, not including the Ex Parte 168 increases.

The direct rate from Idaho Falls to New Cumberland, Pennsylvania, if the movement could have been over the Union Pacific direct to Kansas City and then connecting routes beyond would have been $1.21 per 100 pounds, plus the Ex Parte 168 increases, indicating that in connection with this particular purchase of wheat in Ogden, the mill at Moundridge sustained a transportation cost penalty of 12½ cents per 100 pounds.

I should like to say that wheat, of course, when milled, produces flour, but it is not a fact that specific types or specific grades or qualities of flour can be milled from any [fol. 504] quality, type, or grade of wheat. The mills have laboratory facilities and research facilities through which they develop blends of different varieties, grades, or qualities of wheat, to produce specific types and specification flour. Through these research facilities it has been developed that it is necessary to originate the type of wheat which is produced along the Union Pacific Railroad in northern Utah north of Ogden, Idaho, Oregon, and Washington, to blend with other wheats produced in other sections of the country to produce certain specified types of flour.

Not only do the mills through their research facilities develop the types of flour which they undertake to market, perhaps under specified brand reputations, but the large baking companies of the United States likewise have extensive research facilities through which they develop specifications to conform to their baking production formula, and in order for flour mills to undertake to sell flour to those bakeries it is necessary for them to grind or to mill flour to meet the specifications which these bakeries have established for their flour requirements; and again in the production of that flour it is necessary, through research facilities, to originate and blend different grades, types, or qualities of wheat, to produce the desired quality of flour. Therefore, as I have said, it is necessary for us to originate a certain amount of our flour requirements at these points in the Northwest.

[fol. 505] While this necessity exists, and in view of the fact that we must sustain a transportation cost penalty to

originate wheat on the Union Pacific, for milling at these interior Kansas transit points, and reshipment to the consuming area of the East, we must nevertheless originate a certain amount of that wheat and undertake to absorb this disadvantage in transportation costs.

However, if the transportation cost penalty were removed, it would enable us to originate a considerably greater volume of wheat at stations along the Union Pacific Railroad, and provide those producers with an additional outlet and market for a greater quantity of their wheat. We do have available, without transportation cost penalty, wheat that is grown and shipped from stations on the Great Northern, and Northern Pacific, particularly in Oregon and Washington, that moves over those lines through the Billings gateway, in connection with the Burlington through the Colorado gateways, then the Missouri Pacific, Santa Fe, or Rock Island, through Kansas milling points on the going direct through rate without transportation cost penalty.

Mr. Collins: Excuse me, sir. You don't actually mean a penalty in the sense that tariffs sometimes carry penalties, do you? Aren't you, when you say "penalty," referring only to the difference between the combination rates and the through rates?

[fol. 506] The Witness: That is right.

Mr. Collins: Thank you.

The Witness: So to the extent that it is possible to meet our requirements we undertake to purchase as much of our wheat as we possibly can in this Northwest area where we can move it without this so-called additional transportation cost. But we feel very strongly that we should have open to us, and likewise we feel also that the producers along the Union Pacific Railroad in Utah and Idaho, should have available to them a potential market for their wheat which our demands and requirements provide.

I think that concludes my testimony, Mr. Examiner.

Mr. Quirk: I would like to ask a few questions.

Exam. Mullen: All right, Mr. Quirk.

Direct examination.

By Mr. Quirk:

Q. If the rates on grain, and other commodities that are sought by the complainant in this case should be established, in connection with the Union Pacific, transit that you spoke of in connection with a car that stopped originally at Moundridge and was forwarded to New Cumberland, Pennsylvania, would apply, would it not?

A. That is correct, Mr. Quirk.

I might say that so far as the transit and the routes are concerned, they are available today. Our problem is, due to the difficulty that the through rate applicable over the [fol. 507] Union Pacific Railroad is not also applicable over the Union Pacific Railroad through the Utah or Colorado gateways in connection with the Missouri Pacific, Santa Fe, or Rock Island, operating through these interior Kansas transit points. Just along that point, Mr. Quirk, the Missouri Pacific Railroad, in Item 2400-A of their tariff ICC No. A-9822, for example, authorized transit at Moundridge, Kansas, from points on connecting lines when delivered to the Missouri Pacific at Pueblo, and when the outbound reshipment of the grain or its product from Moundridge is to various destinations, on or east of Kansas City, so that if the rate currently in effect directly over the Union Pacific from Idaho, Oregon, Washington, and northern Utah, were made to apply also in connection with the Union Pacific to Ogden, thence the D&RG to Pueblo, and the Missouri Pacific, this mill could then today—could then, I should say, draw that grain on the same transportation cost and reship the grain or its products to Kansas City or beyond as the rate in effect over the Union Pacific direct.

Does that answer your question?

Q. Yes.

So that the present rate situation against which this complaint is filed, does restrict the mills in the area of Kansas which you represent as to their purchase of wheat, does it not?

A. I would say it restricts our ability to purchase wheat, and also limits or circumscribes our ability to move out [fol. 508] bounds with our products, because of our limited

ability in acquiring this particular grade and quality of wheat.

Mr. Quirk: That is all. Thank you.

Cross-examination.

By Mr. Collins:

Q. Mr. Kohlwes, you could have the same relief as to the mills for which you are speaking, could you not, if by opening the route via the Union Pacific at Denver?

A. You mean Union Pacific, Denver, D&RG, Missouri Pacific?

Q. My point is the Rio Grande would not have to participate in the rates to enable your mills to get the relief that I understand you think you need.

A. Well, if I understand correctly, I don't believe the Missouri Pacific Railroad enters Denver. There would have to perhaps be some connecting line between the Union Pacific at Denver and the Missouri Pacific at Pueblo.

Q. Does the Colorado and Southern connect with the Missouri Pacific at some point?

A. I believe so. Yes, if the rate applied, Union Pacific-Denver, connecting lines between Denver and Pueblo on the Missouri Pacific, the relief would be afforded. Yes.

Q. Now, Mr. Kohlwes, do you know from what area the mills, the companies for which you have intervened, obtain the bulk of the wheat that they use, or that they process, rather? Isn't it from the Kansas area, the area local to the mills?

[fol. 509] A. I don't think that could be answered in a definite way. Some mills of course produce what we term a "family type of flour," preponderantly. Others produce preponderantly a baker type of flour, both of which require fundamentally different qualities or grades of wheat, depending upon the type of flour that is produced by the mill would be an important factor in the territory in which those mills might originate their wheat.

Q. Well, without attempting to be very specific about it, wouldn't it be your estimate that probably 90 per cent of the wheat that is processed at these mills comes from the Kansas and adjacent wheat producing areas?

A. No, I wouldn't say that, Mr. Collins.

Q. What would be your estimation?

A. That would be difficult to estimate.

Q. Then why would the mills have located there, do you know why they located in the wheat area, largely?

A. Well of course those mills that have been located in Kansas have been located there for many, many years.

Q. Before the wheat was produced there?

A. No, of course not that.

Q. No?

A. But what I was about to say is, since the founding of these mills there has developed a more scientific and technical aspect in both milling and baking.

Q. I appreciate that.

[fol. 510] A. There has been revolutionary changes in the grades and qualities of the wheat.

Q. Yes.

A. And I would say that originally the mills were located in Kansas primarily for the reason of being close to a source of production of the raw material which they manufacture.

Q. And that now the new patterns in processing have developed to the extent that it would not make much difference where a processing mill is located, is that it?

A. I wouldn't go that strong. As you undoubtedly are aware, the largest milling center in the United States today is located at Buffalo, New York, far away from the actual source of material.

Q. Actually, yes, but do you know why that is?

A. Transportation factors are a very vital factor in the location of a mill, and particularly with respect to the relation of the application of the rates in transit.

Q. At Buffalo, of course, it is because the wheat comes down by lake boats, isn't it?

A. I believe so.

Q. And there are elevators there?

A. I believe so.

Q. Due further to the fact that the consuming markets are so close by Buffalo, isn't that an additional factor?

A. Yes, that is an additional factor. Of course, Buffalo mills an awful lot of wheat that is milled and bonded in [fol. 511] Canada and exported also.

Q. Most of that that is now milled at Buffalo used to be milled at the Twin Cities, didn't it?

A. I can't answer that, Mr. Collins.

Q. I'm sorry. You're too young to remember that.

A. Thank you for the compliment.

Q. I'll withdraw the question.

Could you tell us about what portion of the wheat that is processed by the members for whom you have intervened comes from Idaho or the Northwest area that is involved in this complaint?

A. I have another witness that I would like to present who is in direct charge of purchasing our wheat, and I think perhaps he would be more competent to answer that, Mr. Collins, than myself.

Q. Well, will you tell us about what portion of Idaho wheat is necessary to be mixed or blended with the other wheat which is used in making the flour that is turned out by these mills that you have intervened for?

A. This other witness I think is better qualified to answer that. I could say this, that that would be dependent upon the type of flour that you would be considering for milling.

Q. Well, you don't know approximately how many carloads would come out of the Northwest and you don't know [fol. 512] what approximate percentage of Idaho wheat is necessary to blend with this other wheat, either one of those?

A. The Kansas Milling Company originates approximately 200 to 250 carloads of wheat in the Pacific Northwest annually. Out of that I would say perhaps 90 to 95 per cent must originate on lines other than the Union Pacific in order to overcome the freight disadvantage which we encounter on the Union Pacific.

Q. On what line does it originate?

A. The Great Northern, Northern Pacific.

Q. And in that way——

A. Of course the Great Northern and Northern Pacific does not serve the Great wheat producing area of southern Idaho which we would like to have opened up to us.

Q. You have got all the area opened up to you that is served by the Great Northern, and Northern Pacific, in a route around by way of Bieber, California, Western Pacific, D&RGW, at equal rates?

A. We haven't moved any over that route. Our movement has generally been through the Billings gateway.

Q. Then you do that, and get equal rates, or you avoid what you call the rate penalty by doing that.

A. Correct.

Q. Yes.

A. However, that wheat must originate in Oregon and Washington, and occasionally the demand for the wheat by Pacific Coast mills has a tendency to pull that wheat west-[fol. 513] ward, making it difficult, and at times impossible for us to buy that wheat.

Q. It's too much of a demand for it at times, is that it?

A. Yes.

Q. Well, then, is this a fair statement of the situation, that you do have access to practically all the wheat producing areas in this Northwest section, except this portion in southern Idaho and at equal rates?

A. I would say Northwest wheat producing section, adjacent to the Great Northern and Northern Pacific.

Q. And of course you would be able to tell us what you mean by "adjacent."

A. I mean wheat that may be moved from the farm to country elevators located at stations on those lines.

Q. As far away from the railroad as there is an actual flow of wheat from farms to those railroads?

A. That is right.

Q. If I understand your situation, Mr. Kohlwes, the establishment of route and rates that would enable the people for whom you are intervening to get into this area there—rather to get wheat from this territory, Idaho and eastern Oregon, or wherever it is produced up there, at rates equal to those by way of the Union Pacific, would be your entire interest in this case. That is your interest in this case, just that?

A. Our interest is to obtain an equality of rates.

[fol. 514] Q. But on the wheat from this area that I mentioned.

A. Yes. Off the Union Pacific.

Q. That is correct.

A. Yes.

Q. And your purpose, of course, is purely financial, isn't it?

A. Well, I wouldn't confine it to that.

Q. You wouldn't?

A. No.

As I explained the necessity for the wheat has been established through research developments. And if we are to be successful millers, I think it is necessary for us to obtain the wheat where it is grown to produce the product which we hope to merchandise.

Q. Yes, but you can get the wheat now. There are railroad tracks, and engines that can haul it to you.

A. Right, but you can't merchandise the products competitively with others who have lower transportation costs.

Q. So it does become a matter of the difference in rates and your profit, or the profit of your clients?

A. It has a bearing on the margin of profit, and also the ability to conduct the business, yes.

Q. By the way, maybe I better ask you, perhaps you stated this, but do they refrain from buying wheat now in that Northwest—or in Idaho and eastern Oregon?

A. No, we have to have a certain amount of it, but as I [fol. 515] explained, we try to get by with as a little as we can, whereas if we coudl equalize our transportation costs we could do better job of milling, do a better job of merchandising, and buy more wheat in this area.

Q. Yes, you could buy more wheat and have it transported at low rates and make more money, couldn't you?

A. That would be the obvious result, surely.

Q. Yes.

A. Our objective is the same as yours, Mr. Collins, we're in business to make money, not to lose it.

Q. And you want this last restriction removed from your operations so that you can expand and make money, that is about a fair statement.

A. Sure.

Q. Is it fair to say that you want the railroad to disregard any lawful restriction even though it reduces its financial situation?

A. Mr. Collins, I wouldn't ask the railroads to undertake an unlawful action.

Q. I put it within the law. I said any lawful.

A. It would have to necessarily be that, Mr. Collins, certainly.

Q. I think you understood. You want us to eliminate a lawful restriction. You think we should eliminate a lawful restriction in order to expand your business.

Mr. Quirk: I object to the question. It is irrelevant. [fol. 516] He expects this witness to deal with a legal matter.

Mr. Collins: No, I'm not asking the witness about a legal matter.

Mr. Quirk: Read the question.

Exam. Mullen: Read the question.

(Question read.)

Mr. Quirk: This complaint alleges it is an unlawful restriction.

Exam. Mullen: The objection is sustained. You needn't answer that question.

Mr. Collins: That is all.

Exam. Mullen: All right, sir.

(Witness excused.)

Exam. Mullen: We will take a ten-minute recess.

(Short recess.)

Exam. Mullen: We are ready to resume.

Mr. Kohlwes: I would like to call Mr. L. R. Ginn.

L. R. Ginn was sworn and testified as follows:

Direct examination.

By Mr. Kohlwes:

Q. Please state your name, address, and business association.

A. My name is L. R. Ginn, address, 715 East 13th Street, Wichita, Kansas. I'm a grain buyer for the Kansas Milling Company.

Q. How long have you been working in this capacity? [fol. 517] A. Five years.

Q. What was your duties prior to that time?

A. I was Elevator Superintendent for 19 years, for the Kansas Milling Company.

Q. Will you relate briefly, please, your operations as grain buyer?

A. Well, it's my job to buy the wheat according to a program set up by the Sales Department as to what they sell, and if they sell a wheat mix—some wheat mixes they sell will require from 12 to 25 per cent of what we call soft white wheat, that is wheat that originates up in this country.

Mr. Collins: In this country?

The Witness: In Washington, Oregon, Idaho, and some small amount of its originating in Colorado.

Mr. Collins: All right. Thank you.

By Mr. Kohlwes:

Q. In your work as wheat buyer, do you conduct your operations on the trading floor of the Wichita Board of Trade, along with other buyers and sellers of wheat?

A. That is right.

Q. Do you have an occasion to contact these other buyers and sellers and have a general knowledge of their operations also?

A. Well, to a certain extent. Of course you don't have a knowledge of all of their operations.

Q. In your duties as elevator superintendent, will you please relate what your work was in that capacity?

[fol. 518] A. Well, as elevator superintendent, I had charge of all of the unloading and loading out, making of mill mixes, and keeping wheat, all stocks of wheat in a general good condition.

Q. Will you please explain in more detail what you mean by the term "mill mixes"?

A. Well, a mill mix is a mixture of different types of wheat as required for certain specification flour. You take wheat from various territories, on your bakers' mix, we ordinarily have to use some wheat out of the spring wheat territory, along with our Kansas wheat and Oklahoma-Texas wheat. In our family mixes we use white wheat, or Missouri red, as a mixture, of both, to make a family mix, as required by specifications.

Q. How are these wheat mixes determined? Are they determined by you as the grain buyer?

A. No, your wheat mixes are determined by your laboratory. That is, as to color, and the grain of your bread, protein, volume, and there are many things that enter into that. It's more or less of a science. In other words, you could take a wheat mix and make it up, and probably it won't work at all, according to their specifications.

Does that answer your question?

Q. Yes.

Do you as grain buyer, and perhaps in your capacity as elevator superintendent have occasion to consult and collaborate with the laboratory concerning the qualities of [fol. 519] wheat and the flours produced by those wheats, in establishing wheat mixes?

A. Oh, yes, that is the must. You have to work very close with the laboratory on that.

Q. Can you explain from your collaboration with the laboratory the requirements on having to originate wheat in Idaho or Oregon, and Washington?

A. Can I state that just in my own way?

Q. Yes, please.

A. It seems like the last few years our Kansas wheat lacked some certain characteristics that are required for making a white close textured flour for domestic baking, so to correct that most of the mills, or we have, I'll speak for our mill there, have been adding from 12½ to 25 per cent of soft white wheat, that is the wheat we are talking about that comes from the Colorado, Utah, Idaho, Oregon territory, and some out of Washington.

By adding that we can get by and make a flour that will pass the specifications. If we don't put it in we just can't do it.

Q. Have you had occasion to purchase wheat in the Pacific Northwest?

A. Yes, most of our purchases are made from terminal grain companies or terminal elevators. We purchase a big end of the wheat out here from Spokane and Ogden.

[fol. 520] Q. What has been your experience in regard to purchasing wheat in Ogden as contrasted with your pur-

chasing wheat in Spokane, so far as volume is concerned, I should say?

A. Well, we purchase more in Spokane, because they have billing that will work. In other words, when the flour department gives me an order they also give me a price that I got to buy it at. Well, in turn, I will call a terminal elevator, we'll say I will call Ogden, on an offer of 25,000 bushels of wheat, and the last few times I have called him, he has told me, "Well, I can offer you 5, I have plenty of wheat, but I haven't any transit that will work without going to Kansas City and coming back." So that limits me to the 5 that I can buy instead of 25, or whatever it is I want to buy.

Q. Do you have anything further that you would like to add to your statement, Mr. Ginn?

A. Well, I don't know what the deal is on that. It would be much easier in the part of my business, if the people up here did have the transit so that they could offer you 25, or 50 thousand bushel of wheat at a time, rather than 5 or 10. It works that way out of Denver. We try to buy some wheat out of Denver, and if it originates up here on certain lines, then it won't work down there, without moving over Kansas City rates.

Q. You mean by that, you can't move it through your milling point?

[fol. 521] A. That is right.

Q. And then on to Kansas City.

A. No, we have to take it to Kansas City and then move it back west to Wichita.

Mr. Kohlwes: I believe that is all.

Mr. Collins: I thought, Mr. Kohlwes, this witness was going to give us some idea about the amount of wheat from this Northwest country that he has to have to blend with his Kansas wheat.

Mr. Kohlwes: He related, I believe, from 12½ to 25 per cent. If you care to follow it up further you are perfectly welcome to do so.

The Witness: I can give it to you in terms of carloads.

Cross-examination.

By Mr. Collins:

Q. Approximately.

A. Approximate.

Q. This is for his Kansas Milling Company alone.

A. This has no connection with the other mills, this is for the Kansas Milling Company alone.

Q. All right.

A. In the last year we have unloaded there and used approximately 385,000 bushels of this white wheat.

Q. From the Northwest?

A. From the Pacific, inter-mountain and Pacific Northwest. And ofcourse this is a relative figure, because you [fol. 522] can't tell for sure what you are going to do in the next year.

Q. All right.

A. But if they would get offers on the same amount of business, we could have easily used 150,000 bushels more if we could have originated it this year. That is in the past year.

Q. Could you tell us about how much of this 385,000 bushels originated on the Union Pacific?

A. About 60,000 bushels.

Q. About 60,000 bushels.

And as to the rest?

A. The rest of it originated on the Great Northern and Northern Pacific.

Q. And moved through——

A. Through Pueblo, mostly via the Missouri Pacific, we moved some in by Santa Fe.

Q. At rates——

A. That would carry on through Kansas City.

Q. Yes.

A. And beyond.

Q. You buy on the Kansas City price?

A. All our wheat is based on the Kansas City price.

Mr. Collins: That is all.

Exam. Mullen: Anything further?

Mr. Koblwes: That is all.

Exam. Mullen: That is all, Mr. Ginn.

(Witness excused.)

[fol. 523] Mr. Blaine: Mr. Charles Redd.

CHARLES REDD was sworn and testified as follows:

Direct examination.

By Mr. Blaine:

Q. Please state your name and address.

A. Charles Redd, La Sal, Utah.

Q. In what business are you engaged?

A. Ranching and livestock.

Q. How long have you been thus engaged?

A. Well, all my life. I have been devoted 35 years to it entirely.

Q. What companies or company are you an official of?

A. Well, I am the Manager of a family partnership, known as Redd Ranches, and I operate individually then in connection with two or three of my cousins, on a partnership basis also.

Q. Where, generally, are your livestock operations conducted?

A. We have ranches and cattle and sheep breeding operations in Utah and Colorado. We pasture and fatten lambs in western Kansas, in the Moscow area. We fed some lambs for a number of years at Scotts Bluff, Nebraska. Most of the operations, however, are in Utah and Colorado, and western Kansas.

Q. Does your company, or do you personally, operate or conduct livestock operations in any other locality?

A. Well, we are pasturing or fattening some lambs in Yuma, Arizona.

[fol. 524] Q. Mr. Redd, will you please state for the benefit of the record in your own language why your company is interested in this proceeding?

A. We have purchased and want to purchase in the future lambs and ewes in the Northwest, in Oregon, Idaho, and western Montana.

Mr. Collins: That place is on the Union Pacific Railroad?

The Witness: Well, practically all the livestock purchased in those areas come into Ogden on the Union Pacific.

Mr. Collins: I mean, you want to purchase from origin points that are located on the Union Pacific Railroad, is that correct?

The Witness: Yes. One of our operations is to purchase breeding stock, both ewe lambs, and yearlings, and some older ewes in the Northwest and bring them into our range properties in Utah and Colorado on a transit basis, and then move them on in the fall either to the markets in Kansas City, St. Joe, or to our pasture areas in western Kansas. Our pasture areas in Kansas are largely on the Santa Fe. I believe our—well, our transit privilege is lost on livestock that comes out of the Northwest that is shipped into our range area over the Rio Grande. That is about a 19-cent or 20-cent penalty, as I recall.

Mr. Collins: Higher rates?

The Witness: Higher rates, yes.

[fol. 525] Exam. Mullen: The word "penalty" should be avoided, because it really isn't penalty, is it, it is just a higher rate?

The Witness: I guess that is the proper term.

By Mr. Blaine:

Q. Proceed, Mr. Redd.

A. Well, that's the principal reason why we are interested in a through rate in connection with the UP and Rio Grande. On a large number of sheep, with a 19-cent or 20-cent advantage, that is a factor. It appears to me that the fellow who sells the livestock from the Northwest area, as well as the buyer, which is where I stand, is affected by the higher rate.

Q. On that point, when you say the producer or seller in the Northwest is affected, how is he affected?

Mr. Collins: Well, now, Mr. Examiner, if the Northwest people are affected, they can come in here and testify.

Mr. Blaine: Your Honor, this gentleman is a member of the American National Livestock Association. They have members in the Northwest, and if you want us to call members from every state, we can do it, but this is an experienced livestock man with 40 years' experience, and we are trying

to cooperate with the Commission and the parties by calling the least number of witnesses possible.

Exam. Mullen: What is the extent of this witness' knowledge of the Northwest producers?

By Mr. Blaine:

Q. Have you any knowledge of the Northwest producers, [fol. 526] Mr. Redd, of sheep?

A. Yes, I am acquainted with their operations, both by reason of being on their places, and in talking about problems that are mutual to both of us.

Mr. Collins: I object to his going into these features, unless he can show he is authorized to testify for those producers and shippers from the Northwest. It is not necessary for him to talk about it. He knows he wants to buy cattle up there, and as I understand the situaiton, he wants transit privileges at points in Colorado and Utah at the same rates, that is feeding and fattening in transit, at the same rates he could have them by the Union Pacific Railroad.

Is that a fair statement of your position?

The Witness: That is essentially true.

Mr. Collins: Then why don't we just end it there.

Exam. Mullen: As I understood it, it was a general question. I think he can answer that. Let's see how far he knows. Suppose you answer the question.

The Witness: Well, I know that ranchers, stockmen in Oregon, western Idaho, and western Montana, are engaged in producing replacement livestock. In my case, I produce lambs and yearling ewes, that are regularly offered to our territory, to buyers such as myself, who market their lambs, a good part of them as fat lambs, and don't retain their own ewe lambs or yearling ewes for replacements.

[fol. 527] Of course each fall, each summer, and each spring, too, we have these sheep men, cattlemen who call us and write us about stuff they have to sell, and the factor of transit privileges is an item in the cost operation.

Exam. Mullen: Is that responsive to your question, Mr. Blaine?

Mr. Blaine: I think it will suffice.

By Mr. Blaine:

Q. Mr. Redd, just briefly, how many animals are you running at the present time?

A. Well, I would have to do a little computation. In western Kansas we had last month about 26,000 sheep, which is made up of ewe lambs which will be put in our breeding herds, and lambs fattened, and some yearling ewes, and older ewes which will be used for breeding also.

Mr. Collins: Now, Mr. Examiner, these gentlemen have been talking to me about saving time. Would it help if we could agree that he handled a substantial number of whatever these are, sheep, or cattle, or both, at all these points?

Mr. Blaine: I prefer, your Honor, just to have the record show the definite numbers. It won't be very long.

Exam. Mullen: You're giving us the total number. Is that sufficient?

Mr. Blaine: Yes. That is in Kansas.

By Mr. Blaine:

Q. Now the rest of your operation.

A. In the Utah and Colorado area, where it is essentially [fol. 528] a breeding operation, myself and partners have about 27 or 28 thousand breeding ewes and lambs—that is ewe lambs, lambs, for replacement purposes, and about 2500 cattle. In the Yuma section we have 12,000 lambs.

Q. Have you anything further, Mr. Redd?

A. I don't think so.

Mr. Blaine: You may cross examine.

Cross-examination.

By Mr. Collins:

Q. Do you know whether these Northwest producers have experienced any particular difficulty in any past times in disposing of their production?

A. I don't——

Q. You can say you don't know.

A. I don't know that they have had any unusual difficulty, no.

Q. As I understand you, their animals are more or less

sought after by people in the line of business that you are in, is that correct?

A. Well, they depend upon people such as myself for their——

Q. Don't you depend on them, to some extent?

A. We would like to depend upon them more than we do now. We are seeking other areas. We are buying sheep in the South Dakota and in the eastern Montana and in the Nevada areas.

Q. Are these the only sources from which you are buying now?

A. We buy some feeder lambs in New Mexico, and we buy some in some parts of Colorado, too.

[fol. 529] Q. Is there any particular reason you want to buy from the Northwest?

A. Well, yes. In the first place the raising of these replacement sheep seems to be more of a business for many of the breeders. That is especially true in eastern Oregon and western Montana.

Q. Do you have need, particular need—do those animals up there in the Northwest have any special talents or qualities that benefit you in your business?

A. I think this can be said without exaggeration, that some of the best bred sheep in the country, for range purposes come from eastern Oregon and from the Deer Lodge, Dillon, and western section of Montana.

Q. Would that be so for fattening purposes, too?

A. No.

Q. No.

A. For fattening lambs, the best sheep come from Idaho. We bought this year 15,000 lambs.

Q. Aren't any sheep raised anywhere within the areas where you operate within the local areas of these places you mentioned where your operations are?

A. Will you ask that again, please?

Q. Are any sheep raised in any of the locations of your different operations, or nearby, where they are?

A. Most of them, or a great many of them——

[fol. 530] Q. Are they?

A. I would say no. A great many of the breeders and sheep men in Colorado are in the same category as I am for replacements.

Q. Do you mean there are no sheep raised in Colorado or Utah?

A. There are a great many raised.

Q. What?

A. A great many. But it is a mutton area, more than a replacement or breeding type sheep.

Q. You don't fatten sheep for mutton, then, do you?

A. Now let's see, fatten them for mutton?

Q. Yes.

A. Oh, yes, you fatten them before you make mutton out of them.

Q. Well, that's good. That straightens that out. Do you fatten them before they are made into mutton, or do you just grow them for lamb chops?

A. We do both.

Q. And wool?

A. We do both.

Q. Both?

A. In both cases.

Q. What I'm getting at, can you operate your business at all, can you make any use of the sheep that are grown in Utah, Idaho, western Kansas, or near Scotts Bluff in your business. Can you make any use of the local sheep at all?

A. Well, there is—if you mean for breeding purposes. [fol. 531] When I speak of replacements, I mean the ewes are going to have lambs, are going to be the mother sheep.

Q. Yes.

A. And the sheep in the areas I speak of, eastern Oregon and western Montana, have been breed specially for high wool production.

Q. Yes.

A. And for doing well on the range. The black-face sheep is a mutton sheep, a low wool producer, and the black-face is the one that is used for lambs, and the white-face, or the Rambouille and Columbia are used for mother sheep.

Q. Now, in your purchases, in the Northwest, do you purchase livestock, cattle, or sheep, at points on the Milwaukee, Northern Pacific, or Great Northern Railroads?

A. We buy some sheep at Deer Lodge, Montana.

Q. I don't know what railroad that is on.

A. That is on the Milwaukee and Northern Pacific, but they come to Butte, and go over the UP there.

Q. You buy them on the Great Northern?

A. Not regularly. We have some at eastern Montana.

Q. Do you buy any on the Milwaukee Railroad?

A. As I say, we buy these in the Deer Lodge area, and they are shipped a short distance on the Milwaukee.

Q. I see.

And from those points, don't you have rates that are [fol. 532] equal to those that you would have by the Union Pacific?

A. There is no way to get, no convenient way to get sheep off the Milwaunkee or Great Northern into our area, unless they are delivered by the Milwaukee to the UP, say, at Butte.

Q. Well, will you tell me about the rate situation from those points—freight rate charges?

A. Well, I can't tell you.

Q. You don't know about that?

A. We haven't used the ——

Q. Now listen, Mr. Redd, do you know about it or don't you?

A. I don't know.

Mr. Blaine: How can the witness answer the question?

Mr. Collins: He said he didn't know.

That is all. Thank you, Mr. Redd.

Redirect examination.

By Mr. Blaine:

Q. Mr. Redd, the purchases you make on the Milwaukee, the Great Northern, and Northern Pacific, do they move to your Colorado operations on the D&RGW?

A. No, except as I said the sheep we received at Deer Lodge in that area, they are brought down to Butte and delivered to the UP. We have bought a few sheep on the Milwaukee that have gone east into the cornfields or eastern Kansas, but that isn't of any great consequence, because it is quite unusual.

Q. On any of the sheep which you purchased in western Montana, they've had to come into this box canyon, on the

[fol. 533] Denver and Rio Grande, by way of the Union Pacific at Ogden, did they not?

A. That is true.

Mr. Blaine: That is all.

Mr. Collins: That is all.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

J. A. HAYLEY was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Mr. Hayley, what is your full name?

A. J. A. Hayley.

Q. What is your business address?

A. Littleton, Colorado.

Q. Is that near Denver?

A. That is about eight miles south of Denver.

Q. Are you Manager of the Monarch Lumber Company?

A. Yes, sir.

Q. Does that company have a plant at Military Junction, Colorado, on the Denver and Rio Grande?

A. That is right.

Q. Just describe the business of that plant. What does it do?

A. Remanufacturing and sales of lumber, wholesale and retail.

Mr. Collins: Remanufacturing, did you say?

The Witness: Yes, sir.

[fol. 534] Mr. Collins: You don't saw any lumber out of logs?

The Witness: Not out of logs, no.

By Mr. Quirk:

Q. Perhaps you better describe briefly what you mean by "remanufacturing."

Mr. Collins: That is satisfactory for my purposes, Mr. Quirk.

Exam. Mullen: Mr. Quirk would like to have an answer.

Mr. Collins: All right.

The Witness: We bring lumber in in rough timbers, for instance 8 by 8's, and remanufacture them into a smaller dimension of board, surface them, and usually ship them on south or east.

By Mr. Quirk:

Q. Where is your principal markets for your product?

A. We have a great number of markets, both south, east, and some as far north as Chicago and Detroit.

Q. Do you include southwest in what you call south?

A. Not southwest of Denver, no.

Q. Well, do you have a market in Texas?

A. Yes, very definitely.

Q. From what points do you now purchase lumber, rough lumber?

A. Mostly California area and Oregon, a small amount out of Washington.

Q. Do you purchase any lumber in Idaho?

A. A very small amount.

[fol. 535] Q. Now, is your lumber subject to the transit arrangement at Military Junction? That is, do you have the transit privilege there, and do you indulge in it?

A. Yes.

Q. Would your company purchase rough lumber in the States of Idaho, Oregon, and other points northwest of Ogden, if you had a competitive system of rates to which the transit would be subject?

A. Yes, particularly out of Washington.

Q. You don't have rates out of the State of Washington now via any route?

A. Not transit rate I don't believe.

Q. Well if you had the rates that this complaint seeks, would you purchase the kinds of lumber you use at Military Junction at points served by the Union Pacific, or points beyond on other railroads that would move via the Union Pacific to Ogden?

A. Yes, several million feet annually.

Q. Describe briefly the respects in which such a transit arrangement would be beneficial to your company?

A. At the present time we are at a disadvantage of buy-

ing Douglas fir lumber. They don't grow a good specie of Douglas fir in California. We would like to bring it out of the Columbia River area into our Colorado plant and put it in transit from there, on south and east.

[fol. 536] Q. Did you express the volume of business in and out of your plant at Military Junction in carloads for a representative year, say, 1948?

A. You mean, in or out of military junction?

Q. In and out.

A. Probably in '48, approximately 350 cars in and 150 cars out.

Q. What would you say, if asked the same question about 1949?

A. 1949 there will be approximately 500 cars in, and approximately 50 per cent of that out.

Q. In other words, as I understand your situation at Military Junction, Mr. Hayley, you can't transit at the competitive joint rates anything which originates on the Union Pacific and is handled by you at Military Junction, Colorado?

A. That is right.

Mr. Quirk: That is all.

You may cross examine.

Cross-examination.

By Mr. Collins:

Q. You do have rates from as far up as Seattle, Tacoma, Portland, and on down the lumber producing area there that are equal to the rates by way of the Union Pacific, do you not?

A. Into Colorado.

Q. Yes.

Now, then, what is the difficulty with your using those rates?

[fol. 537] A. Because we don't have the through rate on the Union Pacific out. Some of those mills we would like to buy from originate on the Union Pacific.

Q. Oh.

You want rates from origin points in addition to those that you have from other points?

A. That is true.

Q. Origin points on other railroads?

A. That is right.

Q. Is Douglas fir lumber produced on any of the other roads up there?

A. Douglas fir of course is produced in several states, but it isn't always convenient to buy it from just any mill you would like to buy from.

Q. Why not?

A. Sometimes the species quality is not up as good as some of the rest of the mills. Your business connections aren't the same.

Q. On what railroads is most of the Douglas fir produced that you seek to buy?

A. I'm not in a position to answer that. A lot of them would be on the Union Pacific.

Q. Well, tell me some more about it. Are those the only Douglas fir lumber producing mills you know about located on the Union Pacific?

[fol. 538] A. No.

Q. Where are the others located then?

A. Some on the Great Northern.

Q. Yes, at what place, what town, or near what town?

A. I'm not in position to say. I have not been buying lumber out of there recently.

Q. I see.

Any located on any other railroads than the Great Northern?

A. I have not been buying any out of that country right now, so I would not know what to anticipate if we bought lumber out of there.

Q. Do you know actually where the mills are located that produce Douglas fir in that Northwest country?

A. Other than on the Union Pacific.

Q. You just know about that and nothing else?

A. We have not bought a great deal of lumber off of the Union Pacific, mills originating there, so I am not too familiar with them, no.

Q. You have not bought a great deal from mills located on the Union Pacific?

A. That is right.

Q. Have you bought a great deal from mills located on other roads?

A. Yes.

Q. What other roads?

[fol. 539] A. Western Pacific is one.

Q. Yes.

A. Southern Pacific.

Q. You said the Great Northern. As a matter of fact, isn't most of the Douglas fir lumber produced at mills located on those roads you named, the last three?

A. Including the Union Pacific.

Q. No. Isn't most of the Douglas fir lumber in that territory produced at mills located on the Great Northern, Northern Pacific and Southern Pacific?

A. I wouldn't say no, because I don't know.

Q. That is a good reason.

From what points on the Union Pacific do you want to buy and ship Douglas fir lumber?

A. Seneca, Oregon, would be one point.

Mr. Quirk: How about Grangeville, Idaho?

The Witness: Yes.

By Mr. Collins:

Q. Grangeville, Idaho, and Seneca, Oregon.

A. Yes.

Mr. Collins: That is all. Thank you.

Redirect examination.

By Mr. Quirk:

Q. Mr. Hayley, is it your position as a businessman that you ought to be able to buy lumber off the Union Pacific at equal rates over available routes?

A. It certainly is.

[fol. 540] Mr. Quirk: All right.

Recross-examination.

By Mr. Collins:

Q. You are not satisfied, then, with any limitations at all on your activities, are you?

A. We think we should be able to compete with competitors within 10 miles of us, who are on a through rate on the Union Pacific.

Q. But they are located on the Union Pacific.

A. They are in Denver, yes.

Q. What railroad are you located on?

A. The D&RGW.

Q. I see.

Is what you just said your interest? You want to include purchases from these other two little points, although you have all the other Northwest part available for purchases of Douglas fir?

A. Those two other little points that you refer to ship millions of feet of lumber a year.

Q. And don't the points on the Great Northern and Southern Pacific?

A. The total output is around 180 million feet a month in the two states.

Mr. Quirk: Are you finished?

By Mr. Collins:

Q. Do you consider that a disability or disadvantage?

A. I consider it a definite disadvantage.

[fol. 541] Q. When did you discover this?

A. Since we have been in operation in Colorado.

Q. Have you filed any complaint with the Interstate Commerce Commission about it?

A. I have not from my office, no.

Q. And have you made any complaint about it to the Union Pacific Railroad?

A. I have not personally, no.

Mr. Collins: That is all.

Further redirect-examination.

By Mr. Quirk:

Q. Tell us where your competition is. You said one competitor was in Denver. Where else?

A. Kansas City would be the other point.

Further recross-examination.

By Mr. Collins:

Q. What road would he be located on?

A. There are several roads in there. I am not speaking about any competitor individually.

Q. You don't know what railroad he is located on. Oh, you don't know who the fellow is down there.

A. I think you will find there are several lumber businesses in Kansas and Nebraska that operate transit yards just as we do.

Q. I see.

You think that? You're not sure of it?

A. No; I know that.

[fol. 542] Q. You know that?

A. Yes.

Q. Then, who are they?

A. How many do you want to know?

Exam. Mullen: Who are the principal ones?

By Mr. Collins:

Q. You are naming your competition.

A. Well the Johnston Lumber Company for one.

Q. Where?

A. Kansas City.

Q. Kansas City?

A. Yes, sir.

Q. Is that all you care to name?

A. Yes, sir.

Q. Then you can't name any more?

A. I would rather not try.

Mr. Collins: All right, that is all, if Mr. Quirk doesn't want to ask any more questions.

Exam. Mullen: Is that sufficient?

Mr. Quirk: Yes. I can't ask another question without Mr. Collins going ahead.

Exam. Mullen: You are excused.

(Witness excused.)

LORENZO J. BOTT, was sworn and testified as follows:

Direct examination.

[fol. 543] By Mr. Quirk:

Q. What is your name?

A. Lorenzo J. Bott.

Q. Where are you located?

A. Brigham City, Utah.

Q. Are you mayor of that city?

A. Yes, sir, at the present time.

Q. Are you engaged in any other business?

A. In the monumental wholesale and retail business, granite and marble.

Q. Now what facilities do you have at Brigham City to cut and size marble or stone that you handle?

A. We have regular wholesale equipment there, sawing equipment, polishing, carving and lettering, finishing the product from the rough material.

Q. How many employees do you have?

A. Well, there was a time we had, before the war, we had around 15 to 20, but conditions came up during the war and since the war, and with competition as keen as it is now, we have got down to about 7 men.

Mr. Collins: How many?

The Witness: Seven.

Mr. Collins: Seven.

By Mr. Quirk:

Q. What do you purchase in your business, describe that?

A. We purchase granite from the State of Georgia, [fol. 544] marble from Georgia, granite from Wisconsin, Vermont and Minnesota. Some from Colorado, very little.

Q. Where do you sell your product?

A. We sell through the State of Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington.

Q. Would you be benefited by some transit or stop arrangement, if possible, on the Denver and Rio Grande?

A. Very definitely so.

Q. Explain that in your own way.

A. Under the present set up I have dealers in Colorado, and to get a carload through to accommodate the dealers in Colorado, with a stop over on the car, I am penalized in getting that car into northern Utah, Idaho, or into Montana, and portions or Oregon, due to no through rates over the Denver and Rio Grande through Utah, and then out over the Union Pacific.

Q. Brigham is on the Union Pacific, is it not?

A. It is on the main line through to Pocatello.

Q. Can you give some specific examples of how the absence of the joint competitive through rate, via the Denver and Rio Grande, Ogden, and your city, has affected you adversely?

A. Yes. I lose my business in Colorado due to the fact that I can't accommodate him by getting the car through on up into northern Utah and the Northwest. It doesn't seem that that connection, whatever you call it, applies that way. I can get it through to my dealers in the Northwest [fol. 545] by coming through Rock Springs over the Union Pacific into Ogden. I have a dealer there, but I would like to accommodate both of them. I can interchange those cars, give one a break one time and the one the next.

But the break through Grand Junction and through Price does not give the fellows up in the Northwest a break on that car. It compels my dealers in Colorado to buy the whole carload, which is, of course, a handicap to him, and which he can't do. Then he buys from my competitors under other conditions that causes me to lose my business, and the same if I route it Union Pacific through Rock Springs, then I lose his business.

Q. Now where is your dealer in Colorado located?

A. Grand Junction, Colorado.

Q. Do you have competition from companies or persons engaged in the same line of business that you are in, that are located at Salt Lake?

A. I do, and plenty of it, and plenty keen, too.

Q. Do they ship their outbound product by rail or truck?

A. Well they ship in here by rail, but I'll say this, for the railroad, that our business is fast going to trucks, due to just such things as that, that we don't get the service that the truck people give us. Other cases, I'm finding out that a lot of my dealers that I sell to are buying their own trucks, and they are going for their own material, which is throwing the major material they are using now [fol. 546] from the West Coast.

People are being deprived of the material they would like to have from the east, due to conditions developing in our line of business. If there isn't something done here in some way to help the situation along for us fellows, and which is beneficial to the railroads, you are going to lose 90 per cent of the business into this inter-mountain country, because they will truck their own material.

They will buy it from the West Coast. They do bring it from Wisconsin, and the State of Minnesota, they bring it in here by these duplex trucks. They will bring a carload of those into my dealers, who are in direct competition with me. I am setting up there with a manufacturing client and I can't compete with those conditions.

Mr. Collins: Is that because you don't have transit privileges on the D&RG?

The Witness: Yes.

Mr. Collins: All this you said in the last minute and a half.

Mr. Quirk: Will you let me finish.

Exam. Mullen: We will wait for cross examination.

The Witness: At the present time since the UIC.

By Mr Quirk:

Q. You mean the Utah, Idaho Central Railroad.

A. Yes. Since they have pulled out of the northern part of the state, now I can't get a car of rough stock in over [fol. 547] the D&RG because it just doesn't come to Brigham City over the D&RG.

Q. When the Utah, Idaho, Central, before it was abandoned, you could accomplish these things, is that true?

A. We did. We could, because as I understand it, my understanding of rights, they were in connection with the Denver and Rio Grande Railroad.

Q. How does the service now of the Union Pacific compare with the service you had at the time with the two railroads there?

A. I would naturally say, in all fairness, I have no ax to grind with the Union Pacific. I have had a lot of service out of them, and I have given them thousands of dollars. In all fairness to myself and our customers, I think if our service has dropped off considerably up in Brigham City since the UIC left us, both in the standpoint of rail service, and the standpoint of courtesy that I think railroad people should consider, whether they have competition or not. That is naturally of course competition——

Exam. Mullen: I think we are going into too great length on that phase of it, it seems to me, Mr. Quirk.

By Mr. Quirk:

Q. Mr. Bott, please name some of the points in Idaho, Montana, and Utah, where you have customers.

A. Well, I'll start at Logan in the State of Utah, and Pocatello, Idaho Falls, Butte, and of course practically all the major towns in Montana, Great Falls, I mentioned Butte, Helena, Missoula, and Livingston, Montana, and [fol. 548] Kalispell, Montana, and my major efforts on the West Coast have been at Spokane, Washington, and a little around Eugene and Portland. Boise, Idaho, of course, and Twin Falls, going down through there, also out at a place just over the line out in Oregon there, Walla Walla.

Mr. Quirk: I have no further questions.

By Mr. Quirk:

Q. Have you said all you care to say on this subject, Mr. Bott?

A. Well, I'll say this, as I said before, I want to be friendly with both railroads, but I can see where it would be a great advantage to me if we could have the Ogden gateway. I could handle my business along with competi-

tion, and I am sure I could bring some of my business back. I am certainly in favor of the Ogden gateway.

Mr. Quirk: All right. You may cross-examine.

Cross-examination.

By Mr. Collins:

Q. Do you have now, by way of the Union Pacific, the privileges that you want on the D&RGW?

A. What was that?

Q. Do you now have by way of the Union Pacific the privileges that you want, you think you want, by the D&RGW?

A. As I understand it, we don't have those privileges, without being penalized by a higher rate, there is no through rate.

Q. Well, do you have on the Union Pacific the privileges that you think would benefit you if they were applicable on the D&RGW?

[fol. 549] A. Yes, when I ship Union Pacific out of Omaha, then of course I have all those privileges through to the Northwest.

Q. Do you ship a substantial quantity of this business by the Union Pacific?

A. Well, I do, yes. In the past, of course, I had to, to keep down to the cheapest rate that applied.

Q. I see.

And if the rate weren't cheaper, would you ship by some other road, is that it?

A. Well, I would—if the rates were equal on both railroads, I would try to ship my business up, and give them as near as I could an even break on it.

Q. What portion of your business do you suppose is at points on the D&RG in Colorado and Utah?

A. Well, on my particular stuff from Georgia, that should be practically every car; I could have come out into the Northwest; it should come through Grand Junction.

Q. Should come through Grand Junction?

A. Give this man a breakdown there.

Q. About how many cars do you think that would be a year, Mr. Bott?

A. Well, I'll say this: we don't talk in terms of hundreds of cars like these cattle and sheep people do.

Q. No, I appreciate that.

A. It would not exceed over four cars a year. A carload [fol. 550] of granite or marble is a lot of material.

Q. Yes.

Am I correct in understanding that at Brigham City you take these granite blocks, or marble or what not, and finish them into what some of us call tombstones, or monuments?

A. That is right.

Q. For cemeteries and those places, that it your business, is it?

A. That is right, we bring them in in blocks weighing anywhere from 5 to 20 tons, in what we call a saw block, then we saw them down into different thicknesses, sizes, and shapes.

Q. Are there any other firms or companies near you engaged in such a business?

A. There is nothing between Denver and Los Angeles and San Francisco, except ourselves here. There was a temporary plant here in Salt Lake City a year or two ago, when they were building a monument here, but that is breaking up now.

Q. There is one at Denver though?

A. Yes, there are a couple at Denver, wholesale and manufacturing at Denver.

Q. How about to the Northwest of you, are there any up there that you know of?

A. Not to my knowledge. Of course there are retail monument dealers, but there is no manufacturers.

Q. Manufacturers is what I am talking about all the [fol. 551] time. That is what I mean.

A. No.

Q. None at Portland or Seattle?

A. No, there is nothing up there of any size. Occasionally you will find a dealer that has a small polisher, just to correct some mistakes or some damage.

Q. How is this business conducted, do you get orders from people up in that country, or do you have sales agents up there?

A. I have salesmen out, and then mail orders of course.

Q. I didn't catch the name of your company.

A. John H. Bott and Sons Company. We have been there ever since they built the city. It is the third generation right now.

Q. Your essential interest would be, say, on the granite or marble from Georgia, would be to unload some of the blocks at Grand Junction?

A. No. What would be unloaded there would be finished monuments.

Q. These blocks would come direct to your plant——

A. What comes in is a pool car to be finished up by the dealers throughout the West all along the line. Those are stop-overs for partly unloading.

Q. All of that would be stuff outbound from your plant, wouldn't it?

A. No, it would be coming through. A lot of the ma- [fol. 552] terial I sell to these dealers isn't manufactured in our plant, it is just to make up a pool car so they get the carload rate. It stops off at Grand Junction, and on through, as many stop offs as we can have on it.

Q. Then you are really in two lines of business, finishing the rough blocks, that is what you really do at Brigham City.

A. The reason I can't serve back, they have the freight to Brigham, and they have it back, and the local freight back is just too high for them. I can't serve these fellows back with any amount. Occasionally they get some in emergency, but you can't serve them to any advantage by shipping to Brigham and shipping back to Grand Junction.

Q. Then your interest, as I take it, is in having the through rates with the stop to part unload privileges?

A. Yes.

Mr. Collins: That is all, Mr. Bott, thank you.

Mr. Torinus: Just a minute, Mr. Quirk. Might I ask Mr. Bott one question?

Cross-examination.

By Mr. Torinus:

Q. You mentioned Kalispell, Montana, as a destination to which some of the granite from the East was shipped?

A. I have sold granite as far north in Montana as Kalispell.

Q. Do you know over what railroads that granite moves to Kalispell—has moved?

[fol. 553] A. Well, as I recall that, they trucked that out of Butte. It went to Butte, the car, and it came back and went to Spokane. They trucked it out of Butte.

Q. The granite originated at Butte.

A. No, it originated in the East, and went as far as Butte, and they had to truck it from there with their own trucks, or occasionally they would ship it in locally. I don't know whether that is the Great Northern or the Northern Pacific that runs in through there, the Great Northern I think up there.

Q. But Butte was the ultimate rail destination of this particular granite, is that right?

A. I think if my memory serves me right, that is as far as I can get it on the Union Pacific Railroad.

Mr. Torinus: I have no further questions.

Redirect examination.

By Mr. Quirk:

Q. Mr. Bott, Mr. Collins mentioned the fact that the Union Pacific had transit privileges. Does that help you in trying to serve a customer at Grand Junction, Colorado?

A. I don't know as I get what you mean by the Union Pacific.

Q. The fact that the Union Pacific, if you used the Union Pacific, could afford transit at some point enroute, I am asking you if that in any way helps you serving a customer at Grand Junction, Colorado, which is on the Denver and Rio Grande?

A. No, to my knowledge that is not possible. I could not ship back to them over the Union Pacific.

[fol. 554] Q. That is right.

Now, of course, if you could sell a whole carload to this customer at Grand Junction, you would pay the rate applying to Grand Junction.

A. Which would be the same as Ogden to Salt Lake.

Q. Yes. What are the facts about that?

A. Well, if I could sell him a whole carload there, naturally there would be no necessity of coming on, but in our line of business today, 30 or 40 years ago a dealer handled two materials, that was sufficient. Now you have gotten down where to hold your own against competition, you have to handle about 10 different materials, and there is no retailer in this section of the country that I have any knowledge of that can afford to buy 10 or 12 cars of granite a year, or different materials, in order to have some of each kind.

He has to pool it. He has to pool his cars so he can have a little of each different material. We can't afford to put in 10 or 12 cars in there in order to get a carload of each kind of granite. We just have to pool it.

Q. I take it being a businessman you naturally want to sell to this man at Grand Junction.

A. Absolutely, if I lose him, and ke[illegible] losing a few more, I[illegible]out of business.

Mr. Quirk: That is all.

Recross-examination.

[fol. 555] By Mr. Collins:

Q. Well, Mr. Bott, were you really ever located actually adjacent to railroad trackage in your operation at Brigham City?

A. Close to a spur, do you mean?

Q. Yes.

A. No, we have had to truck our material about a mile from the depot up to our plant.

Q. That has always been so, even when UIC was there?

A. Well, when the UIC was there we had an advantage of maybe a quarter of a mile.

Q. You said a while ago, in your direct testimony, that dealers were going into the use of trucks for this type business?

A. Yes.

Q. As I understood you, you said they get better service by truck than by rail.

A. Well, you do get it delivered right to you in carload quantities. Now those fellows have the equivalent of a car-

load in those big trailers. That way they deliver it right to your plant, which is a big saving to me to have to go down and draw that up a grade there of a mile, especially in the winter months.

Q. Are the rates charged by the trucks of some advantage to you, too?

A. I think—I understand they are handled by interstate commerce, the rates are approximately the same, if not the same.

[fol. 556] Q. You don't know actually, though, do you?

A. No, because I have never had them bring me in a truckload.

Q. Some of them you say are going into the use of privately owned trucks for this material.

A. Yes, some of these dealers tell me they can go down to California and have their own truck and they can go down there and truck it up and they make themselves $15 a day by sitting there and driving that truck, saving against the freight rate being charged today. Our boys went down last winter and got a load, I know that, and they claimed it was a saving to them. They didn't know how they could make $15 any easier.

Exam. Mullen: Is that all of this witness?

Mr. Collins: Thank you.

Mr. Quirk: That is all.

Exam. Mullen: OK, thank you.

Mr. Quirk: That is all, Mr. Bott.

(Witness excused.)

Exam. Mullen: We will recess until 1:45.

Just a minute, gentlemen, I have an announcement to make. It appears we will have to have a night session tonight, and that will be at 7:30 in the Junior Ballroom on the mezzanine floor.

(Whereupon at 12:22 p.m. the hearing recessed to reconvene at 1:45 p.m. the same day.)

[fol. 557] Afternoon Session, 1:50 p.m.

Exam. Mullen: We are ready to proceed, gentlemen.

The next witness is W. H. Snyder.

W. H. SNYDER was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your name?
A. W. H. Snyder.
Q. Mr. Snyder, where do you live?
A. Grand Junction, Colorado.
Q. In what business are you engaged?
A. The monument business.
Q. Are you a retail dealer?
A. Yes, I am a retail dealer in eastern Utah, western Colorado, and northwestern New Mexico.
Q. Will you tell in your own way how the absence of joint competitive rates over the Rio Grande to points on the Union Pacific in the states involved has affected you?
A. Well, in the first place, all of our salesmen—apparently the companies draw the line on the Continental Divide, so that includes Grand Junction—then they go west to Utah, Idaho, Oregon and all the Northwest and California. In order not to run my inventory up, it would be very beneficial to me to be able to get pool cars, which, at the present time, I am not able to do.
[fol. 558] I have to buy full carloads which overstocks me considerably on certain items, and certain items we figure will run us for a year or a year and a half go out, like at the present time I am overstocked on some items, and some items I am entirely out of. I received a car from Tate, Georgia, on October 7.
Q. Is that a carload?
A. That is a carload, which considerably overstocks me.
Q. Now, is the invoice on this heavy per car?
A. Yes, the invoice on a full carload will run you any-

where from six to eight thousand dollars, where, if we were able to buy and have a pool car stock, which we are unable to do at the present time on account of what you call the Ogden gateway, why, we could have an investment of from possibly $1500 to $2000, and we would be able to sell more merchandise because we could go out and push these certain products, where, at the present time, when we sell what we have in stock, we just quit pushing them.

Q. Have you received carload lots of monuments?

A. Yes.

Q. What happens when you receive a carload with respect to any outbound shipments?

A. I don't get that.

Q. Well, when you get a carload, and you sell the part of the carload and ship it in less than carload lots, do you have some examples of that sort?

[fol. 559] A. Yes. When we are forced to sell, or our customers want something, and we have to ship it in L.C.L., we have to charge our customer more money. Now, as an example, from Tate, Georgia, a monument I had to sell last year, weighed 2150 pounds, the L.C.L. rate on it is $4.66 a hundred, and if we were able to get it in a carload we could have got 895 pounds of it at $1.67, and 1255 pounds at $1.98 a hundred, carload lots.

Q. I think if you had the joint rates sought in this complaint, you would have the privilege of having the car stocked at that point to take smaller car lots out, is that right?

A. That is right.

Q. Would that allow you to expand your market?

A. Yes, I think it would considerably.

Q. In what manner?

A. I could go out, if I knew I could have a pool car, with a stop-over privilege in Grand Junction, I would go out and push these certain materials that I am unable to get in pool cars at the present time, which are very good sellers, but you are unable to tell just exactly what you are going to sell the next year or year and a half.

Exam. Mullen: Who would be the pool car operator in that case?

The Witness: I didn't catch you.

Exam. Mullen: Who would be the pool car operator in such a case?

[fol. 560] The Witness: I would buy it—Mr. J. H. Bott of Brigham City is my salesman on this particular material I am talking about.

Exam. Mullen: Who would ship the pool car?

The Witness: Georgia Marble Company, Tate, Georgia.

Exam. Mullen: Where would it be from?

The Witness: It would probably end up in Pocatello, Twin Falls or up there some place. These dealers up in that territory sell quite a lot of Georgia marble, and that is why in the past I have wanted marble, and Mr. Bott told me he could not ship it over into Pocatello and that territory after stopping at Grand Junction.

By Mr. Quirk:

Q. Have you lost sales because you could not use this stop in transit arrangement that would otherwise be applicable if we had the joint through rates?

A. Yes, in one particular case I can remember right now, from Price, Utah, a very large memorial that I could not deliver when the lady wanted it, on account of the pool car, and I could not get the extra charge that I would have to get by shipping it L.C.L.

Another disadvantage of shipping it L.C.L., if you realize marble and granite weigh from 170 to 200 pounds a cubic foot; whenever you crate it and ship it L.C.L., it has to be handled a lot of times, and nine out of ten times the merchandise arrives in a broken or bad condition.

Q. Have you anything further to say, Mr. Snyder, with [fol. 561] respect to that matter?

A. Well, in regard to the marble, it would probably mean there would be from three to four cars a year come through Grand Junction where I would be able to buy merchandise, and on granite possibly six to eight cars, where they would stop in Grand Junction instead of having to buy full cars and overload.

I would be able to buy in pool cars, and that way keep my stock up one hundred per cent at all times instead of having a full stock today and then 30 or 60 days from now being out of some merchandise.

Q. You have to carry a fairly comprehensive line of these commodities these days?

A. Yes, you do. It is not only carrying one item, but you have to carry various colors which are put out by various companies, which is in one way what runs your inventory up if we have to buy a full carload all the time.

Mr. Quirk: You may question the witness.

Cross-examination.

By Mr. Collins:

Q. Just what is the relation between you and Mr. L. J. Bott?

A. Mr. L. J. Bott is a salesman, who lives in Brigham City, Utah, who sells Georgia marble to me and the dealers in Pocatello and in the Northwest.

Q. You say he is a salesman?

[fol. 562] A. He is—I guess you call him a salesman, or the manufacturer's representative, or whatever you want to call him.

Q. When this material reaches you at Grand Junction, is it ready then to set up as a tombstone, or do you do something to it?

A. No, it is ready in one way. What we do is to carve the design, and the name, and the dates, in our place of business. It is all shaped and it is all polished.

Q. I see. Is it your understanding the material that comes to Mr. Bott is also finished except for carving the name?

A. No, Mr. Bott is a wholesaler also.

Q. Oh, I see.

Q. And he does ship in the rough saw blocks in a lot of his material, not in Georgia marble, but in a lot of the granites, and finishes it, polishes it, shapes it, and finishes it in his own plants, which I don't do. I am strictly a retailer.

Q. Yes. If you want a certain quantity of these monuments, do you notify Mr. Bott and he sends in the order for you; is that the way it is done?

A. That is right.

Q. You don't send any orders direct to Tate, Georgia, in your own name?

A. Well, once in a while we do, but Mr. Bott always gets a copy of the invoice and everything goes through Mr. Bott of Brigham City, Utah.

[fol. 563] Q. And to whom would a car of this material, leaving Tate, Georgia, be consigned?

A. It might be consigned to Pocatello; it might be consigned to Twin Falls, it might be consigned to any place up in that territory.

Q. Well, would there be any receiver or consignees' name at any one of these places shown on the billing, do you know?

A. Oh, yes, yes.

Q. Who would that be?

A. That depends on where it was stopped—what company's place it was stopped at.

Q. Let's take a carload purchased by Mr. Bott: The Georgia Marble Company would ship it from Tate?

A. Tate, yes.

Q. Would it ship it to itself?

A. No.

Q. Would it ship it to Mr. Bott?

A. No. For instance, this car went to Ogden, Utah, which was O.K., but this car was consigned to the Intermountain Monument Company from Rock of Ages Company, Berry, Vermont. This is all consigned to a dealer at some definite point, and they pay the entire freight and then we pay our share of the freight to them, see.

Q. I see. Are any of the cars ever consigned to you?

A. Not unless I buy a full carload.

[fol. 564] Q. I see.

A. The pool cars are never consigned to me unless I buy a full carload, if they are going west, no.

Q. And it is only when a full carload is assigned to you that you pay any freight charges?

A. I pay freight charges.

Q. I mean you pay your proportion?

A. I pay my proportion, yes.

Q. If the whole carload is consigned to you, you pay all of it?

A. I pay all of it, yes.

Q. I understood you to say that you had one car from Tate, Georgia, which overstocked you.

A. Yes, on October 7, I believe was the date.

Q. Of this year?

A. Yes, I believe it was October 7 the car arrived—yes, October 7.

Q. You mentioned one sale of one monument that you lost the last year, you said, because you couldn't ship it at a carload rate?

A. Yes, but I could not get my extra. Now, here are two here, one on March 24, one on March 26. The people wanted them up for Decoration Day. I finally got them up after so much talking, and well, you might say, rubbing their back a little bit, and one thing and another. I finally got them up October 7; and they wanted them by Decoration Day.

[fol. 565] Q. Is this your situation, Mr. Snyder, that you can't do business at any profit unless you can haul at a carload rate?

A. I absolutely cannot meet competition if I have got to ship in L.C.L. If I had to ship everything L.C.L., I would close the business down tomorrow.

Q. And yet the volume of your business is not sufficient in itself to enable you to handle your own sales in carload lots, is it?

A. Not all these different granites that you have to handle. Now, you have got Georgia marble, you have got Rock of Ages.

Q. You have what?

A. Rock of Ages granite from Barre, Vermont. You have a Cold Springs dealer from Cold Springs, Minnesota, who would buy some out of St. Cloud and some out of Minnesota, and to stock full carloads of all that, I am not financially in that position to handle full carloads, because it does overstock me considerably.

Q. How long have you been in this business?

A. Since 1929.

Q. When did you become aware of this situation you have been discussing here in respect to freight rates?

A. What I say is a guess, but I have an idea it is approximately back in about 1932 or 1933. Now, I wouldn't

want to absolutely make that statement as being absolutely correct.

Q. That is close enough. Have you filed any complaint [fol. 566] with the Interstate Commerce Commission about this situation?

A. No, but here about four years ago I did have a half a car ordered from Mr. Bott from the Liberty Granite Company of St. Cloud, Minnesota, and he couldn't get a pool car to stop. Came Decoration Day where everybody wants their monument up for Decoration Day, I had so many customers that got mad, I got made and cancelled it out, which is human.

Q. I don't want mine up on Decoration Day.

A. If we could have had a pool car stopping—he did have granite going up into Idaho, and up in there, and we could have had a pool car stopped and I would have been able to get it in plenty of time.

Q. Have you take- the matter up with the Union Pacific Railroad?

A. No, the only one I have every taken it up with is Mr. Bott.

Q. I see.

A. That has been numerous times. How many, I couldn't say.

Q. How do you happen to appear in this case?

A. The D&RG asked me to appear here. They found out—I don't know who it was through, but they found out what troubles I was having and they asked me to appear and present my side of it.

Mr. Quirk: To satisfy his complaint.

By Mr. Collins:

Q. I suppose you expect them to reciprocate some time by giving you some business?

A. I think probably the D&RGW and Grand Junction [fol. 567] probably give me maybe 20 per cent of what business I have, yes.

Q. And you expect to expand?

A. Yes.

Q. Mr. Snyder, about what volume of business would

you say you have been doing annually for the last three or four years?

A. It is from $25,000 to $50,000. It will probably run pretty close to $50,000 this year.

Mr. Collins: All right. That is all.

Exam. Mullen: That is all, sir. Thank you.

(Witness excused.)

FRED SIMPSON, JR., was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your name?

A. Fred Simpson, Jr.

Q. You are located at Colorado Springs, Colorado?

A. Yes sir.

Q. What is your address?

A. 201 West Colorado Avenue.

Q. In what business are you engaged?

A. Shipper of dried beans, also in the grain, seed and feed business.

Q. Are you in the warehouse business, too?

A. We warehouse beans, just our own commodities we warehouse.

Q. Do you package these commodities?

A. We pack beans in one hundred pound bags, and also [fol. 568] we pack beans in cellophane bags, one and two pound consumer size packages.

Q. What types of beans do you handle?

A. We handle black-eye pea beans, large lima beans, baby lima beans, cranberry beans, and small white beans, which originate in California. We handle pinto beans, which originate in Wyoming, Idaho, Colorado, and New Mexico. We handle Great Northern beans that originate in Nebraska, Wyoming and Idaho.

Q. Where is your principal market?

A. Our principal market on dried beans is in the southeastern section of the United States.

Q. Do you ship beans in carload lots or in mixed carloads, or less than carloads; just describe what you do.

A. Our Bean business is a carload business. We bring the California variety of beans into Colorado Springs, northern beans from Wyoming, pinto beans from the western slope of Colorado, and ship these in assorted cars to consuming markets, both in one hundred pound bags and retail consumer packages and cases.

Q. How many cars did your company ship in 1948?

A. I do not have it broken down into a calendar year. From September, 1948 to September 1, 1949, we shipped a total of 390 cars of 800 bags each—rather, 80,000 pounds, each.

Q. How about 1949; did you give that?

Mr. Collins: You gave it up to September, 1949.

[fol. 569] Mr. Quirk: All right. That is enough.

By Mr. Quirk:

Q. Now, do you obtain any beans from Idaho?

A. Yes, we buy beans in Idaho, and ship them to the southeastern section of the United States.

Q. Is the transit arrangements existing at Colorado Springs available to that movement of beans?

A. We can transit Idaho beans through Colorado Springs, provided the eventual destination of these Idaho beans isn't east of the Missouri River.

Q. Does the destination also have to be south of the Union Pacific, as well as east of the Missouri River?

A. I presume so. However, that is no problem to us, because most of our beans move south anyway.

Q. Well, tell us what you could do if you had the rates which this complainant seeks.

A. We are interested in transiting Idaho beans at Colorado Springs because most of our bean business is east of the Missouri River. The way the situation is today, we never bring Idaho beans through Colorado Springs because we do not know what the eventual destination is going to be on the beans, and in all probability it would be east of the Missouri River.

Also, in our assorted car business we need to transit Idaho red beans through Colorado Springs to forward in

our assorted cars. We cannot obtain Idaho red beans any places except in Idaho. This is a difficult situation, as it [fol. 570] does not give us a complete line of beans to offer the trade.

We have many instances where we have lost the business because we had the varieties already mentioned, but could not furnish Idaho reds. Also, it would be of great advantage to us to be able to transit Idaho Great Northern beans through Colorado Springs, because of the fact that some of our beans are going to destinations taking transcontinental rate territory.

With government support prices in Wyoming at 15 cents a hundredweight over prices in Idaho, if we transit Wyoming beans through Colorado Springs and apply the transcontinental rate against such beans, the ultimate result is we have paid 15 cents more per hundredweight for our beans, taking the same rate to the Atlantic Seaboard, as would Idaho beans, which have a 15 cents per hundred lower freight differential and price support differential—correction, it isn't a lower rate differential, it is a lower price suppor

Mr. Collins: May I ask a question for information?

The Witness: Yes sir.

Mr. Collins: Each time you use the word "transiting" in your statement, does that refer to a mixing or different varieties of beans for the purposes of these packages?

The Witness: By "transiting," we mean for packaging, cleaning, or storing.

Mr. Collins: I see.

[fol. 571] By Mr. Quirk:

Q. Is this a correct statement of your last statement, that if you had the rates which this complaint seeks, you could expand your market? If you had the rates this complaint seeks, to have established, your market would be expanded?

A. Yes, it would put us competitive on the long rate territory on the sort of cars of beans on which we are not competitive at the present time.

Q. I believe your company name is Simpson and Company?

A. That is correct.

Q. Do you have another warehousing plant somewhere?

A. We are affiliated with the Robinson Grain Company, from which we lease warehouse space, and also we lease space from the City of Colorado Springs at Peterson Field.

Q. Have you any further statement to make?

A. The only further statement I have to make is that if we purchased Idaho red beans or Great Northern beans in Idaho, and brought them through Colorado Springs via the Ogden gateway, we would be penalized 39 cents per hundred pounds—I rather should say, we would pay a 39 cents higher rate.

Q. Are the red Idaho beans grown in any other state?

A. There are maybe four or five cars grown at Riverton, Wyoming, on the C&NW.

Mr. Quirk: You may cross examine the witness.

Mr. Collins: No cross examination.

[fol. 572] Exam. Mullen: That is all. Thank you, sir.

(Witness excused.)

Mr. Gibson: Mr. Osborn.

MAX OSBORN was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your full name?

A. Max Osborn.

Q. Where are you located, Mr. Osborn?

A. Fruita, Colorado.

Q. That is a point on the Denver and Rio Grande Railroad, is it not?

A. Yes sir.

Q. How far east——

Exam. Mullen: Just a moment. I think I interrupted the witness and we didn't hear just where he is located. Do you mind repeating that?

The Witness: Fruita, Colorado.

Mr. Collins: I didn't get your line of business.
Mr. Quirk: I have not come to that.
Mr. Collins: Excuse me. I am sorry.

By Mr. Quirk:

Q. Where is Fruita, Colorado located in relation to Grand Junction, Colorado?

A. About ten miles west of Grand Junction.

Q. What is the nature of your business at Fruita?

[fol. 573] A. We are commonly known as a country shipper. That is, the bean business; our business is direct origination of the beans from the grower.

Mr. Collins: Beans?
The Witness: Dried beans.

By Mr. Quirk:

Q. Under what name do you operate?

A. The Osborn Bean and Elevator Company.

Q. Will you state in your own way, if it is a fact, you favor the joint rates which this complaint seeks to have established?

A. Would you repeat that?

Mr. Quirk: Read it.

(Question read.)

The Witness: We market our beans on our own account, and we have run into the difficulty since the close of the war on the requirements of our trade for mixed cars of beans on the unavailability, or on account of the combination rate existing at Ogden, to use the variety of Idaho beans throughout our territory.

By Mr. Quirk:

Q. What type of beans do you handle?

A. Pinto beans.

Q. Do you ever get any of these Great Northern beans?

A. By truck only.

Q. Do you handle these Idaho red beans?

A. Yes.

Q. Do you handle peas, also?

[fol. 574] A. No. We have not to date handled any peas because the same condition exists with them as does with the Great Northerns. We are not able to be competitive with the existing rates to make pool cars of beans, which is necessary to get into the direct sale of beans.

Q. Where are your principal competitors located?

A. Our principal competitors are mostly local buyers in our town of doing business, at Fruita, Colorado. From a selling standpoint, anybody in the bean business is a competitor.

Q. Well, do you mix these read Idaho beans with other beans that you handle?

A. We do locally only, for local consumption. We don't mix them, we bring them in for packaging in cellophane for local trade only. At the present time, our operation is confined to a local packaging operation on the Idaho varieties, I would say.

Q. You would have to pay combination rates on any of those beans that came into Fruita and went east, wouldn't you?

A. That is right.

Q. Is that prohibitive.

A. That is prohibitive.

Q. If you had the joint rates which we seek here, you could get transit on those beans at Fruita, could you not?

A. That is correct.

And mix them with other beans, and ship them east?

[fol. 575] A. That is correct.

Q. Is that what you want to do?

A. That is right.

Q. Where is your principal market?

A. In the southeast part of the United States.

Q. Do you have a customer at Gary, Nebraska?

A. That is right.

Q. That is a town on the Union Pacific, is it not?

A. That is right.

Q. What does he do with these beans after they reach him?

A. They are all broken down primarily into cellophane packages, which is—and, of course, some one hundred pound bags for mixed car shipments; together with the northern

beans which originate in the Nebraska territory, for mixed car business.

Q. In other words, this dealer at Gary, Nebraska, being on the Union Pacific, gets the benefit of the transit, and you do not; is that true?

A. That is correct.

Mr. Collins: What was the Nebraska dealer's name again, please?

The Witness: It wasn't named. The name is—it was at Gary, Nebraska.

By Mr. Quirk:

Q. How do you spell it?

A. G-e-r-i-n-g.

Mr. Quirk: You may cross examine the witness.

[fol. 576] Cross-examination.

By Mr. Collins:

Q. Did you hear Mr. Simpson's testimony just now?

A. Yes, sir.

Q. Your situation is substantially similar to his, is it not?

A. Comparable, yes. We are what is known, as I said before, as a country shipper.

Q. Yes.

A. Our principal problem is the marketing of the one variety, namely, pinto beans, that is grown in our territory.

Q. Is Mr. Simpson's operation in competition with yours?

A. Not necessarily.

Q. Not necessarily?

A. We, of course, sell Mr. Simpson beans, that is, at times. He buys beans for his packaging operations with the other brokers.

Q. Could you tell us about what quantity, volume in carloads, or whatever unit you indicate you handle a year?

A. We normally handle around 60, perhaps, 70 to 80,000 pound cars of pinto beans from the Fruita territory.

Q. What kind of beans?

A. Pinto. Our local trade consumes Idaho varieties, approximately 12 to 14 hundred bags, which constitutes a major part of our bean operation.

Mr. Collins: That is all. Thank you.

Exam. Mullen: Is that all?

[fol. 577] Mr. Quirk: That is all.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

HERBERT P. HEIDEL was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Mr. Heidel, will you give your full name?

A. Herbert P. Heidel.

Q. In what business are you engaged, Mr. Heidel?

A. I am engaged in packing house operation and a cold storage operation, along with a feed lot operation for both lambs and beef.

Q. What company are you with?

A. The Lincoln Packing Division of the American Stores.

Q. American Stores Company, or just American Stores?

A. American Stores Company, Inc.

Q. Is that a large company that has storage plants and stores at other points in the United States?

A. This is the only storage plant they have in the Rocky Mountain territory.

Q. I see. That is enough.

Now, will you give the storage capacity at Pueblo?

A. Our storage warehouse has a capacity of between 200 and 250 carloads.

Mr. Collins: Mr. Examiner, I would like to ask a question [fol. 578] or two before this witness goes on, very important questions. You are not appearing here to speak the position or attitude of American Stores, are you?

Mr. Quirk: I object.

Exam. Mullen: Just a minute; have you finished the question?

Mr. Quirk: I object being interrupted at this point.

Mr. Collins: This is quite important.

Mr. Quirk: Why don't you let me ask the question.

Exam. Mullen: Why not reserve it for cross examination?

Mr. Collins: It doesn't have anything to do with cross examination. Don't you think we ought to know what capacity this man is appearing here? He gets all these other things in there first, and a completely erroneous impression will be in this record.

Exam. Mullen: You can cross examine him on it.

By Mr. Quirk:

Q. Is your plant at Pueblo served by the Denver and Rio Grande?

A. Yes sir.

Q. Do you do a slaughtering business there, too?

A. Yes sir.

Q. What commodities do you store at Pueblo?

A. All perishable commodities.

Q. Did you describe what commodities can be moved to Pueblo, and where they can be moved at the going rate, originating in Idaho and other places?

[fol. 579] A. You mean on a through rate?

Q. Yes.

A. The commodities that we can move from Idaho, Washington and Oregon, primarily Oregon, are apples and pears on a through rate.

Q. Are there other commodities from points on the Union Pacific that you have the capacity to store, and you would store, if you had competitive rates?

A. Yes sir.

Q. What are those commodities?

A. Turkeys, primarily. Also Idaho potatoes and onions, and butter.

Q. Did you hear the testimony with respect to the rate situation as given by Mr. Belcher of Pueblo yesterday?

A. Yes sir.

Q. Did he properly describe the rate situation?

A. He did.

Q. That applies to you as well as to his company?

A. That is right.

Q. Do you handle frozen foods?

A. Yes sir.

Q. Now, do you receive any livestock from points on the

Union Pacific which are slaughtered and packed at your plant in Pueblo?

A. Yes sir.

[fol. 580] Q. What are they, cattle or lambs?

A. It is lambs.

Q. From what points are those lambs shipped?

A. I can think of a few offhand, such as Robinette, Oregon, Gerome, Idaho, Aberdeen, Idaho, Hansen and Buhl, Idaho, Mountain Home, Bellview, Hill City, Macon, Ketchum, Hailey, Idaho.

Q. Are those points located on the Union Pacific?

A. I believe they are.

Q. Are they in Idaho?

A. Yes sir.

Q. They must be there.

A. There is also Silver Springs; I failed to mention that.

Q. There is a joint through rate published by the Union Pacific, and applicable by the Union Pacific, to Denver, or through Denver, and thence via any one of the three railroads that operate from Denver to Pueblo, is it not?

A. That is right.

Q. Then there are combination rates on Ogden, Utah, if the lambs move Union Pacific to Ogden, and then Denver and Rio Grande to Pueblo?

A. That is right.

Q. Which of those routes have you been using in the past year?

A. In the past year, we used the *rate* from Ogden direct to Pueblo.

[fol. 581] Q. By the Denver and Rio Grande?

A. Yes sir.

Q. Does that make a higher per car change than if you used the Union Pacific through Denver to Pueblo?

A. It does.

Q. Do you have any rough idea how much that would average per car?

A. It averages about $70.00 to $80.00, I would say roughly, depending on the tonnage of the car handled.

Q. Why do you use the Rio Grande route in view of that extra charge?

A. Our experience in the past years indicated that we

would be abale to get delivery of the lambs more rapidly, and thus suffer less shrink, by using the D&RG from Ogden to Pueblo direct.

Q. Is that because of the necessity of stopping the cars oftener when they move via Union Pacific for feed, than when they move via Ogden and the Rio Grande?

A. If we move Ogden and the Rio Grande, we do not have to stop to feed between Ogden and Pueblo, that is right.

Q. What happens if you move via the Union Pacific?

A. With very few exceptions, we at least have to feed at Denver.

Q. Do you buy these lambs on the Ogden market?

A. A good portion of them, yes sir.

[fol. 582] Q. Does that difference in the stop-off offset the difference in the charge between the joint rate of the Union Pacific and the combination rate on Ogden, keeping in mind shrinkage and everything?

A. We don't think that it does.

Q. Well then, do you think the Ogden gateway because the service is more adequate?

A. That is the primary reason, yes sir.

Q. Are you testifying here today in response to a subpoena which I requested the Interstate Commerce Commission to issue?

A. Yes sir.

Mr. Quirk: You may cross examine.

Cross-examination.

By Mr. Collins:

Q. You do not purport to state the position of the American Stores Company as favoring the complainant's side of this case, do you?

A. Well, I might answer by saying——.

Q. You can answer this yes or no.

Mr. Quirk: I think that is an improper question anyway.

Mr. Collins: It is not.

Mr. Quirk: Unless Mr. Collins wants us to go into this in a really big way, and you will be sorry you brought it up if you do.

Exam. Mullen: Just a minute, gentlemen. We have a simple question here.

[fol. 583] Mr. Quirk: You better talk to some of your own people over there.

Exam. Mullen: Lincoln Packing Company, subsidiary of the American Stores Company?

The Witness: Yes sir.

Exam. Mullen: I think Mr. Collins may inquire into his capacity here, how he is appearing, and for whom. Go ahead, sir.

By Mr. Collins:

Q. For whom are you appearing here?

A. I am appearing in the interests of the Pueblo Division of the American Stores, Lincoln Packing Company.

Q. Do you know what the position of the American Stores Company, as a corporation or company, is in this case?

A. They were hesitant to take sides in the matter, and expressed a desire to be neutral.

Q. I see. You would not be here except for the fact that you had this subpoena served on you?

A. That is right.

Mr. Collins: That is all. Thank you.

Exam. Mullen: Anything further?

Mr. Quirk: Just a minute.

That is all.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

Exam. Mullen: We will have a ten-minute recess.

(Recess taken.)

[fol. 584] Exam. Mullen: Let us proceed, gentlemen.

ROBERT C. JOHNSON was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your name?

A. Robert C. Johnson.

Q. Where do you reside?

A. Denver, Colorado.

Q. What is the address?

A. 635 Eudora Street, Denver, Colorado.

Q. With what company are you connected, that is, in what capacity?

A. Koppers Company, Inc. I am district manager, Wood Preserving Division.

Q. How long have you been with the Koppers Company?

A. Thirty years next April.

Q. How much of that time has been devoted to the wood preserving aspects of the business?

A. All of it.

Q. Does the Koppers Company have a wood treating or wood preserving plant in Colorado?

A. In Salida, Colorado, yes sir.

Q. That plant is served by the Denver and Rio Grande?

A. That is correct.

Q. Where is the source of the lumber that is treated at [fol. 585] the Salida plant?

A. Well, there is a portion of it that comes out of the States of Colorado and New Mexico, some in Utah, and a greater portion, however, comes out of the States of Washington and Oregon.

Q. What rail route do you use to bring that lumber into Salida?

A. Well, we bring it in Southern Pacific, Western Pacific, the Rio Grande, under the present tariffs.

Q. Do you obtain any lumber from points on the Union Pacific, or any lumber that would move via the Union Pacific and the Rio Grande through Ogden?

A. No sir.

Q. Why don't you use such lumber?

A. The rates are not advantageous.

Q. Is there lumber in the territory served by the Union Pacific which you could use and would use if the competitive rates were in effect?

A. I am sure that is true.

Q. First, from what points on the Union Pacific or reached by the Union Pacific would you obtain lumber if you had competitive rates?

A. There would be various points. To name a few would be Baker, Oregon and Burns, Oregon, and there are two or three other points which at the moment I don't recall.

Q. You would be interested in pine lumber, I suppose?

A. We are. We do buy pine, pine cross-ties, and some lumber.

[fol. 586] Q. And fir?

A. And fir lumber, yes.

Q. Poles?

A. Yes sir, poles and piling.

Q. When was the plant at Salida built?

A. 1925.

Q. What is the investment in that plant?

A. Well, an estimate would be about half a million dollars.

Q. Do you favor the establishment of the rates which this complaint seeks?

A. We do.

Q. Why do you favor it?

A. Well, first we like large range and flexibility in procuring our forest products. We feel through that we would gain in production and often in price as well as delivery, and quality also being considered.

Q. After this lumber is treated at Salida, some of it moves outside of the state, does it not?

A. Yes, I would estimate 60 per cent of the materials that go through the Salida plant move out beyond the State of Colorado, both east, south and southeast.

Q. If any lumber came in to be treated from points on the Union Pacific, and moved outside the state, such lumber would have to pay the combination rates on Ogden, Utah, would they not?

A. That is my understanding.

[fol. 587] Q. That would be substantially higher than the going or competitive rates?

A. That is true.

Q. You want to be in position to buy out wherever lumber is to be bought?

A. That is correct.

Q. That is the reason you are here?

A. That is correct, yes sir.

Mr. Quirk: I have no further questions.

Cross-examination.

By Mr. Collins:

Q. Your company has a wood preserving plant at Utah Junction, near Denver?

A. That is right out of Denver, that is right, yes sir.

Q. It is within the switching limits of Denver?

A. It is; it is within the switching limits of Denver.

Q. Do you carry on at that Denver plant about the same kind of operation you do at Salida?

A. Well, pretty much the same. There is some variation in the operations of the two plants.

Q. I don't mean with particularity. You don't, for instance, at either one of the plants, just treat cross-ties or one particular item, do you?

A. No, they are both quite diversified.

Q. Your company has a contract for treating cross-ties for the D&RGW, does it not?

[fol. 588] A. That is correct.

Q. Where is that work done?

A. At Salida, at the Salida plant.

Q. That is located on the Rio Grande route?

A. That is correct.

Q. And the interests of your company here is merely to obtain, if it can, the same rates by the Rio Grande that you have available by the Union Pacific to—you do have those rates available to the Denver plant?

A. That is quite true.

Q. And you want the same rates by the D&RG?

A. Yes.

Q. And for the purpose of being able to treat this lumber and moving on out such portions beyond the state line as your trade requires, that is our interest here?

A. Our position in that is it is the policy of my company

that each plant, each operation stands on its own foundation, meaning that while we have a definite interest in the Denver plant, we have the same interest in the Salida plant, and we expect each plant to bear its own burden. As a matter of fact, we have 22 other treating plants scattered through the country, in addition to those two.

Q. So I understand.

Mr. Collins: That is all I wanted to ask.

Redirect-examination.

[fol. 589] By Mr. Quirk:

Q. Mr. Johnson, in addition to this treating process that you have in Salida, do you do some commercial business in lumber there?

A. At Salida?

Q. Yes.

A. Oh, yes.

Mr. Quirk: That is all.

Mr. Collins: That is all.

(Witness excused.)

P. G. Batt, was sworn and testified as follows:

Direct-examination.

By Mr. Quirk:

Q. What is your full name, Mr. Batt?

A. P. G. Batt.

Q. Mr. Batt, where do you reside?

A. I reside at Caldwell, Idaho.

Q. Have you lived in Idaho a long time?

A. I have lived in Idaho since 1910.

Q. In what business are you engaged in Caldwell?

A. I am engaged in the business of farming; also a shipper of fresh fruits and vegetables.

Q. What are included in that category, what kind of fruits and vegetables?

A. We ship green pease in the pod, lettuce, potatoes, onions, prunes, peaches, and at one time, carrots. In addi- [fol. 590] tion to that, we raise various othe commodities which are not shipped in carload lots.

Q. You say that you were also a farmer?

A. Yes sir.

Q. Do you operate a large farm?

A. I own and operate a number of farms the total acreage of which perhaps would exceed one thousand acres.

Q. In your shipping business, are you engaged in that as an individual or as a company?

A. We are engaged in that as a company, which bears the name of P. G. Batt Produce Company, Inc., of which I am president and manager.

Q. Now, to shorten this up, I am going to ask you to state in your own way why you favor the joint rates and through routing arrangements which this complaint seeks.

A. I do favor the joint rates which this complaint seeks. I live and operate in an area which produces large quantities of agricultural products far in excess of the amount that can be consumed in that area. To dispose of those products advantageously, it is necessary to ship them to other points of consumption.

It is my firm conviction that any obstacle, natural or artificial, which interrupts the free flow of those agricultural products does not serve the best interest of the community or the area in which I operate.

[fol. 591] Q. Is much of the commodities which you have described shipped on sort of consignment, subject to diversion in transit?

A. The very nature of the perishable industry is such that it is absolutely necessary to bill many cars previous to the time they are sold. It then becomes necessary to sell those cars while rolling or in transit. That is a practice which is generally followed by most shippers of fresh fruits and vegetables.

Q. Just where are your principal eastern markets?

A. Well, perhaps our most important market is Chicago. Then following in the order of importance would be Kansas City, St. Louis, and then a multitude of smaller cities interminged in the mid-west, with perhaps a very substantial

portion of our shipments going to New York, and even farther.

Q. Do you have a market in Kansas and states south of Kansas?

A. Yes sir. We seel quite a few cars in Kansas, Nebraska, Oklahoma, and the Southwest.

Q. Have you had any experience with what are called "distressed" cars?

A. I have had many, and I have one specific example which I would like to give which illustrates perfectly what I previously termed an artificial barrier to the free flow of our agricultural products.

Q. Give that example.

A. On October 29, 1949, we shipped from Allendale, [fol. 592] Idaho, P. F. E. 42431. containing 300 crates of lettuce.

Mr. Collins: What was the date, Mr. Batt, please?

The Witness: October 29, 1949.

Mr. Collins: Thank you.

By Mr. Quirk:

Q. How was the car consigned?

A. This car was sold the day previous to loading to Grant Billingsly Company at Wichita, Kansas, through a broker at that point, with the understanding at the time of sale we would agree upon the price upon the day the car was loaded. On the same day the sale was made, and previous to loading, in conversation with another shipper, I learned that he had encountered what he thought was an unfair rejection in Wichita, which put me on my guard, and I instructed the billing agent to pick the best of the four cars which we loaded on that day to go to Wichita.

The three other cars which we loaded on that day were delivered without complaint, or without allowance. The four cars which we loaded on the day previous to that delivered and according to my records, which I have just reviewed, showed no complaint or allowance. The two cars on the day following that also delivered without complaint or allowance. When the car in question arrived at Wichita, I received a wire from the broker which proceeded to com-

plain about the car, and said that it had many of the defects common to lettuce, and that the receiver desired an allowance of 75 cents per crate.

[fol. 593] I immediately called the broker on the telephone to ascertain more particulars with respect to the rejection, and the conversation soon departed from one of quality to one in which the broker called attention to the fact that there was a great deal of other cheaper lettuce in town, and that my receiver was unable to distribute this lettuce at a profit to himself.

We haggled for some time over the telephone, and I finally made an allowance of 50 cents per crate, and asked him to pay the draft, and mailed him a check on that day, our check number 1949, for $159.00, which was 50 cents per crate on that car of lettuce.

On the same day, I had a call from a receiver in St. Louis, Missouri, who had been handling for me on a jobbing basis approximately three cars per week. He wanted a car of lettuce which was rolling and close in. I had no other car of lettuce which was rolling and close in. I did have this car which I would have been very happy to take away from this receiver, who wanted what I thought was an unjust allowance, and give it to the gentleman in St. Louis.

I made a determination through my local agent as to what the differential or the increased freight rate would be if I were to divert this car from Wichita into St. Louis, and I received the following information: the freight from point of destination, Caldwell, Idaho——

[fol. 594] Q. Point of origin.

A. —was to Wichita, $1.11 per hundred. Had I billed the car direct by way of Kansas City to St. Louis, the rate would have been $1.29 per hundred, but by diverting the car out of Wichita, and thence to St. Louis, I would have been subject to a combination rate which would have been $1.75 per hundredweight. That leaves a difference, if I check it here correctly in my head, of 46 cents per hundredweight that I would have been penalized. With this knowledge, I, of course, made the allowance on the car of 50 cents per crate.

Q. Do you understand, Mr. Batt, that if the competitive rates which the Denver and Rio Grande seeks in this case

were in effect, you could have reconsigned that shipment from Wichita to St. Louis at the going rate?

A. That is my understanding, and that is what I desire.

Q. When these cars of fruits and vegetables are rolling, and they get into a spot where the through rate does not apply, if you have to divert them, does that tend to put the owner of the car at the mercy of the local dealer or broker?

A. It is very definite that it does. Such markets are known in the produce trade as pocket markets. We sell in those markets with considerable reluctance. It is my experience, and I think the generally accepted theory of produce shippers generally, that the hazard of rejection in such markets is greatly increased.

[fol. 595] Q. If you have any further statement to make, proceed to make it.

A. I have this further statement to make, that those markets which we term "pocket" markets adapt themselves to rejections. When an unscrupulous receiver rejects a car, and gets an unjust allowance, he is in the position to undersell his competitor, thereby forcing his competitor to resort to the same unethical practice of asking for unjust allowances.

Q. You mean by that, Mr. Batt, that the effect of one or more of these cars that are distressed, breaks down the general market, or tends to break down the general market in that area?

A. I do. I mean that another shipper who has a carload of lettuce in Wichita at the same time that I had a car, upon which I had made an allowance of 50 cents, stood a very great probability of receiving a demand for an allowance from his receiver in order to meet the competition on the car on which I had reduced the price: and I, in turn, was forced to reduce the price because someone previous to me had been compelled to reduce his price. It is an iniquitous cycle.

Exam. Mullen: I think you have established the point.

By Mr. Quirk:

Q. Mr. Batt, while you ventured this experience at Wichita, that isn't the only place, under the existing system of rates from Idaho, where the shippers could be in the predicament this car was?

A. That is correct.

[fol. 596] Mr. Quirk: That is all.

Cross-examination.

By Mr. Collins:

Q. In the case of these two cars, you gave us instances of two cars, didn't you, Mr. Batt?

A. Just one, sir.

Q. I thought you mentioned a second one. You mentioned P. F. E. 42431.

A. Right.

Q. You didn't mention any other car?

A. No sir.

Q. How did that car move, over what railroads did it move to Wichita?

A. It moved as per the request of the receiver—U. P., Ellsworth, Frisco.

Q. Didn't you know that car could have gone on to St. Louis at the through rate?

A. I did not.

Q. You did not?

A. That is right.

Q. Do you have a traffic manager available to you, a so-called traffic expert, or do you have knowledge yourself of the tariff situation?

A. We usually seek those tariff rates or answer to our tariff problems from the local agent.

Q. Are you a member of the Potato and Onion Shippers' Association?

[fol. 597] A. Yes sir.

Q. Do they have a traffic advisor, so-called?

A. They have a traffic manager. I don't call him an expert. Usually I don't consult him in matters pertaining to rates.

Q. You made no effort after this car was distressed at Wichita to extend it on to St. Louis?

A. No sir.

Q. Could you tell us, Mr. Batt, how many of such distressed cars you have had in the last two or three, or six months, whatever time you can mention?

A. No sir, I could not tell you exactly. It would be comparatively few in number, perhaps ten, because we seek to avoid those situations.

Q. Ten within what period, would you say?

A. Perhaps during the shipping season of 1949.

Q. That would be since July 1?

A. Perhaps June 1.

Q. You may have stated your customary or usual volume, number of carloads you ship annually, but I didn't catch it. Will you state it now?

A. Yes sir. We ship annually between four hunderd and six hundred cars.

Q. Are most of those marketed, say, at points east of the Missouri River?

A. I am guessing. I believe a majority of them would be. [fol. 598] Q. If you can approximate it, would they be marketed in the upper part of the country, in the Chicago area, toward the northern part of the country, east of the Missouri River?

A. I think a majority of them are so marketed.

Q. Is your shipping season completed this year, this year's harvest of these different commodities?

A. The harvest is completed.

Q. But the shipping is not?

A. The shipping will continue, though in a smaller degree.

Q. You made payment to this man that you mentioned, this dealer you mentioned in Wichita, $150.00. Is that in the nature of a refund for what he had already paid you?

A. Yes sir, $159.00.

Q. $159.00; that is what I have. He had already paid you for the shipment?

A. I had drawn a draft on him.

Q. I see.

A. And our mutual arrangement was he would pay the draft in full as originally drawn. I mailed him a check, which I did.

Q. You referred to the results of effects of the activities of what you termed unscrupulous dealers.

A. Yes.

Q. Was not this such a dealer, or was he?

A. I would say he was not.

Q. You think he was entitled to the $159.00?

[fol. 599] A. No sir, I do not think he was entitled to it.

Q. Well, some other unscrupulous dealer then started the cycle that finally caught your dealer, is that it?

A. That is my theory.

Q. I see. But you think the sought joint rates and routes by the D&RGW would stop the activities of these unscrupulous dealers?

A. I think it would reduce them, and if I didn't think so, I certainly would not be here today.

Q. Is it your thought that these routes should be—these routes and rates should be established in order to protect the growers and shippers like yourself from the activities of these unscrupulous dealers?

A. Partially, only. I believe that such a barrier as now exists is detrimental to the free flow of agricultural products.

Exam. Mullen: Isn't your point, Mr. Witness, that you would get fewer so-called pocket markets?

The Witness: Right, sir.

By Mr. Collins:

Q. Well then, is this your position, realizing, do you not, that to establish the routes and rates desired by the D&RGW here would, to the extent that it obtained traffic now being hauled by the Union Pacific, reduce the Union Pacific's revenues? Do you realize that first?

A. I do.

Q. Now then, do you think that should be done as a means of aiding or rather protecting you from so-called unscrupu-

[fol. 600] lous dealers, and to relieve you of the so-called pocket markets which was not the case at Wichita?

A. Well, to begin with, I do not think it would reduce the tonnage of the Union Pacific. I think that the opening of these pocket markets would increase the consumption of Idaho products as much as would be diverted away from the Union Pacific, and I sincerely believe that the tonnage enjoyed by the Union Pacific would not be decreased.

Q. How would we make up for whatever the D&RG might solicit away from us in Idaho?

A. We would sell additional cars into other areas, and the more we can sell advantageously, the more we produce.

Q. Don't you sell all you produce now?

A. Yes sir, but I could produce more.

Q. You could produce more?

A. Yes sir.

Q. What would stop you? Why don't you produce more now?

A. One of the limitations in producing, sir, is the inability to market profitably.

Q. Isn't that the limitation?

A. Largely so.

Q. That, of course, eventually is market price, and your net, isn't it?

A. Yes.

Q. These products you raise, Mr. Batt, I understood them [fol. 601] to be peas, lettuce, potatoes, onions, beans, and peaches.

A. Yes. Did you say "beans"?

Q. Beans.

A. No, prunes.

Q. Prunes. Do any of those commodities have government support prices?

A. Yes sir.

Q. Which ones?

A. Potatoes.

Q. Onions?

A. No sir.

Q. Prunes?

A. No sir.

Q. Are potatoes the only one?

A. It seems to be the *one* one I can think of.

Q. You don't have any on lettuce?

A. No sir.

Q. Or peas?

A. No sir; not peaches.

Q. Yes?

A. Nor carrots.

Q. I understood you to say that you felt it was injurious, generally, for any natural or artificial barrier to exist against what you call the free flow of commerce. Do you

regard this government support price to your potatoes as an [fol. 602] artificial protection to you, or a natural protection?

Exam. Mullen: I don't think we need to go into that, Mr. Collins. It doesn't seem to me to be pertinent here.

Mr. Collins: What this case is about, so far as these shippers are concerned, Mr. Examiner, is to match their economic situation against that of the railroad. Now, he calls our gateway an artificial or some kind of a barrier. At least it is an artificial something or other that apparently the management of the railroad considers as a protection and a financial benefit to it.

Now, I would like to contrast or compare situations with him. I won't argue against your ruling, though.

Exam. Mullen: My ruling is, the policy of the government, in price support of potatoes, is not pertinent in this proceeding.

By Mr. Collins:

Q. Mr. Batt, could you tell us what finally became of the contents of this car, P.F.E. 42431, sold to this dealer in Wichita?

A. I presume it was unloaded in Wichita. He paid the draft and I sent him the check, and I know nothing more about it.

Q. It is your position here, as I understand it, that you would like the route and rates sought by the Rio Grande Railroad in this case?

A. That is correct.

Q. Is it your thought that would add competition, competi- [fol. 603] tive routes, inject competition where there isn't any; is that your thought?

A. No sir.

Q. Do you think you would derive any benefit other than this so-called relief from the pocket market and from the unscrupulous dealer; is that the extent of the relief you would hope to receive?

A. That is the principal reason that I am here, sir.

Q. I understand that you have stated in serious discussion of this situation that you realize that while competition can be beneficial, it can also be destructive?

A. Yes sir, I made that statement in defense of the Union Pacific.

Q. That is your thought, that competition can reach the point of destruction. You are not taking the position here in order to necessarily produce additional competition of routes, are you?

A. No sir.

Mr. Collins: That is all. Thank you.

Redirect examination.

By Mr. Quirk:

Q. Mr. Batt, do you know that the large volume of commodities that you are interested in move from Idaho to Wichita and other points south of the line of the Union Pacific in Kansas and elsewhere, via Denver and Pueblo, in connection with the Santa Fe and other railroads, the Mis-
[fol. 604] souri Pacific?

A. Yes sir, I know that.

Q. Do you know whether or not it is a fact that most of the traffic you handle moves that way rather than through Ellsworth, Kansas, and other more eastern junctions?

A. I would not say which way a majority of it goes. We usually yield to the wishes of the receiver and route it by the method which he asks, giving the diversion point he chooses.

Q. Well, in all events, if it — shown here in this record that if this car had moved to Wichita through the Pueblo gateway, and the Missouri Pacific, the joint through rate from your shipping point in Idaho to St. Louis, after the car is reconsigned, would not apply, and presumably when you had this rate checked, if the Union Pacific intimation is correct, the man did not have the route. He assumed it was moving to Denver, is that correct——

Mr. Collins: Mr. Examiner, I object to all these ifs and presumptions and so forth.

Exam. Mullen: It seems to me that objection is sound, Mr. Quirk.

Mr. Quirk: Well, all right, I think perhaps it is.

By Mr. Quirk:

Q. This much you can express an opinion on, inasmuch as the counsel for the Union Pacific introduced the subject: He asked you whether, if the Rio Grande competitive rates sought were established, the extent that the Rio Grande [fol. 605] could cause traffic to move to Ogden, instead of along the route of the Union Pacific, the Union Pacific would presumably get less revenue than otherwise on that traffic. You heard that statement, did you not?

A. Yes sir.

Q. Now, the car that you happened to use as an example moved through Ellsworth, Kansas. Now, doesn't it follow also that since the Union Pacific joins in short hauling itself through Denver, that they presumably get less revenue when the traffic moves through Denver?

Mr. Collins: I object to that. The witness is not qualified to presume about the revenues of the railroads.

Mr. Quirk: You asked him to presume on the other question.

Mr. Collins: No.

Exam. Mullen: I don't think we need to indulge in these presumptions. I shall ask the witness, are you informed about the various amounts of revenue the different carriers are getting?

The Witness: No sir, I don't feel qualified to answer that question.

Mr. Quirk: I thought Mr. Collins made him qualified.

Mr. Collins: I said nothing to him about revenue via different routes.

Mr. Quirk: That is all.

Exam. Mullen: That is all. Thank you.

[fol. 606] (Witness excused.)

J. F. WATSON was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your full name?

A. J. F. Watson.

Q. Where are you located, Mr. Watson?

A. Parma, Idaho.

Q. Are you engaged in business at Parma?

A. Yes sir.

Q. In what name?

A. I am vice president and general manager of the J. C. Watson Company of that city.

Q. J. C. Watson Produce Company?

A. J. C. Watson Company.

Q. J. C. Watson Company. Describe the nature of the business in which that company is engaged.

A. It is engaged in the production and packing, distribution of fresh fruits and vegetables, namely, peas, lettuce, prunes, apples, potatoes, and onions.

Q. Where are those commodities principally marketed?

A. They are marketed throughout the United States and portions of Canada.

Q. Well, are they marketed in all the states of the United States, or are they principally marketed in Central States or [fol. 607] Southwestern States?

A. Our commodities are marketed in all states. There are certain commodities that have a wider distribution in particular areas.

Q. How many carloads do you handle a year?

A. Our volume runs from 1500 to 2000 cars annually.

Q. Will you state what your position in this case is?

A. I am in favor of seeing the Ogden gateway opened, primarily so that we may have a free flow of goods into all markets. Our major problem in the area of Idaho, and all of our Western States, is a problem of over-production. We are constantly seeking other markets to find better distribution for our products.

Whenever we run into sections of the country where we have this free flow impeded by closed gateways, our distribu-

tion suffers in those areas, and for that reason I feel that anything that would develop new markets for us, and open up wider distribution, would be helpful, more particularly in opening the Ogden gateway, it would give us wider distribution into the southwestern territory, which, by nature of its location, is our logical market area. By that, I mean Kansas, Oklahoma, and such states in that area.

Q. Have you had experience with so-called distressed cars in certain marketing areas?

A. Yes. Anyone who is in the shipping business runs into that constantly. We have certain market areas where, if we [fol. 608] leave the Union Pacific Railroad, we are not able to proceed east of the Kansas City on the through rate.

Q. Will you describe where you consider that area to be?

A. That area primarily is the southwest territory, or all points this side of the Missouri River.

Q. South of the Union Pacific in that territory?

A. That is right; more particularly, the part we are more concerned with is through Kansas, Oklahoma and Texas, but primarily in through the Kansas area, because that is on a direct line with our eastern markets. It is very convenient at times to be able to stop a car off at the town of Wichita, or Hutchinson, and attempt to make a sale on the car at those points.

If the sale is not effected, we would like to be able to continue the car enroute to eastern markets. At the present time, if we leave the Union Pacific at Denver to get into Wichita or Hutchinson, we are not able to proceed east of Kansas City.

I have one or two specific cases along that line, if I may present them.

Q. Yes. I don't know that you need to give the car numbers. Give the examples by description. I think that will be sufficient.

Exam. Mullen: I think just a general description will be sufficient to illustrate your point.

[fol. 609] The Witness: All right. The point on this car was a car of potatoes shipped from Notus, Idaho, August 5, 1949. This car was sold to the Grant Billingsley Fruit Company, at Wichita, Kansas, who requested routing of U.P.-

Santa Fe at Denver. The original invoice on this car was $506.00.

The car later arrived in Wichita and was rejected for no other reason than that the potatoes were too large. Because we were off the Union Pacific, we knew we would be penalized on rates if we attempted to move the car east of Kansas City. Consequently, for two days we attempted to re-sell the car in the territory which we might move, protecting our through rate.

We solic-ted business from Oklahoma City, and other points in that area, and we were unsuccessful to do so, and on the second day, the buyer in Wichita called us back and stated that they noticed the car was still sitting on the track and had not moved. We told them that was the case, and we had been unable to move it because the through rate would not apply east of Kansas City where there was a ready market for the larger potatoes.

On hearing this, he made an offer of $2.25 delivered, or an invoice of $317.00. Because we had no other order in that area, because we could not move east on the through rate, it was necessary for us to accept this offer made, or we showed a loss on this particular car of $134.90.

[fol. 610] Mr. Collins: You say you did have that loss?

The Witness: That was the loss, that was the difference between the original invoice price and the final settlement. That was a car of potatoes. We had the same thing on a car of lettuce, which was again requested U.P.-Santa Fe at Denver, into Wichita, and on arrival at Wichita the car was rejected for no other reason than that the price apparently was too high to compete on that market.

We again tried to seek an additional outlet in the limited area where we might move on the through rate, namely, in and around Oklahoma City, Texas, and primarily Kansas City. Because of the glutted condition of the markets, we were not able to receive an order for the rejected car. Balancing in our own mind the difference between an allowance and paying the combination rate east of Kansas City, we accepted an allowance of 70 cents a crate, or showing a difference from the original invoice of $218.40, merely because we had the mental hazard that we could not move east of Kansas City.

We have another case——

Exam. Mullen: Is it of the same type as the two previous ones?

The Witness: This involves rates into Liberal, Kansas, in which it is necessary to leave the Union Pacific to enjoy the lower rate.

Exam. Mullen: Go ahead. You can give that also, if you wish.

[fol. 611] The Witness: To get into Liberal, Kansas, it is necessary, to be competitive, to enjoy the minimum rate of 66 cents, which requires a specified routing of U. P. to Denver, Santa Fe to Dodge City, and Rock Island to Liberal.

Exam. Mullen: What is the route again?

The Witness: U. P. to Denver, Santa Fe to Dodge City, and Rock Island to Liberal. In other words, to enjoy the cheapest rate, it is necessary for us to leave the Union Pacific at Denver, and as soon as we leave the Union Pacific at Denver, we are in a pocket market at Liberal.

Mr. Collins: Liberal, Kansas?

The Witness: Liberal, Kansas. I am mentioning that only to show that we are reluctant to sell in these pocket markets because of the fact we always have the danger that the car might not deliver, and we then have no alternative in the way of moving to another market.

By Mr. Quirk:

Q. You forward a substantial amount of your products via the U. P. through Denver, and thence Pueblo to this territory that you have been describing?

A. Yes. We do that whenever it is requested by the consignee.

Q. In other words, you follow the instructions of the consignee?

A. That is right.

Mr. Quirk: That is all.

Cross-examination.

By Mr. Collins:

Q. How many of these so-called distressed cars did you [fol. 612] have last year, 1948?

A. I don't have that figure. It would run an estimated 15 to 20.

Q. 15 or 20? For the last four or five years, you have not been having any of them, have you, to amount to anything?

A. Oh, yes, we have always had them.

Q. You always had them?

A. Yes.

Q. One of these gentlemen here, I believe Mr. Holden, said he was pretty much in the same business and had not had them until the last few months.

A. We have always had them, off and on.

Q. Isn't that matter of rejection of cars common throughout the transactions, so far as you might know, in these products that are shipped as yours are, subject to rejection?

A. It is common, yes.

Q. Might you not have the same thing develop if you shipped a car to Chicago over any route at all?

A. No, because we always have the alternative of being able to move on to another market.

Q. You mean you have the rejection; you don't mind that?

A. We have the rejection, yes.

Q. You don't mind that?

A. No.

Q. Provided the railroad will keep on hauling the stuff, [fol. 613] and letting you hunt a market?

A. That is correct.

Q. At no additional rate?

A. Oh, yes.

Mr. Quirk: I object to that question on cross examination of the witness.

Exam. Mullen: The objection is overruled.

Mr. Quirk: Counsel is saying no additional revenue.

Mr. Collins: No, I didn't; I said "rate."

Exam. Mullen: He said "rate." Do you want to clarify

that? They do ask for an additional charge to move it beyond, don't they?

Mr. Collins: Of course, as the car moved on to some more distant destination, the amount of total revenue would be larger.

By Mr. Collins:

Q. You would be working on a rate that would be set as a through rate to enable you to keep diverting from one destination to another until you found ultimately a market?

A. That is correct.

Q. Did you state what route this car moved over on which you lost $134.00?

A. U. P.-Santa Fe, at Denver.

Q. And that one was rejected at Wichita?

A. Yes sir.

Q. Would you tell us what new markets you would expect to open up or to be able to reach if you had the routes and [fol. 614] rates sought by the D&RGW?

A. We have open gateways on fruit, namely, prunes.

Q. Let me change my question; I think it will be shorter. When you say you could reach new markets, do you have in mind any other markets than these so-called pocket markets that are now troublesome?

A. No. We can reach any market.

Q. Isn't the so-called pocket market the only one that you feel you do not reach freely and without some difficulties and disadvantage?

A. That is correct.

Q. To reach those would cost you something higher than the through rate at which you can reach other markets, for instance, if they confine you on where the Union Pacific through rates are applicable?

A. Yes. A pocket market is one which you cannot divert out of on a through rate.

Mr. Collins: That is all, sir.

Mr. Quirk: That is all.

(Witness excused.)

WAYNE NEWCOMB was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your full name?

A. Wayne Newcomb.

Q. Where are you located, Mr. Newcomb?

[fol. 615] A. My business headquarters is at Burley, Idaho; my residence is at Declo, Idaho.

Q. What is the nature of your business?

A. We are growers of potatoes and shippers of potatoes.

Q. Are you one of the large growers and large shippers of potatoes in that area?

A. We have been there in the business—my father established it 37 years ago, and we ship quite heavily and grow quite heavily.

Q. Do you mind stating what your volume is in carloads?

A. We handle around 1600 to 2000 cars a year, and grow approximately 300 cars a year.

Q. How much of that moves to the eastern markets?

A. Eastern markets, east of Idaho?

Q. Yes.

A. About 95 per cent of them.

Q. Where are your principal markets east of Idaho?

A. We ship into all states, except the New England states; principally into Ohio and the Southeast markets.

Q. Are you a member of the Idaho Onion and Potato Shippers' Association?

A. Yes sir.

Q. Are you an officer or director of it?

A. No sir.

Q. Has that association recently made a report dealing [fol. 616] with the volume of potato shipments into Southern Kansas and Northern Oklahoma?

A. Each year they publish a report of the unloads in the principal cities all over the United States. I was checking our unloads into Oklahoma and Southern Kansas for the past five years, and I found a decline of 90 per cent in that territory, as far as we were concerned, so I was interested in following through, and I checked the unloads as reported by

our association annually, and according to their report that was the only territory in the United States where the unloads of Idaho potatoes were decreasing.

They were less in the last five years than they were in the preceding five years.

Q. What reason is there for that decline in those two areas?

A. We are all human, and our problem is distribution, and we avoid territories where we have trouble, and as the preceding gentlemen have stated, they had trouble in that territory, and we had trouble in that territory due to the fact that it was not intermediate with our eastern markets. We had a seller's market for the past good many years, during the war years, and we could more or less pick our customers and our territory to work in, and we naturally avoided that territory which caused us grief.

Q. Mr. Newcomb, except for the rate restrictions that have been mentioned quite a few times today, and yesterday, [fol. 617] with respect to that territory, would you regard it otherwise as a good consuming territory of your commodity?

A. Fifteen years ago that was the best market we had for Idaho potatoes. The reason we have to get that freight back, from a potato viewpoint, it is fundementally necessary to the potato industry. Extreme advances in rate are changing the situation from a seller's market to a buyer's market, and we are feeling the squeeze in far eastern territories.

Q. You sell potatoes in competition with potatoes grown in the San Luis Valley?

A. Yes sir.

Q. There are potatoes shipped from other areas into this Oklahoma-Kansas area?

A. That is correct.

Q. Do you know whether or not those potatoes move in there without this restriction on the right of diversion?

A. According to the Department of Agriculture report, most of them are moving in there by trucks.

Q. Unless you have a further statement, I have no more questions to ask.

A. I have no other statement to make.

Cross-examination.

By Mr. Collins:

Q. What is the squeeze you spoke of you are beginning to feel in the far eastern territory?

A. There is a differential between our potatoes and the [fol. 618] eastern potatoes, which is increasing.

Q. A differential?

A. The price differential in those markets, which have made our potatoes almost a luxury in certain eastern markets. Our freight rates are so high after these last increases, Maine is at an advantage, and they are squeezing us back further this way, and in an effort to hold my business together, I am seeking to regain markets I have lost closer to home.

Q. You have been shipping Idaho potatoes as far as New York, haven't you, or some of the Idaho people have, haven't they?

A. Very few are going into that territory this year. There is a certain outlet there that puts them in boxes, during the past few years.

Q. But there has been a market to some extent back in that territory within seven or eight hundred miles of the Aristook, Maine potato growers, hasn't there?

A. There always has been a market for Idaho's in all markets, to some extent.

Q. Don't Idaho potatoes sell at a higher price than potatoes generally, say, for instance, in the Chicago markets where they compete?

A. Yes, we figure that Idaho's will bring safely $1.25 differential. When the differential is higher than that, we have difficulty in moving them.

Q. I see. That is because of what the consumer or buyer [fol. 619] must consider the more desirable qualities of the Idaho potato, isn't it?

A. That is a kind of difference they will take them for. When they get above that difference, they back away.

Q. They will pay that much more to get the Idaho potato?

A. That is right.

Q. Now, as I understand your situation, and the position.

of your operation, which apparently is just in your name, is that right—it is not a company or incorporated?

A. It is W. W. and W. T. Newcomb, Inc.

Q. As I understand your situation or position here, you are supporting the complaint because if the complaint should prevail, you would simply have a joint through rate and privileges that might enable you to further expand your business, is that correct?

A. It would make Northern Oklahoma and Kansas intermediate with our regular eastern markets, and wherever those markets are intermediate, we can increase our business.

Q. That would be your——

A. We can move some of the potatoes that are now going for cattle feeding.

Q. That would be your hope, then?

A. That is right.

Q. Ultimately to expand your business?

A. Yes sir.

[fol. 620] Mr. Collins: That is all, Mr. Newcomb.

Exam. Mullen: That is all. Thank you, sir.

(Witness excused.)

Mr. Blaine: Mr. Examiner, at this time I offer petition for leave to intervene in behalf of the Utah Cattle and Horse Raisers' Association.

Exam. Mullen: Is there any objection to this petition?

Mr. Collins: Well, no, except it is a little too warm. Its date is the 14th of December.

Exam. Mullen: The petition will be received, and leave to intervene is granted. Are you appearing for them as counsel?

Mr. Blaine: As counsel, yes sir.

Mr. Blaine: I call Mr. L. C. Montgomery.

L. C. MONTGOMERY was sworn and testified as follows:

Direct examination.

By Mr. Blaine:

Q. Please state your name and address for the record.

A. L. C. Montgomery, Heber City, Utah.

Q. Are you, among other things, engaged in the cattle business?

A. Yes.

Q. How long have you been thus engaged?

A. Thirty years.

Q. Where is your headquarters and the operations of your industry?

[fol. 621] A. Heber City, Utah.

Q. Are you secretary, also, of the Heber City Cattle Company?

A. I am.

Q. Where is that operation located?

A. It is located at Heber City, Utah; that is about 50 miles southeasterly of Salt Lake.

Q. Combined, about how many cattle do the two operations embrace?

A. About five thousand.

Q. Yesterday, Mr. Montgomery, Don Clyde testified here. How far are your operations from those of Mr. Clyde at Heber City?

A. We graze the same range with Mr. Clyde. Our cattle and his sheep graze in common on the same range.

Q. Other than you operating cattle, and he operating sheep, are your operations substantially similar?

A. Yes.

Q. The question came up yesterday as to why you gentlemen operating in that territory don't move your livestock to and from Keetley on the Union Pacific instead of taking them to Heber City. Will you tell us why?

A. Keetley is a Union Pacific Railroad station, primarily for the purpose of shipping ore from the Park City mines. We can't ship from there for many reasons. If we ship to the West Coast, we have got to go around by Ogden and back to Provo, a circuitous route of about two hundred [fol. 622] miles, and then they haven't the loading facili-

ties there to accommodate cutting of cattle into the necessary groups that we have to cut them in order to ship. They have a crude shipping yard there, but it can't accommodate the cattle industry as the yards do at Heber City on the D&RG.

Q. Mr. Montgomery, do you produce your own cattle that you condition for slaughter?

A. Some of them, perhaps most of them, although we ship cattle in for feeding and for ranging purposes.

Q. Where do you purchase those?

A. We get cattle from Nevada and Southern Utah, shipping them into Northern Utah, and we get quite a few cattle out of Montana.

Q. On the cattle that originate in Montana, what is the destination of those?

A. Well, it is, of course, to any part in Utah where the purchaser cares to take them.

Q. I was going to ask you as to your own operations.

A. As to our own, it would be Heber City, or possibly Keetley.

Q. Do you buy any cattle in Idaho, eastern Oregon, and Washington?

A. Very few.

Q. Why?

A. Well, I don't know, we just have never gone there. We just figured it was not a favorable market, and the ex-
[fol. 623] pense of handling them was not as economical as to get them from other places.

Q. Take your own operations first; where is the general market that you dispose of your cattle?

A. We ship both to Denver and to the West Coast. Some years the bulk of our cattle will go east, the market may be a little better, some years west. We happen to be exactly half-way between Denver and the West Coast, and we watch the markets, the freight rates, and other advantages we may figure, and then ship accordingly.

Q. Now, are you an official of the Utah Cattle and Horse Raisers' Association?

A. Yes.

Q. Are you the president of that association?

A. Yes, I am.

Q. How long have you held that position?

A. Fifteen years.

Q. Prior to that time, were you a member of the association?

A. Yes, I helped to organize it in 1915.

Q. What is the Utah Cattle and Horse Growers' Association?

A. Well, it is a voluntary organization, organized to protect and further the interest of the members of the organization.

Q. Take an average year, how many cattle would the members of that association market?

A. We have about 225,000 head of cattle that we feel are [fol. 624] owned by the members of our association. Approximately one-third of them are marketed each year as beef cattle.

Q. About how many, then, do you bring in each year in the form of replacements and for other requirements?

A. Well, that would just be an estimate. I don't know.

Q. Mr. Montgomery, has the Utah Cattle and Horse Growers' Association given grave consideration to the matter here in controversy?

A. We have considered it at the meeting of the officers of our organization, which meeting was held in October, I think it was.

Q. What was the conclusions and what were you instructed to do?

A. Well, a resolution was passed at a meeting of the vice presidents and executive committee of our organization in favor of supporting the side of the complainant, the Denver and Rio Grande Western Railroad Company, in this matter, and I think the resolution was forwarded on that, and I was authorized to follow it up.

Q. Does your association believe that the opening of the Ogden gateway would be beneficial to the livestock producers in the Northwest as well as to the producers in the State of Utah?

A. Yes; they feel that it would.

Q. Do you and your organization feel that with the burden, or with the increased freight rates which they are now forced to pay in the movement of livestock from the Northwest via Ogden and the D&RG, when moving to the

[fol. 625] eastern markets, handicaps the growers and feeders on the Denver and Rio Grande?

A. Oh, yes, naturally it does.

Q. Have you anything further, Mr. Montgomery, that would be helpful in the disposition of this proceeding?

A. I have no voluntary statement to make.

Mr. Blaine: You may cross examine.

Cross-examination.

By Mr. Collins:

Q. To what extent would this handicap exist that you just referred to in the answer to Mr. Blaine's last question?

A. I could not give you dollars and cents, nor specific instances.

Q. I don't mean dollars and cents, nor specific instances; but could you measure it in some way?

A. Well, it would have the effect of——

Q. Maybe I didn't make myself understood. You recall his question, the last one you answered?

A. I think so.

Q. Well then, what would be the handicap that you said these people were under?

A. Well, if a car of cattle was shipped in from——

Q. I am afraid I still didn't make myself clear, Mr. Montgomery, so I will ask it this way: What do you have in mind, what you call a handicap, would be the difference between the combination rates now by the D&RGW and the through [fol. 626] rates that exist via the Union Pacific, is that right?

A. That is right.

Q. That is what I meant, and nothing more.

A. I think that is all. I would say that in the consideration of this by our committee, perhaps they based it on somewhat of a broader ground than that. They felt that it was perhaps unfair to give any advantage to any particular railroad.

Q. To give any advantage?

A. Yes. No railroad company should have a particular advantage, an exclusive right of use of any particular part of the country.

Q. Did they consider whether it would be wrong for the D&RGW to have its long haul in any instance?

A. They felt that the country should——

Q. Did that subject come up at all?

A. It was discussed, of course. The angles, as we understood it, it was discussed generally, yes, all phases of it, as we understood it, which is more or less limited; bear in mind. We are not experts on freight rates or anything of that kind.

Q. Neither am I.

A. But we felt there should be competition just the same as if we had a sales ring, and they only allowed one purchaser to come in and bid at a sales ring.

Q. Would you mind waiting until I finish asking you questions, and then you get on your own time and make whatever talk you like?

A. Ask them again.

[fol. 627] Exam. Mullen: What is the question on the record?

Mr. Collins: There wasn't a question on the record, when he started out on this.

Exam. Mullen: All right.

Mr. Blaine: I thought he was still answering.

By Mr. Collins:

Q. Do you know approximately how many cattle the Union Pacific yards at Keetley would hold?

A. No, I know they have got two or three small cor-als there.

Q. They will hold ten or twelve carloads, though, won't they, for loading onto cars promptly?

A. I wouldn't think so.

Q. How many would you think they would hold?

A. I would think it was closer to three or four carloads.

Q. How many carloads do you ship from your operation to that area at once?

A. Well, they group their cattle and usually ship a trainload at once.

Q. I am speaking of you. I thought you had an individual operation out there.

A. My individual operation is not very much.

Q. Do all of the people have to ship all of the cattle at one time, or do they ship some of them today and some tomorrow and some the next day?

A. They usually ship, or group their holdings into herds, and ship them certain days of the week.

[fol. 628] Q. About how many carloads would they load that way on one day, do you suppose?

A. Maybe from 10 to 15 or 20 carloads.

Q. I see.

A. In a day.

Q. Yes. Just a little bit more than the stockpens there would hold?

A. There is accommodations nearby where you could hold stock there and keep filling your corrals; it would not be prohibitive at all. We appreciate what they have got there, I want you to know that.

Q. Are the cattle that you sell from this operation of yours—I understood you were speaking here in one capacity as an individual stock grower?

A. That is right.

Q. And seller. Do you sell in about the same way that Mr. Clyde, Don Clyde—do you know him?

A. Yes.

Q. Is your operation similar to his, do you know?

A. As an individual, he is what we call a rather large livestock operator.

Q. I really mean your acquisition and bringing in cattle and maybe breeding some or fattening some, and then selling on out.

A. Yes sir.

[fol. 629] Q. Mr. Clyde told us that his interest in this controversy was to be sure that he would save the amount of his inbound freight expense, that is, freight expense he incurred inbound to his ranch operations. Is that your situation here as an individual grower?

A. Yes, in a way, yes. Mr. Clyde, I believe, buys most of his sheep, however, in Montana, and I couldn't say that we buy most of our cattle there.

Q. Well, you don't buy them any farther away than that, do you?

A. No.

Q. You said, I believe, that the officers of the Utah Cattle

and Horse Growers' Association considered the question of this case that is now on trial during October some time?

A. Yes, it was at the time of the County Fair. I remember, here last September, first of October.

Q. Your petition says there are two thousand members of that association. Now, did those members—are those members shippers of cattle or livestock?

A. Yes, they are all producers of cattle, and either sell to speculators and local buyers, or ship their cattle.

Q. The association has a broader interest than just in the transportation of this livestock?

A. Oh, yes, certainly.

Q. Did those members consider the question of whether they wanted to intervene here on the side of the Rio Grande?

[fol. 630] A. Yes, through their officers.

Q. Did the members themselves, individually and personally voice their views?

A. Oh, no, certainly not.

Mr. Collins: Just a second, please.

The Witness: I think you have heard a number of our people, possibly, testify here. Charlie Redd told me he testified today. He is a member of our association.

By Mr. Collins:

Q. Do you know of any other members of your association who have testified here, other than Mr. Redd?

A. No, but I have noticed one or two of the larger producers in this audience here today who are here hearing me testify now.

Q. I see.

Mr. Collins: That is all.

Redirect examination.

By Mr. Blaine:

Q. In that respect, following the action taken in October, did I understand you to say that you were designated by the other officers of the Association to appear here and testify in behalf of the association?

A. I don't think they said to appear here, in this room. They said, "You go ahead and follow this up—carry into effect our desires."

Mr. Blaine: Thank you.

Exam. Mullen: That is all. Thank you.

[fol. 631] (Witness excused.)

Mr. Blaine: Mr. Examiner, at this time I offer petition in behalf of the Idaho Wool Growers Association in support of the complainant.

Exam. Mullen: This is similar to your other petition?

Mr. Blaine: Exactly. It does not broaden the issues.

Exam. Mullen: Any objection?

Mr. Collins: No.

Exam. Mullen. The petition will be received and the petition to intervene will be granted. Are you appearing as counsel for the association also?

Mr. Blaine: Yes sir. I will have no witness. Mr. Roscoe Rich, who was supposed to arrive here yesterday to testify, has serious illness in his family, and I have been informed he will be unable to arrive before I leave for home tonight. So we will have no witness at this time. I thank you.

Exam. Mullen: All right.

Mr. Quasey: Mr. Examiner, I call Mr. Hilbert.

W. H. Hilbert was sworn and testified as follows:

Direct examination.

By Mr. Quasey:

Q. Will you give the reporter your full name and where you reside?

A. W. H. Hilbert, 1084 South Cook, Denver, Colorado.

Q. Where and by whom are you employed?

[fol. 632] A. I am employed by the Producers' Livestock Marketing Association at Denver, Colorado, as head of the sheep department.

Q. Is that organization one of those named by Mr. Jacob in his testimony yesterday?

A. That is right.

Q. How long have you held your present position?

A. I have been in this position since their acquiring of the firm on the Denver market, which is about two years.

Q. What experience have you had in the livestock business prior to that time?

A. Thirty-one years on the Denver market.

Q. Was that in connection with the selling and buying of sheep and lambs, chiefly?

A. That is right.

Q. What experience have you had in the feeding and raising of sheep and lambs?

A. I have been feeding since starting in the sheep business, which is 34 years ago, and have fed every year. As to the raising, that has been intermittent. Some years I have some breeding ewes and raise lambs; other years I do not.

Q. But you have been in the business to some degree as a raiser or feeder during the past 34 years, is that correct?

A. That is correct.

Q. Where do you conduct these operations?

A. Mostly in Colorado, but of late years we have quite [fol. 633] a little in Kansas.

Q. What do you do in your present position?

A. You mean the producers?

Q. Yes.

A. I am head of the sheep department, and buy and sell both fat and feeder sheep and lambs.

Q. Is a majority of your work confined to activities on the Denver market?

A. No, I also do some buying in the country, of both kind of sheep; also breeding ewes.

Q. Are you familiar with other livestock markets?

A. Well, in my position, I have to be familiar with all of the large markets, namely, Chicago, St. Louis, Sioux City, Omaha, Kansas City, St. Joseph, and to some extent the western markets like Ogden, Salt Lake, and Los Angeles.

Q. Are you generally familiar with the livestock producing and feeding areas of the country?

A. Yes, I have to be.

Q. From what territory does livestock come to Denver?

A. Livestock to the Denver market comes from all states west, north, south, of Denver; also some from Kansas and Nebraska, and it also arrives by all railroads entering Denver.

Q. Generally, where is livestock shipped to from Denver?

A. In every direction out of Denver. We have fat lambs that go as far as the eastern seaboard, New York City, [fol. 634] and some shipments to the west, California, but not extensive at all, and most all intermediate points east of Denver, killing centers. As to feeders, they are also shipped quite extensively all through the east of Denver, north, and south, and some little west.

Q. How, in a general way, are lives-ock prices determined from day to day on the Denver market?

A. Well, I believe I could best answer that by telling you about how we go about our business, starting with the morning.

Q. If you will do so briefly.

A. Our Denver market opens at nine o'clock in the morning for trading. We sort our sheep and lambs ahead of this time, and look around the barn to see what other commission firms have, and as to the quality of fat or feeders, whichever it may be, and as I say, our trading will start at nine o'clock. We have to be prepared to know about what the packer-buyers have bought the day before, what we feel their needs will be that day, the total receipts on the market.

Mr. Collins: Mr. Examiner, I am sorry to interrupt, but it seems to me that misses the issues in this case.

Exam. Mullen: The same thought occurred to me. The sole question involved here is how the price is determined.

Mr. Quasey: That is right.

Exam. Mullen: Isn't it a wide open bidding market?

Mr. Quasey: Plenty goes on besides the sole bidding, Mr. [fol. 635] Examiner.

Exam. Mullen: The sole question is how the price is determined.

Mr. Quasey: That is right.

Exam. Mullen: We don't need all this detail, it seems to me.

Mr. Quasey: Very well.

The Witness: The prices are determined a good deal through our knowledge of the previous day's market, and if receipts are short, we will ask additional prices over the day before. That is especially true if other markets are short sheep, and in doing this, the buyer, who is equally as capable as we are in most cases, has information from other points and is——

Exam. Mullen: Well, how does it start. Someone opens a bid, or does some one make an offer of some sheep, or how?

The Witness: We price the sheep to them.

Exam. Mullen: In other words, you have an offering price, is that it?

The Witness: No, we price them.

Exam. Mullen: What do you mean by "price them"?

The Witness: It is by our knowledge of the day before and other days.

Exam. Mullen: Do you announce the price?

The Witness: We announce it to our own buyer only.

Exam. Mullen: Then what happens?

The Witness: If we do not sell to him, we will take the [fol. 636] next buyer, and so on down the line.

Exam. Mullen: Do you offer them at a given price, or do you wait until he makes you an offer?

The Witness: He will make me an offer.

Exam. Mullen: And then if that offer is not acceptable, you will wait for another buyer for a higher offier, is that right?

The Witness: That is right.

Exam. Mullen: Then if you finally get a price that is satisfactory, you sell it?

The Witness: That is right.

Exam. Mullen: That is the same on any other market, isn't it?

The Witness: That is right.

Exam. Mullen: All right.

By Mr. Quasey:

Q. Does the freight billing have any effect in the net return the producer receives from the sale of livestock at a public market?

A. Yes, it does.

Q. Will you state what that effect is?

A. Well, this effect is not always the same. It depends a lot on the value of this billing. This especially is true in case we have two shippers with comparable sheep. If one billing is of more advantage to the buyer than the other, we so state, and adjust our prices, or try to accordingly. [fol. 637] Q. Does the freight billing have the same general effect in connection with transactions at country points?

A. Yes, that is true where they have the feed in transit billings.

Q. Is more than one route, to and from livestock market, of any value to livestock producers?

A. Yes. I would think it would have been of great value if it can be used on a competitive basis.

Q. Will you state why you say that?

A. Well, it would assure better service for one thing, and would afford an alternate route in the event of emergency or possibly interruption of service for some other reason of either route.

Q. Based on your long experience in livestock business, what effect would the opening of the Ogden gateway have upon the interests of the producers?

A. Well, it would give livestock producers another important route without a rate discrimination, or rather a rate disadvantage, I will put it that way.

Mr. Collins: A rate difference, maybe.

The Witness: A rate disadvantage, and would place them on a parity in the sale of their livestock as far as freight rates are concerned.

Mr. Quasey: That is all, Mr. Examiner.

Exam. Mullen: Any cross examination?

[fol. 638] Cross-examination,

By Mr. Collins:

Q. Would you expand your idea a little, where you said another route would assure a better service? Just what did you mean by that?

A. Well, any time you have competition, whether it is in railroads or selling of sheep, you have to give better service.

Q. That is what you are counting on; each one will sort of spruce up when he sees the other fellow come in?

A. Sure.

Q. In what area or what service do you have in mind when you say that now? Do you mean they run the trains faster, or just what do you mean?

A. I have seen that in my time, also.

Q. You just tell us what you mean now. You used the term "service."

A. Well, before the war, we used to run trains from Denver to Chicago without stop.

Q. Yes.

A. Today they do not.

Q. All right. That is speed; that is one thing. You think the Denver and Rio Grande would haul your cattle any faster than the Union Pacific would haul them if it had a chance?

A. I don't believe that would be true, but if they were in direct competition, I think it would help service.

Q. We got speed out of the way as a part of service. [fol. 639] What next? What else is included besides speed in the term "service," within your conception?

A. Well, there could be several things. There could be even price adjustments, if it was on the same basis.

Q. Price adjustment?

A. Yes.

Q. By the railroads?

A. No.

Q. That isn't something they could do.

A. By the producers or consumers.

Q. We are talking about what the one railroad would do, if it was in competition with another, and you said he might run his trains faster, that is, within the term "service."

What else would you expect him to do under competition that he would not do otherwise?

A. By doing that, he would get them through without feed and water.

Q. Yes, that is speed.

A. Sometimes that is necessary.

Q. Anything else you have in mind coming within the

term "service" that might be applied in connection with cattle shipments?

A. Not especially.

Q. The shorter the transit time, or the time the cattle are on the train, the better it is for the owner of the cattle, is it not, Mr. Hilbert?

A. Surely. It saves shrinkage.

[fol. 640] Q. Do you understand your cattle would be on the train any shorter period if they were on the route by the D&RGW instead of a route by the Union Pacific?

A. I don't believe there is much difference in that.

Q. Don't you think, as a matter of fact, if there is any difference, it is they would be on the train longer on the D&RGW than they would on the Union Pacific?

A. I think their routes are not too far different in mileage. I think the Rio Grande is somewhat shorter, but it is not quite as straight a road.

Q. You think the Rio Grande is shorter, but not as straight?

A. That is right.

Q. Would you be surprised to know it is longer in every instance over every route between the territory in Idaho and Montana from which they are talking of purchasing cattle here?

A. The only difference that there could be would be from Ogden to Salt Lake.

Q. Mr. Hilbert, in what capacity are you testifying here, that is, are you testifying as an officer of this Producers' Livestock Marketers Association, which has not intervened?

Mr. Collins: Maybe you can tell us that, Mr. Quasey.

Mr. Quasey: He can explain that.

Mr. Collins: Is he testifying in support of the association?

Mr. Quasey: Yes.

By Mr. Collins:

Q. You are a dealer in sheep, is that right?

[fol. 641] A. That is right. I feed some cattle.

Q. And some cattle?

A. But I do not sell cattle.

Q. You are not a producer, then? You do not produce them on ranches, you just train them?

A. I have a few.

Q. But it is not in connection with that part of your operation that you are appearing here, is it?

A. Mine as well as all of my customers.

Q. Well, is your growing or producing activity a part of the business of the Producers' Livestock Marketing Association?

A. No, it is my own.

Q. I see. Mr. Hilbert, isn't it a fact that about the only real reason that you favor this route and rates by the Rio Grande is that it would give you a chance to, if one day you didn't think you had a satisfactory service from the other, you would turn your traffic over to the other route the next day, if you felt like it; isn't that about the size of your position?

A. I would not say that. I think I have been very favorable to the Union Pacific in the past 34 years.

Q. I am just asking you as to your desire after this route might have been established, if the Rio Grande prevails here. What do you want it for?

A. If I felt they didn't do right, yes.

[fol. 642] Q. As Mr. Stanger said yesterday, he called it retaliation.

A. Mr. who?

Q. Mr. Stanger. You didn't hear him, I guess.

A. No.

Q. He was one of the gentlemen who favored the D&RG, because he said it would enable him to indulge in some retaliation. You said also there would be another route open in case of emergency. You understand, of course, there is published and outstanding and applicable, I believe, on all railroads, what is called an emergency routing clause, which give you the service by the other routes without any increase in rates under this emergency routing clause?

A. I understand that, yes. I have had it many times.

Mr. Collins: That is all. Thank you.

Redirect examination.

By Mr. Quasey:

Q. Does the matter of supply of cars enter into the matter of service by railroads, Mr. Hilbert?

A. Naturally it does.

Q. And the kind of cars that are supplied, the condition of the cars?

A. Yes, but I think all railroads are pretty good on that point, keeping them clean.

Q. How about loading and unloading facilities at local points?

A. Well, I think that is comparable on all railroads.

Q. But that is something that might be induced to be [fol. 643] maintained to a better degree if there was competition?

A. Certainly it would do that.

Mr. Quasey: I believe that is all.

Mr. Quirk: I have no questions. I have changed my mind.

Exam. Mullen: Is that all?

Mr. Quasey: That is all.

Mr. Collins: That is all.

Exam. Mullen: Thank you.

(Witness excused.)

Exam. Mullen: I don't think we have time for another witness, so we will recess until 7:30 this evening, and it will be in the Junior Ballroom on the mezzanine floor.

(Whereupon, at 4:55 o'clock p. m., the hearing was recessed, to reconvene at 7:30 o'clock p. m., the same day.)

[fol. 644] Night Session, 7:35 p. m.

Exam. Mullen: We're ready to resume the hearing, gentlemen. The hearing will be in order.

KENNETH G. SELF was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your full name, Mr. Self?

A. Kenneth G. Self.

Q. Mr. Self, where is your place of business?

A. Salt Lake City.

Q. What is your business address?

A. 703 West Second, South.

Q. Are you with some company or your own company?

A. I am majority stockholder in our corporation, which is called Inter-Mountain Tractor Sales Corporation.

Q. How long have you been in business here?

A. We started on July 1, 1947.

Q. Is your company located on the tracks of the Denver and Rio Grande in Salt Lake City?

A. Yes, sir.

Q. Describe the nature of the business of that company.

A. We are—you mean of our company; or the D&RG?

Q. No, your company.

A. We are the distributors for Ford tractors and Dearborn farm equipment for Utah, southeastern Idaho, the eastern half of Nevada, and three counties, I think it is, in [fol. 645] Wyoming.

Q. Do these tractors move to Salt Lake City, consigned to your company, in carload lots, or in part lots, or just how do they move?

A. They move in carload lots from Detroit.

Q. By railroad?

A. Yes, sir.

Q. In general, what routes are used to get to Salt Lake City?

A. We have three different routes we have used, which are the Wabash to St. Louis, Missouri Pacific to Pueblo, D&RG to Salt Lake.

Q. What are the origin points?

A. Where the machinery is picked up at; do you mean?

Q. Where do they start from?

A. Well, it's in Detroit, the Highland Park plant of the

Ford Motor Company. The machinery is manufactured in, I think about 24 different states, mostly in the East.

Q. Are these carloads consigned to your company, to Salt Lake City?

A. Yes, sir.

Q. And they reach Salt Lake City via the Union Pacific generally, is that true?

A. No.

Q. You use the Denver and Rio Grande?

A. Yes, sir.

[fol. 646] Q. Now, are these transit arrangements partly unloading, and partly load, and things of that kind, of interest to your company?

A. Just a minute, I don't quite follow you there. Explain it again once more.

Q. Where is your principal market?

A. It's approximately 50-50, I mean 50 per cent of our business is done in Utah, and the other 50 per cent is done in Idaho. In fact, if I had the sales records, I could prove it out. During the days of allocation, that was just about the breaking point.

Q. Well now, when you ship into Idaho, how do you ship from Salt Lake City?

A. By our own trucks.

Q. Do you have any customers in Colorado?

A. No, we're not able to ship there. We start at the Utah line. We have a dealer at Moab, Farmsville, Springville, American Fork, Utah.

Q. And how are your shipments moved from your plant in Salt Lake City to these customers in Utah?

A. Well, we bring the machinery all into Salt Lake and then parcel it out by truck. If you want me to tell you why we do that——

Q. I want you to tell me. Why do you use truck instead of railroad?

[fol. 647] A. When we originally came down to Salt Lake, it was during the days of machinery allocation. What that means is, of course, you all know, they ration the machinery out on a past sales basis, so we started out to bring the cars in here, take out what belonged to Utah, and then reshipped to Idaho. Well, after the first car was shipped to Idaho.

Falls we rudely found out, we had a rude awakening, I should have said, the rate change to a carload basis from an LCL basis, when it left Salt Lake going into Idaho.

Well, to be right honest with you, that is the first time I ever knew there was a gateway. We attempted to figure out a way to ship the tractors via the Union Pacific into Idaho, but the unfortunate part of it is during allocation no one dealer could get a whole carload or a part of a carload, so they had to purchase this transport and ration it out ourselves—ration the equipment out ourselves.

Rather than try to handle it haphazardly by stop cargo, under the days of allocation, we went ahead and bought a motor truck and carried one of these automobile transports, and we have been shipping them into Idaho and Utah since then with that truck.

Q. In other words, when you bring the tractors and machinery into Salt Lake in carload lots, you unload them and then you move them out either to Utah or to points in Idaho by your own trucks?

[fol. 648] A. Yes, sir.

Q. If you had a joint rate, from Detroit and the other eastern points of origin, to these destinations in both Utah and Idaho, what would happen?

A. Well, it would have to be so we could partially unload in both states, otherwise we would have to start dropping off. If we are not going to handle them at all, we disband our trucks, if we weren't going to handle them at all. We would start like, for instance, combines, we can drop off one alone the line, in both states, and back-haul, instead of getting away from the back-haul.

Now we bring everything into Utah, in Salt Lake City, and while we only handle it once, we are only going to ship it by our own trucks.

Q. If you had the joint rate and if you had the transit privilege of partially unloading at Salt Lake, what would you do then, would you use the railroads or would you continue to use the trucks?

A. I'm quite sure we would do away with the trucks, because I don't want to be in the trucking business. In fact, it is a big headache. I would just ship over the rails.

Q. Is it proper to say the principal reason why you

bought trucks is because you didn't have a competitive joint rate from the eastern points to points in Idaho and to points in Utah?

[fol. 649] A. Yes, sir.

Q. Where are these points in Utah located, are any of them served by the Union Pacific?

A. Well, Ogden, and Salt Lake City. I think—don't they go down to American Fork?

Q. I'm asking you where your customers——

A. I thought you were asking me, I couldn't tell where their railroad went in here.

Q. I thought you probably knew whether the points where your customers are located——

A. We serve Logan, Preston, Idaho, that is a borderline point, and Free Mountain.

Q. Do you wish to elaborate any on how you would be benefited if you had joint rates from these eastern points via the Rio Grande through Ogden to the Idaho points?

A. Well, it would make it very convenient to be able to route it to our own discretion where we wanted to route it, and in case we had a car under the existing situation, we had a car rolling that was going into, we'll just pick a point, Burley, Idaho, if that dealer was plugged up with tractors, we'd be in a position, if we were bringing them through here, we could just automatically take out what we wanted, and then continue on, and don whatever we want to over there.

Today, we have to definitely know—just supposing we bring it over into Idaho, over the Union Pacific Railroad, we [fol. 650] have to definitely know what is going to be done, because we can't move it after we get it rolling.

Q. Would such a joint business aid your business?

A. Yes, sir, all the way through to Boise and Nampa, Idaho.

Mr. Quirk: That is all I have.

Cross-examination.

By Mr. Collins:

Q. Why do your shipments now move by way of the Rio Grande into Salt Lake City?

A. Why do they?

Q. Yes.

A. Because I chose to put them over that way.

Q. Have you any particular reason for that?

A. Yes, they give me good service.

Q. I see.

And you realize, of course, that if you had a carload sent by way of the Union Pacific to Salt Lake City you could partly unload here and then go on up into Idaho with the balance.

A. That is right. I know that. In fact, I think your company wrote a letter saying they would absorb the switching charges. I think that is right. But what are we going to do about the other end of the state, Utah?

Q. I hope we'll find some solution to that, but do you make any deliveries in Utah from the car by stopping at points on the Rio Grande?

A. No, not now, because you see, if we're going to touch them at all we've got to touch them—if you are going to [fol. 651] break into the car at all, we break into it once. I mean, if I'm going to do it, that is what I do. Otherwise, for instance, just to give you an example, we'll say Springville down there, these cars roll so many every month, as you know.

Q. Springville, Utah?

A. Yes, I'm using this as an example.

Q. OK.

A. We will say he can take two this time, and the American Fork can take four, and then the next car we might have to work out so that the next stop would be we'll say Preston, Idaho, just an example, or McKammon—I don't care, I'm just using a hypothetical illustration.

Q. That is all right.

A. Today, if we are going to touch it at all, we would have to unload it in Salt Lake, after we make drop shipments, we have the investment in the truck anyway, we drop it in Salt Lake City and back-haul.

Q. You bought your truck in the war period?

A. No, we bought it on October, 1947.

Q. Oh. Your implement purchases were then subject to government allocations, were they?

A. Not government allocations, it was production, they couldn't get enough production.

Q. Then manufacturers' allocation.

[fol. 652] A. Yes, and our own allocation. We had to set it up on the past records of the various dealers.

Q. Yes.

A. Otherwise there were not enough tractors to go around.

Q. Was that the main reason you bought your truck?

A. No. No. No, we bought the truck because we couldn't get the tractors into Idaho without shipping them right straight into Idaho through, right on your rails.

Q. Yes.

A. We realize we could have brought into Salt Lake, and then shipped the rest of the car on. We realized that.

Q. But you couldn't get a full carload, is that what you said?

A. Well, I can't allocate one dealer a full carload you understand, or even a large portion of a carload without slighting the Utah people.

Q. I understood you to say a while ago, at the time you bought this truck, you didn't have a dealer in Idaho—wait a minute, you either didn't have a dealer in Idaho who could take a full carload, or else you couldn't get a full carload.

A. I couldn't allocate him a full carload.

Q. You couldn't allocate him?

A. That is right.

Q. And you prefer to ship by way of the D&RG and forego this top to partly unload privilege that you now have over the Union Pacific at Salt Lake City?

[fol. 653] A. Yes.

Q. As a matter of fact, Mr. Self, don't you perform some kind of work or servicing or something of that nature on these implements at Salt Lake City, before you distribute them around?

A. No, sir.

Q. You don't know?

A. No. Just haul them out of the box car and kiss them good bye.

Q. How are those implements shipped to you out of Detroit, is it shipped FOB cars in Detroit?

A. You mean money-wise?

Q. Yes, freight charges.

A. No, we pay the freight right here.

Q. You pay the freight charges after they get here?

A. Yes, sir.

Q. How about the freight charges from Salt Lake City on to the—well, the cost of transportation to the people to whom you deliver.

A. You mean from us to the dealer?

Q. Yes.

A. We pay that.

Q. I understood you to say that your customers were partly in Utah and partly in Idaho.

A. About 50-50. I'm talking about business-wise.

Mr. Collins: That is all, Mr. Self, thank you.

[fol. 654] Redirect examination.

By Mr. Quirk:

Q. Did you say you had customers at Price?

A. Not at Price, it's about, I don't know, 18 or 20 miles down to Orangeville. I don't think it is on any railroad. You unload at Price, if that is what you are getting at.

Q. Yes.

A. You unload at Price, stoploads there.

Q. I see. You partly unload?

A. Yes. They did that quite a bit before the war.

Q. Do you do that now from your own truck?

A. We haul—we back-haul, we bring everything right into Salt Lake.

Q. Do you have any customers in Idaho now that would take a carload?

A. Well, of course we don't have allocations today.

Q. I understand, but you are in business.

A. I'm in business, and so are they, and they are not looking for carloads today—just partial carloads.

Q. Then the answer is no.

A. That is right. We have some who will take them.

Mr. Quirk: All right. That is all.

Mr. Collins: That is all.

(Witness excused.)

JOHN W. GERBER was sworn and testified as follows:

[fol. 655] Direct examination.

By Mr. Quirk:

Q. What is your name?

A. John W. Gerber.

Q. Where are you located?

A. Our office is located at American Fork, Utah.

Q. In what business are you engaged?

A. I am the Executive Secretary and General Manager of the Utah Grower's Cooperative, operating throughout the State of Utah in the production and shipping of vegetables, including potatoes and onions.

Q. Well, will you describe in your way the benefits that would accrue to you if the joint rates sought in this complaint should be established?

A. Well, one benefit would be being able to move shook, or box crate material, crating material, from the Panhandle of Idaho into Rio Grande points. We operate two branches on the Union Pacific and three on the Rio Grande. As it happens, our rates are so much higher than the California rates from the Northwest, which is our competitive territory, that we could be benefited considerably competitively by buying in Payette and Lewiston, Idaho. Under the present set up we have a transcontinental tariff that enables us to come through on a through rate, but the Union Pacific also maintains on their line a rate considerably cheaper.

To be exact, I think it is five and one-half cents under [fol. 656] the old base rate. It is a good deal higher now with the increases—to transfer this tonnage onto the Rio Grande. We either must pay the penalty or haul it across town where we have the sheds on the Denver and Rio Grande Railroad.

Q. Which part are you talking about now?

A. I'm talking about American Fork, Springville. At Midvale we have a shipping or a switching at additional cost there. We are able to ship across to our shed at Midvale at additional cost. For the past two years we have been able to obtain this shook at a somewhat lesser

price, but due to the increased rates the only places we have been able to use it is on our sheds operating off of the Union Pacific Railroad. We not only are a shipping organization for our growers, but we obtain their supplies, and in the purchase of fertilizer from Pocatello and Anaconda.

Q. Montana.

A. Anaconda, Montana. It necessitates a combination of rates at Ogden or Salt Lake, or the trucking of this fertilizer across town at the two main operations, American Fork and Springville. We buy considerable amount of seed potatoes on the eastern side of Idaho, from Twin Falls North(and up into Montana at Dillon. This we have been forced to obtain by truck shipments as the rate does not apply on a through basis.

Mr. Collins: To where?

The Witness: To American Fork and Springville.

[fol. 657] Mr. Collins: Utah?

The Witness: Utah. Only at Midvale by an additional cost, on the switch charge, which is not absorbed, I grant you that. We have another problem in bringing red potatoes in from the Red River Valley and distributing them to our grower members north of Ogden. In many cases it necessitates part carload shipments. We wish to unload at either Springvale, American Fork, Midvale, and go on into north of Ogden. This under the present status we are unable to do and have the through rate. That pretty well covers our incoming supplies.

Now since the tremendous increase in rates on some of our commodities, or all of them, coupled with increased weights on namely celery and carrots, it has greatly limited our markets east of the Mississippi River. Celery and carrots are grown to a great extent in those eastern areas, namely, New York, Michigan, Ohio, Pennsylvania, but our western produce has long since been recognized at a higher quality, but with the tremendous rate differential that we obtain through the increase of rates, and one year ago 22 per cent approximately increase in weights on carrots, and this year 20 per cent increase of weight on celery, it limited our marketing in the East.

People went to home-grown far more than ever, so it

necessitated us looking to smaller markets and we have for the past two years gone into Idaho, and Montana, also [fol. 658] Wyoming and Nebraska which is not a part of this case, but have moved more tonnage by truck into those areas than even the great state of New York has absorbed. We are unable, under the present status to move from our shipping points, namely American Fork, Springville, or Midvale, without a penalty in eastern Idaho and Montana with these commodities to our market that we are seeking for stop-over.

We have run into the same problem in going into the Southwest with our north of Ogden operations to such an extent that this year we saw fit to close the Corinne operation, and move by truck to Midvale our celery, so that we would not get into the so-called pocket markets of the Southwest that we would be bound to reach moving via UP to Denver, and transferring onto other lines.

By Mr. Quirk:

Q. What state is Corinne?

A. Utah.

All of our operations are in Utah. Up to the present time we do not have facilities north of Ogden to operate during the cold weather, and yet we have numberous members there, I would say upwards of 100 in that district, that we would like to be able to load their onions and potatoes, ungraded, and move them to packing sheds, namely, American Fork and Springville; and process it in transit and go on.

Under the present status of the closed gateway we are unable to do that. That I think pretty well covers our situation.

[fol. 659] Mr. Collins: What facilities, just for clarification. You said you did not have facilities north of Ogden to take care of something.

The Witness: Under winter weather, Mr. Collins. We have to close them when the frosts set in.

Mr. Collins: You have no facilities for housing or taking care of it.

The Witness: That is right. For storage, and processing in cold weather.

By Mr. Quirk:

Q. Is American Fork and Springville served by both the Union Pacific and the D&RG?

A. Yes, sir.

Q. Is there any interchange between the Union Pacific and the Rio Grande at either of those points?

A. No, sir.

Q. How many members are in your organization?

A. Approximately 450.

Q. Does the Utah Grower's Cooperative favor this complaint?

A. Yes, sir.

Q. Can you state in carload lots, or by some other unit, the volume of your inbound business, first, and your outbound business, second?

A. Our inbound business of course depends on the amount of outbound. We have been up as high as 500,000 crates; 1946 was our highest, and that is what our purchases were. [fol. 660] They would range from 8 to 10,000 crates of carload.

Q. Crates of all sorts?

A. Knock-down crates. We assemble them and ship our commodities. This year was a great deal less than that. It would range, I would say, anywhere from 15 cars to 50.

Q. How about your outbound business?

A. Outbound business is ranging from 600 to 1100, which is our top season.

Mr. Collins: Cars?

The Witness: Cars.

By Mr. Quirk:

Q. Do you have icing facilities on the Rio Grande at American Fork?

A. Yes, sir.

Q. And at Springville?

A. Yes, sir.

Q. Do you have any icing facilities on the Union Pacific at those points?

A. No, sir.

Q. How does that affect the commerce in which you engage?

A. In order to ship mixed carloads, or carloads of any type of our produce into eastern Idaho and Montana we did not do that. It is impossible to do that. You might say we could haul it across town and load it on the Union Pacific, but without icing facilities, these commodities cannot be shipped, so we have had to resort to truck shipments through those areas entirely.

[fol. 661] Q. In this cross-town movement, in cold weather of the winter, might there be some risk of freezing, too?

A. Bringing in of seed potatoes, which we often do, and would like to do, when the markets are possibly cheaper than we feel they would be in the spring, we are unable to come in during the winter because the haul across town subjects us to chance of frost on these potatoes.

Mr. Quirk: You may ask the witness.

Cross-examination.

By Mr. Collins:

Q. Do you have a trackage service at either of these plants? I mean a spur track, a side track, adjacent to your plant at either of these towns or locations?

A. We have them at all, Mr. Collins.

Q. What railroad?

A. On the Rio Grande at Springville, American Fork, and Midvale.

Q. I understood you to say that you had closed out a plant, or closed up a plant at Corinne?

A. Through the celery shipping of this year. We hauled it to Midvale by truck.

Q. About how much do you truck to Midvale, do you know?

A. Approximately 30 carloads this year.

Q. 30 what?

A. 30 carloads.

Q. You mean rail carloads.

[fol. 662] A. Comparable. We are speaking in terms of rail carload.

Q. Is that from the Corinne area?

A. That is right, Boxelder County. We go up beyond Tremonton and up to the Idaho line.

Q. You spoke of Red River Valley. Where is that particular Red River Valley?

A. North Dakota.

Q. I didn't understand quite what you meant when you said you couldn't move out of these places, I guess American Fork, Springville and Midvale, without a penalty. Is that what you said? Maybe I misunderstood you.

A. Where I brought that in was loading onions and potatoes north of Ogden, and processing in transit at Midvale, Springville and American Fork, where we would be penalized. We are unable to do that. At the present time under our facilities it is much of a need.

Q. What is the penalty?

A. The combination haul. We would have a short haul to the Rio Grande.

Q. It is the difference between the combination of rates and what?

A. And a through rate.

Q. I see.

A. Elimination of the Ogden gateway, we could load at Brigham City, for instance, or Cache Valley.

[fol. 663] Q. What is the through rate?

A. Potatoes and onions, and move into American Fork, or Springville, whichever we elected, proces- them, and go on without a penalty.

Q. What is the through rate that you speak of?

A. Well there is no through rate at the present time. That is what we desire to have.

Q. Oh, I see. The penalty then is the difference between the present combination rate over the UP and Rio Grande, and whatever rate it is you hope might be established as a joint through rate.

A. Or a comparable rate if we were to have a processing shed and went UP all the way. That is what we desire.

Q. Oh.

A. To be able to route either way.

Q. You are using as a measure then the through rate on the Union Pacific?

A. That is right.

Q. And you don't use that rate, though?

A. We are unable to.

Q. Do you use it for any purpose at all?

A. We ship a lot of stuff out of up there.

Q. You have shipments that move so that you can use this lower through rate on the UP.

A. That is right. A movement of potatoes and onions, [fol. 664] before the heavy frost period all go that way, from the north of Ogden.

Mr. Collins: That is all, Mr. Berger, thank you.

Exam. Mullen: You spoke of a heavier weight of carrots. You are speaking of an estimate weight?

The Witness: That is right.

Exam. Mullen: You had increased estimated rates, didn't you?

The Witness: We stood an increased freight rate, and increased estimated weight on the carrots amounted to 22 per cent. Our increased estimated weights on celery amounted to exactly 20 per cent. We got 10 pounds on 50.

By Mr. Collins:

Q. That increase in estimated weights was the result of an Interstate Commerce Commission proceeding.

A. It shut us out of eastern markets. That is why I stated we have to branch out into these smaller markets.

Q. It was the result of an Interstate Commerce Commission proceeding.

A. That is right. There is no argument there.

Mr. Collins: All right. That is all.

Exam. Mullen: That is all, thank you.

Mr. Quirk: Do you have anything else to say?

The Witness: No.

Mr. Quirk: That is all.

(Witness excused.)

[fol. 665] Mr. Quirk: Mr. Vanderford.

T.S. VANDERFORD was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your name?

A. T. S. Vanderford.

Q. Where are you located, Mr. Vanderford?

A. Aberdeen, Idaho.

Q. In what business are you engaged?

A. Farming and shipping potatoes.

Q. Do you do business under your own name, or are you the owner or connected with a company?

A. In my own name.

Q. In your own name.

A. In the name of T. S. Vanderford.

Q. How many carloads of potatoes would you ship in a year?

A. We ship from 2,000 to 2,200, annually.

Q. Where is your principal market?

A. Over most of the United States with the exception of New England.

Q. Are you a director or an officer of the Idaho Potato and Onion Shippers Association?

A. I am a director of the Shippers Association.

Q. Have you considered the issues involved in this complaint on hearing here now?

[fol. 666] A. I have.

Q. Do you favor the joint rates which the complaint seeks to have established?

A. I do. I am in favor of having the Ogden gateway opened.

Q. In what respect would the competitive rates sought in this complaint, if established, help you in your business?

A. We think it would help create some additional outlets for our potatoes. I do not care to repeat over and over what you have heard several of the potato shippers testify, but there is one point which I would like to bring out which I don't believe has been mentioned, and that is the privilege which we are denied today of billing our potatoes to Ogden and diverting East, on a through rate.

We think that would be an advantage in many cases to be able to do that. If we could bill our potatoes to Ogden as we also sell a lot in the state of California, some in Nevada and some in Utah, and in the event we didn't get the orders we were expecting and looking for, in California or these other points that I have mentioned, we would still have the privilege of diverting East on a through rate. We think that would be quite an advantage to us.

Q. You would like to have the privilege, I take it, of diverting a car from Ogden over the Rio Grande on East?

A. That is right.

Q. Through Pueblo.

[fol. 667] A. If the Ogden gateway is opened, I take it, we would have that privilege, and I dare say that Union Pacific would give us that privilege if the Ogden gateway was opened.

Q. Well, without asking any further questions, I take it you subscribe generally to the testimony that has been given here by several Idaho potato shippers?

A. Generally, I do.

Mr. Quirk: That is all.

Exam. Mullen: Cross-examination.

Cross-examination.

By Mr. Collins:

Q. Mr. Vanderford, I understood you to say that you could not now ship potatoes from—would Aberdeen, Idaho be your point of loading?

A. Either Aberdeen or other loading points on the branch line between Black Foot and Aberdeen, that is where we operate.

Q. I understood you to say that you could not now load potatoes at these points and bring them down to Ogden and then divert east on the Union Pacific.

A. That is right, sir.

Q. I wonder if you—are you sure about that, because our information is, from the tariff experts on the Union Pacific, is that you do have that privilege.

A. They better inform their agents then, because I have tried to bill that way and our agent has refused the billing.

Q. Your interests in having the routes and rates by the [fol. 668] way of the Rio Grande, as sought by this complaint, would be about the same as those of Messrs. Stanger and Holden, and other potato shippers?

A. I did not hear Mr. Stanger or Mr. Holden testify. I heard Wayne Newcomb today, which is substantially the same as I would testify on that line.

Q. Your main purpose would be to have available an additional route, is that part of your purpose?

A. That is part of it. We are in favor, though, of having the Ogden gateway opened as sought in this complaint.

Q. Well, what I was getting at was just what additional benefits you thought it would afford to you.

A. Well, we think it will give us some additional outlets for our potatoes to have this gateway opened.

Mr. Collins: That is all. Thank you.

Mr. Quirk: That is all, Mr. Vanderford.

(Witness excused.)

Mr. Quirk: Mr. Adams.

JACK ADAMS was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your full name?

A. Jack Adams.

Q. Where are you located, Mr. Adams?

A. Idaho Falls, Idaho.

[fol. 669] Q. In what business are you engaged?

A. Several lines of business. My principal occupation is a buying agent for jobbers throughout the country, principally to the South, especially Texas, Alabama.

Q. What commodities do you buy?

A. Potatoes, largely.

Q. Do you buy potatoes in Idaho?

A. Yes, sir.

Q. You are not the shipper of the potatoes, I take it?

A. Yes, I am. I supply as a buying agent a buying

service and a shipping service as well as a personal inspection service.

Q. Where do most of the potatoes—where do they go that you act in that capacity in, starting from movement?

A. The largest operator that I represent is in Texas, advertises as the largest jobber in the South.

Q. How long have you been connected with the business in Idaho Falls, or at Idaho?

A. I first came to Idaho in 1906, and until just after World War I I was only engaged or in Idaho a portion of the time from 1906 until World War I, and the winter of 1920. Since then I have permanently operated in the capacity I have told you of as a buying agent with the exceptions after World War I up to 1923 I was general representative for the Ennis Brown Company of Sacramento, California, and the Dunbar Harson Company of California.

[fol. 670] Q. Are you familiar with the objectives sought by the complaint here under investigation?

A. Yes, sir, if you speak of opening the Ogden gateway, I am.

Q. Are you in favor of the opening of the Ogden gateway and the joint competitive rates which the complaint seeks to have established?

A. Definitely so.

Q. Why are you in favor of it?

A. I am interested to bring about a competitive effort that I think the opening of the Ogden gateway would bring about.

Q. Do you think that additional route at competitive rates would be beneficial to the producers and to those that you represent?

A. Yes, I think it would be, and in addition to that I think it would definitely create a point of diversion and a point in assembling products that I think the West has needed in the past—when I speak of the West, I mean west of the Rocky Mountains—and I think the future will demand a condition of that kind more than the past has due to the fact that we are told of a great development, and of the situation that has been made in the last few years, for the additional population of the Pacific Coast.

They naturally depend on Idaho after they depend on

themselves, or any of California first. That holds good with Oregon and Washington. They then think of Idaho as their bread basket, speaking practically and economically.

[fol. 671] Q. Have you any further statement to make, Mr. Adams?

A. Yes. I think the opening of the Ogden gateway would eliminate considerable discrimination, especially in times of car shortages that we have experienced in the past, from the fact that it would be used as a competitive weapon or a weapon in competition.

I have found it necessary during the war especially, and even since, to identify myself with men that operate in Idaho that are transcontinental shippers, and I found that transcontinental shippers could get cars in Idaho when cars were short and we have experienced car shortages galore. I found with that weapon of transcontinental shippers they were given cars in a very discriminating manner, and I had to identify myself in order to supply my jobbers as a buying agent, at least I did, to render a better service.

Mr. Quirk: That is all. You may ask the witness.

Mr. Collins: No cross examination.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

Mr. Quirk: Mr. Examiner, could we have about a ten-minute recess?

Exam. Mullen: Yes, we will have a 10-minute recess.

(Short recess.)

Exam. Mullen: We are ready to resume, gentlemen? Are you ready with the next witness?

[fol. 672] Mr. Quirk: Yes.

Exam. Mullen: Go ahead.

W. B. Long, was sworn and testified as follows:

Direct-examination

By Mr. Quirk:

Q. What is your full name, Mr. Long?
A. W. B. Long.
Q. Where are you located?
A. Twin Falls, Idaho.
Q. Twin Falls, Idaho?
A. Yes.
Q. And you are engaged in shipping potatoes from Twin Falls?
A. Potatoes, apples, onions, peaches, prunes.
Q. Do you do business under your own name, or are you connected with some company?
A. Under the firm name Long Produce.
Q. Long Produce Company?
A. No company.
Q. Just Long Produce.
A. Right.
Q. I suppose you are in favor of the joint competitive rates via the Ogden gateway and the D&RG and the route east of the D&RG?
A. I am.
Q. Now in addition to the reasons that have been given [fol. 673] by quite a few other potato growers and shippers from Idaho, have you some reasons that have not been mentioned for favoring this complaint?
A. Last winter we had quite a snowstorm in Idaho, throughout the inter-mountain country. There was a period —I might stand a little correction on this, but I believe 26 days— when no freight, with the exception I think of one day and one-half moved through Wyoming by Union Pacific. At that time there must have been—I know there were several hundred carloads of Idaho potatoes, onions, apples, blocked in by snow in the State of Wyoming, Idaho.

There were potatoes setting in Pocatello. All the branch lines in Idaho—that could not be moved. Had the Ogden gateway been open those perishables could have moved via Ogden to the eastern terminal markets, or to the South, or East. It so happened there were four pullman cars of

Idaho potato and onion shippers headed for Chicago to the United Fresh Fruit and Vegetable Convention during this period. I was in Chicago for a period of four days. I think there was one car of Idaho potatoes arrived.

During this period of over three weeks all of our employes in Idaho were sitting around their desks playing pinocle. We couldn't load out the potatoes. The Union Pacific was blocked. The Rio Grande—almost every day.

It certainly would have been a big advantage to all ship-
[fol. 674] pers in Idaho to have had the privilege of coming through Ogden with our produce.

Q. Did you have any produce in that jam yourself?

A. Yes, I did.

Q. Do you recall how many cars?

A. I don't know exactly, but I would say between 15 and 20 cars.

Q. Do you know how long they were in the blockade?

A. We had no way of knowing. We couldn't find out where they were, whether they were being heated, whether they were where they could be cared for or not. Many of those cars, most of them; we suffered quite heavy losses, due to freezing injury.

Q. What finally happened to those cars?

A. They were finally released when they opened the tracks. The last few days the Union Pacific did haul, I understand, some of them by the Rio Grande, they brought them down through Ogden to relieve the track at Pocatello, and loading points in Idaho. Of course we realize that many of the trains were blocked in in Wyoming and could not get forward or backward. It was a tough deal and there is no doubt the Union Pacific did all they could.

I know they spent an enormous amount of money fighting the snow, and there is no doubt in my mind they did all they could, but that didn't save the potatoes from freezing, and that situation could very easily happen any winter.

Q. Is it your point that this snow blockade, the significance of the snow blockade is that all rail routes should be
[fol. 675] made available to shippers at equal rates, so they could be used under any and all circumstances and conditions?

A. I am not just here in the belief they should open the Ogden gateway. I think all gateways should be opened,

so that perishables may move when and where you want to move them.

Mr. Quirk: That is all. Do you have anything further to say?

You may cross examine.

Mr. Collins: No cross examination.

Exam. Mullen: Thank you, Mr. Long.

(Witness excused.)

L. D. Robbins was sworn and testified as follows:

Direct examination

By Mr. Quirk:

Q. Will you give your name and address to the Reporter, Mr. Robbins?

A. L. D. Robbins, Twin Falls, Idaho.

Q. And in what business are you engaged?

A. Carlot distribution of potatoes and onions, and in years past I have handled lettuce, peas, carrots, that is all.

Q. Roughly, how many carloads of these various commodities would you normally ship in a year?

A. I have had a high year of 700. Last year I dropped down to about 300.

Q. Where is your principal markets?

[fol. 676] A. Chicago and Kansas City, and immediate territory.

Q. You heard the testimony of other potato shippers, and I assume you would be for the opening of the gateway and competitive rates for substantially the same reasons that the other witnesses have testified to?

A. Very difinitely I am, and in addition to that I believe that we need the combined efforts of both of these great roads toward the development of the produce industry in the state. We need the efforts and the help of the Rio Grande, not only toward the moving of our produce to markets, but the supplying of cars and other facilities which at times the Union Pacific have been unable to supply us.

Q. What about this question of diversion, and the brokerage that you mentioned to me this evening?

A. At the present time shipping on the main line to Kansas City, there are numbers of cars stopped at Manhattan, Kansas, at Topeka, Kansas, and other points along that route for inspection.

Q. You mean the main line of the Union Pacific?

A. The main line of the Union Pacific. If the customer likes them he takes them, if he doesn't they can proceed on into Kansas City and go anywhere in the United States east of there. As has been brought out by several witnesses, such is not the case in southern Kansas, or in Oklahoma. I firmly believe if the Ogden and Denver gateways [fol. 677] were thrown open so that we could bill potatoes and onions and other commodities across the State of Oklahoma for inspection, and then have the privilege of moving them on through St. Louis into Cincinnati, Chicago, or the east or the southeast, that we could drum up a lot of business.

The Idaho Advertising Commission has spent thousands and thousands of dollars in advertising Idaho potatoes and onions, and as a result we now enjoy a wider distribution and a greater movement than at any other time in the history of Idaho, except in the territory of southern Kansas and Oklahoma, and in my mind it is due, one reason, because we can't go in there and still move on through because of these pocket markets, and because we can't do that we are forced in a way to sell our potatoes either to Kansas City operators or to bill them to them for sale on arrival.

As I see it, this creates another problem. I talked to one of the largest operators in Joplin, Missouri, and he said, "I won't buy potatoes from Idaho. I wait and watch the track holdings in Kansas City, and when they get glutted I go in there and buy cars at less than the market price," and every shipper in Idaho has had the experience of losing money on that basis.

In my opinion, if it were thrown open, that we could route these cars south of the Union Pacific road, across Oklahoma, across southern Kansas, that they would not [fol. 678] arrive in Kansas City to where the tracks were glutted. There is another thing that enters into it there, and that is this: Because the Oklahoma markets are so close

to Kansas City at the present time we cannot sell in Oklahoma because it takes us about six days to get there, and your Oklahoma and souther- Missouri buyers will go into Kansas City and buy them off of the track where they can get two-day arrival.

I just put in three weeks, about six weeks ago, going across the country, and in no less than six of the contacts that I made people told me definitely that they represented in that market one of the three large Kansas City operators. If I send my potatoes into Kansas City for arrival, or on consignment because I have no place to put them, I pay a brokerage to the Kansas City operator, I also pay a brokerage to the Oklahoma City operator, where my potatoes are eventually sold.

Mr. Collins: Were you just quoting the other fellow, or are you speaking in your own behalf now?

The Witness: I am speaking in my own behalf.

Mr. Collins: I see.

The Witness: It seems to me if that were opened up, we could go through there, we could put potatoes in Oklahoma City for inspection, if they saw them they could buy more, if they didn't like them we could move them out. I think it was Mr. Vanderford who touched on one point I would like to enlarge on a little bit, and that is this: I understand that [fol. 679] a very heavy percentage of the potatoes from southern Idaho at this time: Burley, Twin Falls, Kimberly, Hanson, Buell, that go into Los Angeles, are going in there by trucks, because they can get them in there in 36 to 48 hours. Our present schedule is about four days by rail to Los Angeles. It is my contention that if that gateway were opened that we could use Salt Lake City as a diversion point, place cars of potatoes here in Salt Lake.

If we were unable to sell them in Los Angeles we could then move into Oklahoma territory, and if the gateway were opened, move them out of Oklahoma on into St. Louis and east. On a basis of that kind we could give Los Angeles second-morning arrival where at the present time we are restricted to four days, and consequently our business is all being lost to trucks.

I believe that covers what I had.

Mr. Quirk: You may question the witness.

Cross-examination.

By Mr. Collins:

Q. Do I understand you are adopting the testimony of these other gentlemen from Idaho who have testified as Idaho potato producers and shippers, and what you have said is in addition to theirs?

A. Supplementing it, Mr. Collins.

Q. I understood you to say, Mr. Robbins, that your principal markets were at Chicago and Kansas City?

A. That is right.

[fol. 680] Q. About what per cent of your shipments or volume—you said 700 carloads in a high year and about 300 in 1948—

A. Yes, sir.

Q. About what percentage of those carloads would you say were sold in Chicago and Kansas City?

A. There were two different grades of potatoes. The number 1 potatoes went principally into Chicago, and I would say 90 per cent of my number 2 potatoes went into Kansas City. Just what percentage those shipments would be, I won't know. It varies greatly, Mr. Collins, by weeks or by months.

Q. You said maybe 90 per cent of the number 2's went to Kansas City, and most of those that went to Chicago were number 1's. Would you be able to estimate what per cent of the number 1's went to Chicago?

A. I would say 75 per cent.

Q. Could you tell us about how many carloads of potatoes you had caught up in what has been called this "pocket" that you were talking about down there?

A. I was connected with the Atlantic Commission Company for 11 years. Four years ago I left my position there and went into business for myself, and because of the experiences of other people, and because of no known acquaintances in that territory where the markets existed, I have not been doing business in there.

Q. I see.

[fol. 681] A. Just recently this fall I covered 6,000 miles through that territory, making contacts in the hopes that I could get some business from them. But so far I have never been caught in one of those pocket markets myself.

Q. You have not lost anything yet by being caught in them?

A. No, sir. I have profited by the other fellow's experience.

Q. Isn't it a fact, Mr. Robbins, that there is a considerable movement of potatoes from Idaho to California points by truck where the truck owner—the trucker is the private owner of his truck, and he buys his potatoes in Idaho, and owns them and hauls them say to the Los Angeles area?

A. I couldn't verify that, because I don't pack potatoes, therefore, I don't sell to truckers. I buy carloads after they are packed, and all of my business is rail shipments.

Q. You are not a producer of potatoes?

A. Not to any great extent, no, sir.

Q. You are a buyer and seller, is that right?

A. That is right. I buy on brokerage for some accounts, but principally I buy these potatoes and handle them on a merchandising basis.

Q. Do you buy them on a track around Twin Falls for some principal located say in Kansas City?

A. I would say that 15 per cent of my tonnage is bought on that basis, not only at Twin Falls. I have bought potatoes all the way from St. Anthony and Newdale in the [fol. 682] Northeast, to Weiser in the Southwest and also in eastern Oregon.

Q. Does your principal pay the freight charges on these potatoes when they reach him?

A. In all cases. I don't prepay any freight. Some of them are sold on an FOB basis in which I draw a draft for the net amount. Others of them are sold, and most of them are sold on a delivered basis, in which I draw a draft for the gross amount less the freight charges and he pays the freight charges and submits the freight bill as part payment on the merchandise.

Mr. Collins: That is all.

Mr. Quirk: That is all.

Exam. Mullen: That is all, thank you.

(Witness excused.)

Mr. Quirk: Mr. Examiner, we thought we might have some other witnesses, but we haven't. While we are here, and the hearing is in session, I would like to ask Mr. Col-

lins if he has come to any conclusion about cross examining Mr. Earley.

Mr. Collins: Well, I hadn't actually yet, Mr. Examiner. I thought I would make a statement about it when all of the complainant's witnesses at this hearing had testified. I want to talk with my officers of the company who are here with me briefly about the matter again, that is the matter of possible cross examination of Mr. Earley, but I will say this, I am quite sure that if I have anything to ask Mr. Earley it will be very brief, and it is possible that I will [fol. 683] have no questions to ask him at all.

If I ask him anything, it would not take more than 20 to 30 minutes, I'm sure, from my standpoint, at the outside. I would like to defer final declaration on it until the other witnesses are in. I'm quite certain it won't cause anybody to miss a train if the hearing can be closed otherwise. That is, my dealings with Mr. Earley's situation won't add enough time to cause anybody any inconvenience.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: The hearing will be resumed then tomorrow in this room at 9:30 a.m.

(Whereupon at 9:25 p.m. the hearing recessed to reconvene on Friday, December 16, 1949, at 9:30 a.m.)

[fols. 684-685] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant

UNION PACIFIC RAILROAD COMPANY, ET AL., Defendants

Transcript of Testimony—Salt Lake City, Utah, Friday, December 16, 1949

Met, pursuant to adjournment, at 9:30 o'clock a.m.

Before: Frank E. Mullen, Examiner.

[fol. 686] Proceedings

Exam. Mullen: We are ready to resume the hearing. Please come to order, gentlemen.

Mr. Quirk: Mr. Fuller.

JOE FULLER was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Your name is Joe Fuller, is it not?

A. Yes.

Mr. Collins: Fuller.

Mr. Quirk: Fuller.

By Mr. Quirk:

Q. And you reside in Pocatello, Idaho?

A. That is right.

Q. Now I understand you have a short statement here that you will read and that will constitute your testimony, so proceed with your statement.

A. Well, I'm engaged as a partner with Mr. Goldstein in buying and selling livestock, principally sheep. We buy Idaho, Oregon, Washington, Montana, that is, we contract during the summer normal deliveries as a rule in different

localities, and we would like to do a little more business in Colorado and Utah.

Mr. Collins: Would you read that last sentence, Mr. Reporter.

(Answer read.)

The Witness: But the feed in transit freight rate is a lit-
[fol. 687] tle too high, and we have lost a lot of deals on that account, because we can't compete with the Union Pacific.

By Mr. Quirk:

Q. Mr. Fuller, would you talk into the microphone there. Just hold yourself back a little bit.

Mr. Collins: Off the record a minute. Are you reading this statement, Mr. Fuller?

The Witness: I started to, but I have a little trouble with my eyes.

Mr. Collins: I'm sorry.

The Witness: We cannot sell to Utah or Colorado sheep men on the same basis as we do to stockmen who live where they can ship on the Union Pacific. There is considerable demand for sheep of all classes in Utah, Colorado and Kansas. At different times during the past several years some of our fat lambs have gone to the Lincoln factory, Pueblo, Colorado, and other meat packers in California are periodic customers of ours. If competitive through rates to Denver and Missouri River points from Idaho, Oregon and Montana points, on the Union Pacific were established via the D&RGS through Ogden, we could enlarge our operations by moving our entire purchase of sheep as received at the railhead in Idaho, Oregon or Montana by the UP to Salt Lake or Ogden for sorting and grading, some of them going to Colorado and Utah, and some of them to California points.

Such privileges are permitted at both Ogden and Salt
[fol. 688] Lake City and ample facilities for such work are provided there. After sorting, shaping and grading, the sheep could be forwarded on to destination via whichever railroad we wanted, that is, whoever we sold to, they could do whatever they wanted with them.

Mr. Collins: What was the last thing you said?

(Answer read.)

The Witness: We are not big buyers, but this year we handled a little over 100 carloads. Last year I think we handled about 200 carloads, and the year before I think about 300 carloads altogether. It makes quite a little difference if we had these through billings by way of the D&RG.

Mr. Quirk: You may cross examine.

Mr. Collins: No cross examination.

Mr. Quirk: You are excused.

Exam. Mullen: That is all, Mr. Fuller. Thank you.

The Witness: Thank you.

(Witness excused.)

Mr. Quirk: Mr. Wagner.

ELMER J. WAGNER was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Your name is Elmer J. Wagner?

A. Right.

Q. And you are located where?

[fol. 689] A. Lamar, Colorado.

Q. What is your business?

A. I am President of the Arkansas Valley Stock Feeders Association.

Q. You have a statement. Will you proceed to give your testimony in this statement form?

A. I will.

I am President of the Arkansas Valley Stock Feeders Association. This association is located and carries on its livestock feeding operations in Southeastern Colorado, East of Pueblo, and in Southwestern Kansas. It is generally located in the farming country, in the valley of the Arkansas River, contiguous to the Santa Fe and Missouri Pacific Railroads.

The membership of our association is interested in having competitive through rates on livestock from points in the Northwest, via Ogden and The Denver and Rio Grande

Western Railroad. We are interested in having such rates because we wish to be able to purchase feeder livestock in Idaho, Oregon, Washington and Montana on a competitive basis with feeders of livestock in other localities; for instance, northern Colorado and Nebraska.

I have been feeding lambs ever since 1900 or nearly 50 years, and some years have fed between 80,000 and 100,000 lambs in Colorado, Kansas and Nebraska. In 1928, 50,000 lambs were purchased in Oregon and Idaho. At the present time I am feeding 9,000 lambs, 5,000 ewes and 225 head of cattle.

[fol. 690] The Arkansas Valley Stock Feeders are not on a competitive basis with stock feeders in other localities, such as northern Colorado, Nebraska and northern Kansas. We do not raise livestock; we fatten them by utilizing the best pulp, beet tops, grain, hay, forage and other miscellaneous agricultural crops suitable for fattening livestock, raised on the farms and ranches. This feeding process generally takes place during the early fall, winter and spring months.

These livestock almost entirely go to slaughter at the Missouri River or other eastern livestock markets—Kansas City, St. Joseph, Omaha, Sioux City, St. Louis, Chicago, and others. Transportation costs are a factor in the overall operation. Through freight rates from the localities where cattle and sheep are raised to these slaughter points with feeding, grazing and fattening in transit privileges are a consideration. There was a time when we could, and did, buy feeding lambs in large numbers in Oregon. The through freight rates from Oregon points on the OWR&N Railroad where we bought lambs was the same via the D&RGW at Ogden and AT&SF at Pueblo to Kansas City as it was via the Union Pacific.

In the years before 1932, it was a regular custom for Colorado range men, in the spring to buy old ewes and lambs in Idaho, Oregon, Montana and Washington, ship them into Colorado to points along the D&RGW, summer them, in the fall sell both ewes and lambs. We Arkansas Valley men were always in the market for such of the sheep as were [fol. 691] suitable for further fattening. The cost of the animals, as well as the freight benefit, made them attractive to us.

It cost us no more generally to deliver them at Kansas City when they were fat than it cost any livestock feeder on the Union Pacific in Colorado, Nebraska and Kansas. I am now told it was in 1932 that the rate relationship was changed. Stockmen in these Colorado, Nebraska and Kansas points on the UP were given lower freight rates on livestock from the Northwest points to the Missouri River markets than we Arkansas Valley fellows.

We slowly learned that there was no through freight rate from these Northwest points via the D&RGW-AT&SF and that even if shipments moved UP to Denver and then down through the Arkansas Valley on the AT&SF that the rate to the Missouri River was higher. We learned by repeated efforts that feeders located on the UP to the north of us were able to overbid us in Oregon and the other states. We like the Northwest lambs and would like to buy them if we had the same freight rate advantage.

Q. By the way, Mr. Wagner, where are you located?

A. I am located at Lamar, Colorado, on the Santa Fe.

Q. As President of the Arkansas Valley Stock Feeders Association, where are you located?

Mr. John L. Anderson of Los ——.

A. Our office is located at Los ——. Our secretary is

Has decreased less than for instance in Oregon and Mon-

[fol. 692] Mr. Quirk: All right. You may cross examine.

Cross-examination.

By Mr. Collins:

Q. Mr. Wagner, who wrote this statement for you?

A. This statement was prepared by our secretary, Mr. Anderson, and myself, after we had a meeting of the Board of our Executive Committee.

Q. Do you know what happened in 1932 that caused you to make the statement here that you did?

A. Well, I understand that the Ogden and Denver gateway was closed about that time.

Q. Did anyone tell you that the Interstate Commerce Commission had had a proceeding involving the cattle rates at that time?

A. No, I don't think so, not that I remember.

Q. Did your 215 members take action on this intervention of the Arkansas Valley Feeders Association?

A. Those things at our annual meeting that is held in February every year is always left to our Executive Committee, and our Executive Committee passed a resolution authorizing the president and secretary of the association to proceed.

Q. Your Executive Committee can do anything it wants to so far as the membership is concerned, is that it?

A. The membership at every annual meeting give them that privilege, because our members are scattered up and down the valley so it would be impossible to get them to-
[fol. 693] gether on occasions of this kind.

Q. They are the actual producers and shippers, are they not, your members?

A. The feeders, yes, sir.

Q. The feeders, yes, sir, excuse me.

A. Yes, sir.

Q. Last February—do you mean 1949?

A. Yes, sir.

Q. Mr. Wagner, as I understand the petition for leave to intervene, all the Arkansas Valley Stock Feeders Association wants is a choice of alternate routes at equal rates as indicated in Paragraph 3 of the petition, is that correct?

A. That is correct.

Mr. Collins: That is all. Thank you.

The Witness: Could I add a little bit to this statement?

Exam. Mullen: Go ahead.

The Witness: I would just like to say in 1928 we purchased a great many lambs up in the Oregon and Idaho territory. At that time we could compete with the northern Colorado and Nebraska feeders. At the present time our freight rate on lambs from Baker, Oregon, to Missouri River points over the UP is $1.37 per hundred. If we come down through the Ogden gateway over the D&RG Western, and Santa Fe into the Arkansas Valley, our freight rate is $1.86 a hundred. That is 49 cents over the Colorado and
[fol. 694] Nebraska feeders rate, or with tax and all, over $100 per car.

That makes it impossible for us to compete with north-

ern Colorado and Nebraska feeders in that locality for feeding lambs. We have always liked those Oregon and Idaho lambs especially, and we can get them in early in the fall to turn into the cornfields, and we could use a good many of them every year; but this high freight rate is prohibitive for us and we are not able to buy them.

I would like to say that in previous years, in 1928, I think our association fed something over 400,000 lambs in the Arkansas Valley. That did not include the western part of Kansas. At the present time we are feeding approximately 100,000 lambs.

By Mr. Collins:

Q. How many did you feed in 1928?
A. Over 400,000.

Mr. Quirk: That is all.
Mr. Collins: No, just a minute.

By Mr. Collins:

Q. When did you become conscious of this competitive situation between the members of your association and the feeder operators in Nebraska, for instance?

A. I couldn't state exactly the time that we did, but our secretary, Mr. Anderson, is a good rate man. He handles the freight bills for our association and audits them for the members as the lambs come in in the fall, and Mr. Anderson discovered this, but I couldn't state just when he did discover it. However, I know for several years we have been trying to see if we could get some information [fol. 695] or way that it could be corrected.

Q. Let me ask you this, Mr. Wagner. Where does your association members sell their lambs?

A. Most of them go to either Kansas City or St. Joseph, Missouri.

Q. I understood you to say that it had become impossible for you to compete—your association to compete with the Nebraska feeders?

A. We could not compete with Nebraska——

Q. Is that what you said, it is impossible for you to compete with them?

A. On Idaho and Oregon lambs.

Q. That is, they can make more money at their rates than you can make at the rates on the D&RG, is that what you mean?

A. We would have $100 extra per car of freight to pay, and that is really prohibitive, which runs up the cost of the lambs to start with, and it is prohibitive so that we cannot compete with them.

Q. If they had the same rate that you have, the prohibition would be removed, wouldn't it?

A. I think that would be probably prohibitive.

Q. For both?

A. For both of us.

Q. I see.

A. Another thing, it would encourage the transportation by trucks a great deal, which I think that all railroads [fol. 696] should recognize. Down in our valley at the present time a good many lambs are coming in from Texas and New Mexico, all by truck.

Q. Why do you think that is? What causes that?

A. These last three or four, whichever it is, increases in freight rates, have discouraged a good deal of feeding everywhere, for that matter. These freight rates are getting so high that it's almost impossible, and a good many feeders feel that they cannot afford to pay these excessive freight rates and stay in business.

Q. The freight rates are increasing as well for the Nebraska feeders as they are for the Arkansas Valley feeders, are they not?

A. I imagine they are, although this differential from Baker, Oregon seems for some reason to us to be out of line with some other rates.

Q. You haven't tried to figure out whether or not the increase is proportionately the same.

A. No, I have not.

Q. Isn't this a fact, Mr. Wagner, that these people ship by truck, the members of your association ship by truck when they see it is to their financial advantage?

A. Well, they do in some cases where it's not too long a haul, but they couldn't ship by truck from points up in Oregon and Idaho. That would be impossible.

[fol. 697] Q. Would they ship by truck at all if it was not to their financial advantage?

A. I think that is right.

Mr. Collins: All right, sir. That is all. Thank you.

Redirect-examination.

By Mr. Quirk:

Q. Did you say how many members there are in the Arkansas Valley Stock Feeders Association?

A. 215 at the present time.

Mr. Quirk: That is all. Thank you.

(Witness excused.)

Mr. Quirk: Mr. McIntosh.

Angus McIntosh was sworn and testified as follows:

Dedirect-examination.

By Mr. Quirk:

Q. Your name in Angus McIntosh.

A. That is right.

Q. Where are you located?

A. Las Animas, Colorado.

Q. Are you connected with the Colorado Wool Growers Association?

A. I am President of the Colorado Wool Growers Association.

Q. You were Vice President?

A. Yes.

Q. How many members are there of that organization?

A. 832.

Q. In general where are they located?

[fol. 698] A. I would say 90 per cent of the sheep produced in Colorado are produced in the D&RG territory.

Q. Now you have prepared your testimony in statement form.

A. Right.

Q. Will you proceed to read your statement.

A. Since I have prepared this statement I have been elected President of the association instead of Vice President.

I represent the Colorado Wool Growers Association which is composed of 832 members and I am President of that organization. The Colorado Wool Growers Association is interested in being placed upon an equal basis with other sheep producing and feeding areas.

Colorado is an important state in the sheep industry. The high mountain country provides excellent forage feeds for summer pasturing flocks of sheep. Ewes with new born lambs are put on such high country ranges or pastures as soon as possible in the spring. The lambs "ripen" with the forage in the fall.

Most of the lambs (about 85%), both ewes and wethers, are fat enough for slaughter and are either purchased at the rail loading point or at adjacent livestock markets (Denver, Kansas City, etc.) by meat packing company representatives for slaughter at those points or in many cases, for shipment on to other slaughter houses. The trend of fat sheep movement from Colorado is eastbound as a preponderance of lamb and mutton is consumed in the [fol. 699] east.

Some of these lambs are shipped by rail as far as New York City for slaughter. The small per cent of lambs, both ewes and wethers, not fat enough for slaughter, are eagerly sought after by Colorado lamb feeders for further finishing in the fattening pens in the Arkansas Valley of Colorado and Kansas, in northern Colorado and now, to a great extent, by Kansas wheat pasture lamb feeders.

The Kansas wheat pasture market for such lambs has recently grown to large proportions since wheat raising in that section became popular. Thus the ewe lambs are too valuable as "killers or feeders" in the fall for the Colorado sheep men to hold over for herd replacements. He must and does look to other localities for such replacements where sheep raising does not produce fat lambs for immediate slaughter.

In the years prior to 1932, many such ewe lambs for herd replacements were bought in the Northwest in localities

from which there were through rates to Denver, Missouri River and Eastern points by way of Ogden and the D&RGW Railroad to other railroads at Pueblo, and Denver, AT&SF, MP, CB&Q and CRI&P. A large part of our membership have their sheep raising operations contiguous to the D&RGW.

The grazing-in-transit privileges generally permitted by all railroads enabled these Colorado men on the D&RGW to use the through freight billing, after summer grazing, on [fol. 700] the sheep that moved east. The saving by such use was, in some years, about all the profit the grower received. In any event, the saving is a valuable consideration.

Some time early in 1932, restrictions were placed on routing sheep, originating at Northwest points, on or by way of the UP at Ogden with the D&RGW. Our members were no longer able to compete in the purchase of sheep in those localities with the sheepmen in Wyoming, or at other points east in Colorado, Nebraska, Kansas, etc. on the UP, who have a much lesser through freight rate on their product.

Prior to 1932 there were annually large movements of "pairs"—old ewes whose breeding expectancy was not great and young lambs from the Northwest to Colorado points on the D&RGW—for summer grazing. Both ewes and lambs were shipped on to eastern markets in the fall. They enjoyed the benefit of competitive through rates from origin to eastern destination with grazing-in transit privileges enroute.

Increased freight charges now assessed on such shipments have almost entirely discontinued purchases in the Northwest. Certainly absence of potential Colorado demand for herd replacements or old ewes and lambs has resulted in proportionately lower values on these sheep in the Northwest by eliminating the Colorado sheepmen in D&RGW territory from competition with the sheep purchasers from other localities who enjoy the lesser freight charges.

[fol. 701] As to my personal activity in the sheep industry, I have been so engaged for about 25 years. My ranch holdings in Bent, Otero and Kiowa Counties in Colorado aggregate approximately 55,000 acres, where I raise lambs from about 7,000 ewes. I also fatten lambs in the fall, winter

and spring, and annually purchase 5,000 or more lambs in addition to those I raise, for that purpose.

At the present time I have about 10,000 lambs on feed in Colorado and Kansas. This fattening process is conducted at Las Animas, or adjacent Arkansas Valley points, and on wheat pasture in Kansas.

Prior to 1932 I purchase large numbers of sheep, mostly in Oregon, which I shipped by way of Ogden and the Rio Grande, and Pueblo and the Santa Fe. At that time the same through rate was charged, whether the sheep moved over the Rio Grande or by way of the UP. Shipments made over the Rio Grande better suit my purpose for these reasons: When sheep are loaded at Oregon points I prefer to have them stop, first at Caldwell, Idaho for feed, water and rest, and next at Salt Lake City, from which point the Rio Grande invariably arranged through service home to Las Animas, in connection with the Santa Fe to Pueblo.

Some of my lamb shipments from Oregon, routed UP, Denver and Santa Fe, have been fed at Caldwell the first time, at Pocatello, Soda Springs or Green River the second [fol. 702] time, and Laramie or Denver the third time, and some shipments were fed at Laramie the third time and at Denver the fourth time.

Mr. Quirk: You may cross examine the witness.

Cross-examination.

By Mr. Collins:

Q. Mr. McIntosh, did you write this statement?

A. Yes, sir.

Q. You know the facts that are stated in there of your own personal knowledge?

A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. Are you speaking for the 832 members of the Colorado Wool Growers Association?

A. This action was taken by the Executive Committee of the Colorado Wool Growers and was approved by the Transportation Committee and approved by the members at their state convention last week in Denver.

Q. The majority of the 832 members.

A. There was a quorum present.

Q. A majority of the 832 emmbers.

A. I can't say how many members were there.

Q. You don't know.

A. No.

Q. Now do all members of the association engage in the same business that you indicate in the last part of your [fol. 703] statement that you are engaged in?

A. No.

Q. Their activities vary from yours, they are not all the same.

A. No.

Q. They are not all in the same situation at all, are they?

A. No.

Q. Where are the markets, if you will name some of the cities where you indicate on the first page about six or seven lines from the bottom of the first paragraph of your statement that your lamp and mutton is consumed, can you indicate by naming some cities? You say in the East.

A. A great majority of lamb is consumed in the New England district.

Q. What portion or percentage, if you could estimate it, Mr. McIntosh, of the sheep or lambs or whichever it is that you purchase come out of this Northwest country, north of Ogden?

A. You mean I personally purchase, or the wool growers?

Q. You can take it on your own operation. Yes, let's have it on your own operation.

A. Well, since 1932 a small per cent of the lambs have come out of there. I would not say just what per cent, but it is much smaller than it was prior to that.

Q. I noticed this sentence beginning five lines from the bottom of your statement, the first page, "The small per cent of lambs, both ewes and wethers, not fat enough for [fol. 704] slaughter, are eagerly sought after by Colorado lamb feeders," and so forth. Now, does that refer to these ewes and wethers from any particular part of the country?

A. I believe I am talking about the Colorado lambs there.

Q. I see.

Well, would Colorado lambs serve the purpose of your own fattening operation?

A. As I have said in this statement, 85 per cent of the Colorado lambs are fat enough to go to the slaughter when they come off the mountain ranges, and there is just a small per cent of the lambs that go into the feed lots.

Q. I am wondering, I hope you will tell us, just what real importance it is to you in your fattening operation of these lambs to have those from the Northwest, north of Ogden?

A. I have never bought lambs that I like as well as I do the Northwest lambs: The eastern Oregon, southern Montana, Idaho lambs seem to do better. They are younger lambs when we get them. They put on better gains, and I like them better than any lambs I have ever purchased.

Q. Why?

A. For that reason.

Q. Well, finally, is it because you can make more money out of them?

A. That is what I am in business for, yes, sir.

Q. You know, do you not, Mr. McIntosh, that there has [fol. 703] been a gradual reduction in the number of sheep and lambs produced or grown in the western country in recent years?

A. Yes, sir.

Q. Is that particularly true in your Colorado area?

A. Colorado has decreased less than most of the other states.

Q. I see.

Has decreased less than for instance in Oregon and Montana, perhaps, or Idaho?

A. Yes.

Q. Now, Mr. McIntosh, on the bottom of page 2 of your statement you say: "Our members were no longer able to compete in the purchase of sheep in those localities with the sheepmen in Wyoming, or at other points east in Colorado, Nebraska, Kansas, etc. on the UP, who have a much lesser through freight rate on their product."

Would your situation be changed at all if there were no, I would suppose you would call it fattening operators, in these states that you mentioned?

A. I don't just quite understand.

Mr. Quirk: If you were the only lamb feeder in the world, would you be better off?

Mr. Collins: No, you took in entirely too much territory, Mr. Quirk.

By Mr. Collins:

Q. If the people in these states you mentioned were not in business, wouldn't your problem be just the same?

[fol. 706] A. No, sir, I don't believe so.

Q. Well, does that situation, the fact that there are feeders in Nebraska and Kansas, does that have anything to do with the marketing of your lambs?

A. We have to compete with them in the market, yes, sir.

Q. And don't you have to compete with them from every place lambs are produced all over the country?

A. Yes, yes, I do.

Q. So that these operators in Kansas and Nebraska probably are an unrecognizable part of your competition, are they not?

A. No, no, the Colorado-Nebraska feeds the majority of the lambs feed in the United States.

Q. I see.

Does the buyer make any distinction between the lambs you fatten and those that are fattened in Wyoming?

A. I don't believe that can be answered. There are several different ways of fattening lambs, and lambs are sold on their own merits.

Q. Yes, but the buyers don't really refuse to buy your lambs because they are fattened in Colorado, adjacent to the Rio Grande Railroad, do they?

A. No, sir.

Q. No.

The petition for leave to intervene is filed by the Colorado Wool Growers Association. Are you intervening, with [fol. 707] respect to wool, as well as meet?

A. We're in the business for both the wool and meet, and we have found we like the replacements out of the Northwest better than any replacements we can buy.

Q. And for the reasons you indicated that you can make more money out of the lambs?

A. Yes.

Mr. Collins: That is all, sir. Thank you.

Mr. Quirk: That is all.

(Witness excused.)

Mr. Quirk: We have three witnesses we thought would be here. Unfortunately one of them is on the Union Pacific train which is three hours late. I don't know what is the matter with the others. Could we have about a 15-minute recess, and perhaps we can have some understanding with counsel?

Exam. Mullen: Yes, we will recess for 15 minutes.

(Short recess.)

Exam. Mullen: The hearing will be resumed, gentlemen.

ANTON POITEVIN was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Mr. Poitevin, your name is Anton Poitevin, and you are from Idaho Falls, Idaho.

A. Yes, sir.

Q. Are you prepared to testify here in the form of a statement?

[fol. 708] A. Yes, sir.

Q. Will you proceed to read your statement?

A. My name is Anton Poitevin. I live at Idaho Falls, Idaho, and have been engaged in various enterprises in this state since 1910. I am President of the Idaho Potato Growers, Inc., and am a member of the Idaho Falls Chamber of Commerce. Both of these organizations have passed resolutions favoring the establishment of competitive rates through the Ogden gateway via the Union Pacific and the Denver and Rio Grande Western Railroad.

The Idaho Potato Growers, Inc., has 1200 members and last year shipped about 5,000 cars of potatoes from Idaho. This organization has been active in this capacity for the past 25 years, and from 11 points in Idaho now ships about 10% of the Idaho crop. In 1910 the potato produc-

tion was about 2500 carloads; in 1948 about 50,000 carloads.

I have personally been engaged in growing potatoes for many years and have in former years grown and shipped as many as 200 cars of potatoes per year.

The potato grown in Idaho, known as the Idaho Russet, is a premium potato and is in demand in all states. It is adapted to the volcanic ash soil prevalent in Idaho and to the high altitude and also to irrigation. It is not grown successfully elsewhere in any quantity except for a portion of the State of Washington.

[fol. 709] This potato has some peculiar characteristics. It needs moisture all of the time it is growing and its growth must be continuous. It does not develop properly when dry farming methods are used. Because of these factors, it develops to a high degree in Idaho and a potato is produced that is in demand throughout the United States.

Despite this quality, the Idaho Russet is grown in a state that is not close to the larger markets and consequently must be sold at a freight rate premium in the competitive markets. For this reason we feel that the Idaho Potato Growers should have every advantage in the way of available rail routes to all markets and should not be handicapped by higher rates through any gateway.

Q. Have you anything to add to that statement?

A. Not at this time, thank you.

Mr. Quirk: All right. You may cross examine.

Mr. Collins: We have no cross examination.

Mr. Quirk: All right.

Exam. Mullen: Thank you.

(Witness excused.)

COLLOQUY BETWEEN EXAMINER AND COUNSEL

Mr. Quirk: Mr. Examiner, I hoped to have the privilege of putting on one or two, or perhaps three witnesses at the adjourned hearing before the defendants put on their case. We have no additional evidence to offer at this hearing.

Exam. Mullen: Mr. Collins.

[fol. 710] Mr. Collins: Mr. Examiner, sometime ago, at the suggestion of the Chief Examiner, or the ex-Chief

Examiner now, Mr. Butler, who suggested that although an adjourned hearing in this case would be arranged, he thought that we should endeavor to put on such testimony as we could. We prepared some testimony somewhat in the dark, not knowing exactly what we would have to meet, and even approximately what we would have to meet, and I find practically all of that that was prepared now has to be revised and cannot be introduced without such revision in the light of what has been introduced here, so that it leaves us with nothing of substance ready to go into the record at this hearing, and I would like to state, particularly in view of the fact Mr. Quirk for the complainant may have some other witnesses at the adjourned hearing, to begin with, I would like to submit no testimony for the defendant, the Union Pacific Railroad at this hearing, instead follow immediately with our testimony after he determines what further witnesses, if any, he wants to put on at the adjourned hearing.

Exam. Mullen: Could you tell me, Mr. Quirk, about the approximate number of witnesses and the time of testimony you will have?

Mr. Quirk: As far as I can now determine I would assume we would not consume more than one hour and a half or two hours. We might have one or two men who were supposed to be here this morning, who will deal from the [fol. 711] shipper or businessmen's standpoint. I might put Mr. Earley on to make clear certain things which I am not sure until I read the record are clear in the record about tariffs, and especially—well it is not necessary to mention them—it will not be very much.

Exam. Mullen: How about that question of cross examination of Mr. Earley?

Mr. Collins: I am not sure I caught what Mr. Quirk just said. You say you want to put him back on?

Mr. Quirk: Well, only for the purpose, Mr. Collins, of making clear certain tariff situations which some of the businessmen witnesses I fear, if you read their testimony without reference to the other testimony, that it is not clear. I am sure there will nothing for you to rebut in that, because it will be merely a tariff exposition of what the tariff situation is.

Mr. Collins: Well, of course I will have to decide

whether there will be something to rebut after your clarifying statements.

Mr. Quirk: All right. But you can certainly determine now whether you want to cross examine him on what he put in.

Mr. Collins: Up to now.

Exam. Mullen: Yes, up to now.

Mr. Collins: Well, I'm ready to announce that we have examined this rather large compendium here of 274 pages of Mr. Earley's exhibit, and 60 pages of testimony, and we have decided to waive cross examination of Mr. Earley [fol. 712] with respect to the testimony he has put in so far. By our waiver, I would like this record to show, however, we have no intention of not controverting what he said. We want an opportunity, and will insist upon an opportunity to do the work necessary to prepare the testimony that will answer and rebut and explain all of the circumstances set forth in Mr. Earley's testimony just to illustrate there are reasons why the Union Pacific, to use his words, "permits itself" to be short-hauled. We know that is not the case.

We will have an explanation for all such matters such as that. So rather than to wrangle with Mr. Earley on cross examination, we will prepare the answers and submit them as our own testimony at the adjourned hearing.

Exam. Mullen: Is there any objection to the receipt in evidence of Complainant's Exhibit No. 3?

Mr. Collins: No, sir, no objection.

Exam. Mullen: It will be received in evidence at this time.

(Complainant's Exhibit No. 3, Witness Earley, received in evidence.)

Exam. Mullen: That is apparently all we can get in at this hearing then.

Mr. Quirk: Yes.

Exam. Mullen: I would like to take up the matter of a further hearing in this proceeding which we discussed last night. In addition to the grounds presented by the de- [fol. 713] fendants at the general discussion off the record last night for a hearing at Boise, Idaho, consideration has been given to the intervening petitions filed by interested

State Regulatory Commissions. It is noted that the Public Utility Commission of Idaho has taken no position in this proceeding, either for or against the complaint, which is the same position taken by the Public Utility Commission of Colorado and the Public Service Commission of Utah.

The petitions of the State Commissions of Wyoming, Montana, Washington, and Oregon state that those agencies are in opposition to the complaint. I assume they will want to be heard, and will offer evidence. If so, they probably will want a hearing at some point in their states.

Boise may be an appropriate place.

At this time, then, I will announce an adjournment of 60 days until February 15, 1950. The place of hearing tentatively will be Salt Lake City subject to a change to Boise in the event good cause is shown for a hearing at that point. In the meantime, the Examiner expects the defendants and the State Commissions who are appearing in opposition to present their reasons in some detail for a hearing at Boise, as requested here. Notice will be given to the parties by the Commission of any changes made as to date or place of hearing.

Mr. Collins: Very good, sir.

[fol. 714] Exam. Mullen: That concludes this proceeding, gentlemen, until further hearing.

Thank you very much, gentlemen.

(Whereupon at 11:20 a.m. the hearing was adjourned to reconvene at further notice.)

[fols. 715-716] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL., Defendants

Transcript of Testimony—Boise, Idaho, Monday, April 3, 1950

Met, pursuant to adjournment, at 9:30 o'clock a.m.

Before: Frank E. Mullen, Examiner

ADDITIONAL APPEARANCES:

H. L. Mulliner, 817 Continental Bank Building, Salt Lake City, Utah, appearing on behalf of Denver and Rio Grande Western Railroad Company.

James M. Souby, Jr., 114 Sansome Street, San Francisco, California, appearing for Atchison, Topeka and Santa Fe Railway Company, et al.

[fol. 717] PROCEEDINGS

Exam. Mullen: The Commission has set for further hearing at this time and place, Docket No. 30297, the Denver and Rio Grande Western Railroad Company versus Union Pacific Railroad Company, et al.

Will those who are appearing here please announce their appearances, but we need to know only the appearances of those who have not appeared before, that is, at the Salt Lake City hearing.

Are there any additional appearances?

Mr. Souby: J. M. Souby, Jr., 114 Sansome Street, San Francisco, California, appearing for the Atchison, Topeka and Santa Fe Railroad; Gulf, Colorado and Santa Fe Railway Company, and Panhandle & Santa Fe Railway Company, defendants.

Exam. Mullen: Any others?

Mr. Collins: Mr. Examiner, at the Salt Lake City hearing, I announced appearances for attorneys for the Union Pacific Railroad, and included the name of Mr. W. R. Rouse, who was not then a practitioner, but since that time he has been admitted to practice before the Commission.

I would also add as an appearance for the Union Pacific, Mr. L. W. Hobbs, who is a practitioner.

Exam. Mullen: Are they here?

Mr. Collins: They are here.

Exam. Mullen: Are there any additional intervenors?

Mr. Quirk: Mr. Gibson and I have been asked to file a [fol. 718] petition of intervention for the executive committee of the Utah State Farm Bureau Federation. It is a petition for leave to intervene and doesn't broaden the issue.

Exam. Mullen: Do you have a copy of that, Mr. Collins?

Mr. Collins: Yes sir.

Exam. Mullen: Is there any objection to this intervention?

Mr. Collins: I would like to inquire, do they have a representative present here?

Mr. Quirk: Not at this time, they do not, so I understand.

Mr. Collins: Do they expect to have a witness?

Mr. Quirk: I don't know. I am not sure. We have been asked merely to file this for them.

Mr. Collins: I think it could well wait until they have a representative here, Mr. Examiner.

Mr. Quirk: For the time being I could be considered as acting for them.

Exam. Mullen: Well, you say, Mr. Quirk, there will be a representative here during this hearing?

Mr. Quirk: Well, I just can't answer that definitely, Mr. Examiner. There probably will be, but I don't know for certain.

Exam. Mullen: Well, I think we will receive this petition, and admit it subject to objections later. It is now received and filed.

Mr. Quirk: I have also been asked to intervene for the Idaho State Farm Bureau. This does not broaden the [fol. 719] issue, and in this instance there will be present

the president of the Idaho State Farm Bureau, who will also be a witness.

Exam. Mullen: Is there any particular objection to this petition?

Mr. Collins: Will Mr. Lau be the witness, do you know?

Mr. Quirk: Yes.

Mr. Collins: It may be received.

Exam. Mullen: It will be received.

Are there any further preliminary matters to be disposed of at this time?

(No response)

Mr. Quirk, I understand you have some witnesses you desire to put on now.

Mr. Quirk: Yes, we do.

Exam. Mullen: All right, you may proceed.

Mr. Quirk: Mr. Rich.

Roscoe C. Rich was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. State your name, Mr. Rich.

A. Roscoe C. Rich.

Q. Where do you reside?

A. At Burley, Idaho.

Q. And what business are you engaged in, Mr. Rich?

A. In the live stock and ranching business; principally at [fol. 720] this time in the production of lamb wool, or commonly called the sheep business.

Q. How long have you been engaged in that business?

A. Since the summer of 1914.

Q. Are you a member of the Idaho Wool Growers Association?

A. I am, sir.

Q. And how long have you been a member of that Association?

A. I could not say definitely, but since before 1920.

Q. Have you been an officer of that Association at any time?

A. I have been, sir.

Q. And what offices have you held?

A. I was first a director or member of the executive committee, and later president of the Association, and served on the executive committee for a great many years.

Q. Are you a member of the executive committee of that Association now?

A. The past presidents are all members of the executive committee under our organization program, yes sir.

Q. Now, are you familiar with the issues raised by the complaint in this proceeding filed by the Denver and Rio Grande Western Railroad?

A. At least some of the issues.

Q. I don't mean in a technical sense, but you understand the broad purposes of the complaint?

A. I think so.

[fol. 721] Q. Now, has your organization authorized you to testify in this proceeding in favor of the complaint?

A. It has, sir. The president of our Association invited me personally to make this appearance.

Q. Are you also a member of the National Wool Growers Association?

A. Yes sir, that is right.

Q. And have you held any executive office in that Association at any time?

A. I have. I was a member of the executive committee and served as president of the National Wool Growers Association commencing in 1936, and served four years in that capacity. I have sat on their executive committee both previous to my election as president and past presidents there also have served on their executive committee with a voting privilege until the last convention, and they now serve in an advisory capacity.

Q. Have you ever held office in the American Wool Council?

A. I have, sir. I served as president of the American Wool Council when it was formed and I think for about six years thereafter.

Q. Where are your ranches, or principal places of business located?

A. At Burley, Idaho, Black Foot, Idaho, and at Soda Springs, Idaho.

Q. Would you describe the number of sheep or other [fol. 722] live stock that you raised in the course of a year?

A. Well, I can best describe that by saying that we sheared about eight thousand sheep this last year, and our numbers have varied over a period of years. That happens to be about as few sheep as we sheared in any year in thirty years. When I refer to "we," I refer to the R. C. Rich Company, of which I am the principal owner.

We do some farming. Some years we feed cattle for market. We run range cattle for many years. Our range cattle numbers are very low at this time.

Q. Is the R. C. Rich Company, Mr. Rich, engaged in the raising of livestock, or does it have any other business?

A. Yes. We are engaged principally in the live stock and farming business. In fact, that is about our only business. Any other business would be a pretty minor part of our business.

Q. Now, in your ranch and sheep business, I suppose you fat lambs and feeder lambs and old ewes?

A. That is right, sir. We raise a percentage of fat lambs. Sometimes we feed our own lambs, some years we sell our feeder lambs. We market our old ewes in any one of several various ways. We attempt in a feeble way to get the best price we can for them, and to sell them on the best market when we dispose of them.

Q. Well, in selling these lambs and live stock, are the freight rates and the freight costs a factor in their marketing?

[fol. 723] A. We think definitely they are, sir.

Q. What are your principal markets?

A. Well, our markets, sir, have changed over a period of time. If you speak of our own particular operation, at one time we pretty largely sent our fat lambs to Chicago, and sold our feeder lambs in Omaha and Kansas City.

That same thing would be somewhat generally true with most Idaho lamb producers. Some of our lambs go to California, at certain seasons of the year; some of them are bought by the big packers or by the chain stores who have packing plants, and they are distributed over various parts of the country. Some years we sell them at home; some years we ship them on the open market. In late years,

a big part of the lambs north and west of Pocatello go to the Ogden market when the Growers ship them.

Our own lambs, I think the last two or three times we have shipped to a central market; we have shipped to the Ogden market. That situation depends on where the demand is, where the best market appears to be, and where it would appear that the lambs can be sold to the best advantage at the time.

Q. Is the demand for lambs influenced by the availability of rail transportation at competitive rates?

A. We think it is. In fact, we are certain that it is.

Q. Is there a demand for the lambs in Colorado from time to time?

A. Yes, some of our Idaho lambs go to Colorado; some [fol. 724] of them go to the Kansas wheat fields. They go to a number of wide and varied points.

Q. Are they sent to these places for the purposes of fattening them?

A. The ordinary thing that happens with a feeder lamb is that either the proudcer of the lamb fattens the lamb or sells it to an order buyer, or sells it directly to a feeder, and that would include either a man who is going to feed in the feed lot in northern Colorado, Nebraska, Iowa, or a man who is going to pasture in the Kansas wheat fields, and that again depends on the year and the situation as to who might feed that lamb.

In many cases, the grower might elect to feed him; he might elect to pasture him in Kansas; he might feed him in Colorado; he might feed him in any one of a great number of places, but these lambs, excepting the ones which are kept for breeding stock, a very great percentage of them, practically all of them are fattened in the hands of growers, feeders, and producers, and then by direct purchase are going to the central markets, go to the packers for slaughter, and ultimately for consumption.

Q. Do breeder lambs go to Colorado?

A. Yes, we have had a demand in Idaho for a good many years. I might say, it is a varying demand for ewe lambs, yearling ewes, breeding stock, on the part of the Colorado producers, to fill in their herds, and to build up their numbers for breeding purposes.

[fol. 725] Q. Now, I take it that what you said, you are

talking about other ranchers that raise lambs and market them, that are members of this Association?

A. That is right. I myself——

Mr. Collins: Mr. Examiner, may I have a moment before he testifies with respect to other ranchers? I think the witness would have to establish the fact, if it is a fact, that he has knowledge of their individual methods of shipment and disposition of their lambs, and what he says seems to be a varying and diverse kind of an operation.

What I mean is, the fact he disposes of his one way one year and another way the next year wouldn't necessarily mean at all that that would be illustrative of the method all other ranchers would pursue.

Exam. Mullen: Do you desire to develop that, Mr. Quirk?

By Mr. Quirk:

Q. Mr. Rich, you have testified you have been in this business a long time. You have been an officer of the Idaho Wool Growers Association.

Now, are you familiar, do you know from your direct contact with the business, from the knowledge that you acquired in the regular course of your business, whether or not there are other growers of lambs who operate in substantially the same way that you do, or are affected by the same factors?

A. Yes, I think I know that. I have spent the time from 1914 until the present time engaged principally and wholly [fol. 726] in this business, and spend the big part of my time in Southern Idaho. If I did not know something about it, I certainly would have lost a grand opportunity.

Q. Mr. Rich, would a transit arrangement for Colorado feeding or breeding purposes of lambs at competitive through rates be a benefit to the growers of lambs in Idaho?

A. It would, in my opinion, yes sir.

Q. Why?

A. It would create additional demand, put the producers here of the particular kind of live stock that your Colorado producers wanted to buy in a better position to compete, and to supply that trade. It would give more competition here, and we labor under the impression that competition is what makes the price and gives people in the producing

business an opportunity to make better sales, create better markets.

Q. In other words, do you think that there should be flexibility in the use of transportation facilities? That is, in order to bring about the best results for producers of live stock?

A. That is rather a broad term, "flexibility," sir, but we think that if, and I think, maybe I should state it that way, that all markets should be available to producers at competitive rates and shipping costs, making them available, and we think, of course, that that improves our marketing situation, and permits us to get nearer the market for our live stock when we sell it.

[fol. 727] Q. By the way, is there a market for lambs at Pueblo, Colorado?

A. There has been certain times of the year. I have known of sales, both at the Ogden market, and in the country where lambs were bought for the account of a killer at Pueblo.

Mr. Quirk: I believe that is all.

By Mr. Quirk:

Q. Do you have anything to add yourself, Mr. Rich?

A. Only that we believe in the broad principle that the freer movement, and the greater possibility that I may have and that the growers in Idaho may have to the use of any market which might be available at any time, now or in the future, is in the direct interest of the Idaho wool growers, and in my direct interests, and I think that what is in the interest of your wool grower-shipper and the other shipper is in the interest of the people generally in the State of Idaho, and by reason of the fact that Idaho is primarily an agricultural state, and that our economy is very largely based on agriculture.

I think that is all I have to say, sir.

Q. Mr. Rich, I have one more question. Based on your broad experience, and intimate knowledge of the raising and marketing of lambs and other live stock, keeping in mind the matters you have covered in your testimony, do you think that if the railroads would cooperate with each other in making competitive rates available to shippers,

that that would make rail transportation, as against other [fol. 728] kinds of transportation, more attractive to shippers?

Mr. Collins: Mr. Examiner, I hardly know how to characterize it, but I object to the question, and unless he shows that this gentleman is a student of railroad transportation and gives this witness some idea of about what the railroads might accomplish if they cooperate in this competitive situation.

Exam. Mullen: The question was rather broad, Mr. Quirk. Did you intend to limit it to the products or the cattle and lambs?

By Mr. Quirk:

Q. All right, Mr. Rich, do you know whether or not lambs and other live stock produced in Idaho, or raised in Idaho, do move to some markets by truck?

A. Yes. That is coming a little into the picture in the last few years.

Q. Well then, do you think as a business man, to the extent railroads connect with each other, restrict competitive conditions, that that makes the rail, as railroads, less attractive to a shipper than it otherwise would be?

A. Of course, every shipment of live stock is different; it is from a different point of origin to a different point of termination, but in a general way I would say yes.

Mr. Quirk: That is all.

Cross-examination.

By Mr. Collins:

Q. Did I understand you to say that you do some feeding of lambs for marketing purposes?

[fol. 729] A. That is right.

Q. And where do you feed those?

A. At the present time, this last year, we fed at Blackfoot, Idaho.

Q. Where?

A. At Blackfoot, Idaho.

Q. And how long have you been feeding them there?

A. Well, we have had a ranch there since about 1918, and we feed a good many of the years since then there, sir.

Q. Is this feeding grazing, or is it a feeding or fattening in the feeder lots, or some such method?

A. It is usually a combination of both, sir. We ordinarily put lambs on the pasture in the early fall, and the percentage of those lambs that become fat on the pastures are marketed and the ones that do not become fat we either sell them to an agent or an order buyer or a feeder, or we feed them ourselves. We might, and sometimes do, follow either one of those courses.

Q. Now, are you the shipper or consignor of shipments of lambs as they leave the location, Blackfoot, if that is it, of your operation?

A. Ordinarily we are not, sir. We might be at any time. We have been at some times. For your information, in answer to your question, I might say that if we can make what we deem a satisfactory sale, we sell them there. If in the future, or during the past, we could not make what [fol. 730] we deem a satisfactory sale, we might ship them to any one of several different markets.

Q. Your lambs that are fattened at Blackfoot, where are they marketed?

A. If we can make a satisfactory sale, they are marketed at home; we sell them right there.

Q. Right there on the spot, but suppose you can't make a satisfactory sale there?

A. We would then ship them to the market where, in our judgment, they will make the best sale and bring the most money.

Q. You said you would ship some to Ogden?

A. That is right.

Q. Is that a place where lambs are slaughtered?

A. There are some lambs slaughtered there. The American Packing Company was in buisness there for years, and Swift and Company have acquired that property.

Q. Do you know—go ahead.

A. A good many of the lambs that go to Ogden go to various destinations. Some of them go east, some go to San Francisco, some go to Los Angeles; they go wherever killers pay the best price and where they want to ship them to.

Q. You don't know what happened to the lambs that you shipped to Ogden, then, do you?

A. Yes, I know what happened to some of them.

Q. Well, did someone else own them as they arrived at Ogden, someone other than yourself?

[fol. 731] A. As they arrived at Ogden?

Q. Yes.

A. Not when I shipped them there. When I shipped them there they belonged to the R. C. Rich Sheep Company, when they arrived at Ogden.

Q. Is this a fair statement of your reason for appearing in this case, Mr. Rich, that you would like to have equal rates and no routing restrictions anywhere, so far as your desire is concerned?

A. That is a very broad statement, and it is your statement and not mine.

Q. I am asking you if that is your position in this case?

A. What do you mean by the word "anywhere"?

Q. Well, anywhere that might—to any part of the country that might be involved in your business. You said you shipped to California, you shipped to the east, and so forth.

A. Yes, I would like to be able to ship any place where there is a logical market for my lambs, and I would like to be able to ship at a competitive rate, and at a competitive cost.

Q. And by "competitive rate" you mean——

A. Equal costs.

Q. You would want a rate anywhere which would be no higher than the lowest rate you had anywhere else, is that right?

A. Generally so, yes sir.

Mr. Collins: I think that is all.

[fol. 732] Exam. Mullen: You spoke of desirability of having additional points at which to feed in transit; did I understand you to testify to that?

The Witness: If I did not, I would do so, yes sir.

Exam. Mullen: What particular points do you desire to have feeding in transit that you do not have now?

The Witness: Well, in selling breeding stock "in transit," in selling breeding stock, we have in mind, we would

put the buyer in a competition position if he could enjoy transit rate to breeding stock going into Colorado west of the mountains; as I understand the situation that obtains now, his billing is valueless when he gets there. If he had the transit privilege, he could use that billing going on east. That puts him in a frame of mind where he is more interested and more inclined to buy his yearling ewes, ewe lambs, or breeding stock in Idaho than he would be under the conditions that exist today.

As far as we are concerned, Mr. Examiner, we never know from one year to the next what situation might obtain in marketing our lambs. We might market our lambs and do practically the same thing for several years, and the next year we might be almost forced to do something entirely different.

If transit privileges are open to us, that enlarges our possibility of marketing our lambs, of getting them fattened and getting them ultimately into the hands of the packer.

Exam. Mullen: Well, are there feeding in transit privi-
[fol. 733] leges open to you on the D&RGW?

The Witness: It is my understanding there is not, going from Burley into Blackfoot through Ogden.

Exam. Mullen: You don't know that?

The Witness: I am of the opinion, when you get there, the freight bill is dead.

Exam. Mullen: That is all.

Redirect examination.

By Mr. Quirk:

Q. Mr. Rich, if you should stop lambs at points in Colorado for grazing or any other purpose, and then should attempt to forward those lambs to Pueblo, or any points east of the so-called Colorado common points, you couldn't do it at the competitive rates, you would have to pay a higher rate, a combination rate?

Mr. Collins: I object to it, Mr. Examiner. The witness already answered that question and said he didn't know.

Mr. Quirk: All right. The record shows exactly what he said.

The Witness. Does the record say I did not know? I don't recall so testifying.

Mr. Quirk: I didn't think so either.

Mr. Collins: We will let the record show what the witness said, but not what Mr. Quirk said as to the fact.

Mr. Quirk. All right.

By Mr. Quirk:

Q. Do you know that, Mr. Rich, from your business experience?

[fol. 734] A. I already stated I am of that opinion. I have not had that actual business experience myself, sir.

Q. You have to keep informed, don't you, as to where you can market and the conditions under which you can market?

A. We attempt to.

Mr. Quirk: That is all.

Exam. Mullen: Any further cross-examination?

Mr. Collins: No.

(Witness excused.)

Floyde H. Hughes was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Mr. Hughes, will you state your name?

A. Floyde H. Hughes.

Q. Where is your place of business, and business address?

A. The Independent Lumber Company, Grand Junction, Colorado.

Q. How long have you been connected with that company?

A. Sixteen years.

Q. Please describe the character of that business and the scope of the operation of the Independent Lumber Company.

A. I might first add that I am the purchasing agent for the Independent Lumber Company. In addition to operating 14 retail lumber yards in Western Colorado, we also operate at the Grand Junction, Colorado, point a wholesale

distribution yard, a box factory, a remanufacturing plant, [fol. 735] and a storing and drying yard constituting about 13 acres.

The same interests which own the Independent Lumber Company and its various yards are also financially interested in the Crissey and Fowler Company at Colorado Spring, Colorado. In connection with this remanufacturing plant, I thought I might mention some of the possibilities and also some of the exact operations that we do with this remanufacturing plant.

It is completely equipped to handle a transit operation at Grand Junction. It has as part of its equipment a large American No. 20 planer, which has the capacity of surfacing a carload of lumber in an eight-hour shift. It also has a 44-inch circular saw, with a saw mill carriage capable of handling large timbers up to and including 40 feet in length.

We also have a large McDonough R. A. 59 resaw, with a seven-inch blade. Also, we have various other equipment such as a Ross lift and a Ross carrier.

I just wanted to point this out, we are completely equipped at Grand Junction to handle a transit operation.

Q. What is the source of the lumber used in your operation at Grand Junction, Colorado.

A. Some of the lumber comes from local points in Western Colorado, such as New Castle, Kremmling and Eagle. However, most of our lumber comes from the States of Oregon, Idaho, Washington and California.

Q. Now, on the lumber that you buy in the Northwest, [fol. 736] what routing is generally used into your plant at Grand Junction?

A. Well, if the mill is located on the Union Pacific, naturally we use Union Pacific-D&RGW routing. When it is at all possible, we try to get S.P. routing to Ogden, then D&RG or GNWP routing to Salt Lake, and then D&RG.

Q. Why do you prefer to purchase lumber on railroads other than the Union Pacific, and to route via railroads other than the Union Pacific?

A. Well, when the inbound routing is by these lines, we enjoy through point competitive rates to Colorado common points and beyond.

Q. You mean when it is by lines other than the Union Pacific?

A. That is correct.

Q. It wasn't quite clear.

A. It was via lines other than the Union Pacific we enjoy these joint rates to Colorado common points and beyond.

Q. And what happens when you do buy and route via the Union Pacific from points in Idaho or other points served by that railroad?

A. We can do some transit business with those cars. We can do a transit business into a point such as Ogden, but not into a common point, such as Colorado Springs, without any penalty as far as rate is concerned where rates, of course, apply into those points in connection with the origin on the U. P. and delivery to the D&RG point.

[fol. 737] Q. Can you name some points on the Union Pacific from which your company has procured lumber?

A. Yes, there is Cascade, Idaho, Winchester, Idaho, Burns, Oregon, and Metaline Falls, Washington; they are some of them.

Q. What is the annual volume of your lumber that is purchased in the Northwestern states?

A. I am sorry. May I go back just one moment? I think that I put in one mill there that is not correct, or one locality.

Q. Yes, you can do that.

A. I would question the Metaline, Washington, because I believe the question was some points on the Union Pacific, is that correct?

Q. That is correct.

A. Mateline, Washington is not on the Union Pacific, I am sorry.

Q. All right, I will ask you what the annual volume of your lumber purchases is from the northwestern states?

A. I would say approximately 300 cars per year.

Exam. Mullen: What percentage of that is the total?

The Witness: The percentage of our entire business, or percentage of the lumber business?

Exam. Mullen: The lumber business. What do you purchase in the Northwest, lumber?

The Witness: Lumber, yes sir.

Exam. Mullen: Dressed lumber?

The Witness: Dressed lumber, rough lumber, plywood, and doors.

[fol. 738] Exam. Mullen: You said you buy 300 cars a year, that is, the annual average in the Northwest?

The Witness: I said I believed or guessed it would be about 300 cars a year.

Exam. Mullen: What proportion is that of your total purchase, approximately? You don't need to give it exactly.

The Witness: Well, our operation is so diversified, I cannot say.

By Mr. Quirk:

Q. Where else do you purchase lumber, Mr. Hughes?

A. Oh, out in McCloud, California is one place.

Q. Do you purchase some in Western Colorado?

A. Oh, yes, but that is not the same type lumber, nor is it in most cases used for the same purposes.

Q. All the Examiner wanted you to say, if you knew, is what relation does this 300 cars that you get from the Northwestern States bear to the number that you buy from the California points or Western Colorado, if you know.

A. I would guess about 75 per cent.

Mr. Collins: Excuse me, Mr. Quirk. In other words, you buy about 400 carloads of lumber per year, is that it?

The Witness: That will completely close, yes.

By Mr. Quirk:

Q. What is the present capacity of your transit operation at Grand Junction that you use?

A. Well, the remanufacturing plant can easily handle a carload a day. The box factory, when going to capacity, can also remanufacture about a carload of lumber a day.

[fol. 739] Q. Now, what is your position with respect to the existing restrictions on your transit arrangement at Grand Junction?

A. Well, we feel that our operation cannot stand still, and if we are to increase and expand our operation we must have additional markets and additional outlets for our ma-

terials. The present market naturally in Western Colorado on D&RG local points is limited on account of the population.

We are hampered in securing these additional markets and outlets unless we can enjoy the same liberty in the choice of routes and rates as our competitors, and we feel that the absence of through joint competitive rates in connection with materials originating on the Union Pacific to competitive areas is a distinct hardship.

Exam. Mullen: Can you specify those competitive areas, and competitive points?

The Witness: Oh, yes.

Exam. Mullen: I mean where you desire to have these rates.

The Witness: Colorado Springs, Pueblo, and the territory [fol. 740] beyond in that same general direction.

Exam. Mullen: Over what junction and what routes?

The Witness: Well, of course, it would be the D&RG to either Colorado Springs or Pueblo, and from there we have sold lumber for Santa Fe delivery down into Boise City, Oklahoma. That is one point. And in Eastern Colorado beyond the Colorado common points.

Exam. Mullen: You say those markets are closed to you now?

The Witness: They are on anything that has a U.P. origination through our operation at Grand Junction, unless we want to pay, of course, the full rate that exists from Grand Junction to that point.

Exam. Mullen: How would it get to those points, over what routes?

The Witness: The D&RG.

Exam. Mullen: I mean at the present time.

The Witness: From, I presume, principally the Union Pacific into Denver. I have not thought of it in those terms.

Exam. Mullen: What do you have to pay, a combination rate, in order to get the shipments down to those points?

The Witness: That is correct If a carload of material comes into our yard from a U.P. point of origin, we cannot go to a point either to or beyond these Colorado common

points with our transit operation without having to pay the full rate from Grand Junction on.

Exam. Mullen: What would be the effect of this other route if it were opened to you?

The Witness: We would enjoy the same privilege as we do shipping from Great Northern, or Southern Pacific originating points. It comes into Grand Junction and we merely pay the transit charge and it delivers them to these points such as Colorado Springs at the same rate as it would had [fol. 741] it traveled on a through rate from the point of origin to Colorado Spring. The transit charge is not very great in most cases; I think it runs about $19 or $20 a car, which is very small in comparison to a full freight rate from Grand Junction.

Exam. Mullen: That is all I have.

By Mr. Quirk:

Q. Now, if you had the same joint through rates from origins on the Union Pacific for lumber, that you now apply to origins on the other railroads that you mentioned, your company buy more lumber from points on the Union Pacific?

A. Yes. As it is now, when we buy a carload of rough material into Grand Junction, we buy that to have or in order to take care of future orders, and we don't know at what point the final destination of that car of material might be. Therefore, we want to make sure that as much material coming into our yard is subject to a transit rate as is possible.

Q. Well, Mr. Hughes, when you do buy lumber, rough material, from points on the Union Pacific, is it a fact that there are special circumstances that require you to have that particular grade or kind of lumber at any particular time? Let me put it this way: Do you——

A. Yes, we buy—in order to conduct an operation such as ours, you have to buy at the very lowest price consistent with quality, and, therefore, we might purchase—I believe if I have your question correctly—we might purchase mer- [fol. 742] chandise and take it into Grand Junction simply because we could not buy that at some other point at what we felt was a competitive price.

Q. Now, does your company handle products from the Northwest for distribution to your plants and customers for which the transit arrangements for partial unloading is used?

A. Oh, yes.

Q. Is that a benefit to a company of your kind of operation and location?

A. Yes, because naturally you can't always outguess the demand, and you are not only buying straight carloads for stock, but every once in a while it is necessary to buy a quantity to balance the stock that you have on hand, and possibly your storage facilities are not quite adequate, and, therefore, it is desirable to find a customer who in turn can also use about half a carload of those items.

I am speaking now of doors, as a specific example. We buy straight carloads of doors for ourselves, and then very often we look for a customer to whom we can sell another half a car to buy just the amount we need to balance our own stock.

Q. Can you give a specific example of what you have been describing?

A. Yes. For instance, at Colorado Springs, the need developed for about 300 doors. We regularly buy doors and plywood from the Northwest Door and Plywood Sales Com-
[fol. 743] pany at Tacoma, Washington. When this need arose, I contacted the mill and told them that I wanted to change the destination of the car we had on order so that the car could go to Colorado Springs, with stop over in Grand Junction for partial unloading. I cautioned them in order to do that, so we would not have to pay the full rate on whatever we shipped from Grand Junction on, that the shipment would have to travel by Great Northern and Western Pacific, and to make sure that it did not travel by Union Pacific.

I found that the car had already been billed U.P., but that the car had not actually been pulled out of the plant. They succeeded in rebilling this car and it travelled in the manner that we requested, with a stop-over at Grand Junction and final unloading at Colorado Springs. But when we received the invoice for this car, we were billed for $25.19, which the shipper said was the penalty they sus-

tained by using inbound U.P. transit on Great Northern routing, and this was the amount, then, that the shipper lost in using this inbound tonnage in the manufacture of doors which travelled by Great Northern.

Had the rate then applied to Colorado Springs, through Denver, with stop-over—I mean to Colorado Springs, with stop-over at Grand Junction, we would not have been subjected to this penalty in the amount of $25.19.

Q. That is a good illustration of inter-railroad relationship and the ramifications of what we call "transit," is it [fol. 744] not?

A. That is my interpretation.

Q. In other words, you tried to move this car over a route you thought was available, but because of the inbound-outbound transit arrangement, you found you had to pay a penalty anyway, is that correct?

A. That is right.

Q. Do you have any other example?

A. Yes, I can cite another one at the moment. We have need at Colorado Springs for approximately 300 screen doors. We had an order with the Acme Door Company at Hoquiam, Washington, an order for a straight car.

Now, I immediately contacted the Acme Door Company and requested the same thing, that the car travel Great Northern, Western Pacific and D&RG, with a stop-over at Grand Junction, and final destination Colorado Springs, in order that we could get these 300 screen doors to final destination without a freight penalty.

I found that this particular plant is on the Union Pacific only, and we have no other choice now than to take these doors into Grand Junction. We will have to do some figuring to see what is now the easiest way out for us. We have the doors, but we can't get them to Colorado Springs on a transit basis. We will have to crate these doors, and ship them by common carrier, or else the customer at Colorado Springs will have to buy from some Denver or east- [fols. 745-746] ern slope competitor.

Q. Now, if the joint rates which the complaint here seeks to have established with respect to lumber and other commodities are established, do you expect any beneficial results in the way of reductions from your existing rates?

A. We do, definitely.

Q. Would you describe what you have in mind?

A. Well, there are some mills in the Spokane area that the rate to Grand Junction applies through Denver. I other words, the shipments would travel by Great Northern to Laurel, Montana. Then there is a choice of routing there, either CB&Q to Denver, or CB&Q to Wendover, Wyoming, and then C&S to Denver, and in either case back to Grand Junction by D&RG.

Now, these rates by this route to Grand Junction is are 80 cents; the rates on that same car, from the same point of origination, the same routing to Denver, for the same car is 71 cents.

Q. You mean per hundredweight?

A. That is right, sir. Now, there is also an established rate in routing over which that car could travel Great Northern to Butte, and then U.P. to Denver. That rate is 71 cents. Likewise, that 71 cents would be the Grand Junction rate then if the routing applied Great Northern to Butte, Butte to Ogden by the U.P., and then Ogden to Grand Junction, because an intermediate point then would have [fol. 747] no more than the same rate as the final destination, which is 71 cents.

Q. Mr. Hughes, can you cite other examples where the establishment of a joint competitive rate sought would be beneficial to your company, the Independent Lumber Company?

A. Did I understand you to say—would you repeat the question?

Mr. Quirk: Read it.

(Question read)

The Witness: Yes, because as I stated a while ago, an operation such as ours, you have to buy at the lowest price consistent with the quality, and we can't always be served—rather we can't always buy to advantage exclusively in the territory serviced by the Southern Pacific or the Great Northern.

Occasionally we will have to go to mills served exclusively by the Union Pacific. Now, when that happens, we take that merchandise into Grand Junction. There is a very definite limit as to what we can do with that mer-

chandise, because the through rate in connection with U.P. origin, by way of the D&RG, does not apply to these Colorado common points. Therefore, when we get that merchandise into Grand Junction, we can't do anything with it except to sell it at either retail or to a small wholesale outlet in the nearby community, or re-ship to a D&RG common point, or D&RG local point east of our transit operation, but west of the common points.

[fol. 748] I have got an example that possibly might clear up what I mean. Last fall, I found with one supplier who had quite a production—I found what I thought was an advantage of from two to four dollars a thousand per board feet on lumber, and I purchased a number of cars. This mill is located on the Union Pacific.

Mr. Collins: At what point?

The Witness: Cascade, Idaho, and also Winchester, because it was the same shipper. Now, I took all these cars into Grand Junction, because, as I say, I felt I had an advantage there in the buying. We put the lumber on bunks, we stripped them, we banded them, we covered them, to protect them from the elements.

Shortly after that, the whole lumber producing area was stricken with a very severe winter. A great many of the mills closed entirely, or closed for a varying degree of times.

Mr. Collins: Do you mean in the Idaho areas?

The Witness: Yes, because the Cascade operation ceased entirely, and at the same time the area around Colorado Springs was enjoying a very mild winter, and construction continued to go at a very good pace. Therefore, the Crissey-Fowler Company found themselves all at once completely out of stock. We had stacked up there in one bunch there about ten carloads of this stock that all moved U.P.

Mr. Collins: From Cascade or Winchester?

[fol. 749] The Witness: From the two of them, because it is the same shipper. I had all these cars stacked up, but we could not reship them under the privileges accorded us by the tariff which allows billing in transit and storage in transit, and so forth, we could not reship those cars to Colorado Springs where the demand was without paying the full rate, which I cite from memory is about 46 cents per hun-

dred. That would run roughly $11.50 a thousand board feet. Therefore, at Colorado Springs they had to buy to disadvantage from a competitor.

By Mr. Quirk:

Q. That is just another example of the bottling up effect of the existing rate situation, isn't it?

Mr. Collins: I move that be stricken. That is not a question.

Mr. Quirk: I like that.

Exam. Mullen: I didn't catch a word. Will you read it, please, Mr. Reporter?

(Qestion read.)

Exam. Mullen: Do you insist on your question, Mr. Quirk?

Mr. Quirk: I think the question is all right. Of course, the answer is quite obvious.

Exam. Mullen: What is your answer, Mr. Witness?

Mr. Collins: I object to the witness answering when he has not asked him a question. He just made a statement.

Exam. Mullen: The witness may answer. I think we understand the question.

[fol. 750] The Witness: In my opinion, I think the statement is correct.

Mr. Quirk: That is all.

Exam. Mullen: But the question is, Mr. Witness, we want your testimony, not that you believe Mr. Quirk's statement is correct. What is the fact?

The Witness: I believe I brought it out we do not enjoy through competitive rates to these Colorado points.

Exam. Mullen: And you believe those examples you have given illustrate that, is that it?

The Witness: I believe so.

Exam. Mullen: All right. We will let the testimony stand.

Mr. Quirk: That is all.

Cross-examination.

By Mr. Collins:

Q. From what trees is the lumber produced that you buy in the Northwest; can you name them?

A. Oh, yes. We tried to buy a very high quality of old growth Douglas Firs.

Q. Of what kind of Douglas?

A. Old growth.

Q. Was that what you bought at Cascade?

A. No. That is called an inland fir, sometimes billed as fir and larch. We also buy, when you ask for species, Bonderoza Pine.

Q. Where do you buy that?

[fol. 751] A. That we also get from Burns, Oregon; that is on the Union Pacific, and it is the Central Oregon Lumber Company at Burns. Also they have Bonderoza Pine at Cascade and Winchester.

Q. Now, what lumber, by species of trees, do you buy when you have it shipped by way of the Great Northern or the Southern Pacific, and D&RG, to Grand Junction?

A. Douglas Fir.

Q. Douglas Fir?

A. That is right.

Q. Any other?

A. Yes, we have had some pine shipments that have travelled Great Northern-Western Pacific.

Q. What would be the origin or location of the mill at which you bought this pine?

A. I just had some from Burns, Oregon.

Q. Wasn't that shipped by S. P. or G. N.?

A. I am sorry, I was thinking about the origin. I would have to refer to my files. We also get pine from McCloud, California.

Q. You do ship lumber by way of the Great Northern or the Southern Pacific, and the route there by the Great Northern, Western Pacific, and D&RG. Is that a considerable portion of your operation?

A. Yes, because we are forced, you might say, to exclude many of the other mills because we know when we get that stock that does travel by U. P. that we can't do anything with it.

[fol. 752] Q. What kind of lumber constitutes the principal part of your operation, or do you use in your principal part, fir, pine, or what?

A. As far as volume, fir, but, of course, as far as importance in home construction and so forth, you have to

have pine in order to meet the demand. If you don't supply the pine, the contractors or carpenters who have that figured into their job will go to your competitor. You can't furnish fir finish if the man insists on pine finish.

As far as volume, then, that would be the answer, fir would have the largest volume, but pine is equally important in your construction.

Q. Do you ship any pine via the Great Northern, Western Pacific and D&RG?

A. Yes. I think I answered that.

Q. That car you spoke of, could you give us that, was that from Tacoma?

A. I said there were mills in the Tacoma area.

Q. Yes, but you spoke about a particular car that moved, that had some original movement by the Union Pacific and then went to some other line, and came around and you spoke of having to pay $21.00 more for that.

A. That was a car of plywood and doors.

Mr. Quirk: That is right.

By Mr. Collins:

Q. Plywood and doors?

[fol. 753] A. That is right.

Q. Could you give us that car number and date of shipment?

A. Yes. It was consigned in car U. P. 173132.

Q. The date?

A. I think it was February 15. If that is not the exact date, it is close enough, I believe, for the record.

Q. What year?

A. This year.

Q. Now, you spoke of a carload of screen doors from this Hoquiam locality. Do you have that?

A. Hoquiam, Washington; I said we had on order a carload of screen doors at Hoquiam, Washington.

Q. That has not been shipped?

A. That has not been shipped. It was supposed to be shipped April 15.

Q. What did you say the capacity of your equipment was at Grand Junction for transit?

A. It is an easy matter to handle a carload at Grand Junction a day through the major plant. The box shook factory naturally operates only in the season when there is the greatest demand for box shipments. We do have a token crew that manufactures such things as survey stakes, and so forth.

Q. What part of your inbound movement consists of rough lumber for further manufacture?

A. Offhand, I would say probably 30 per cent.

[fol. 754] Q. And the balance of it has been dressed at the mill of original manufacture?

A. That is right.

Q. Or rather original milling?

A. Of course, under the tariff we are allowed to assort and ship on, and store and ship on, without changing the physical characteristics.

Mr. Collins: That is all.

Exam. Mullen: We will recess for ten minutes, gentlemen.

(Short recess taken.)

Exam. Mullen: Come to order, please. We are ready to resume.

(Witness excused.)

Exam. Mullen: Are there any other appearances?

Mr. Mulliner: H. L. Mulliner, Mr. Examiner. I appear for Denver and Rio Grande Western.

Mr. Collins: I didn't get it.

Mr. Mulliner: H. L. Mulliner, for Denver and Rio Grande Western.

Exam. Mullen: Mr. H. L. Mulliner, for the D&RGW.

Mr. Quirk: Mr. Miller.

W. S. Miller was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. What is your business, Mr. Miller?

A. I am manager of the Umitilla Canning Company, in Milton, Oregon.

[fol. 755] Exam. Mullen: What was that? I didn't hear it.

The Witness: The Umitilla Canning Company.

Exam. Mullen: Canning?

The Witness: Canning, yes.

By Mr. Quirk:

Q. Where are you located, where is that plant located?

A. Milton, Oregon is nine miles from Walla Walla, in the northeast corner of the State of Oregon.

Q. Now, you are general manager of that company?

A. Yes sir.

Q. Briefly state your functions with that company. Do you buy and sell, or do you do things of that kind?

A. Yes, our firm is a farmers' cooperative, and my job is to coordinate the various activities of the farmers as related to processing, to arrange the necessary acreage, to arrange for the processing, and everything a manager is supposed to do.

Q. What commodities do you buy and what commodities do you sell?

A. Actually, we don't buy the commodities; we handle the commodities of our members. There are various commodities; peas, that is our main pack. We handle asparagus freezing, strawberries, peas for freezing, and canning, both, purpose plums, Italian prunes for canning, apples, sometimes tomato products, pork and beans for canning.

Q. Where did you say the plant was located?

A. Milton, Oregon.

[fol. 756] Q. Do you ship canned goods from Milton, Oregon?

A. Yes sir.

Q. Where is your principal market?

A. Well, our markets are fairly well distributed. I think probably our principal market would be in the Texas area, in the southern states. This change has taken place in the last two or three years due to the fact that we have been excluded from some of the eastern markets because of our freight rate problems.

Q. You have been describing your marketing of canned goods, I take it, up to now?

A. Yes sir. I might explain a little on the freezing end. Last year, it was our first experience in freezing. We operated in a leased plant. This spring we purchased the plant, and this spring approximately half our volume will be freezing, where last year it was more or less an experimental basis, approximately 20 per cent of our output was frozen.

Q. What railroad is Milton, Oregon, located on?

A. We are served there both by the Northern Pacific and the Union Pacific.

Q. That is one or the other of them actually have switch or spur tracks into the plant?

A. Yes, the Walla Walla Valley Railroad, which is a part of the Northern Pacific, has tracks into our plant, to our canning plant. The Union Pacific and Northern Pacific have [fol. 757] a joint track to our freezing plant.

Q. And I think you said you ship out canned goods, and you also ship out frozen fruits?

A. Yes sir.

Q. Now, can you state the approximate volume, first of your canned goods, to these eastern markets, and second, the frozen fruits, in carloads?

A. We will have this year approximately 150 carloads of canned goods, and 150 carloads of frozen goods. That will be shipped to various markets in the United States. We don't know yet which way they are going, but we know they will be well distributed over the United States.

Q. I think I failed to ask you to describe the members in the cooperative organization you referred to.

A. Most of our members are large farmers in eastern Oregon. Their primary business is wheat. That area has been adapted particularly well for the production of peas on the summer fallow land. To explain that, farmers can raise wheat only every other year in our section, and under ordi-

nary conditions the land in the off-year would be cultivated clean or fall load. That is why the term "summer fallow," so with the introduction of the canning pea industry in 1935, the farmers found that their large acreages were very well adapted to the production of English peas for processing, and in a very few years that industry developed it to the point where between 20 and 25 per cent [fol. 758] of all of the canned peas in the United States were produced in that section where we are located.

Q. Now, when you ship your products from Milton, Oregon, to the eastern part, will you describe briefly what factors determine the routes that you use?

A. Well, one of the factors that—there are two factors we consider: One is time, and the other one is the temperature.

Q. You consider freight rates, too, don't you?

A. And freight rates. Of course. Naturally we have to be competitive, as far as freight rates are concerned, and we have to avoid being bottled up. One of the important things that we have recognized for a long time is the effect of extreme temperatures on canned goods, and I believe that most shippers are trying to route their merchandise in such a manner that they can avoid certain storm areas. Does that answer your question?

Q. Yes. If you had a competitive system of rates on your commodities to the Ogden gateway, via the Denver and Rio Grande, would that be beneficial to your company, with the varying changes in the weather from time to time?

A. Well, I think that anything that would facilitate the shipment of your products to market would be beneficial, especially if certain storm areas can be avoided.

I know that two years ago, when the Union Pacific tracks were blocked, we had a storm area there, some of our mer- [fol. 759] chandise from the Northwest was routed over the D&RG. Of course, this was done voluntarily by the Union Pacific, and it was appreciated by the shippers in the Northwest.

Q. Well, in that case, it being the disability of the Union Pacific, of course, the going rates or competitive rates had to be protected?

A. That is right.

Q. Are there other times where it would be beneficial to you in the absence of some such emergency situation as

caused the cars in question to be diverted? In other words, don't you have storm conditions on the Northern Pacific, and on the Union Pacific that you don't have on the Denver and Rio Grande, and so forth?

A. Yes, we get weather maps which tell us where certain storm areas are, and if we see there are storm conditions developing in the Dakotas, we will route via the Union Pacific, and the same thing, if we see storm areas developing down in Wyoming, we may route via the Northern Pacific. I think that is also an advantage.

To explain that a little further, some of the things that develop, a sudden rise of 30 degrees in temperature will cause a condensation to take place on the sides of the cans. It may result in spots of rust developing, or a stain in the label. We carry insurance against that, and in extreme cases we have never had claims, but we understand there [fol. 760] have been some, but the factor is it doesn't do your product any good, and our brokers, particularly in the south, around the Gulf States, have warned us many times about shipping through cold areas and subjecting the products to extreme temperatures.

Mr. Collins: Extreme cold or extreme heat?

The Witness: Well, you see, if you go through an extreme cold area, then when you go down into a warm area, the difference in temperature is so great that condensation is increased.

By Mr. Quirk:

Q. Are you connected with any other company or corporation, Mr. Miller?

A. Yes sir, I am also manager of the Key Equipment Company.

Q. In what business is that firm engaged?

A. In the manufacture of specialized canning machinery.

Q. Where is the market for the canning machinery produced by that company?

A. We are building machines for many processors, many of the national brand members, and most of those machines go to the Midwest areas, and to the East Coast.

Q. In the sale of your other canned goods, fruits and

vegetables, do you sell much of those products to some of the nationally-known stores?

A. Oh, yes. We sell a substantial quantity of our goods through people who maintain their own brands. In fact, I would say 90 per cent of our sales are made to people that maintain their own labels.

[fol. 761] Q. Is the Safeway one of your customers, Safeway Stores?

A. We don't sell to Safeway Stores direct. We have an account on canned goods and we ship them, supply them, as most of our packers in our area do.

Q. Is transit any advantage to your company in the marketing of these products?

A. You mean storage in transit?

Q. Or partly unloading, or any of the kinds, reconsignment, any of the kinds of transit that are commonly known in the railroad transportation field?

A. We have very little need for storage in transit outside of our own plant. At our own plant we accept certain commodities for storage in transit. We operate a cold storage plant there, and we, of course, get apples from Hood River and from Yakima, and store them there.

For our canned goods or frozen foods, I don't believe we would have any occasion to use very much storage in transit. We do ship in many areas where part unload. Many of the markets are not of a size they can take a full carload quantity, and so we ship to partially unload. I think in most of the areas we are allowed three stops, and we usually use them.

Q. How long has the Umitilla Canning Company been in business?

A. We started in business in 1943. We are one of the three newest plants in the area. It has been a little difficult in the processing business. As many of you know, there [fol. 762] have been changes that have taken place in marketing methods during the adjustment period of the war. Many of the older companies that had their markets firmly established didn't encounter the troubles that the new plants encountered. One of the differences in our operation, one of the reasons why we had to seek markets in the south was the fact that we were not as firmly entrenched in the eastern market as some of our competitors,

so we had to seek markets that were generally not considered too desirable.

The southern areas were one thing, and they have been known for a long time as sort of a dumping ground, but since the war that condition has changed and the conditions in the south have bettered materially, and they are using a much higher grade of processed goods than they did before the war, so we have concentrated our efforts in those areas of the Southwest.

Mr. Collins: Would you make that a little more definite; where in the Southwest?

The Witness: In Texas; Houston, San Antonio, Dallas, New Orleans, on into Florida, New Mexico, Colorado.

Mr. Collins: All right.

By Mr. Quirk:

Q. Because you were a newcomer, did your competitors ever indicate that they thought you were invading their markets?

A. That has always been a story. Of course, the first fellow to pioneer a field claims a priority to it, and we know the customers over 30 years develop certain loyalty [fol. 763] to the people who start first. But it has been our feeling in this country that any individual or group of individuals should have the right to enter into business and compete on a free market. We have fought this considerably.

I think this is one of the reasons why they have developed a feeling on this gateway situation.

Mr. Collins: May I interrupt? Would you read what he said?

(Answer read)

The Witness: One of the other reasons why we have developed a feeling on this gateway is the fact that this past winter our storage, our apple storage was used only to one half capacity because we could not get access to the fruit out of Wenatchee. We know that there was a storage shortage in Wenatchee and we know that there were hundreds of cars shipped, storage in transit to Minneapolis and eastern points, and we could not get access to

this commodity because we could not get through the Spokane gateway.

In other words, this revenue went to people in the Midwest where we felt we should have a chance at that business out home.

Exam. Mullen: You mentioned the Spokane gateway. What do you mean?

The Witness: Well, according to the tariffs, the Great Northern originates the fruit that we were concerned about. [fol. 764] They can transfer and ship on the Union Pacific, providing those cars are terminated on the Union Pacific, or this side of Omaha, but we could not get storage in transit privileges on the Union Pacific for these apples out of Wenatchee beyond Omaha, so consequently the shippers would not consider routing their merchandise, even though we had some friends in Wenatchee who tried very hard to develop some business for us.

By Mr. Quirk:

Q. You are familiar, I take it, Mr. Miller, with the issues and the objectives of the complaint of the Denver and Rio Grande?

A. Yes sir.

Mr. Collins: Well now, May I interrupt a moment? Let's have the witness state what his conception of the objectives of the complaint are.

Mr. Quirk: Could I ask the questions for the time being?

Mr. Collins: I make an objection then.

Exam. Mullen: Just a minute, gentlemen.

Mr. Collins: I make an objection to the form of the question.

Exam. Mullen: He merely asked whether he was familiar with the issues in the complaint. Mr. Miller, what are your answers to that?

The Witness: Yes sir. I should qualify that. I believe I am——

Mr. Collins: I object to both the question and the answer, unless the witness can state what his understanding of the [fol. 765] objectives of the complaint are.

Exam. Mullen: We will wait until the next question. That objection is overruled. Go ahead, Mr. Quirk.

By Mr. Quirk:

Q. As you understand this complaint, do you and your corporation favor the granting of the relief sought by the complainant?

A. We do.

Q. In other words, do you favor joint competitive rates over all reasonably available routes?

A. We do.

Q. Well now, will you sum up in your own way why you favor this complaint?

Exam. Mullen: Well, suppose you state at this point in answer to Mr. Collins, just what is your understanding of this complaint.

The Witness: My understanding of this complaint is that the gateway known as the Ogden gateway—I will state it another way: If the Ogden gateway were permitted to be opened, it would enable us to use this route at our own discretion at times when we feel in our own minds that a need for this route is there, and we would be permitted to secure the same through rates without any penalty as we now enjoy by routing by way of the Union Pacific. This would apply—I am kind of beating around the bush here—in other words, I don't believe this man's question is [fol. 766] fair because he expects me to memorize the brief here.

Mr. Quirk: You have answered the question.

Exam. Mullen: Mr. Miller, I would like to ask you one question: What market is closed to you now by the fact that you lack a route by way of Ogden and the D&RGW, with joint rates, of course?

The Witness: Yes. Well, the only routes that are closed to us now are those points in Colorado such as Grand Junction, and in there, that we would like to have access, particularly on frozen foods. Now, with canned goods it is not so important to us, because they have canneries in Utah, and they have canneries in Colorado, but we sell a good quantity of merchandise, frozen products, in Arizona and New Mexico, and we would like to have access to that area in Colorado, particularly for partial unloading.

It would be much more important to us from the angle of frozen foods than it would canned goods. We have

also some customers that have stores, that have houses located in that area, that we could accommodate. We could get that additional business where now we are not getting it.

Exam. Mullen: It isn't quite clear to me just what marketing area you are now seeking. Can you clarify that point?

The Witness: It is that area. In other words, there is no point in this Colorado area, in our opinion, that can take straight carloads of merchandise, so we now cannot [fol. 767] ship into Colorado, say, at Grand Junction, partially unload, and then ship on to other points in Colorado to Denver, and then down to Colorado Springs. Those markets are small, and they represent a small percentage of our business, but each market in itself is small and it is only these markets collectively that ever give you the sales program. No one marketing area is going to make or break you, but it is having good markets well distributed which does develop a stronger organization.

I believe the strongest argument we would have in favor of that would be that it would give us another route in the event storm areas would develop along the Union Pacific. It would give us a route by which we could get our merchandise to our Texas and Southern markets in a much more direct manner, and in much better shape than we could by subjecting them to storm areas.

I believe we should have the privilege of doing it. It is true that we hear a lot at home about patronizing home industry, and we recognize a lot of the claims of the Union Pacific here, that they have done a lot toward developing that area. We are friendly to them, and we recognize responsibilities to our home industry. We are not going to, and I don't believe any shipper is going to, intenti-ally route his merchandise all around the country in order to patronize every railroad. We are interested in getting our merchandise to the market in as direct a route as possible, [fol. 768] as quickly as possible, and have it arrive in as good a shape as possible.

In the event that the Union Pacific can serve us just as well, we wouldn't consider diverting it around. We recognize they have problems, and I believe our loyalty to them— I believe the shippers would exercise that prerogative and

go along with their home shippers. We have always done that in the past, I believe.

The only time we would have use for that gateway is when in our own minds we felt that we could get better service or we could get our products to market quicker and in better condition than we could by using the other route. It is just matter of "should we have the right to determine which road would best meet our needs, or should we be told which road?"

We look upon these railroads as a sort of public utility, and believe they should be maintained as such, and we resent the discriminatory practices that make us ship over certain routes and through certain points even though they may prove detrimental to our products or may provide service that would penalize us.

Mr. Quirk: That is all.

Cross-examination.

By Mr. Collins:

Q. How many times have you known the Union Pacific, through Wyoming or elsewhere, in routes you use in your shipping, to be blocked, which you referred to a while ago?

A. The only time I would say would be last winter. Of [fol. 769] course, you never know when they are blocked, but we do know when these storm areas occur, and we do know the area occurs along Wyoming and the Idaho line and we would like to get across that country as quickly as possible.

Q. Do you know whether the D&RGW is subject to blocking?

A. They have a better reputation, it seems to me, than the Union Pacific.

Q. Are you aware of the fact they were blocked by a landslide within the last two or three weeks?

A. No, I wasn't, but I know on a recent trip back east, we waited several—I believe it was a day and a half—on the Union Pacific, when they were blocked by a landslide down in the Columbia River Gorge.

Q. So far as you know, isn't it a fact all railroads are subject to the results of acts of God at times?

A. That is right.

Q. You wouldn't expect any one of them to be free of it, would you?

A. No, but we would expect the railroads to be freer of that trouble if they were out of a particular storm area.

Q. What you want, as I understand you, is that if one railroad gets blocked, you will have another with equal rates?

A. That is right.

Q. And you had that last winter when the Union Pacific was blocked?

[fol. 770] A. No, you did that yourself; we didn't have the right to do that.

Q. You got it, though, didn't you?

A. That is right. But I believe there were about 18 or 20 trains stuck in the snowbank there.

Q. Yes, there were plenty of them stuck, but you got your stuff.

A. We would like to have the privilege of selecting our own routes.

Q. I see. When did you become aware of this need, or this desire, as you have expressed it, for routes and rates by the D&RG, equal to those by way of the U. P.?

A. I think when a storm condition developed.

Q. When what?

A. When we had that trouble two years ago.

Q. That was the first time you became aware of it?

A. Yes. We tried even to get some routings through, down the Pacific Coast, where we could ship down—we even considered, to avoid this area, paying a penalty freight to get down on a southern route by way of Southern Pacific.

Q. What route would that be from your point of origin?

A. We would have to ship by Union Pacific to Portland and down from there, Southern Pacific and then Santa Fe.

Q. You are aware of the fact, are you not, that you can ship to Texas by the Union Pacific through Denver and down that way?

A. Oh, yes, we use that route a lot, and will continue to use it.

[fol. 771] Q. Didn't you ship last year to Kansas, Colorado, Texas, and New Mexico?

A. Yes, sir.

Q. At the same rates you would have if the D&RGW were successful in this case?

A. Yes. We would have no desire to change the program under the normal circumstances. We have had very good service.

Mr. Collins: That is all.

Exam. Mullen: That is all.

(Witness excused.)

Mr. Quirk: Mr. Adams.

D. G. ADAMS, was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Your name is D. E. Adams?

A. D. G. Adams.

Q. What does "D" stand for?

A. That stands for Doug.

Q. You are branch manager of the J. I. Case Company, Salt Lake City, Utah?

A. That is right.

Q. How long has that company had a plant in Salt Lake City?

A. I believe they first established a branch house in Salt Lake City about 1902.

Q. How long have you been connected with that plant?

[fol. 772] A. I have been with the Case Company for 33 years. I have been with the branch there, I have been manager of the branch in Salt Lake City since 1938.

Q. Now, is the plant at Salt Lake City served by the rails of the Denver and Rio Grande Western?

A. Yes sir, we are on the D&RG tracks.

Q. Will you describe the business of the J. I. Case Company?

A. The J. I. Case Company manufactures all types of farm machinery. We have everything from walking plows up to tractors and combines, everything the farmer needs. This

machinery is distributed through dealers located in all of the farm communities of the territory.

Q. You receive these implements from eastern point-, do you not?

A. Yes, we have eight factories. The principal factories are located at Racine, Wisconsin, where we have two factories. We have a factory at Rockford, Illinois; another factory at Burlington, Iowa; another factory at Bettendorf, Iowa; another at Rock Island, Illinois; another at Anniston, Alabama; and the last one at Stockton, California.

Q. Are these implements consigned to your company at Salt Lake City that are shipped from the east?

A. We are the distribution point for the inter-mountain area. Most of our shipments—I would say probably two-thirds of the shipments—are consigned to us at Salt Lake City, or at our distribution points in Idaho. Falls, Twin Falls, and Ontario.

[fol. 773] Q. Could you state approximately the volume of your inbound tonnage in a year?

A. Last year, I looked it up before I came up here, we had 369 cars shipped into the Salt Lake City territory.

Q. Where is the principal marketing of these commodities after they get to Salt Lake?

A. About 70 per cent of them are sold north of Salt Lake City and the other 30 would be in Utah and five counties in Westgrn Colorado.

Q. When you say "north of Salt Lake," do you mean about 70 per cent are distributed or sold to points served by the Union Pacific Railroad?

A. Yes, I would say that is about right.

Q. Now, how are these commodities generally routed inbound to Salt Lake City, what railroad?

A. Well, we don't have any choice as far as the branch is concerned, except in specific instances to how it is to be routed. That is handled by our traffic department at Racine, and they try to split the business as much as possible between the U. P. and the D&RG, both of which serve our territory. Naturally, being that we are on the D&RG line at Salt Lake City, we prefer to have it come in, anything that is distributed out of Salt Lake, come in by D&RG. However, we are not permitted to do this too often because

we have to very frequently divert cars enroute or stop them [fol. 774] in transit, partially unload, and also to take advantage of storage in transit facilities.

Q. What happens in cases where you send a carload from Racine, for example, to a plant at Salt Lake City, via same railroad, and the Denver and Rio Grande, if that shipment has to move on to destinations on the Union Pacific northwest of Ogden?

A. We can't do anything about it. It has to be unloaded at Salt Lake City. Further, we can't move it on by virtue of the storage in transit privilege either. If it goes north, we have to pay local freight or send it by common carrier.

Q. Well, do you frequently have experiences of that kind?

A. Well, I won't say "frequently." Every once in a while we get caught with something. You see, I might explain a little bit further about how we handle this. We have to place our orders for the machinery well in advance of shipping dates, anywhere from 60 to 90 days ahead of the act.

In addition to actual shipping dates, we have to give the factory shipping orders for the goods to be shipped out. We try to anticipate as much as possible about where they are going to go, so we will get the machinery where we need it. If we can—if we make a mistake and get it routed the wrong way, then we are faced with the possibility of shipping out local, which costs the delaers more money, or we have to pay the freight ourselves in cases of carload movement.

Q. Is the various kinds of transit important to your plant at Salt Lake City?

[fol. 775] A. It certainly is. As I say, having to move the goods well ahead of the season, we do not know at that time just where they are going, and by virtue of the storage in transit privilege, when the need develops, and the goods are sold, we can pay the additional slight charge, whatever the through rate might be.

Q. Well, would the opening up of this gateway, so that you could transit and still come in on the D&RG, and go out up to Idaho or Oregon on the U.P. be a benefit to your company?

A. I would say it certainly would. It would certainly take a lot of worry off of me.

Q. Could you give some examples in which this restriction on your ability to subject this traffic at Salt Lake City to transit at the going through rate to destination on the Union Pacific northwest of Ogden have hindered your operations, or injured you adversely?

A. I can think of one instance last year where we had a carload of plows weighing about 40,000 pounds that was shipped to Salt Lake by the D&RG. It so happened we needed those plows at Idaho Falls. They had a rush on them, and we would like to have diverted the car up to Idaho Falls, but we couldn't do it, so we brought them into Salt Lake, re-billed it, and paid the local freight on the entire car from Salt Lake to Idaho Falls, and it cost us in the neighborhood of about three hundred dollars.

[fol. 776] Q. Have you had a more recent example of that?

A. Yes; we had one this week. Our dealer at Ontario, Oregon, which is the limit of our territory, has need for tractors of a particular type. He phoned us about a week ago and wanted direct shipment to him if possible. We told him we had a car we thought was enroute, that we thought could be diverted up there by stopping at Salt Lake. When we checked at the factory we found it had just been shipped by the D&RG; therefore, we could not move it.

The car is on the tracks at Salt Lake City now, and we will have to ship these two tractors by local freight, which will cust us about $50 apiece.

Q. What do you mean by "local freight"?

A. Common carrier truck.

Q. You mean truck?

A. Truck, yes, that is right.

Q. Then the Union Pacific loses the business?

A. They don't get any of that load stuff.

Q. Is there much of that?

A. We do a lot of distributing out of Salt Lake by truck in small shipments.

Q. Would there be less tendency to use trucks if the railroads had their routes and joint rates more flexible?

A. I would say if we had the privilege of routing any shipment into Idaho that was shipped regardless of the

[fol. 777] lines, that we would have a lot less distributing to do from Salt Lake.

Exam. Mullen: What was that question? I don't understand it.

Mr. Quirk: What is that?

Exam. Mullen: Read the question and answer. I don't understand it.

(Question and answer read.)

Exam. Mullen: You mean you would not ship through Salt Lake?

The Witness: No, I mean we would have less local shipments.

Exam. Mullen: You still would distribute at Salt Lake?

The Witness: We would stop the car in transit and let it go on.

By Mr. Quirk:

Q. By "local shipments" you have already said you mean truck?

The Witness: Truck, that is right, truck shipments.

Q. Then what you finally said, then, would be less use of trucks?

A. That is right. We don't ship anything by local freight, that is, by the U.P. or the D&RG; it is all done by truck.

Q. The Union Pacific would get some of the business that you now ship by truck if this gateway was opened?

A. I would say that would be true.

Q. Does the fact that you are restricted in the manner that you have described influence the selection of the Union Pacific or the D&RG on your inbound commodities to Salt Lake?

A. Yes, very definitely. Whenever there is any question [fol. 778] in our mind about the ultimate destination of these goods, we specify Union Pacific in order to protect ourselves. Quite often the cars come in and we unload them at Salt Lake and don't have occasion to use them, but very often a car is routed Union Pacific, as a matter of protection, and then the lat-er is diverted enroute, or even after it comes into Salt Lake, where it is stopped for partial unloading.

Q. Can you say roughly how that routing is divided now?

A. Well, of the cars that come into Salt Lake, there is about 50 per cent U.P. and 50 per cent D&RG.

Q. If it wasn't for this restriction, what would you do in face of the fact that you are local to the Denver and Rio Grande tracks?

A. I wouldn't be in position to say, because that would be done then entirely by the traffic department at Racine, but my guess would be they would get most all of it, because they would divide all the traffic coming into the territory fairly equal between the two lines. That is their practice.

Mr. Collins: Who do you mean would get nearly all of it?

The Witness: The D&RG.

Mr. Collins: That is what I thought.

By Mr. Quirk:

Q. Mr. Adams, you are testifying here today in response to a subpoena?

A. That is right.

Mr. Quirk: That is all.

[fol. 779] Cross-examination.

By Mr. Collins:

Q. Why was a subpoena necessary, Mr. Adams?

A. Well, we do an awful lot of shipping over the Union Pacific as well as the D&RG, and we felt that we didn't want to be taking sides on the thing.

Q. Do the views that you have expressed here—are they those of your general traffic manager?

A. No sir, they are the views of myself only.

Q. You don't really know what your traffic manager would do?

A. I have no idea what their ideas are on it at all. I am just testifying as to how it affects our particular branch.

Q. As I understood you, some 70 per cent of your inbound implements have destinations or are ultimately sold to points that are north of Salt Lake City?

A. That is right.

Q. How about Ogden, would that be north of Ogden?

A. Well, I presume you would call it north of Ogden, yes sir. There is very little between Salt Lake and Ogden.

Q. None of that territory could be served by the Denver and Rio Grande, could it?

A. That is right. The point I was mentioning there was the fact that we could use the storage in transit privileges for distribution out of Salt Lake.

Q. That is, you could use the storage in transit privilege at Salt Lake City?

A. To any point.

[fol. 780] Q. On carloads that came in by the D&RG?

A. No, not unless it came in by the U.P. but if it was open we could.

Q. Yes, I see. And do you do a lot of storing in Salt Lake City?

A. Quite a lot, yes sir.

Q. How do you deliver into the local area around in Utah where you dispose of a part of your remaining 30 per cent?

A. Well, it is done in two ways. Most of our dealers have their own trucks, and come in and pick it up because the railroad facilities in southern Utah are not too good, there is not too much of it.

Q. As a matter of fact, are all of your dealers located on railroad tracks?

A. No.

Q. How do you make delivery to the counties in Colorado to which you distribute some portion of this remaining 30 per cent?

A. We have to ship most of it in direct, and the rest of it is trucked out of Salt Lake.

Q. You mean shipped direct from your factories?

A. Yes.

Q. Those counties, I take it——

A. Are on the D&RG.

Q. So that the benefit that you think would be derived largely would be to enable you to route by the D&RG instead [fol. 781] of the Union Pacific, and to stop and partly unload on the D&RG?

A. Stop in transit privileges and storage in transit privileges are the only things that would interest us.

Q. What portion of this 30 per cent that is for Utah and

Colorado distribution would you say is distributed in Colorado?

A. Oh, I would imagine probably five per cent.

Q. How much?

A. About five per cent.

Q. About five per cent?

A. I might add that we just recently have taken over the Colorado territory. I don't know too much what the potentialities will be down there.

Q. The Colorado what?

A. I said we have just recently taken over the Colorado territory.

Q. Mr. Adams, this shipment you mentioned, and all other shipments that you route west-bound over the Union Pacific, including this one to Ontario, may now and for some time could have been stopped to partly unload, or stopped for storage at Salt Lake City, and then go up into Idaho via Union Pacific, could it not?

A. Providing it was shipped via Union Pacific into Salt Lake City.

Q. That is what I mean.

A. Yes.

[fol. 782] Q. You have all the privileges in Salt Lake City on the Union Pacific that you require, do you?

A. But there are no storage in transit privileges on the D&RG, because you only have the one line.

Q. Yes, but you do have them on the Union Pacific?

A. Oh, yes, if we ship it Union Pacific into Salt Lake, we can use it, that is right.

Mr. Collins: That is all.

Redirect examination.

By Mr. Quirk:

Q. Just one or two questions, Mr. Adams.

Do you stop cars from the east at Price, Utah, or Grand Junction?

A. Not at Grand Junction. We have stopped two or three cars at Thompson.

Q. Are the rates on your commodities from Racine and the other eastern points via available routes, the same

whether they move via Union Pacific or D&RG to Salt Lake City?

A. That is right.

Q. They are competitive rates up to that point?

A. That is right.

Q. Would the opening of the Ogden gateway, as you have described it here, be to the interest of the Salt Lake branch of the J. I. Case Company?

A. I would say very definitely so.

Mr. Quirk: That is all.

[fol. 783] Recross-examination.

By Mr. Collins:

Q. In what respect would it now? We are starting all over again.

It would give us the advantage of storage in transit regardless of how the goods were shipped in. The idea is this: In order to absolutely save on this, we should ship everything Union Pacific that stops at Salt Lake. Obviously, that would be very unfair. Our company would not permit it. In a number of cases we have been overruled on our own recommendations because they just simply can't ship everything over one line, but whenever we don't have that happen, whenever we ship some goods in by D&RG, we are always faced with the possibility of being stuck with it and having to ship it out by common carrier.

Q. How often are you stuck with it?

A. Any type of implements or machinery that might be shipped in there on the D&RG.

Q. In your own experience, how often are you stuck with shipments?

A. Quite often.

Q. How many cars, what percentage of your D&RG shipments?

A. That would be very difficult to tell, because it would depend entirely on the movement, and just how much of the goods we have to move out of Salt Lake City.

Q. Well now, do you want to leave on this record the [fol. 784] impression this happens most of the time on shipments on the D&RG?

A. I wouldn't say that.

Q. Wouldn't you venture some kind of a guess?

A. It would be just a guess; about 20 per cent.

Q. Do you know whether it happens or not?

A. Definitely. I have given you examples of that.

Q. You don't have any idea how often it happens?

A. No, because the goods are placed in storage, and it would mean, it would depend entirely on where the goods were wanted, and so forth.

Q. But as to a shipment moving to Salt Lake City, provided there isn't some change in shipping plans by your traffic manager, what difference would it make to you or your company whether it moved to Salt Lake City by the Union Pacific or by the D&RGW?

A. None whatever.

Mr. Collins: All right. Thank you.

Further redirect examination.

By Mr. Quirk:

Q. Is it customary when a railroad serves a plant directly with its own tracks to favor that railroad as much as possible?

A. I wouldn't know whether that is customary or not.

Mr. Quirk: That is all.

(Witness excused.)

Mr. Quirk: Mr. Lowe.

[fol. 785] J. CYRIL LAU was sworn and testified as follows:

Direct examination.

By Mr. Quirk:

Q. Will you state your name and spell it for the reporter, please?

A. J. C-y-r-i-l L-a-u.

Q. Where do you reside, Mr. Lau?

A. Soda Springs, Idaho.

Q. Are you a farmer or business man? What is your business?

A. I am a farmer and stock man.

Q. Are you president of the Idaho Farm Bureau?

A. Yes sir.

Q. Will you describe the make-up of that Bureau?

A. The Idaho Farm Bureau is an organization of agricultural producers.

Q. How many members are there of that?

A. We have approximately 11,000. We don't call them members, we call them families. We have approximately 11,000 farm families that belong to the organization at the present time.

Q. And the farm families are engaged in ranching and professional farming?

A. Yes. The Farm Bureau covers all producers of agriculture.

Q. Well, does one of the products against another predominate? Which is the principal one in which this group of farm families are interested in, or produce?

A. I think livestock leads in the state.

[fol. 786] Q. Then wheat, I suppose?

A. Well, I wouldn't say, but of the four leading commodities, it would be live stock, wheat, dairying, and potatoes I think those are the four largest items.

Q. Now, do these farmers generally sell their products to commission men?

A. Well, I wouldn't say always. I think there are several of them, especially the live stock producers probably sell most of them to your commission men. They sell them right on the market. They go right on to the market. Other commodities—well, I would say most of them sold, especially wheat, potatoes, barley, are probably sold to elevators and warehouses.

Q. Did the Idaho Farm Bureau take any action with respect to the intervention in this proceeding?

Mr. Collins: Excuse me, Mr. Quirk. Is this the same named organization as that which intervened, Idaho State Farm Bureau? You say "Idaho Farm Bureau." The intervenor is the Idaho State Farm Bureau. I wondered if there were two organizations or what.

By Mr. Quirk:

Q. The Idaho State Farm Bureau, isn't it?

A. Yes.

Q. My error in omitting one word; it is Idaho State Farm Bureau.

A. It is the Idaho Farm Bureau Federation. That is what the real name of it is. I think some call it the Idaho State, but the regular name is the Idaho Farm Bureau Federation.

[fol. 787] Exam. Mullen: Let us clarify this on the record. We have a petition for leave to intervene filed by the Idaho State Farm Bureau.

The Witness: That is right.

Exam. Mullen: What is the correct name of the intervenor, the Idaho State Farm—what is the correct name?

The Witness: The correct name is the Idaho Farm Bureau Federation.

Exam. Mullen: Omitting the word "State."

The Witness: That is right.

By Mr. Quirk:

Q. You signed this document, you remember?

A. That is right.

Q. That says "Idaho State Farm Bureau."

A. I think it was just a misprint there. That is all it was.

Exam. Mullen: Let the record show, then, the correct name of the intervenor is the Idaho Farm Bureau Federation.

Mr. Collins: Do you want to make that correction in the petition for intervention?

Mr. Quirk: It is made in the record now. We could file another one, I suppose. That is satisfactory, isn't it, as long as it is understood?

Mr. Collins: If the witness is testifying for that one, and that is the one that intervened, that is all right.

Exam. Mullen: I understand that is the correct name of the intervenor.

[fol. 788] The Witness: Yes sir, that is the correct name.

By Mr. Quirk:

Q. Did the Idaho Farm Bureau Federation take action with respect to the intervention in this case, and, if so, in what manner?

A. Yes, they took action in this case. I think it was, if I remember correctly, some time in August last year, the first part of August. Our board recommended that we go on record as favoring the opening of the Ogden gateway. At the next meeting it was moved that they lay that on the table for the time being and get recommendations from our people out in the counties.

I can't tell you which meeting it was, but I think it was in the October meeting that the question was taken up again, and they went on record the second time as favoring the opening of the Ogden gateway.

Q. Well, why do you, as president of that organization, favor the opening of the Ogden gateway?

A. Well, I don't like that question too well. I am sent up here by our state board to represent them. Personally, it doesn't make any difference to me, but our board—I can't take action myself in this matter—I am sent by our board of directors who are authorized by the people of the state in our organization.

I have been directed by our board as to what testimony to give. Now, our board takes the stand, along with our people, that by opening this gateway it will create competi-
[fol. 789] tion which our people have always thought develops good business. They feel that if there is competition created, it is going to bring about better service, and they also feel that they should have the satisfaction themselves in where they ship their products, over what roads, without being penalized. That is the position they took last fall.

Q. This group that you speak for think opening this gateway will make competitive rates available and thereby result in competition and result in better service?

A. That is right.

Q. And also might result in better rates?

A. They feel that way.

Q. And in a wider range of markets?

A. That is right.

Q. And a better car supply?

A. Yes, they feel that if this gateway is opened that the Denver and Rio Grande might be able at the time of the year when we have a shortage of cars, they might be able to furnish some cars up in that part of the territory. We have been faced with it in the southeast part, and it was brought to my attention very forcibly a year ago last fall when we were stuck for cars.

The Union Pacific at that time could not furnish cars, and they tried to figure out how we might get cars probably [fol. 790] from the Denver and Rio Grande, but owing to this closed gateway, it was impossible to do it.

Mr. Collins: What kind of cars were those?

The Witness: Grain cars mostly.

Mr. Collins: What?

The Witness: Grain cars.

Mr. Quirk: You may take the witness.

Cross-examination.

By Mr. Collins:

Q. You said you were a shipper. Do you ship stuff, Mr. Law?

A. No.

Q. You don't?

A. Not at the present time, I don't.

Q. I don't catch just what business you are in.

A. At the present time I am just a farmer. I have been a farmer and live stock man all my life. Up until two years ago, I was in the sheep and cattle business, up until two years ago this last fall.

Q. At that time, were you a shipper?

A. That is right.

Q. Or did you sell your sheep and lambs at your ranch or at your feeding place?

A. No sir, they were all shipped to market.

Q. They were shipped from the source——

A. They went to the market 95 per cent of the time.

[fol. 791] Q. They were shipped from around Soda Springs to the east?

A. Both east and west.

Q. West—do you mean California?

A. Ogden and California.

Q. I see. Your operation is southeast, is it not, of the point where the railroad line of the Union Pacific diverges eastward to Soda Springs and on through Wyoming, and the other prong southward toward Ogden?

A. That is right.

Q. In your farming operation, do you make any use at all of railroad service?

A. Oh, yes.

Q. In what way?

A. If we don't have railroad service, we can't do very much with our grain when it comes into town on trucks.

Q. Oh, you do ship grain, then, do you?

A. Yes.

Q. Where do you ship that ordinarily?

A. The grain goes east to Omaha, Kansas City; it goes to Ogden.

Q. I see.

A. You can't tell; it goes all over.

Q. Eventually, it would almost necessarily go to one or the other of those places, is that right?

A. Oh, yes, you can't tell where it goes to. It is shipped to Portland, Los Angeles, San Francisco, Ogden. You can't [fol. 792] tell where you are shipping to until probably the day before you load it.

Q. When did this Idaho Farm Bureau Federation first take action in connection with this complaint of the D&RGW in this case?

A. I think it was in the August meeting. It was brought to our attention the first part of August. Our regular meetings are held the last Saturday of every month, and at that August meeting they took action for the first time.

Q. I have been informed, and I wish you would state whether or not this might also be an action in addition to your August action, that on July 2 of 1949, your Bureau Federation voted in favor of the D&RGW proposal in this case; would that be so?

A. Well now, I wouldn't say for sure. I would have to examine our minutes of our meetings to make sure of that.

Q. That was almost a month before the complaint was filed?

A. I wouldn't say because I could be wrong.

Q. When would you say this matter of the D&RGW complaint in this case, or the purpose to file a complaint, first came to your attention, Mr. Lau?

A. I stated a few minutes ago I thought it was the first part of August.

Q. Was that when it first came to your attention?

A. When it first came to my attention.

Q. Was that the first time the opening of the Ogden gateway, so-called, came to the attention of the members of your [fol. 793] organization?

A. No, I don't think so, because this was brought to my attention, as I stated, I am sure, a year ago last fall, during the grain season. We couldn't get cars up in our district, and they tried to get some from down south, and they said they couldn't do it on account of that gateway. I never even had thought of it up until that time.

Q. D&RG said that they couldn't turn over any cars to you, is that right?

A. Well, the party that told me about it and asked us to take action on it, he didn't say who done it or anything, he just said "we can't get cars from the south there," and he said, "I wish that gateway were open," and "you people should take action." That was the conversation.

Q. Have you ever seen any D&RG cars spotted for loading in the area where you live?

A. Oh, yes.

Q. You have?

A. Yes.

Q. Very often?

A. Not too often, no.

Q. Is the Idaho Farm Bureau Federation composed of local federations, farm groups, around over the state?

A. No.

Q. Is it composed of individual persons?

[fol. 794] A. That's right.

Q. Who are farmers?

A. That is right.

Q. As I understood you to say, your board, is that board of directors; is that what you mean?

A. Yes.

Q. Your board adopted some, or proposed some resolution in favor of the D&RG in this case?

A. No; they didn't pass the resolution. It was brought to our attention, as I stated, and was taken up in our meeting.

Q. Yes.

A. We went in favor of it, and the next meeting, we thought it probably would be better if we would take it up with the people in the counties.

Q. You mean your entire membership?

A. That is right, the membership in the counties, so it was laid on the table, and after it was taken up with the locals in the counties, that is, our people in the counties, we received their recommendations; then we acted on it at the state level.

Q. I understood you to tell me just now that you had no sort of subordinate organization under this State Bureau?

A. Let me explain the workings of the Farm Bureau. In the different localities like Soda Springs we have a local. Caribou County ties in from the local to the county to the state.

Q. Yes.

[fol. 795] A. Just the same as our national government. We get our instructions, they start down at the local level, they go to the county and then to the State Board.

Q. Well, were you a director at the time of this action, or were you president at the time of this action last August?

A. I was vice president at the time.

Q. Were you a director also?

A. Yes sir.

Q. How did you vote?

A. I think that is an unfair question.

Q. Well, your vote wasn't unanimous, was it?

A. No sir.

Q. What percentage of it was it, a majority; do you recall?

A. It was a majority vote.

Q. I might say, Mr. Lau, I don't intend to pry into irrelevant things. We have asked those questions in this case before and have been permitted. I think it is entirely appropriate. What was the answer last?

Mr. Quirk: You have been talking quite a bit over there. What was your last comment?

Mr. Collins: I told him I thought it was appropriate for me to ask questions, and I didn't want him to feel I was prying into things that I shouldn't.

Mr. Quirk: I don't think how this gentleman voted in an action that has already been taken——

[fol. 796] Exam. Mullen: That question was not pressed.

The Witness: I will answer the question.

Mr. Quirk: I object to the question.

Exam. Mullen: The objection is sustained. You don't have to answer if you don't wish to.

Mr. Collins: What did you state, Mr. Examiner?

Exam. Mullen: The objection to how this man voted on this question. He doesn't have to answer if he doesn't desire to.

Mr. Collins: I see. All right.

The Witness: I might add, to straighten you out on that, our board wasn't unanimous. We have a majority vote.

By Mr. Collins:

Q. Mr. Lau, what is your personal view as a shipper as to the opening of the Ogden gateway? Do you feel it would benefit you in any way?

A. Indirectly, yes.

Q. Do you feel it might indirectly be detrimental to you in any way if a lot of traffic or a considerable amount of traffic is diverted to the D&RG?

A. Well, I wouldn't say it would hurt me. I think it would help.

Q. Would the curtailment of frequency of train service be of any detriment to you as a shipper?

A. That is true, it would.

Q. If the diversion of traffic to the D&RG as a result of the opening of the Ogden gateway resulted in eventually an [fol. 797] increase in rates, would that be detrimental to you?

A. Sure.

Q. If the opening of the Ogden gateway resulted in a less frequent switching and spotting of cars, would that be detrimental to you?

A. Certainly.

Q. Would it be detrimental to you and your organization if

the opening of the Ogden gateway resulted in the payment of less taxes to the state and counties of Idaho?

A. If that were possible, I would say yes.

Mr. Collins: That is all. Thank you, sir.

Redirect examination.

By Mr. Quirk:

Q. Mr. Lau, do you think competition usually improves transportation service?

A. I do.

Q. Have you noticed any difference in the services of the Union Pacific in the last year and a half?

A. Yes, I have.

Q. What is the difference now compared with a year and a half ago?

A. Well, we are getting better service. Last fall in our one community alone, they have always had quite a bit of trouble about getting cars switched. Last year, we have had a switch engine that sat there all the time, ready to switch those cars.

[fol. 798] Mr. Collins: What place?

The Witness: Soda Springs.

By Mr. Quirk:

Q. You mean that since this complaint was filed, the service has been improved?

A. Well, I wouldn't say it was only since this complaint was filed. That might have some bearing on it. However, our service was better last year. The reason I couldn't tell you——

Q. Has there been any change in the attitude of the Union Pacific with respect to their stopping their streamliners at Soda Springs? Have you had any experience on that?

A. Yes sir.

Q. Will you state it?

A. Two years ago, or a year ago last December, we went to Atlantic City to a convention. We tried to get the streamliner to stop at Soda Springs. It took five days to get an answer on that. There were six of us leaving Soda

Springs, and there were 54 on the streamliner going to New York, of our organization. Last year—in fact, I might say we never got an answer on it until five o'clock of the night before we were to board the train the next morning.

Last year, last December, leaving for Chicago, the secretary said, "We will want the streamliner to stop at Soda Springs to pick up the president." "Yes, sir, it will be done." And that was before we had ever asked for reservation. Whether that had anything to do with it or not, I wouldn't say.

[fol. 799] Mr. Quirk: That is all.

Recross-examination.

By Mr. Collins:

Q. Do you think you would derive a benefit of the streamliner stopping if the Ogden gateway is opened and the D&RGW can solicit freight in your territory?

A. I don't know about that.

Q. You have no idea on that?

A. This is my personal opinion. I don't think the Union Pacific is going to have to take off any trains as long as they give service. I think the people that are using the Union Pacific today are not going to change to the Denver and Rio Grande as long as they get the service.

Q. I thought I understood you to say, Mr. Lau, a while ago, that you had difficulty obtaining grain cars last fall.

A. A year ago last fall, not last fall. We had plenty of cars last fall.

Q. How about 1947?

A. 1947 was a bad year, too.

Q. 1946?

A. That is right, that was a bad year.

Q. Bad?

A. Yes, I might state that the last two years there has been an improvement. Last year we couldn't complain.

Q. The last two years have been an improvement over previous years?

[fol. 800] A. That is right. Last year we couldn't complain a bit about the cars coming in. In fact, we didn't have any complaints.

Q. The previous year, 1948, was an improvement over 1947?

A. That is right.

Mr. Collins: That is all. Thank you.

Mr. Quirk: One more question: Are these 11,000 farm families located in all the counties in the State of Idaho?

The Witness: No, they are in, I think, 31 counties. In other words, we are not organized in the panhandle of the state yet.

Mr. Quirk: Thirty-one counties out of how many counties?

The Witness: I think there are 44 counties in the state, if I am not mistaken.

Mr. Quirk: All right. Thank you.

Exam. Mullen: If there are no further questions, the witness is excused.

(Witness excused.)

Exam. Mullen: We will recess until two o'clock this afternoon.

(Whereupon, at 12:27 o'clock p.m., the hearing was recessed, to reconvene at 2:00 o'clock p.m., the same day.)

[fol. 801] Afternoon Session, 2:00 p.m.

Exam. Mullen: We are ready to proceed, gentlemen.

Mr. Gibson: Mr. Examiner, at the Salt Lake hearing, we agreed to introduce into the record that portion of our agreement with the American Refrigerated Transit Company regarding car supply. This is a copy of that paragraph from that contract.

Mr. Collins: Do you want it as an exhibit?

Exam. Mullen: Exhibit No. 11.

(Complainant's Exhibit No. 11, Counsel Gibson, marked for identification.)

Exam. Mullen: I assume there is no objection to it?

Mr. Collins: No.

Exam. Mullen: It will be received in evidence.

(Complainant's Exhibit No. 11, Counsel Gibson, received in evidence.)

Exam. Mullen: Do you have another witness, Mr. Quirk?

Mr. Quirk: No, the complainant rests.

Exam. Mullen: The complainant rests.

Are you ready to proceed, Mr. Collins?

Mr. Collins: It may take a minute or so. I can't keep up with my opponent. I thought he had another witness, so we are not ready until we get the stuff in for distribution.

Exam. Mullen: All right. Will it take five minutes?

Mr. Collins: It won't take more than a couple of minutes, I think.

[fol. 802] Mr. Collins: Do I understand now, for the purpose of the record, that the Rio Grande's direct case is closed?

Mr. Quirk: Yes.

Mr. Collins: All right.

Mr. Pease: Mr. Examiner, J. E. Pease, United States Department of Agriculture. The Department has one exhibit and one witness which we desire to put on Friday, if we may. Our attorney is not due here until Friday morning. He has an argument before your Commission on the sixth and he will be here Friday morning.

If it suits the convenience of the defendants, we would like to have 20 minutes some time Friday.

Mr. Collins: How long do you think you will take?

Mr. Pease: About 20 minutes, Mr. Collins.

Mr. Collins: Is your testimony in support of the complaint?

Mr. Pease: I suspect it will be so construed, yes sir.

Mr. Collins: Well then, will the Department of Agriculture change its position from the neutral one it stated in its intervention to a support of the complaint?

Mr. Pease: Yes sir.

Mr. Collins: Then I think they should put their testimony in now, Mr. Examiner.

Exam. Mullen: I understand from Mr. Pease his attorney is not here, and he has the privilege of putting it in Friday if there is no objection. As I understand it, it will [fol. 803] consist of a statement.

Mr. Pease: It is an exhibit and a very short statement.

Exam. Mullen: Do you have the statement with you?

Mr. Pease: No sir.

Mr. Collins: I don't think it is quite proper for someone

who is supporting the complaint to come in in the middle of our case for the defense and put in testimony.

Exam. Mullen: Is it testimony, Mr. Pease, or a general statement of the position taken by the Department?

Mr. Pease: It is a little of both, Mr. Examiner. I appreciate Mr. Collins' position and I dislike very much to do this, but as I say, our attorney could not leave Washington. If Mr. Collins is insisting, we can wait until he gets through.

Exam. Mullen: Suppose we take it up Friday.

Mr. Collins: All right.

Mr. Lynch, will you take the stand, please?

PERRY J. LYNCH was sworn and testified as follows:

Direct examination.

By Mr. Collins:

Q. Mr. Lynch, you have a statement prepared to submit into this record, have you?

A. I have.

Q. And do you know that the statements therein made are true to the best of your knowledge and belief?

A. Yes sir.

[fol. 804] Q. Will you proceed with your statement?

A. My name is Perry J. Lynch. I am Vice President in charge of Operations, Union Pacific Railroad Company, 1416 Dodge Street, Omaha, Nebraska. I have been employed by the Union Pacific Railroad Company in the Transportation and Operating Departments for over 39 years. In my position as Vice President in charge of Operations, I have direction of the maintenance and operation of the railroad.

The Union Pacific was the pioneer railroad from the Missouri River westward and, connecting at Promontory Point just west of Ogden, Utah, *Utah* with the old Central Pacific, with its western Pacific Coast terminus in California, formed the first trans-continental railroad.

The origin of the Union Pacific is found in the Pacific Railroad Acts, the first of which was the Act of Congress approved July 1, 1862. The circumstances of the Nation

at that time were such as to bestir Congress to see that the railroad was built more for military protection of the Nation than for immediate transportation needs along its lines. It was feared that California might be lost through seizure by some other nation or by secession.

Tying the West Coast to the East through construction of the railroad was a National safety and defense measure. Its vital place in National defense was thus recognized in conceiving the railroad, and our performance in World War [fol. 805] II proved the wisdom and foresight of the original idea. From those early days, the Union Pacific has expanded, through acquisition and construction of other lines, until it now has lines which reach the Pacific Coast at Seattle, Portland and Los Angeles and the Missouri River at Council Bluffs, Iowa and Kansas City, Missouri.

Annual report to the Interstate Commerce Commission for the year 1949 will show average miles of road operated by Union Pacific as 9,724. Current timetable folder shows that the Union Pacific serves more than 1,700 towns, cities and stations.

Page 1 of my Exhibit 12——

Exam. Mullen: That will be Exhibit No. 12.

(Defendants' Exhibit No. 12, Witness Lynch, marked for identification.)

The Witness: —herewith submitted, is a Straight Line Map of the Union Pacific Railroad showing:

Stations, Towns and Cities.
Railroad Operating Divisions.
Distance in units of 100 miles.
Single and Double Track Main Line.
Branches.

Profile showing Ruling Grade percent, Elevations, and Mileage Main Line Seattle, Washington, to Council Bluffs, Iowa; Borie, Wyoming, to Denver, Colorado; and Gibbon, Nebraska to Kansas City, Missouri.

[fol. 806] Legend-Large Red Letters from "A" to "O" inclusive show Terminals, Divergence points and Territory Primarily Involved in These Proceedings.

From this exhibit, it will be noted that the Union Pacific operates in thirteen states, namely, Iowa, Nebraska, Wyoming, Idaho, Oregon, Washington, Missouri, Kansas, Colorado, Montana, Utah, Nevada, and California, the D&RGW operating only in the States of Colorado, Utah and a little mileage in New Mexico.

Union Pacific Railroad Company, through its predecessors, also pioneered railroad building and operation in Idaho and the Pacific Northwest. Beginning with the construction of the Utah and Northern Railway Company in 1878, when the population of the then Idaho Territory was only about 32,000 people, and in 1881 of the Oregon Short Line Railway Company, from Granger, Wyoming to Huntington, Oregon, this pioneering continued, until, with the acquisition of some short lines and of the old Oregon Railway & Navigation Company in 1889, now the Oregon-Washington Railroad & Navigation Company, the Union Pacific finally completed connections between its main line in Utah and Wyoming, and Portland, Oregon, and the Pacific Northwest.

The construction work was done under the name of several separately incorporated railroad companies. This history is set forth in detail in the Interstate Commerce Commission's valuation report covering the Union Pacific [fol. 807] and subsidiary lines, I.C.C. Valuation Report Volume 44, which discloses also that the Union Pacific put more than fourteen million dollars into the original construction and equipment of the Oregon Short Line Railway Company.

The result of all this early activity is that, today, from Ogden, Utah, and Granger, Wyoming, northward through the states of Idaho, Montana, Oregon and Washington, the Union Pacific operates 5,606.7 miles of railroad, and I wish particularly to emphasize the fact that 2,913.19, or over 50 per cent, of this total railroad mileage consists of the large number of branch lines shown on map, Page 1, of my Exhibit.

Attention is directed to Page 1 of my Exhibit showing the location of our double track main lines, particularly that portion between Council Bluffs, Iowa, and Ogden, Utah, a distance of 992.6 miles, which I believe to be the longest

continuous segment of double track on the American Continent.

The Legend shown on Page 1 of my Exhibit, letters B, C, D, E, H, I, K and L, cover trackage between Pocatello, Idaho and North Platte, Nebraska, the latter being point of divergence of traffic flowing via Council Bluffs, Iowa, and Kansas City, Missouri, and is the main portion of the territory principally involved in this proceeding. The standard of track construction in this territory calls for 133 lb. rail, rock ballast, fully tie plated and treated cross ties.

Although the Union Pacific has a billion dollar railroad [fol. 808] plant, more than six-hundred million dollars of which is in the routes more particularly affected in this proceeding, it has been, and is continuously expending large sums to improve the railroad, increase its transportation capacity and the efficiency of its service.

All main line tracks of the Union Pacific are protected by automatic block signals. Automatic continuous cab signals have been or are in the course of being installed on locomotives, including wayside equipment, operating between Summit (Omaha), Nebraska, letter "M" on Page 1 of my Exhibit, and Cheyenne, Wyoming, letter "K"; and between Green River, Wyoming, letter "E," and Laramie, Wyoming, letter "I," a total distance of 755.3 miles, at a total estimated cost of $5,647,220.

The Interstate Commerce Commission has granted our application to replace obsolete automatic train control equipment between The Dallas, Oregon, and Portland, Oregon, a distance of 85.8 miles, with automatic continuous cab signals, at a total estimated cost of $1,258,430.

Attention is also directed to the following territories on the Union Pacific Railroad operated by Centralized Traffic Control:

Territory	Miles
Pocatello, Idaho, to Glenns Ferry, Idaho	159.9
Huntington, Oregon, to Pendleton, Oregon	173.8
Salt Lake City, Utah, to Daggett, California	625.7
Riverside, California, to Los Angeles, California	58.7
Total	1,018.1

[fol. 809] The above installations have been made at a total estimated cost of $16,336,200. Under the Centralized Traffic Control System, the movement of trains is directed by signals and by power switches controlled from a central point, and the capacity of the line is increased 50 per cent to 80 per cent. Trains are expedited, eliminating train orders and handling of switches. Train and locomotive hours are reduced, as well as reduction in train stops and saving in freight car days and man hours.

At Pocatello, Idaho, which is one of the major terminals in the territory principally involved in this case, the Union Pacific has large locomotives and car repair facilities, including extensive shop facilities of the Pacific Fruit Express Company. At this location, we completed late in 1947 a modern Retarder Operated Gravity Switching Yard, at a cost, including miscellaneous yard improvements, of $2,965,833. I submit Page 2 of my Exhibit, which is a Straight Line Map of this retarder yard.

This retarder yard is strategically located. It is the hub for routes diverging in four directions, namely, east via Granger to Denver, Kansas City and Omaha, northward to Butte, northwestward to Spokane, Portland and Seattle, and south to Ogden, Salt Lake City and Los Angeles. In reality, the Pocatello yard is three yards. To the east is the departure yard consisting of nine tracks, each with a capacity of 92 to 124 cars. In the center is the "bowl" of 40 classification tracks each holding 16 to 48 cars. To the west [fol. 810] is the receiving yard consisting of 14 tracks, 7 of which hold from 87 to 125 cars each, 6 holding 39 to 75 cars each, with one track used as a running track.

With construction of the Retarder Yard at Pocatello, the usual problems and difficulties encountered in freight switching yards handling large volumes of traffic were largely overcome.

Eastbound trains are made up at Pocatello and dispatched thence to Green River; the first terminal of importance. Trains are moved between Pocatello and Green River intact, stopping at intermediate terminal at Montpelier, Idaho only for servicing and inspection. Diesel locomotives primarily, and some oil burning steam locomotives, are operated in this territory.

In 1943, in order to improve the operation between Mont-

pelier, Idaho, and Green River, Wyoming we eliminated (daylighted) tunnel at Hodges Pass at a cost of $361,082. This pass is near Moyer Junction, Wyoming, which is 42.3 miles west of Granger, Wyoming.

At Green River, Wyoming, extensive yard and locomotive facilities are located, and in 1949, $117,690 was expended for additional trackage and improved switching facilities. In 1947, $52,438 was expended at Granger, Wyoming, for track improvements and interlock in order to eliminate delays previously encountered in that location. At Green River, [fol. 811] Wyoming, traffic for Colorado and western Kansas is assembled from the two converging lines, Ogden, Utah to Green River, Wyoming and Pocatello, Idaho to Green River, Wyoming, and cars are then blocked for movement to Laramie, Wyoming.

In 1947 and 1948, a line change was made at Thayer Junction, Wyoming, 32.9 miles east of Green River, Wyoming, at a cost of $1,295,375 to obviate restrictions on train speeds by reducing curvature.

In 1948, yard improvements were made at Cheyenne at a cost of $256,264, which further increased the capacity and efficiency of that yard.

At North Platte, Nebraska, is located the second modern Retarder Operated Gravity Switching Yard, a Straight Line Map of which is submitted as Page 3 of my Exhibit, also photograph Page 4 of my Exhibit, the latter showing only the classification tracks in the "bowl." This yard was completed in 1948 at a cost of $3,125,221. There was also completed in 1949 at North Platte, Nebraska, a new Freight House Transfer Station and trackage at a cost of $909,820, in order to provide fast service for solid carload lots to western destinations on the Union Pacific and Southern Pacific Railroads.

The new Retarder Yard at North Platte, Nebraska is similar to the one at Pocatello, Idaho. The North Platte yard is five miles in length overall, and is divided into four major sections; receiving yard, incline, classification yard and [fol. 812] departure yard. The receiving yard, located at the west end of the retarder yard, consists of 12 parallel tracks for incoming freight trains whose cars must be regrouped for further movement to various destinations.

Switch engines push strings of cars from the receiving

yard to the top of the incline or "hump." Here, the cars are uncoupled singly or in small groups and permitted to roll down the incline. By means of electrically controlled retarders and electrically controlled switches, it is possible to control the speed of the free-rolling cars and direct them onto any one of the 42 classification tracks fanning out at the foot of the incline called the bowl.

After cars have been grouped on the classification tracks, they are moved by switch engines to the departure yard preparatory to their moving east or west in newly made up trains. The departure yard consists of 16 tracks.

It is estimated that by the facility the classification work and switching time is reduced one-half.

At each of the retarder yards, as cars move up the incline or "hump," there is an inspection pit which affords full opportunity to carefully inspect the running gear of all cars, and this materially reduces the hazard of accidents on the road.

To illustrate how the retarder yards increase the efficiency so far as destination terminals are concerned, we will use as an example a train moving from the West Coast to [fol. 813] Council Bluffs, Iowa. When the train reaches North Platte, the cars are classified along with cars from other trains, and on departure from North Platte, cars are in trains not only in station order, but are grouped for delivery to connecting carriers. In other words, instead of it being necessary for a switch engine to switch the entire train on arrival in order to deliver the cars to each connecting carrier in one cut, the cars leave North Platte grouped for each connecting carrier, and the switch engine at Council Bluffs or Kansas City need only cut the cars off and deliver them. This insures on-time delivery to connecting carriers who also have definite schedules to meet.

The retarder yards at North Platte, Nebraska, and Pocatello, Idaho, are the most modern that present day equipment and practices afford. They are completely flood lighted, and are equipped with the latest communicating systems, both station to station and loud speakers. The Diesel switching locomotives in use in the two retarder yards are equipped with two-way radio systems.

The advantages, therefore, of retarder yard operations may be summed up as follows:

1. Material reduction in switching at initial, intermediate and destination terminals, resulting in substantial saving in time.

2. Permits maintenance of fast freight schedules, even under adverse conditions, and on time deliveries too.

[fol. 814] 3. Reduction in switching effects a reduction in rough handling.

4. Reduction in hazard of accidents account all cars moving over inspection pits on retarder incline.

5. Substantial reductions in expenses through reductions in switch engine shifts at initial, intermediate and destination terminals.

The capacity of these modern yards and their facilities is several times the volume of traffic they are currently receiving.

During October, 1944, when we had only a flat switching yard at Pocatello, with much less capacity than the new retarder yard, we were handling through that yard, giving each freight car switched one count on arrival, 2,147 cars per day, compared with only 1,367 cars per day in January, 1950, with the new retarder yard in operation.

During October 1944, at North Platte, Nebraska, we were handling with a flat switching yard, 3,753 cars per day compared with 2,239 cars per day in January, 1950. It is quite evident, therefore, that we have a huge unused capacity at the new retarder yards.

At Altamont, Wyoming, which is 86.6 miles west of Green River, Wyoming, and 89 miles east of Ogden, Utah, a new tunnel 6,705 feet in length was placed in service in November, 1949, for westbound traffic. Prior to this time, there was but one tunnel at Aspen, Wyoming, for both eastbound and westbound traffic. The new tunnel, which cost [fol. 815] $8,000,000 and took two and one half years to construct, completed the continuous double track main line between Council Bluffs, Iowa, and Ogden, Utah. This huge bore is more than a major step in progressive railroading, it is an important factor toward a more effective National defense.

I have discussed the costs of and increased efficiency from several of the individual improvements and installations. I wish now to enter Pages 5, 6, 7 and 8 of my Exhibit, showing that the Union Pacific expended between Janu-

ary 1, 1944 and December 31, 1949, in the Maintenance of Way Department approximately $124,300,000, and in the Mechanical Department $149,600,000 for major improvements and equipment. Further, it is proposed to expend in the Maintenance of Way Department during the year 1950 an additional $42,100,000, and in the Mechanical Department $51,000,000 on major improvements and equipment. Grand total expenditures for the period January 1, 1944 to December 31, 1950 will approximate $367,000,000.

I am reading now from page 5 of the exhibit: "Maintenance of Way, which is a consolidated statement of major improvements of the Union Pacific System, period 1944 to 1949, inclusive. Major improvements and the cost: New heavy rail, replacing lighter rail in main line tracks, $46,410,644"——

Exam. Mullen: Is it necessary to read this in, or is it all right to copy it in?

[fol. 816] Mr. Quirk: It is all in the exhibit. I don't see why it should be put in the transcript. We all have to pay for the transcript.

Exam. Mullen: The point is, do you want it in the transcript? It is already in the exhibit. It is just repetitious to read it in the record.

Mr. Collins: Those pages of exhibit, 5, 6, 7, and 8, may just go in as exhibits, Mr. Lynch, and need not be read or copied into the transcript.

The Witness: That is page 8, inclusive?

Mr. Collins: Yes. Now, you were down to the last paragraph on page 10.

The Witness: The purport of my testimony to this point has been that the Union Pacific by the expenditure of huge sums of money now has a direct route and a vast transportation facility that is adequate to move the present or foreseeable volume of traffic expeditiously, safely and economically.

But we are still striving to improve. With advice and counsel of associate officers, I have initiated from time to time many recommendations, which were subsequently approved, providing for improved and enlarged facilities, additional modern motive power, freight cars, etc., having a direct and improved effect upon the territory now under

consideration in this case. Each of these recommendations was predicated on the premise that they were necessary to [fol. 817] handle or to facilitate the handling of the traffic now being offered us, and likely expansion of such business in the future.

Any prospective reduction or diversion of traffic would leave upon the hands of the Union Pacific a giant plant, the expense of which could not be justified by the reduced business, and a progressive program of retirements would necessarily result. This is unthinkable, if for no other reason than the need for this tremendous transportation facility in promoting the interests of National economy and National defense.

The transportation facilities of the Union Pacific are so located and are of such vital necessity to the economic existence of so many thousands of people and hundreds of cities, towns, villages, ranches and farms, and to the National economy and National defense, as to require that it maintain a high degree of performance and efficiency. To so maintain these facilities requires the maximum of traffic that it can originate or terminate at points which it serves.

As a railroad, the Union Pacific is not comparable in any sense, geographically, physically or otherwise with the D&RGW. In this connection, attention is directed to the ruling grade shown at the top of Page 1 of my Exhibit. Because the profile is condensed, rises and falls in elevation are necessarily indicated in abrupt form, but study of the exhibit will show maximum elevation on the Union Pacific route is 8,013 feet at Sherman, Wyoming, which elevation [fol. 818] prevails for approximately one mile, in contrast to elevations up to 9,239 feet on the D&RGW Railroad, and above 8,000 feet for approximately 35 miles, presenting a more difficult operation.

The maximum gradient eastward at any point on the Union Pacific route is 1.52 per cent, and westward 1.55 per cent, contrasted with substantial mileage with gradient of 2 per cent and over on the D&RGW route.

In this connection, the annual report to the Interstate Commerce Commission for the year 1948 shows the D&RGW's total principal locomotive miles in freight service were 27,816,537, and helper locomotive miles for the same

year were 1,145,304, or only 4.11 per cent of the total principal locomotive miles.

I submit Page 9 of my Exhibit setting forth certain physical characteristics of the Rio Grande between Ogden and Denver and the Union Pacific Railroad between Pocatello and Cheyenne. These statistics cover conditions as of 1940 as we do not have such data for the Rio Grande as of this time, but if the Rio Grande cares to submit statistics which will cover changes made subsequent to 1940, we shall be glad to show comparison as of this time.

I am reading now from page 9 of the exhibit, and I would like the privilege of reading it into the record.

Mr. Quirk: I object to that, Mr. Examiner.

Exam. Mullen: I don't think it is necessary. That is just [fol. 819] duplicating it. You can point out some of it, and highlight it if you wish.

The Witness: While this exhibit is self-explanatory, I call particular attention to maximum curvature and degrees of curvature on the two railroads. On the Rio Grande, it is equivalent to 111 complete circles or 225 per cent greater than on the Union Pacific Railroad. In other words, the degress of curvature on the Rio Grande result in a complete circle for every 5.45 miles traveled by train.

The maximum ruling grade and total rise on the Rio Grande greatly exceeds that on the Union Pacific.

It will be noted from the exhibit due to degress of curvature and grades involved the effort produced in moving a train from Ogden, Utah, to Denver, Colorado, over the Rio Grande, a distance of 606.9 miles, is equivalent to what it would be in moving a train a distance of 1,440.76 miles on straight and level track. This is 51 per cent greater than the effort produced in handling a train over the Union Pacific Railroad from Pocatello, Idaho, to Cheyenne, Wyoming, a distance of 551.6 miles.

All of these conditions on the Rio Grande involve slower, more difficult, more expensive and more circuitous operation than via the direct Union Pacific route from Pocatello through Granger to Cheyenne.

During and subsequent to the War years, 1942-1949, the [fol. 820] Union Pacific has not only met the transportation requirements of the territory it serves, but has more

than adequate capacity to do so in the future. As already shown, this has been accomplished through vast expenditures for maintenance, additions and betterments and operating efficiencies. Now, in the face of a lower railroad traffic volume, we are confronted with the threat of losing, according to the forecase by Mr. T. K. Farley, Assistant Freight Traffic Manager of the D&RGW, a potential of 101,476 loads of eastbound traffic and 56,286 loads of westbound traffic, or a total of four trains per day, eastbound and westbound, between Pocatello, Idaho, and Council Bluffs, Iowa, and Kansas City, Missouri.

Another Union Pacific witness is testifying with respect to this loss of traffic, and the formula used in determining the potential loss of four trains per day eastbound and westbound on the Union Pacific.

To indicate the capacity and the adequacy of the Union Pacific Railroad Company to handle all traffic now offered, or that may be offered in the future, I call attention to the following data:

Incidentally, this is in thousands, as reported by the Interstate Commerce Commission:

[fol. 821] Gross ton miles handled by Union Pacific Railroad, freight only:

1944—89,652,529,000
1948—76,243,067,000
1949—71,497,835,000

During the War year of 1944, gross ton miles handled exceeded the handling during 1948 by 17.6 per cent and exceeded the handling during 1949 by 25.4 per cent.

Freight train miles operated:
1944—36,733,020
1948—27,822,880
1949—26,158,252

Freight train miles operated in 1944 were 32 per cent greater than in 1948, and 40.4 per cent greater than in 1949.

Passenger train miles operated:
1944—21,423,697
1948—17,869,236
1949—17,267,180

Passenger train miles operated in 1944 were 20 per cent greater than during 1948, and 24 per cent greater than in 1949.

Freight and Passenger train miles operated reflect the density of traffic, and it will be noted from these figures total train miles both passenger and freight operated in 1944 were 33.9 per cent greater than the total train miles in 1949. This demonstrates the very large unused capacity [fol. 822] of the Union Pacific Railroad at this time compared to the peak war years of 1944.

At a time when the Union Pacific Railroad Company is striving diligently to attract new industries and minimize its traffic losses as a result of the lower level in traffic volume——

Mr. Quirk: Mr. Examiner, I object to the argument.

Mr. Collins: It is not argument. He is pointing out to the Commission——

Exam. Mullen: We will let the witness continue.

Mr. Quirk: All right.

Mr. Collins: Go ahead, Mr. Lynch.

The Witness: —it would be inconceivable to divert traffic from its lines and restrict and curtail service and growth in territories which it alone serves and in which it pioneered in railroad transportation. The D&RGW Railroad has built no trackage into these territories, pays no taxes and has no responsibility to the towns and cities, industries, businesses, farmers and the general public, nor can it perform a transportation service that is equal to or at a lower cost than that afforded by the Union Pacific to the Idaho and the Pacific Northwest territory.

All of the obligations and responsibilities now assumed by the Union Pacific Railroad Company in the named territory would remain with the Union Pacific with a lesser return with which to meet these responsibilities.

[fol. 823] Other witnesses will testify concerning the tremendous adverse affect that the Union Pacific would suffer if the D&RGW should succeed in this case and take away from the Union Pacific the traffic, or any appreciable part of it, indicated in the testimony of Mr. Earley. This adverse effect would also be felt by the Pacific Fruit Express Company, by the Union Pacific Coal Company and by the

employees of all those companies, and the detriment would extend to cities, towns, villages and the countryside all along the lines of the Union Pacific Railroad.

I will not discuss the subject in detail because other witnesses of the Union Pacific and witnesses of intervenors will do so. I do want to emphasize, however, that the intervention in this case on behalf of the defendants by the several State Commissions, the Union Pacific Railroad's employes, the Chambers of Commerce and others is not an idle or strategic gesture.

I previously called attention to map, Page 1 of my Exhibit, and to the fact that of the 5,606.7 miles of Union Pacific Railroad in Idaho, Montana, Oregon and Washington, 2,913.19 miles, or over 50 per cent of the total mileage, consists of numerous branch lines. On these branches, there is originated and terminated about 46 per cent of the total traffic in the area served by them.

The original purpose and the present benefit of this extensive branch line mileage was and is to serve as so-called [fol. 824] feeders for the main lines of the railroad. Few, if any, of these branches would be self-sustaining if operated and treated as individual lines separate and apart from the Union Pacific.

Branch Line operation is generally more expensive than main line operation and affords less opportunity to have increased efficiency. The fate of branch line operation is well known to the Commission through its conduct of abandonment cases since 1920. Unless we have a substantial main line haul on traffic to and from these branches, the operation of many if not most of them would not long be justified.

Attention is directed to our branch line situation in this area because of the fact that The Denver and Rio Grande Western Railroad in this case, to the extent that it may succeed in diverting traffic from the Union Pacific if the Ogden Gateway is opened, is to have our very extensive Northwest branch lines serve as "feeders" for the main line of The Denver and Rio Grande Western Railroad, instead of their owner, the Union Pacific Railroad.

In this connection the Commission's attention is also directed to the fact disclosed in its own reports, that since

1930 the D&RGW has abandoned its own branches to the extent of nearly 17 per cent of its total mileage as of that year, while the Union Pacific's abandonments for the same period are only about six per cent of its total mileage as of 1930.

The D&RGW's policy of abandoning its branches and fa- [fol. 825] voring its main line was recognized by the Commission in Denver & R. G. W. R. R. Co. Trustee Abandonment, 247 I. C. C. 381, 384. On some of our branches in this area, our expensive branch line haul would be about as long as the main line haul we would get if we are compelled to turn over the traffic to the D&RGW at Ogden. The shorter our main line hauls are in proportion to our branch line hauls, the less possibility there is for making a profit on traffic to and from the branches, and the greater likelihood there is of abandonment of the branch lines. If the D&RGW succeeds in this case, our main line haul on much of the traffic would not be much more than 100 miles, while our present main line haul is more than 1,000 miles.

I now wish to comment briefly upon certain statements made by Mr. Bradford at the Salt Lake City hearing.

At Pages 196 and 197 of the record, he mentioned the fact that the traffic his road seeks to take away from the Union Pacific in this case would be interchanged between the Rio Grande and the Union Pacific through the Ogden terminal by the Ogden Union Railway and Depot Company, and that:

"The OUR&D yard is a modern yard and in our opinion is adequately capable of taking care of the additional Northwest business which might move through there."

While another witness will demonstrate in detail that Mr. Bradford is entirely wrong in his statement, I wish also to contradict it most emphatically.

[fol. 826] The yard facilities at Ogden present an insurmountable problem. The lines of the Union Pacific and the Central Pacific, now the Southern Pacific, were joined at the historic Golden Spike ceremony on May 10, 1869, at a point just west of Ogden known as Promontory Point. In the construction of these lines, terminal facilities for interchange of traffic were installed at Ogden, and are owned jointly by the Union Pacific and Southern Pacific. These

facilities, of course, have been enlarged and expanded through the years.

At the same time, the village of Ogden grew and expanded into a large city. Industries were established, and, for the most part, adjacent to the railroad. Today, we find the terminal surrounded by these growing industries, by buildings and other construction, and property suitable for railroad expansion is not available.

Attention is directed to page 10 of my Exhibit, which is an aerial photograph of the Ogden Yard. Terminal facilities at Ogden have been expanded to the limit of available space, but they are inadequate for the volume of business now being handled, with the result that service can only be provided at a greatly increased expense in the way of additional switch engines and related services, and even then trains frequently leave that terminal late and it is necessary to run off the time by reducing tonnage and subordinating other movements to the late trains.

[fol. 827] This condition is so pronounced that the Union Pacific long ago found it necessary to by-pass Ogden to the extent possible. This has been done by making up trains at Pocatello, Salt Lake City and/or Green River that can be moved via outside wye trackage at Ogden and not actually enter the terminal proper. Further, Ogden is an icing point for eastbound and westbound perishable traffic, and the facilities would not lend themselves efficiently to the icing of perishables from the Pacific Northwest and Idaho territory at Ogden prior to delivery to the D&RGW.

While serious delays to trains at the Ogden terminal are frequent throughout the year, during the heavy Fall business they are more pronounced. As an example, during the month of September, 1949, it was necessary to hold out 76 trains from the Southern Pacific, an average of 36 minutes per train, while track room was being made available in this yard. During the same month, Ogden yard received 220 fruit trains from the Southern Pacific, and these trains were in the yard an average of four hours thirty-eight minutes per train.

D&RGW traffic from these trains during the same period averaged six hours nine minutes from the time of arrival until delivery was accomplished. If the Ogden Gateway was

opened for traffic from Pocatello for delivery to the D&RGW, this traffic would have to be received in the Union Pacific Yard, and then move to one of the ice house docks [fol. 828] for servicing, and then handled to ice house tracks for movement to the D&RGW, and with present ice dock facilities at Ogden, it would result in long delays in handling perishable traffic. Another witness will explain the Ogden yard situation in detail.

Mr. Bradford, at Page 203 of the record, stressed the interchange of traffic between the Union Pacific and the D&RGW at Denver and at Utah Junctions. Another witness will show that the greater percentage of the cars handled in the Utah Junction were interchanged at Provo and Salt Lake City rather than any considerable interchange at Ogden. The diversion of war traffic referred to by Mr. Bradford at page 208 of the record was, for the most part, if not entirely, interchanged at Salt Lake City, rather than Ogden, account latter yard being congested.

Our experience in the interchange of traffic with the D&RGW at Denver is not all satisfactory. Serious delays are encountered, because the Rio Grande is either unable to handle the traffic promptly or employs inefficient methods of handling it. As will be shown by another witness, cars we have interchanged to the Rio Grande at Denver have been delayed by that line as long as 117 hours.

Other witnesses will demonstrate Mr. Bradford's error in stating that the Rio Grand has at its "command" a total of approximately 11,500 refrigerator cars under contract with the American Refrigerator Transit Company, and they will also show that the Union Pacific and the Pacific Fruit [fol. 829] Express have regularly come to the aid of the Rio Grande by furnishing it refrigerator cars.

At Pages 210 and 211 of the record, Mr. Bradford explains certain statistics indicating increases in train speeds, tons per train, train hours, etc., between 1944 and 1948, which he said indicate Rio Grande efficiency.

I submit Page 11 of my Exhibit showing statistics of the Union Pacific compared with the D&RGW for the year 1948. These are taken from annual reports to the Interstate Commerce Commission and Statement No. 49,200, dated July, 1949, Bureau of Transport Economics and Statistics, Interstate Commerce Commission.

From this exhibit, you will note the substantially greater efficiency of the Union Pacific versus the D&RGW in freight gross tons per train mile, gross ton miles per train hour, miles per locomotive day, car miles per car day, also lower freight transportation expenses per 1,000 gross ton miles, as well as transportation expenses per passenger car mile.

It will be noted that, regardless of these efficiencies, the Union Pacific, because of the territory it serves and being a transcontinental route, found it necessary to operate 31,768 passenger car miles per mile of road operated in passenger service compared with 11,612 passenger car miles per mile of road operated in passenger service by the D&RGW, as a result of which, our passenger service deficit in 1948 was [fol. 830] $28,462,572; or $4,291.97 per mile of road operated compared with a deficit of only $4,954,967, on the D&RGW or $3,127.41 per mile of road operated.

It is common knowledge that, in normal times, deficits from operating passenger service are the rule rather than the exception among railroads generally. This deficit was incurred from our passenger operations regardless of the fact that we have reduced our passenger service expenses in every way we could. Deficits from passenger service may be expected in future years even though the service be reduced to the bare minimum essentials to meet public requirements. We cannot go out of the passenger business to avoid incurring a deficit from that operation.

Our only hope is to offset that deficit by a full volume of freight traffic and freight revenues, and we are in no position to contribute financial aid to the Rio Grande by giving it a share of our freight traffic.

It will be noted from the exhibit that the Rio Grande is not justified in demanding financial assistance from the Union Pacific. While the net railway operating income per mile of road from freight trains for the Union Pacific was $7,293.13 compared with $7,005.40 for the D&RGW——

Mr. Quirk: Mr. Examiner, I object to these sentences. My company is not demanding financial assistance from the Union Pacific in this proceeding.

[fol. 831] Exam. Mullen: I think the witness is stating what he meant, Mr. Quirk, by giving it a share of the freight traffic. I think we understand what he means. It is not direct financial assistance, of course.

The Witness:—considering both freight and passenger trains, the net railway operating income per mile of road for total transportation service was $4,374.46 for the Union Pacific and $4,976.82 for the D&RGW, in the light of which, there is no justification for the D&RGW's demand to share in Union Pacific's traffic from and to Idaho and the Pacific Northwest, where the Rio Grande has no facilities and can furnish no service. A loss of this traffic can result in only one thing to the Union Pacific, and this is a prohibitive increase in its operating costs, without any offsetting return whatever from the D&RGW or anyone else.

For a further comparison, I submit Page 12 of my Exhibit showing taxes paid, by States as well as United States Government taxes by the Union Pacific and by the D&RGW Railroad for the year 1948, as reported in annual reports to the Interstate Commerce Commission. It will be noted that the D&RGW's taxes for the year 1948 in the States of Colorado and Utah were $2,852,956 compared with Union Pacific's taxes in those two States of $2,949,568 for that year.

It will also be noted that the Union Pacific's taxes in the States of Idaho, Montana, Oregon and Washington, [fol. 832] which is the territory in which the D&RGW Railroad wants traffic for movement over its line via the Ogden Gateway, were $4,991,573. Further, the exhibit shows that taxes per mile of road operated on the Union Pacific were $6,152 compared with $3,294 for the D&RGW.

At Page 201 of the record, Mr. Bradford states that, in the event business moved from Idaho Falls via the Ogden Gateway and D&RGW to Pueblo, there would be ten yard moves of more or less importance involved, and that via the Union Pacific from Idaho Falls to Pueblo, via Denver, there are nine yard moves involved.

This is in error, as the following terminals only would be involved via the Union Pacific, namely, Idaho Falls, Pocatello, Montpelier, Green River, Rawlins, Laramie, Denver and Pueblo, or a total of eight. At Montpelier and Rawlins, all that is involved is relaying engines, servicing and inspection. No importance can, therefore, be attached to those two terminals.

Mr. Bradford erred in indicating Cheyenne as a terminal,

on Denver traffic, overlooking the Borie, Wyoming cutoff, which is 9.5 miles west of Cheyenne and by-passes that terminal. This cutoff line has been in service since 1908. In addition to the fact that the involved traffic would move through two more yards if moved through Ogden over the D&RGW than if moved direct by the Union Pacific, the traffic would have to be handled through the Ogden terminal under complicated, congested and expensive operating conditions, which will be discussed in more detail by another [fol. 833] witness. Too much emphasis cannot be placed on the importance of avoiding the handling of traffic through terminal yards wherever possible, because each terminal yard which can be avoided results in a definite saving of time, protection to lading and reduced expenses.

Mr. Bradford, at Page 209 of the record, calls attention to the fact that during the January and February, 1949 blizzards in our territory, when our line was blocked in Wyoming, the D&RGW handled considerable traffic for the Union Pacific. There is nothing unusual about such diversion of traffic among railroads under emergency conditions. It is the rule and not the exception.

Detour movement of trains and traffic via other lines in the event of interruptions is an accepted principle in American railroading, and hundred of agreements are on file today stipulating the terms and conditions governing such movements. It is the device under which traffic of the Nation is kept fluid regardless of the temporary stoppage or incapacity of one line to function.

We also have special tariff provisions which anticip-te and provide for just such diversions. Certainly it would not be economically sound to use this emergency diversion of traffic from the Union Pacific to the D&RGW as an argument or reason for a permanent diversion of Union Pacific's traffic, nor as a measure of the Rio Grande's capacity or ability to handle such diversion permanently. If Mr. Brad- [fol. 834] ford's contention is sound, then the Union Pacific should have had permanently diverted to it the D&RGW's traffic since 1925, for in August of that year, their line was flooded near Helper, Utah, and at their request, the Union Pacific handled 20 D&RGW passenger trains and 11 of their freight trains between Denver and Ogden. However,

we have not considered that this emergency assistance to the D&RGW was any reason for seeking permanent diversion from them to our line of a large part of or any part of their traffic.

I would like to add there that on March 21, the D&RGW had suffered a——

Mr. Quirk: What date?

The Witness: What is the question?

Mr. Quirk: You said "March 21." What year?

The Witness: 1950.—a line interruption caused by a landslide and had some traffic back up, and on March 22, made inquiry of our officers as to the chances or the prospect of re-routing some traffic via the Union Pacific between Salt Lake City and Denver. It seems they had good fortune and the line blockade was not of the duration expected, but there were 13 cars re-routed from Salt Lake and 29 cars re-routed from Denver, via the Union Pacific.

Mr. Quirk: Did they get through Ogden all right?

The Witness: I think so.

By Mr. Collins:

Q. Did you go to Ogden?

[fol. 835] A. I think so. It was a very small movement, not much movement.

Q. Didn't they go around the Wye, they didn't go through the terminal?

A. They went around the Wye.

Q. They didn't go through the terminal?

A. No. Again, on March 31, the D&RGW suffered a line blockade. I believe that was due to burned off journal. It was necessary to detour their passenger trains 8 and 17 over our line between Pallas and Provo, and in addition to that, it seemed that the wrecking derrick of the D&RGW was inoperative, and we loaned them the Union Pacific derrick to clear their line.

Now, those incidents just go to show what can and does happen on a railroad, and I reiterate what I read there in my testimony, that diversions in emergency situations are nothing unusual. They occur right along, and in a neighborly way, each railroad helps the other railroad in distress.

Witness Earley of the Rio Grande described conditions which he said have caused a very severe decline in traffic originating on the Rio Grande and loss of tonnage to other forms of transportation, and stated that, because of these losses, they were forced to turn their thoughts and efforts to off-setting these losses by taking bridge or through traffic from other connecting lines, and he pointed to the startling success the Rio Grande has enjoyed in this effort during recent years, stating that few, if any, other Class I railroads had experienced such a change from local to [fol. 836] through freight traffic during a similar period.

His discussion of these matters appears at Pages 61 to 64 of the record.

Mr. McCarthy confirmed this policy of the Rio Grande, and stated at Page 35 that they want to continue increasing their volume of traffic they take from the originating and terminating and connecting lines and others, "because generally speaking, there is more money in it."

At Pages 32 and 33 of the record, Mr. McCarthy made it clear that the only purpose of the Rio Grande in filing the complaint in this case was "to improve the financial condition of our railroad."

In connection with the sta-ements of these two Rio Grande officers, I wish to point out that the Union Pacific is not in position to give up any portion of its traffic and revenue to enable the Rio Grande to pursue its policy of improving its financial condition by taking traffic from connecting lines that originate and terminate it, and which lines are now hauling the traffic and in need of it to maintain themselves financially.

While the transportation business of the Union Pacific has produced satisfactory results generally during many of the past 30 years; nevertheless, like the Rio Grande and all other railroads, it has had its lean years, and it is not in a position to be a "big brother" financially to the [fol. 837] Rio Grande or any other railroad.

Conditions that affect financial results of the Rio Grande and other railroads also affect the Union Pacific. For example, out of the past twenty years, there were only six years (principally those in the war period) in which the net railway operating income of the Union Pacific was sufficient

to pay the fixed charges and the dividends that were declared.

During this twenty-year period, the Union Pacific reduced its funded debt by $137,893,000, thus reducing its fixed charges by $9,654,235 annually, and made substantial additional investments in fixed property and new rolling stock in an effort to operate more economically, reduce maintenance charges and safeguard or increase our Net Railway Operating Income. These accomplishments, together with the payment of the dividends, were possible not because of earnings from transportation operations alone, but largely because of income from oil properties and other non-transportation sources which were earned outside of the common carrier plant.

The Union Pacific has no guarantee of a continuous condition of prosperity, and our common carrier business ought to pay its own way. To illustrate further, in 1949, although suffering some losses from January and February blizzards, the Union Pacific had a net railway operating income of $21,707,437. This amount was insufficient by $10,269,865 of the amount necessary to pay the interest on funded debt and the dividends that were declared.

[fol. 838] Contrasted with these facts, in 1948, according to the Annual Report of the D&RGW to the Interstate Commerce Commission, the D&RGW had a net railway operating income of $12,156,284. Out of this amount, the D&RGW was able to provide for all fixed charges and other miscellaneous debit and credit items, pay the dividend that was declared, provide for the sinking fund requirement, and still had left over in Surplus Account for the year an amount of $5,167,148.

As a matter of fact, and as will be shown by another witness, the percentage of increase in gross revenues from 1930 to 1949 reported by the D&RGW is relatively higher than the average percentage of increase of the other carriers operating in the western territory during this period.

Further, with a continuing lower level of traffic volume thus far in 1950, it is not likely that we will show a very substantial profit from our common carrier business during the current year.

By Mr. Collins:

Q. You mean the Union Pacific Railroad. It is a "we." "It is not likely that we will show a very substantial profit," is the way it reads. I just want to make sure you mean the Union Pacific Railroad.

A. We will change that, Mr. Reporter: "It is not likely that the Union Pacific will show a very substantial profit."

Even the oil properties are subject to Acts of God and could possibly vanish as the result of an earthquake. As a [fol. 839] matter of fact, a light earthquake in November, 1949 damaged 101 productive Company wells, of which 43 had stopped producing by the close of the year and several more have stopped since that time.

In closing my testimony, I wish particularly to emphasize the following facts for the Commission's serious consideration in connection with the Rio Grande's demand in this case for a large and vital part of Union Pacific Traffic. It would take substantial traffic from the Union Pacific, most of which it originates and terminates and bears the cost of the expensive part of the service; it would deprive the Union Pacific of revenues from a 1,000-mile haul, in contrast to the haul of little more than 100 miles from Pocatello to Ogden; it would, as other witnesses will show, add from 33 to over 200 miles more transportation, but by adding at least one and probably two more interchanges between carriers and by adding at least two more terminal yard services; it would require moving the traffic through the complicated, expensive and frequently congested Ogden terminal which was constructed for interchanging and handling eastbound and westbound traffic and not for northbound or southbound traffic; it would require at least a full day longer than it does by the Union Pacific for the same traffic to reach the same destinations; it would result in wasteful transportation and in economic waste, for the additional cost of hauling traffic over the additional mileage at the [fol. 840] same rates would necessarily reduce the net return or the possibility of net return at present rates; its effect would be to curtail services to shippers or increase their rates, or both, and to endanger continuing operation of many of Union Pacific's approximately 3,000 miles of branch lines in Idaho and the Northwest; and while it

might help the Rio Grande to accomplish the only purpose, as stated by President McCarthy, that it had in filing the complaint, that is, to improve the Rio Grande's financial condition, it could, and it would if the Rio Grande should succeed, seriously endanger the financial ability of the Union Pacific to maintain its transportation facilities and personnel in the manner and to the standard necessary to furnish essential service to the National Defense and reasonable efficient service to shippers.

By Mr. Collins:

Q. Mr. Lynch, in mentioning the figures on page 14 of your statement, you said, as I noticed it, that they were in thousands, and then you read them as they are shown on that page, that is, actually in billions, but you meant round thousands at the end and not carried out to hundreds?

A. That is right.

Q. You didn't intend to make any change in the way the figures are stated there?

A. No, I wanted to point out they were thousands, the way they were reported in the Commission's report.

[fol. 841] Q. You don't bring it down into the detail of hundreds?

A. No.

Q. All right, that is all. Do you want to say anything further?

A. I have nothing further to enter.

Mr. Collins: That is all.

Mr. Quirk: We will have to ask cross examination be deferred.

Mr. Collins: To when?

Mr. Quirk: I don't know. I am following your pattern on this.

Mr. Collins: You are.

Exam. Mullen: You will let us know, then, a little later?

Mr. Quirk: Yes. This gentleman has given us a great many figures here. I said we wanted a reasonable time on it. Mr. Collins insisted on that in all of our witnesses except one.

Exam. Mullen: All right, call your next witness, Mr. Collins.

Mr. Collins: I want to make the record clear on that. I asked for the privilege of deferring cross examination of Mr. Earley for the reason that I would limit cross examination, if given the privilege, and wound up by not cross examining him at all. It ended at the Salt Lake hearing.

I would like for Mr. Quirk to speed along in his decision as to whether or not and when he may want Mr. Lynch for cross examination, because Mr. Lynch is an operating officer of the railroad and has a lot of duties that shouldn't be [fol. 842] made to wait while opposing counsel is making up his mind, so I insist that he make up his mind as soon as he can as to what he wants to do in the way of cross examination.

Mr. Qurik: We will make up our mind as soon as we can. We have not indicated any desire this proceeding be delayed at any time. It would be over now if we had our way, but there is a lot of detail here and technical stuff that has to be checked.

Exam. Mullen: Will you be here tomorrow, Mr. Lynch?

The Witness: Yes sir, I will be here tomorrow.

Exam. Mullen: You may call your next witness.

(Witness excused.)

Mr. Collins: I offer Exhibit 12 in evidence.

Mr. Quirk: I think that ought to be deferred until we cross examine this witness.

Exam. Mullen: It will be received, subject to objection later.

(Defendants' Exhibit No. 12, Witness Lynch, received in evidence.)

Mr. Quirk: Do you want a recess?

Exam. Mullen: Yes, we will have a ten-minute recess.

(Short recess taken.)

Exam. Mullen: We are ready to proceed, gentlemen.

Mr. Collins: Mr. Examiner, at that point in Mr. Lynch's testimony on page 14, where the gross ton miles are shown [fol. 843] for three years, they are stated in billions, and he referred to page 11 of his exhibit at about the middle of the page, where there appears "gross ton miles freight,"

and those figures should have thousands added to them as they are stated there.

Exam. Mullen: What page of the exhibit?

Mr. Collins: Page 11 of the exhibit, "gross ton miles," down about the middle of the page.

Exam. Mullen: Yes.

Mr. Collins: That should have the word "thousands" under it, because the figures should have "one thousand" added to each U.P. and D&RGW. Is that clear?

Exam. Mullen: Just a moment. We will correct the exhibit on the record.

Mr. Collins: Mr. Plummer.

K. V. PLUMMER was sworn and testified as follows:

Direct examination.

By Mr. Collins:

Q. Will you state your name, please?

A. K. V. Plummer.

Q. And what position do you hold?

A. Vice President and General Manager, Pacific Fruit Express Company.

Q. What is your business address?

A. 116 New Montgomery, San Francisco.

Q. You have prepared a statement and some exhibits?

[fol. 844] A. I have.

Q. An exhibit for presentation in this case?

A. I have.

Q. And are the facts and the statements in your prepared statement and exhibits true and correct to the best of your knowledge and belief?

A. They are.

Q. Will you proceed with your statement?

A. The Pacific Fruit Express Company is a wholly owned subsidiary of the Union Pacific Railroad Company and Southern Pacific Company, each holding 50 per cent of the stock. Its obligation to its parent companies is to furnish refrigerator cars, perform protective services, handle diversions, and render passing reports to the trade. It also

has a contract with the Western Pacific Railroad Company under which somewhat similar obligations prevail, the only difference being that Western Pacific provides its own icing independently of PFE.

In its contracts with parent companies and Western Pacific Railroad, Pacific Fruit Express Company receives the exclusive right to supply refrigerator cars and is solely responsible for the direction of movement and distribution of these cars to the end that undue favor or discrimination shall not exist between the respective railroad companies or any shippers served by them.

The magnitude of Pacific Fruit Express Company's facilities and services can best be illustrated by the following [fol. 845] data taken from books and records of the company and which, to the best of my knowledge and belief, are true and correct: The total investment in facilities of the Company as of December 31, 1949, is $179,066,933, of which $158,289,202, is invested in rolling stock; $14,277,425 in ice plants, icing platforms and related facilities; $5,746,063 in car shops; and $754,243 in other miscellaneous facilities such as land, tracks, heaters, storage facilities, etc.

The total fleet of refrigerator cars operated by PFE as of January 1, 1950, is 38,589 cars, of which 37,573 are owned by PFE and 1,016 car- of Western Pacific ownership are operated under lease arrangement. This fleet of 38,589 cars represents about 29.7 per cent of the national supply of refrigerator cars.

PFE also owns 287 express refrigerator cars which are operated in the Railway Express Agency pool.

While the national supply of refrigerator cars, according to data issued by the Association of American Railroads, has shrunk from approximately 143,000 on January 1, 1942, to approximately 130,000 on January 1, 1950, PFE, through purchase of 1,002 cars in 1945, 3,941 in 1947 and 1,059 in 1948, and the construction in its own car shops of 3,000 new cars in 1949, has actually increased its fleet since 1942 from 36,083 cars to 38,589 cars. The total investment made in new cars during the last five years alone exceeds $65,000,000.

For the repair and maintenance of its large fleet of cars,

[fol. 846] PFE owns and operates six car shops located as follows:

On Union Pacific: Nampa, Idaho; Pocatello, Idaho.

On Southern Pacific: Colton, California; Los Angeles, California; Roseville, California; Tucson, Arizona.

As a matter of information, PFE is now constructing at Pocatello, Idaho, a new car shop costing about $1,300,000, which will more than triple the capacity of the existing facility. This should adequately take care of the present and future needs of that area.

In addition, inspection, cleaning and light repair tracks are located at points as shown on page 1 of Exhibit 13.

Exam. Mullen: That will be Exhibit 13.

(Defendant's Exhibit No. 13, Witness Plummer, marked for identification.)

The Witness: At North Platte, Nebraska, PFE has undertaken the initial stage in development of hot water de-icing facilities for removal of ice from empty cars, 2 tracks of 20 carlengths each having been equipped to date. Ultimate plans provide for two 80-carlength tracks. This facility greatly reduces the time formerly required for de-icing cars and leaves them in better condition for the next load.

Substantial economies are anticipated in reduced labor costs to PFE for removing ice and in reducing operating costs to its contract railroads through elimination of this ice haulage from North Platte west to Idaho, Utah and even into California. To the extent that eastbound traffic [fol. 847] and westbound movement of empty cars might be diverted to the D&RGW through the Ogden gateway, benefits from and usefulness of this North Platte installation would be lessened.

To provide lowest possible cost for refrigeration service, PFE owns and operates 17 artificial ice manufacturing plants and 2 natural ice plants together with related car icing and other facilities, locations and capacities of plants being shown on page 2 of Exhibit 13.

PFE also maintains ice transfer platforms at various strategic points on UP and SP rails, the major ones being as shown on page 2 of Exhibit 13.

In the 12 months ended December 31, 1949, PFE issued

from its own ice plants 1,212,025 tons of ice. In addition, it purchased 758,049 tons from contract plants located on UP and SP rails.

The investment of $14,277,425 in ice plants and icing platforms has made ice and car icing services available at a price lower than could be obtained from commercial plants under comparable conditions.

If the opening of the Ogden gateway results in the diversion of any substantial amount of traffic originating in the Northwest and Idaho producing areas, the decreased volume of icing performed at such main line stations as Laramie, Council Bluffs and Kansas City, would naturally be reflected in increased unit operating costs at those points. [fol. 848] The same holds true of all other services performed by PFE, for volume is a most important factor contributing to low unit cost of operation.

In this connection, PFE spent in 1946 more than $360,000 in constructing at Laramie, Wyoming, one of the most modern and efficient car icing platforms in the country. With this facility, which is a double deck island-type 85-length carlength platform, bunker icing and icing in the car body can be performed simultaneously at the low train average of about one minute per car serviced.

In 1949, at Council Bluffs, Iowa, some $50,000 was spent for improved ice delivery facilities to speed up the handling of trains. Such expenditures were made with a view to more efficient handling of present traffic and an increased volume of traffic in the future. Obviously, they were not made with the idea or for the purpose of handling a reduced volume of traffic which witness Earley's testimony indicates may result to Union Pacific if the D&RGW succeeds in this case.

By Mr. Collins:

Q. Mr. Plummer, may I interrupt to ask you to state what you mean by "island-type of platform"?

A. A platform that is built in the center of two tracks, so you can service trains on either side.

Q. Very well. Go ahead, sir.

A. In addition to icing service, PFE also furnishes heater service on lines of its parent companies. For the per-

[fol. 849] formance of this service it has 8,484 charcoal heaters, 978 manually operated alcohol heaters, and 3,184 thermostatically controlled alcohol heaters. The latter have proven more efficient than either the charcoal or manually controlled alcohol heater and a gradual changeover is being made to the thermostatically controlled alcohol heater. This has required installation of new alcohol and heater storage facilities, costing so far about $15,000, to accommodate existing and potential traffic.

In the handling of the heater service, inspection forces are established at strategic points along the existing routes of travel. The number of men required at each inspection station is controlled more or less by the time allowed for servicing trains. It is conceivale that forces might vary to some extent depending upon the amount of traffic handled, but here again a smaller volume of traffic would increase the unit cost of service for it would require about as many men on a shift to service on- train as it would three or four trains, the number of men being regulated by the time allowed for servicing trains. This situation might prevail at some seven or eight inspection stations on the main line of the UP east of Pocatello and it is unlikely the increased unit costs at these points would be offset by any reduction in unit cost at Ogden resulting from heavier volume of traffic through that gateway.

As previously stated, the national supply of refrigerator [fol. 850] cars has shrunk since 1942 from approximately 143,000 to about 130,000 in 1950. This gradual shrinkage has made it necessary for all carlines to cooperate closely with each other to get the maximum use of available equipment. It is not uncommon, therefore, for one carline to call upon another to assist in meeting peak requirements and in this regard PFE is no exception.

For example, every year PFE makes rather extensive use of cars owned by the Merchants Despatch, Inc., Northern Refrigerator Lines, Fruit Growers Express, Western Fruit Express, American Refrigerator Transit (ART), Santa Fe, and others. Likewise, these carlines often use PFE cars to assist in protecting peak requirements or flush movements that occur from time to time.

In this connection, I should like to point out that all ne-

gotiations having to do with the exchange of c. s between one carline and another are handled directly between the car owners and not with any contracing railroad served by those car owners.

To be specific, if PFE needed ART cars, it would deal directly with the ART and not with the D&RGW. True, physical delivery of some cars might be made to our contract lines by the D&RGW, but in each instance the car owner itself—the ART rather than the D&RGW Railroad—would be the one to direct the movement to PFE service. This applies with equal force to the PFE and its contract lines; PFE exercising full control over the handling of its equipment.

[fol. 851] As a matter of information, the number of foreign cars, including ART, delivered to PFE contract lines by the D&RGW is relatively small when compared to the total loads handled on PFE lines in foreign cars which, during the five-year period 1944 to 1948, inclusive, averaged 146,975 annually—this during the "car pooling period" when cars were at times allocated without regard to car ownership.

Two of the shippers called from Idaho by the D&RGW spoke of refrigerator car shortages in their locality. (Stephens, Record 337; Stranger, Record 341-353).

I wish to say that for 12 years prior to the war year 1942, no refrigerator car shortage of any consequence prevailed in Idaho or in any loading territory served by PFE and its contract railroads.

It is true, however, that despite its aggressive new car program, PFE, like other carlines and railroads in the country, experienced refrigerator car shortages of varying duration, beginning in the war year 1942 and intermittently to 1948, that not only inconvenienced its shipping friends, but also cut into the revenues of PFE and its contract railroads.

To make the record clear as to shortages that occurred on PFE contract lines, including the Union Pacific in Idaho from 1942 to 1949, I wish now to explain or describe the circumstances surrounding the handling and movement of refrigerator cars during that period.

[fol. 852] It will be recalled that our entry into World

War II came with the Japanese attack on Pearl Harbor, December 7, 1941. Numerous "war controls" followed. In September, 1942, at request of the Office of Defense Transportation, voluntary agreement was reached by all the carlines to "pool" the refrigerator car equipment of the Nation.

This was considered necessary to meet the anticipated growth of war-time perishable traffic by rail and to provide all producing areas with a fair share of the Nation's available equipment. In furtherance of this purpose, a manager was appointed to direct the supply and movement of refrigerator cars without regard to ownership and in a manner that would promote greatest possible national efficiency in car handling.

This action was made mandatory by issuance of I.C.C. Order 95 on November 9, 1942. This pooling arrangement remained in effect after hostilities ceased and in fact, to some degree until original Order 95 was cancelled at the end of June, 1949. It is my considered opinion that the Commission acted wisely and in the interests of the public welfare for, had such an order not been issued, it is quite conceivable that at times a surplus supply of cars might have been available on certain railroads and in certain producing areas while others might have suffered through lack of cars.

There were times when PFE and its patrons were inconvenienced to a greater extent than some of the competing [fol. 853] areas, but at other times the reverse was equally true. In a country as large as the United States, and with the uncertainties attending the fruit and vegetable industry, it is not possible to regulate the flow of cars in a manner that will produce the exact number that should reach the many and widespread loading territories each and every day. Where maladjustments did occur they were quickly corrected.

During the period in which refrigerator cars were pooled, a record for aggressiveness in seeking a fair share of cars for our patrons was probably established not only by PFE but also by our contract lines—the Union Pacific, Southern Pacific and Western Pacific. In fact, from personal experience, I know at times we tested the patience of the Pool Manager and his principals in the Office of Defense Trans-

portation and the Interstate Commerce Commission in our efforts to obtain from the pool sufficient refrigerator cars to satisfy the wants of our patrons in Idaho and in other areas which we serve.

It is proper to relate, however, that by and large, I.C.C. Pool Manager Taylor, who was responsible for the general distribution of refrigerator car equipment, did an outstanding job and I know of no one who could have done better.

Failure of Idaho shippers to receive cars in January and February, 1949, was due entirely to unprecedented storm conditions prevailing in the Rocky Mountain Area and not in any sense to lack of equipment. There were plenty of [fol. 854] cars available on both sides of the storm area and they were moved to loading territory in record time following the resumption of rail operations.

By Mr. Collins:

Q. Do you want to say anything more, Mr. Plummer?
A. No sir.

Mr. Collins: That is all.

Cross-examination.

By Mr. Quirk:

Q. Mr. Plummer, on page 4 of your narrative, you say: "If the opening of the Ogden gateway results in the diversion of any substantial amount of traffic originating in the Northwest and Idaho producing areas, the deceased volume of icing performed at such main line stations as Laramie, Council Bluffs and Kansas City, would naturally be reflected in increased unit operating costs"——

I don't know whether you realize it or not, if this gateway was opened, the traffic would move to Ogden, and back again to the Union Pacific at Denver; in that case it would not affect Council Bluffs, would it?

Mr. Collins: I object. This record does not show any traffic which would come back from the D&RGW to the Union Pacific at Denver. There is that possibility, but there is not and cannot be any such showing in this record.

Mr. Quirk: Will you read my question before you rule on it?

(Question read.)

[fol. 855] Mr. Quirk: Just before you rule on that, I want to make this statement: The witness here has made an "if" statement, and I have asked him an "if" question. The answer is quite obvious, but you may answer it, please.

Exam. Mullen: Does your question, Mr. Quirk, mean all of the traffic moving there?

Mr. Quirk: If the traffic moved through Ogden, was given back to the Union Pacific at Denver, which it would be, under the plan that is involved here, the complaint, and everything else. They can do that on the Los Angeles line now.

Exam. Mullen: You said "if it did."

Mr. Quirk: He said "if," too.

Exam. Mullen: It wasn't in your original question.

Mr. Quirk: I beg your pardon, it was in my original question.

Mr. Collins: I will withdraw my objection if Mr. Quirk's question means that if the traffic were given to the D&RGW at Ogden, and if it were turned back to the Union Pacific at Denver, then it would not affect Council Bluffs.

Mr. Quirk: All right, then.

Exam. Mullen: That is the question anyhow.

By Mr. Quirk:

Q. What is the answer?

A. Do you want a further answer, Mr. Examiner, than what Mr. Collins gave?

Exam. Mullen: You are the witness, not Mr. Collins.

The Witness: All right. Well, if the traffic moved through [fol. 856] Ogden and if it came back through Denver, which is extremely unlikely; and if it made schedule through that circuitous routing, the difference would not be great at Council Bluffs and Kansas City.

By Mr. Quirk:

Q. Now then, if the statement that you made here, which is that "if there was a diversion of a substantial amount of traffic," didn't turn out to be so, then your statement, of course, is wrong, isn't it?

A. To the extent that any traffic moved through the Ogden gateway, it has some effect upon our operating conditions at main line icing stations. The volume would dictate the effect it might have.

Q. Now, on page 7 of your narrative, of your prepared statement, you say, "the ART rather than the D&RGW Railroad would be the one to direct the movement to PFE service."

Are you familiar with the contract between the Denver and Rio Grande Western and the ART?

A. I am not.

Q. You don't know whether that is true in that case or not, do you?

A. I have been connected with the Pacific Fruit Express Company since 1922, and in each and every instance they called upon the ART for cars. We have dealt with them and not any contract railroad of the ART Company.

Q. But you are not familiar with the contract that now exists?

[fol. 857] A. I have never seen the contract.

Mr. Quirk: That is all.

Mr. Collins: Just a moment.

By Mr. Quirk:

Q. Will you look at page 4 of the prepared statement, that passage, "The investment of $14,277,425 in ice plants and icing platforms has made ice and car icing services available at a price lower than could be obtained from commercial plants under comparable conditions."

This doesn't affect the rates or the charges to the shippers, does it?

A. All refrigeration rates are based upon the cost of service.

Q. If that investment at all would affect the charges to the shipper?

A. The investment makes it possible to produce a lower cost service than would be the case if we attempted to contract some of these stations I mentioned.

Q. Do you reduce the charges to the shipper every time there is some change in the cost?

A. The rates are handled by rate experts, not by me, sir,

but they are based upon the costs presented by our company and others.

Mr. Quirk: That is all.

By Mr. Plummer:

Q. In connection with Mr. Quirk's question as to your familiarity with the contract between the D&RGW and the ART, I show you Exhibit No. 11, which was introduced by Counsel Gibson without a witness, and ask you to read the [fol. 858] quoted portion there. You don't need to read it aloud, but I request Mr. Plummer be allowed to read that and then I want to ask him a question about it.

Mr. Quirk: Mr. Examiner, it seems to me that Mr. Collins is asking a layman to interpret a contract. I object to the question.

Mr. Collins: He is not——

Mr. Quirk: He said he was not familiar with it.

Exam. Mullen: The question has not been asked yet. We will let the witness study this for a moment.

By Mr. Collins:

Q. Have you read it?

A. I am ready for the question, Mr. Collins.

Q. I ask you if you see anything in that language there that affects any of the statement you made in your direct testimony?

A. I think not. In the first place, I should like to again point out that we have the exclusive right to furnish refrigerator cars on the lines of the Southern Pacific and the Union Pacific, also the Western Pacific. Therefore, any carriers served by us would not make a request upon the D&RG for cars; that would be the obligation of the PFE, and as I have stated previously, since 1922, when I have been intimately connected with car handling, all of our dealings are with the car owner and not with any contract railroad.

Q. If the Union Pacific, Southern Pacific or Western Pacific wanted cars in the first place, they would call upon you for them?

[fol. 859] A. That is correct.

Q. In what way would they ever obtain a ART car for use on these three lines I have mentioned?

A. Only with our consent.

Q. That is with the PFE's consent?

A. And the PFE would make the arrangements, not the Union Pacific.

Mr. Collins: Thank you.

By Mr. Quirk:

Q. Ordinarily you don't want the help of the ART, do you?

A. I think I made it clear in my report, Mr. Quirk, it is necessary today, with the limited number of cars in service in the country, that all car lines cooperate with each other and exchange cars when necessary to meet peak loads. That we are doing constantly. We have called on the ART this year; we have called on the other car lines. In turn, they have called upon us, and without that spirit of cooperation the perishable loads in this country wouldn't be handled.

Mr. Quirk: That is all.

(Witness excused.)

Exam. Mullen: Do you offer the exhibit?

Mr. Collins: Yes, I offer Exhibit 13 in evidence.

Exam. Mullen: Any objection?

Mr. Quirk: No.

Exam. Mullen: The exhibit will be received in evidence.

[fol. 860] (Defendants' Exhibit No. 13, Witness Plummer, received in evidence.)

Exam. Mullen: Do you have another witness?

Mr. Collins: Mr. Edens. I might say, Mr. Examiner, Mr. Edens has an exhibit which consists of a large map, and a correction or addition had to be made on it this morning, and I don't have all the hundred or so copies ready to distribute yet. We have 13 copies of that map, and plenty of copies of the testimony, and other copies of the map will be available, but I would like to put him on the stand and let him go ahead if we can do that. We will have other copies of the map to distribute a little later.

Exam. Mullen: Distribute what copies you have to opposing counsel.

Mr. Collins: All right.

R. E. EDENS was sworn and testified as follows:

Direct examination.

By Mr. Collins:

Q. Mr. Edens, you have prepared a statement for submission in this case, and an exhibit?

A. Yes sir.

Q. And that identifies you by name and position and so forth?

A. Yes sir.

Q. Are the statements in the testimony you will give, and the information disclosed in the exhibit, true and correct [fol. 861] to the best of your knowledge and belief?

A. It is.

Q. Will you proceed with your statement, please?

A. My name is R. E. Edens. I am Superintendent of the Ogden Union Railway & Depot Company with offices in Ogden, Utah, located within the terminal facilities maintained and operated by The Ogden Union Railway and Depot Company. I have held this position since October, 1936, and I am the officer of that company having direct responsibility for the maintenance and operation of the terminal facilities at Ogden, Utah.

My purpose in testifying here is to comment briefly on the testimony given by Mr. R. K. Bradford, a witness for the D&RGW, and to explain in some detail the operations within the Ogden terminal facilities and the difficulties which the Depot Company encounters in making interchanges between the Union Pacific and the D&RGW.

Mr. Bradford stated that the interchange of traffic at Ogden as between the Union Pacific and the D&RGW:

"would, of course, be handled by the Ogden Union Railway & Depot Company, which is an equally owned subsidiary of the Union Pacific and Southern Pacific." (R. 196).

He stated further:

"Our yard at that point is adjacent to the OUR&D yard."

He stated further that:

"We are spending approximately $200,000 this year in-
[fol. 862] creasing our yard to improve our facilities and bring about a faster and better interchange of business at that point." (R. 196)

And then he stated that:

"The OUR&D yard is a modern yard and in our opinion is adequately capable of taking care of the additional Northwest business which might move through there;" (R. 197)

And that:

"we do not at the present time, nor do our plants contemplate a classification by us of business received at Ogden." (R. 197)

Because of Mr. Bradford's discussion about the terminal facilities of the Ogden Union Railway and Depot Company, of which the D&RGW is a user only for certain of its passenger business, it will be my purpose to explain in my testimony, and by an exhibit, the reason for the existence of the Ogden terminal facilities, its purpose and capacity.

The Ogden Union Railway & Depot Company was incorporated during the year 1888 for the purpose of constructing and operating a railway terminal in the City of Ogden, Utah. On January 7, 1889, an agreement was made between the Depot Company, the Union Pacific Railway Company (now Union Pacific Railroad Company) and the Central Pacific Railroad Company (now Central Pacific Railway Company), setting forth the basis on which the facilities for the new Ogden terminal would be acquired, financed, maintained and operated.

[fol. 863] A new contract was entered into on September 1, 1920 (hereinafter called "Original Agreement") for a term of 99 years from September 1, 1920, between the Union Pacific Railroad Company, Oregon Short Line Railroad Company, Southern Pacific Company, Central Pacific Railway Company, and the Depot Company, for the purpose of enlarging the terminal facilities and to set forth the basis

for the enlargement and of the maintenance and operation of the facilities as so enlarged.

Full explanation of the contract, as supplemented, between the Depot Company, the Union Pacific and the Southern Pacific is set forth in the record before this Commission in Finance Docket No. 16507 (unpublished report dated July 13, 1949.)

The Union Pacific and the Central Pacific Railway Company each own 50 per cent of the capital stock of the OUR&D Company, and each company contributes funds in the way of advances to the Depot Company for enlargements and improvements. The Union Pacific since January 1, 1936 is the lessee of the Oregon Short Line. The Southern Pacific is the lessee of the Central Pacific Railway Company. The Union Pacific and the Southern Pacific use the terminal facilities at Ogden for interchanging their eastbound and westbound transcontinental and other traffic and for handling of their business at that point.

Under the terms of the contract, the Depot Company maintains and operates the terminal facilities for the benefit of the parties, and the parties agreeing that the Oregon [fol. 864] Short Line should have the right to use the terminal facilities and that such use should be considered as use by the Union Pacific.

For the purpose of operation and opportionment of fixed charges and expenses of maintenance and operation, the terminal facilities were divided into a Passenger Terminal Zone and a Freight Terminal Zone and the latter was divided into a Freight Station Zone and a Freight Yard Zone, all as defined in the Original Agreement. My discussion of the Ogden terminal facilities and the contract relating to them will deal only with the freight facilities embraced within the freight yard zone of the terminal.

The expenses of maintenance and operation, repair and renewal of the terminal facilities (Freight Yard Zone), including taxes not chargeable to capital account, are apportioned to the Union Pacific and the Southern Pacific on a per car count basis. Two car counts are assessed against the Union Pacific or the Southern Pacific for each car interchanged for either of those roads from and to the D&RGW.

The two-car count now assessed does not reflect cost to the OUR&D Company, but reflects only the amount which is assessed for accounting purposes against the company (Union Pacific or Southern Pacific) involved in the interchange with D&RGW.

The D&RGW is not a party to the contract covering the ownership, maintenance and operation of the Ogden termi- [fol. 865] nal facilities (although it does not under separate contract make use of the terminal facilities for certain of its passenger trains, but not freight trains), and does not bear in any manner any part of the expense of operating the freight yard zone which it is necessary to use in the interchange of business with the D&RGW.

A map to which I now refer——

Exam. Mullen: Exhibit 14.

(Defendants' Exhibit No. 14, Witness Edens, marked for identification.)

The Witness: ——Exhibit 14, has been prepared to show the trackage and other facilities of the Ogden terminal. On my Exhibit, I have shown:

By the letter "O" the route of the Union Pacific entering or departing from the Ogden terminal to Pocatello, Idaho, which is the route that traffic moves to and from Ogden, Utah, and points in Idaho, Montana, Oregon and Washington;

By the letter "S" the route to and from the Ogden terminal by the Southern Pacific;

By the letter "P" the route to and from the terminal of trains entering or departing the terminal to and from Salt Lake City; and

By the letter "U" the route eastwardly from the terminal to and from Green River and points east on the Union Pacific.

There is also shown on my exhibit at location marked "X" outside the boundaires of the Ogden terminal facilities, [fol. 866] a track owned by the OUR&D Company, used in delivering cars to the D&RGW and at point marked "Z" the track owned by the QUR&D Co., used in receiving cars from the D&RGW. The Union Pacific does not have a direct

connection with these tracks and I will hereafter explain the movements necessary by the OUR&D in handling traffic originating on the Union Pacific and interchanged to the D&RGW at Ogden.

It will be observed from my exhibit that the location of the OUR&D Company tracks, which have been provi-ed to make interchange with the D&RGW, makes it necessary to move switch engines of the OUR&D Company from one-third to one-half mile beyond the terminal facilities.

There are five divisions of the freight yard facilities in the Ogden terminal, namely, Ice House Yard: The Ice House Yard, designated on my Exhibit consists of 21 tracks which are used to handle Union Pacific eastbound business, including perishable raffic, received from the Southern Pacific, assembling cars for Union Pacific Stores Department and Roundhouse and bad order cars for Union Pacific shops, cars to be set at ice docks for icing and heater service, cars held for diversion, the storage of empty Union Pacific and Southern Pacific stock cars and two of the tracks (No. 6 and No. 9) are used to classify for delivery of cars to be interchanged to the D&RGW.

Union Pacific Yard: The Union Pacific Yard, designated on my exhibit, which consists of 13 tracks, is used to classify [fol. 867] traffic from hold tracks, to receive trains from the North (Pocatello) and Southern Pacific cars interchanged to the Union Pacific, for classification of cars for movement to Pocatello, the assembly of bad order cars for Union Pacific and Southern Pacific shops, the assembly of traffic for Salt Lake City, the assembly of cars for local industries delivered into the terminal by the Union Pacific and Southern Pacific, the handling of cars to be interchanged to the Southern Pacific for westbound movement, cars for Utah Quartermaster's Depot and making up outbound trains.

Southern Pacific Yard: The Southern Pacific Yard, designated on my exhibit, which consists of 14 tracks, is used to handle westbound traffic received from the Union Pacific's Eastern District and the D&RGW, the assembly of bad orders loads for Southern Pacific shops, the storage of Southern Pacific cabooses, cars for Utah Quartermaster's Depot and the making up of outbound Southern Pacific trains.

Hold Yard: The Hold Yard, designated on my exhibit, consi-ts of short tracks holding from 20 to 40 cars and is used for the holding of loaded traffic that is being held in Oregon for billing, disposition, etc., as well as empty equipment being held for loading. In about four months of the year, during the wheat movement, these tracks are filled with carloads of wheat which is required to be held for Federal inspection. Normally no trains are received or forwarded from the Hold Yard because of the short lengths [fol. 868] of the tracks.

East Yard: The East Yard, designated on my exhibit, consists of ten tracks which hold approximately 135 cars each. The facilities in this yard were constructed and put into operations during the War years 1942-1945, at a cost of $864,000. Construction of these facilities was required because the limited facilities of the terminal freight yards had become so congested with abnormal war traffic that operations were practically paralyzed.

This yard is used in the movement of Union Pacific manifest trains from Green River to Salt Lake City and through trains from Salt Lake to Green River which move between those points via what is known as the "Wye Route" shown by the letter "Y" on my exhibit. These trains do not otherwise make use of the freight terminal facilities of the OUR&D Company.

This yard is used also for cleaning and conditioning empty refrigerator cars, where a large force is maintained by the PFE Company for this purpose, and for overflow traffic from the Union Pacific, Southern Pacific and Ice House Yards during periods of heavy traffic when those yards will not accommodate the normal flow of business. The property for this yard and the trackage therein was provided during World War II for the handling of overflow traffic from the main freight yards.

Its relation to the other four yards makes operation therein expensive, but it was constructed in this location [fol. 869] because it was found that, due to the industrial development around the Ogden terminal facilities, there was no room for expansion in a location adjoining the main freight yards. When trains are moved to the East Yard because of the overcrowded conditions of the other yards,

they are switched in the East Yard and then returned to one of the other three freight yards already described for classification with other traffic.

Each of the above yards is within the freight yard zone, and I have indicated by notation on my exhibit the ice docks within the Ice House Yard.

D&RGW facilities: That D&RG train yard is located just west of the north end of OUR&D yard and the main line tracks of the Southern Pacific, and their roundhouse, car shops, freight house, tracks for interchange with the Bamberger Electric Railroad, and a number of industries served by the D&RGW are located east of the OUR&D yard. Connecting its train yard on the West with its facilities to the East of the OUR&D yard, the D&RGW has a track which crosses at right angles at point marked "A" on my exhibit, four combination switching and freight yard lead tracks at the north end of the OUR&D yard, which are used by Union Pacific and Southern Pacific freight trains for entrance and exits, also two main line tracks used by the Southern Pacific for all of its eastbound and westbound passenger trains.

The crossing at Point "A" is protected by interlocker with signals normally set clear for OUR&D movements. [fol. 870] The D&RGW controls this interlocker and when its crews want to cross OUR&D tracks, they unlock the control box and set the signals at stop against all OUR&D switching and Union Pacific freight trains from and to the North, and all Southern Pacific freight and passenger trains arriving and departing.

Switching in Interchange with D&RGW: Union Pacific's southbound traffic from Idaho, Montana, Oregon and Washington for delivery to the D&RGW at Ogden is received in trains from Pocatello normally in the Union Pacific yard. Since there is no direct track connection between the lines of the Union Pacific and the D&RGW at Ogden, it is necessary that cars interchanged to the D&RGW at Ogden be delivered by the OUR&D Company.

Under normal conditions, all Union Pacific freight trains arriving in the Ogden terminal from Pocatello and the Northwest are switched and classified in the Union Pacific yard, and all traffic for the D&RGW and other Ice House

yard traffic is assembled in the Union Pacific yard, and when conditions permit, this assembled traffic is moved from the Union Pacific yard to the Ice House yard where it is reswitched and cars for delivery to the D&RGW are reassembled with other cars in the Ice House Yard where it is reswitched and cars for delivery to the D&RGW are reassembled with other cars in the Ice Yard for movement to the D&RGW's interchange track indicated by the letter "X" on my exhibit.

[fol. 871] This, of course, is more than double the handling required in normal interchange at this terminal between the Union Pacific and Southern Pacific. There are many times, particularly during heavy volume of traffic that we are unable to receive trains in either Ice House, the Union Pacific or the Southern Pacific yards, and it is necessary to move the trains on to the East Yard about two miles from the Main Yards and there switch the train and later return the traffic to the main yard for proper classification and assembly.

These movements of trains to the East Yard and return are extra movements and must be followed by the movements I have already described to effect interchange of cars in such trains to the D&RGW. I estimate that this handling increases our costs by four times the cost of handling direct from the Union Pacific yard to D&RGW and five times the cost of handling to the D&RGW direct from the Ice House Yard.

Traffic received from the D&RGW for interchange to the Union Pacific is set on the OUR&D receiving tracks indicated by the letter "Z" on my Exhibit, and moved northward a distance of approximately one-half mile beyond Cecil Junction and then moved south through the interlocker where tracks of the D&RGW cross our yard lead tracks and main line tracks on the way to Union Pacific yard for classification and assembling into northbound trains.

Delay in handling traffic through the Ogden Terminal [fol. 872] facilities and incapacity of yard for additional business:

The present facilities of the OUR&D Company are insufficient to handle efficiently any volume of traffic over

that presently handled without incurring long periods of delay. Even with the present volume of traffic, during the month of September, 1949, it was necessary to hold outside the Ogden terminal 76 trains from the Southern Pacific an average of 36 minutes per train while track room in the terminal was being made available to accommodate them; also numberous Union Pacific trains were held beyond Cecil Junction for the same reason.

During the month of September, 1949, there were received 220 fruit trains from the Southern Pacific. The average time these trains were held in the Ice House Yard was 4 hours and 38 minutes per train, and D&RGW perishable traffic from these trains averaged 6 hours and 9 minutes from time of arrival until delivery to the D&RGW was accomplished.

During the month of December, 1949, there were received 94 fruit trains from the Southern Pacific. The average time these trains were held in the Ice House Yard was 3 hours and 51 minutes per train, and D&RGW perishable traffic from these trains averaged 4 hours and 46 minutes from time of arrival until delivery to the D&RGW was accomplished.

There is insufficient room in either the Ice House Yard or the Southern Pacific Yard to handle overflow traffic from the Union Pacific Yard, and if the Union Pacific was forced [fol. 873] to handle into the Ogden terminal facilities the volume of traffic which the D&RGW has described in its testimony as traffic potential, during heavy periods of traffic there would be insufficient room in the Union Pacific, Southern Pacific and Ice House Yards in the Ogden terminal to accommodate such additional traffic.

In such event, it would be necessary to move the trains, including traffic to be interchanged, to the D&RGW, to the East Yard at the south end of the terminal, a distance of something over two miles, and after trains are switched, return them to the proper yard for further classification, thence D&RGW traffic to either Track 6 or 9 in the Ice House Yard for subsequent delivery to the D&RGW.

I have heretofore described the various purposes for which the tracks in the various yards are used, and I have described the movement required to deliver southbound cars interchanged by the Union Pacific to the D&RGW.

Northbound traffic interchanged by the D&RGW to the Union Pacific would likewise require handling in the Union Pacific Yard, and, as heretofore indicated, this yard contains only four tracks, one which holds 95 cars, one which holds 76 cars, one which holds 60 cars, and another which holds 55 cars, to receive and make up trains in this yard.

It requires approximately one hour's time for OUR&D Co. yard engines to get from 21st Street to the D&RGW interchange tracks, pull the interchange and get cut back [fol. 874] into the yard proper for segregation. Frequently Depot Company yard engines are delayed at interchange by inbound movement of Southern Pacific freight trains.

Bad order cars for the North interchanged by the D&RGW to the Union Pacific are moved to Union Pacific shops located in the Southwest portion of the terminal facilities at point marked "R" on my Exhibit, which is reached by leads from the Ice House Yard. The shops are located approximately one mile from D&RGW interchange tracks. It requires considerable handling to get bad order cars from the D&RGW interchange to Union Pacific shops, and when repairs are completed, the cars are then moved from Union Pacific shops to Union Pacific yard to be lined up for movement.

The Southern Pacific Yard is used to receive westbound traffic from the Union Pacific and the D&RGW interchanged to the Southern Pacific. However, during heavy movements, there is insufficient room in the Southern Pacific Yard to accommodate the westbound traffic, and it is necessary to handle empty refrigerator drags into East Yard to make necessary cut outs and build up refrigerator drags for Southern Pacific. After trains are made up, they are then handled from East Yard into Southern Pacific Yard for subsequent movement via the Southern Pacific.

Ogden is a large livestock market, as well as a transit feeding point. There were handled through the Ogden terminal facilities during the year 1948, 17,183 inbound cars [fol. 875] and 17,526 outbound cars, or a total of 34,709 cars, at Union Stockyards. In this handling it is necessary to reload stock handled by the Southern Pacific in Southern Pacific equipment and reload livestock destined to Southern California points to Union Pacific high-speed equipment. Livestock unloaded by the D&RGW must be re-

loaded into either Southern Pacific or Union Pacific equipment as the case may be. This necessitates the maintenance of a large supply of both Union Pacific and Southern Pacific empty stock car equipment which takes up yard track room.

As heretofore stated, D&RGW trackage crosses over OUR&D Co. trackage at the North end of the terminal facilities and this crossing is protected by an interlocking plant at 20th Street. The movement of D&RGW engines and trains over this interlocking plant causes delay to Southern Pacific trains arriving and departing, as well as delay to Union Pacific Utah Division freight trains arriving and departing. These movements presently average 17 per day with average time at interlocking plant being 7 minutes. D&RGW freight trains arriving block interlocker; also, all D&RGW road engines move through the inter-locking plant to Roundhouse to be turned and after having been turned move through interlocker to train.

While the freight terminal yards at Ogden constitute a "bottleneck" at times of heavy movement which we frequently have, the operation of the D&RGW of its engines across OUR&D Co. tracks and Southern Pacific's main line [fol. 876] tracks through the interlocker at point marked "A" on my Exhibit, proves to be a "bottleneck within a bottleneck. D&RGW's operation of this interlocker results in serious delays to OUR&D Company's almost continuous switching at the north end of the yard as well as to both inbound and outbound freight trains of the Southern Pacific and Union Pacific, and in delays at infrequent times to main line transcontinental passenger trains. Three of the OUR&D tracks at the point of the crossing are in continuous use by our switch crews, and delays and loss of time by these switch crews is very heavy due to D&RGW's use of the trackage which crosses our tracks at the interlocker. In many instances, D&RGW freight trains arriving at its freight train yard with an excess number of cars have to be pulled onto the crossing, blocking it for our use until part of the train can be separated and moved to another track in its train yard. All D&RGW road engines move over this crossing enroute to their roundhouse and to return to their freight train yard. As stated, all D&RGW facilities other than its train yard are located east of the

OUR&D Company's trackage, making it necessary for their yard engines to cross over this crossing frequently to serve their industries, freight house, car shops, etc.

The north or west end of OUR&D Company's freight yard tracks converge at 21st Street and a series of four lead tracks extend from 21st Street to Cecil Junction, approximately 1,500 feet, and all freight train movements to [fol. 877] and from the Union Pacific north, also all Southern Pacific freight trains arriving and departing, as well as all switching movements at the north end of the yard, are handled on these lead tracks, two of which serve the Ice House Yard and two serve the Southern Pacific and the Union Pacific yards. At Cecil Junction, these four leads converge into the Southern Pacific's double-track main line and a Union Pacific single-track main line for trains to and from Pocatello and the Northwest. All traffic received from the D&RGW for both the Southern Pacific and Union Pacific is handled from interchange track marked "Z" on my Exhibit. Such received traffic must be handled over the lead track serving the Southern Pacific and Union Pacific yards for ultimate segregation and classification.

I have personally observed delays of more than one hour in getting a cut of cars from the D&RGW interchange back into our main yard proper because of interference by the D&RGW's switching back and forth through the interlocker. These delays occur not only to our switching operations, but also to both westbound and eastbound Southern Pacific passenger trains. I have personally seen yard engines stand with cuts of cars at this crossing many times in excess of 30 minutes while the D&RGW was using the crossing for their movements and switching. I have also personally seen 100-car freight trains from both the Southern Pacific and Union Pacific stand for 30 minutes or more at this crossing waiting for the D&RGW to finish their [fol. 878] switching and set the signals at clear for our operation. I have seen D&RGW employes throw the signal controls and set signals at stop position immediately in front of a moving Southern Pacific freight train of 100 cars, causing the train to stop in emergency, resulting not only in delay to that train but to other train and yard movements that were standing by until the stopped main line train cleared into a receiving track. Any increase in volume of

traffic which increases train and switch engine movements by the D&RGW or by the Union Pacific or the OUR&D Company yard switching through this "bottleneck" would only tend to aggravate the very bad situation that now exists at that point.

As an illustration of congestion and delays experienced at periods of peak traffic, I call attention to the fact that when we were handling the War traffic in 1945, our Ogden terminal facilities were terribly congested and we were unable to accept inbound cars from the D&RGW yard at Ogden which overflowed that yard and necessitated the D&RGW holding inbound loads outside its Ogden yard. My reclaim records show that on July 7th of that year, the D&RGW, because of congested conditions I have described, held outside of their Ogden facilities 73 cars at Roy, Utah, 74 cars at Roy and 42 at Farmington on July 8th, 32 cars at Roy on July 19th, and 25 cars at Roy on July 22nd.

Another illustration of delays in handling interchanges with the D&RGW may be given. On February 22, 1949, the [fol. 879] OUR&D received two Southern Pacific trains in the East Yard, one with 85 cars, 14 of which were for interchange to the D&RGW. This train was received at 11:20 a.m. The other train was received at 10:20 p.m. with 78 cars, 26 of which were for delivery to the D&RGW. These two trains were switched in East Yard. Cars for interchange to the D&RGW moved back into yard proper on the morning of February 23rd, and finally delivered to the D&RGW at 11:00 p.m., February 24th, cars from the first train being delayed about 60 hours in interchange and cars from the second train being delayed about 48 hours. While this was during the period in February, 1949, that the D&RGW could not accept all business offered them, the best delivery we could have made would have been approximately 20 hours after arrival of the first train.

To further demonstrate the lack of capacity of either the Ogden terminal or the D&RGW yards at Ogden to accommodate and handle efficiently and expeditiously excess or peak loads of traffic, I call attention to the fact that, because of the blizzards which temporarily blocked the Union Pacific in Wyoming several days in February, 1949, we diverted considerable traffic to the D&RGW at Ogden and experienced tremendous delays because the D&RGW was unable to re-

ceive the traffic offered it. On February 17, 1949, we delivered to the D&RGW. 232 cars and had left over 151 cars they were unable to receive. February 18th, we delivered to them 172 cars and had left over 390 cars that they were unable to receive. February 19th, we delivered 243 cars and had left over 636 cars they were unable to receive. [fol. 880] February 24th, we delivered 369 cars and had left over 444 cars they were unable to receive. February 25th, we delivered 267 cars and had left over 216 cars they were unable to receive. February 26th, we delivered 337 cars and had left over 143 cars they were unable to receive. During the period just mentioned the maximum number of cars the D&RGW was able to receive from us in its Ogden yard in any one day was 369. Although I understand the D&RGW has plans to expand its Ogden freight yard facilities, it has been my observation that their train yard facilities, including interchange tracks, are inadequate to handle expeditiously their present volume of business.

Ogden Freight Terminal Yard Inadequate to Handle Expeditiously any Substantial Increase in Traffic.

In 1949, 2,359 trains, or an average of 76 trains daily, were handled through our Ogden facilities. This handling required an average of about 50 shifts with engines and crews daily. We handled a total of 1,955,219 cars through these facilities in 1949, and as I have already stated, we incurred serious delays at periods of peak or high volume of traffic.

While our all-time peak of traffic handled through the Ogden facilities was in 1945, the handling of this number of cars incurred tremendous congestion and serious delays, at times almost paralyzing the operations in the yard, and I do not believe it would have been possible at all to handle that volume if we had not spent over $800,000 in construct- [fol. 881] ing the facilities at the East Yard, some two miles from the main yard. But even with this additional East Yard, our operations during that all-time peak were slow and expensive, and even the addition of the East Yard did not permit efficient and expeditious operations because of its distance from the main yard. At times, even after the East Yard was in operation, westbound cars were held out at Evanston and other points east of Ogden awaiting avail-

able trackage to come in. One important fact that kept us from being completely blocked during this wartime peak volume was that a great many, if not the majority, of the trains handled carried Government War material, troops and their equipment and these trains arrived in and departed from the Ogden terminal as solid trains and required no classification, assembling or use of the yard trackage for switching.

Mr. T. K. Earley testified for the D&RGW that the traffic "potential" it seeks in this case is 157,762 carloads annually and Mr. A. D. Hanson will testify that the handling of this number of carloads would necessitate handling about 50,000 empty cars annually, making a total of 207,762 additional cars to be handled through the Ogden terminal in interchange between the D&RGW and the D&RGW and the Union Pacific if the D&RGW realizes its desired "potential". This means that about 550 additional cars per day would have to be handled through the Ogden terminal yard, none of which now passes through the yard, but moves over the Union Pacific east or west via Granger. This additional [fol. 882] 550 cars per day or any substantial portion of that number would add greatly to the already congested condition of the Ogden terminal during the frequent periods when we have a heavy volume of traffic passing through these yards. Also, as I have already shown, since the maximum number of cars the D&RGW was able to receive from us on any day at its Ogden freight yards in February, 1949, was 369 cars, its own yard would not be able to handle the traffic "potential" the D&RGW seeks.

As I have already stated, when congestion made it necessary during World War II to increase the capacity of the Ogden terminal yards, it was found that the only location where this could be accomplished was where the East Yard was constructed. There is no space available for expansion by constructing additional tracks adjacent to the existing OUR&D tracks and there is no space available to expand in the vicinity of the D&RGW interchange yard. Nor would it be feasible or practical to construct a direct track connection between the D&RGW and Union Pacific for interchange purposes. Even if it were possible to expand the facilities of the OUR&D Company and the D&RGW to accommodate any substantial increase of traffic to be interchanged be-

tween them, such expansion would not solve but would only aggravate the present awkward, cumbersome and excessively expensive interchange between the two roads which results from the fact that the D&RGW interchange yard lies at right angles to the facilities of the OUR&D.

[fol. 883] Average Cost Per Car of All Cars Handled in Ogden Freight Terminal.

The Accounting Department of the Union Pacific has made a study and analysis of the expense to the OUR&D Co. during the year 1949 of operating the freight yard zone of the Ogden Terminal facilities used in the handling of freight and has determined that average expense per car of all cars handled by the OUR&D in the freight terminal is $4.63 per car. As I hav already said, the total expense of the terminal operation is apportioned to the UP and Southern Pacific on a cars-handled basis. No part of this expense is borne by the D&RGW.

Mr. Quirk: Just what do you mean by that statement? Don't you get paid for the services performed?

The Witness: The D&RGW doesn't pay for the services performed.

Mr. Quirk: All right. We will come to that later.

The Witness: Excessive Cost of Interchanging with the D&RGW Contrasted with the Average Cost.

As indicated earlier in my testimony, the Ogden terminal was originally constructed and its present main purpose is to interchange eastbound and westbound traffic between the Union Pacific and Southern Pacific. The arrangement of the yards and layout of the trackage was to accommodate that transcontinental traffic and to interchange it between the two companies expeditiously and with a [fol. 884] minimum of switching to accomplish the interchange.

The arrangement of the trackage in this terminal was not planned for the purpose of interchanging southbound traffic from Idaho and the Northwest to Salt Lake City or northbound traffic between the same areas, although track connections have been made by means of which such interchange of north and southbound traffic is physically possible through the facilities of the OUR&D.

It will be noted from my exhibit that the traffic which the D&RGW seeks in this case to divert to its line would have

to be interchanged by the OUR&D by movements that would necessitate working the cars destined either to the north or to the south, all the way across the numerous tracks arranged and laid out more or less parallel for handling eastbound and westbound transcontinental traffic. I have already endeavored to describe some of the switch movements necessary in interchanging through the Ogden facilities with the D&RGW. The cost of interchanging traffic between the D&RGW and the Union Pacific and the Southern Pacific is at least twice the average per car cost of handling all cars in this terminal. The simplest explanation of the reason why the expense of average per car interchange is so much less than expense of interchange between the Union Pacific and the D&RGW is that in interchanging between the Southern Pacific and UP it requires only one move of a switch engine to take care from the inbound train [fol. 885] and place them on a nearby track on which the outbound train is being assembled. This may be called the very minimum of interchange switching and the average of $4.63 per car for all cars handled is as low as it is because about 75 per cent of cars interchanged at Ogden is between the Union Pacific and Southern Pacific, requiring only such minimum switching. But every interchange between the Union Pacific and the D&RGW requires at least two and often more separate switch movements. I believe the description which I have given earlier of switching between the D&RGW and the Union Pacific demonstrates the fact I have just stated.

In other words, interchanging between these two lines requires at least twice the handling required for ordinary interchange between the Union Pacific and Southern Pacific, and when necessary to handle cars in trains to the East Yard, it requires, as previously stated, four or five times the handling required for interchange to the D&RGW from the Union Pacific or Ice House Yards. This would necessarily make the cost of interchanging with the D&RGW at least twice as much as the average cost of $4.63 per car for all cars handled in the terminal, as determined by the Union Pacific's accounting department or $9.26 per car.

Multiplying the total additional cars, 207,762, that would be handled if the D&RGW realizes the "Potential" [fol. 886] it seeks by the cost figure of $9.26 per car just

mentioned, would result in a new and additional expense to the Union Pacific of $1,919,820 annually which the Union Pacific would have to bear in addition to the amount of the expense it already bears in connection with operation of the Ogden Terminal.

Mr. Quirk: As I understand it, you yourself did not determine that cost, did you?

Mr. Collins: No, sir. Somebody else determined it, Mr. Quirk. If you want to ask how that figure was arrived at I have the gentleman here who made the determination.

Mr. Quirk: I wanted to know if he did it.

Mr. Collins: No, he didn't do it.

Mr. Quirk: You don't know whether that is accurate or not, do you?

The Witness: It was given to me by the accounting department.

All of that additional expense would accrue to the Union Pacific because all of the traffic the D&RGW seeks in this case would have to be interchanged between the Union Pacific and D&RGW and under the terms of the contract, as already shown, all of the car counts on the interchanged cars would be assessed against the Union Pacific. As the D&RGW is not a party to the contract for operations, maintenance and allocation of expenses of the OUR&D Co. opera- [fol 887] tion, the D&RGW would bear no part whatever of this additional burden placed on the Union Pacific. Instead, it would have free interchange service on this traffic, and, in addition would have little or no switching to perform in its own train yard in order to effect the interchange.

While the D&RGW enjoys the benefit of free interchange to and from the Union Pacific and Southern Pacific on a considerable volume of traffic and especially the volume interchanged between the D&RGW and the Southern Pacific which amounted to about 119,000 cars in 1949, the additional cost to the Union Pacific of interchanging the traffic "Potential" which the D&RGW seeks in this case would be an entirely new and tremendous burden on the Union Pacific because none of that traffic presently goes through the Ogden terminal.

In concluding my testimony, I wish to emphasize that based on my daily work as Superintendent of the OUR&D Co. since 1936 and my continuous observation of the dif-

ficulties at that terminal and efforts to solve the difficulties of handling traffic with reasonable expedition through those facilities, the Ogden terminal facilities are inadequate to handle with reasonable efficiency, expedition and expense such traffic "potential" as the D&RGW seeks in this case or any substantial portion of it without incurring greater and more serious delays particularly during peak load [fol. 888] seasons and aggravating and increasing the difficulties that we continually face in operating these facilities.

By Mr. Collins:

Q. Mr. Edens, Mr. Quirk asked you what was meant by the statement on page 20 of your statement that "No part of the OUR&D expenses are borne by the D&RGW." I want to ask you if in the allocation of the expenses of the OUR&D any car counts are ever assessed against the D&RGW?

A. No, the Denver & Rio Grande pays no part of that freight or zone expense.

Mr. Collins: That is all.

Exam. Mullen: Do you want to offer the exhibit?

Mr. Collins: Yes. I offer exhibit 14 in evidence.

Exam. Mullen: Any objection to the receipt of that exhibit in evidence?

(No response.)

It will be received in evidence.

(Defendant's Exhibit 14 Witness Edens is received into evidence.)

Exam. Mullen: We will adjourn until 9:30 tomorrow morning.

(Whereup, at 5:08 o'clock p.m. the hearing was recessed to reconvene April 4, 1950 at 9:30 a.m.)

[fols. 889-890] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., Defendants

TRANSCRIPT OF TESTIMONY—Boise, Idaho, Tuesday, April 4, 1950

Met, pursuant to adjournment, at 9:30 o'clock a.m.

Before Frank E. Mullen, Examiner

Frank E. Mullen, Examiner.

Proceedings

[fol. 891] Exam. Mullen: We are ready to proceed, gentlemen.

R. E. EDENS resumed the stand and testified further as follows:

Direct examination (continued):

By Mr. Collins:

Q. We have a typographical correction in Mr. Edens' testimony, Mr. Examiner.

Mr. Edens, on page 18, in the first line of the paragraph under the heading there, beginning with "Ogden Freight Terminal," will you state what the correction is; the paragraph beginning "1949," what is the correction?

A. I just want to add the word "in July, 1949."

Q. In other words, the number of trains shown there is for the month, instead of for the year?

A. Yes, sir.

Q. Is that all?

A. That is all.

Cross-examination.

By Mr. Quirk:

Q. Mr. Edens, have you ever worked in any terminal other than Ogden that you know of?

A. I have worked for about 45 years in various terminals.

Q. Where are some of those terminals at which you worked, located?

A. In Texas.

Q. That is a big state; what point in Texas, you were not all over, were you?

[fol. 892] A. Well, I worked for the MK&T Railroad in Texas; in Dallas, Fort Worth with ACO.

Q. Did you ever work at Pocatello?

A. Yes.

Q. The Union Pacific has made some substantial changes in that terminal in recent years, has it not?

A. I understand they have added the pumpyard there.

Q. In fact, they relocated a good part of the tracks?

A. I can't answer that.

Q. Now, Mr. Lynch testified it is a very modern up-to-date yard, in classification of terminals generally. You heard that? If the Union Pacific, at the new yard in Pocatello would block all their business at one place by their trains, so that all that would be necessary for your company would be to deliver the cars to the Rio Grande, wouldn't that remove and correct many of the difficulties that you have beeen describing?

Mr. Collins: I object to the question. This gentlemen has not been qualified as a transportation man, but as a terminal operating superintendent.

Mr. Quirk: I submit, Mr. Examiner, that a man who has testified about the way cars are handled through a terminal ought to be able to answer that, because it is relevant.

Mr. Collins: He has only testified how he handles them through the yard after he gets them. He takes them as [fol. 893] they come. You may ask Mr. Hanson, who is going to follow Mr. Edens, you can ask him that.

Exam. Mullen: Let's have the question read, please.

Mr. Quirk: How is that?

Exam. Mullen: Have the question read.

(Question read.)

Exam. Mullen: I think the witness is competent to answer that question, Mr. Collins:

Mr. Collins: All right.

The Witness: Certainly, if the Union Pacific would make it possible for me to operate or handle the Ogden Yard without requiring any switching, it would be helpful.

By Mr. Quirk:

Q. Now, if the perishable business that moves off of the Union Pacific from the Northwest should be iced at Pocatello, so that there would be no necessity for icing it at Ogden, wouldn't that make possible the direct movement of perishable freight from U. P. trains arriving in the U. P. Yard as shown on exhibit 14, your exhibit 14, to the interchange shown in zone Z of that exhibit, and thus avoid the difficulties that you have described?

A. No. Perishable traffic must be serviced at certain periods. There is a certain time involved there.

Q. But not at all times?

A. That would have to be developed as it stands today, Mr. Quirk. Ogden is the regular icing point for all perish-[fol. 894] able traffic requiring icing moving through there.

Q. Who performs the icing when it is necessary?

A. The P.F.E.

Q. That icing isn't performed where it isn't necessary, is it?

Mr. Collins: Mr. Examiner, Mr. Quirk should have asked Mr. Plummer about these questions yesterday. Mr. Edens has nothing to do with the icing services as such, where it shall be performed at all.

Exam. Mullen: I understand he is in charge of this Yard, where the icing is performed.

Mr. Collins: Yes, but he is not in charge of the icing, and does not have the authority to say where it will be performed.

Exam. Mullen: I think he can answer the question. If he knows, he can answer.

The Witness: What was the question?

(Question read.)

The Witness: It is necessary on all perishable traffic moving through Ogden to require icing service; yes, sir.

By Mr. Quirk:

Q. You mean by that, to inquire whether the perishable freight needs icing at that point, you don't ice it if it isn't necessary, do you?

A. That isn't a part of my responsibility.

Q. But you testified about the switch movement made necessary as incident to icing, and it stands to reason doesn't it that if the cars don't need icing you wouldn't have this [fol. 895] extra switch movement.

Mr. Collins: Now, Mr. Examiner, that shows the real ground of my objection. He wants to keep arguing with this witness about where icing is necessary, and this witness has nothing to do with it. He can't take the icing out of the Ogden Yard.

Exam. Mullen: Let's see what the witness has to say about it.

Mr. Quirk: You shouldn't put the witness on.

Mr. Collins: I didn't put the witness on in regard to icing.

Exam. Mullen: Please address you remarks to the Examiner. Can you answer that question, Mr. Edens?

The Witness: The question is what?

(Question read.)

The Witness: They require icing. They require icehouse service.

By M Quirk:

Q. Now, you seem to know when they require and when they don't require icing; a moment ago you said you didn't.

Exam. Mullen: Please don't argue with the witness, Mr. Quirk.

Mr. Quirk: I think I have the right to call attention to the fact that he said he didn't know.

The Witness: I don't think I said I didn't know.

By Mr. Quirk:

Q. All right.

On page 5 of your prepared statement you said that there [fol. 896] is no physical connection between the Union Pacific and the Southern Pacific at Ogden with the Denver and Rio Grande.

Mr. Collins: What part of page 5 is that, Mr. Quirk?

Mr. Quirk: Page 5.

Mr. Collins: The whole page?

Mr. Quirk: Well——

Exam. Mullen: Have you located it, Mr. Edens?

The Witness: No.

Mr. Quirk: The first paragraph.

By Mr. Quirk:

Q. You haven't answered the question, have you?

A. What is the question?

Q. You did say that, didn't you?

A. Say what?

Q. That there is no physical and direct connection between the Union Pacific and the Denver and Rio Grande?

A. That part of my testimony, Mr. Quirk, means the Union Pacific does not have a direct connection with these tracks, and I will hereafter explain the movements necessary by the OUR&D handling traffic originating on the Union Pacific on interchange to the D&RGW at Ogden.

Q. What do you mean then, that the Union Pacific does not have a direct connection with the track, the Denver and Rio Grande tracks you meant, didn't you?

A. That is right.

Q. All right. Now, does the Union Pacific have any direct [fol. 897] physical connection with the tracks of the Southern Pacific?

A. Yes.

Q. You mean by the use of your Union Depot Terminal?

A. Yes.

Q. In other words, the Depot Company at Ogden acts as agent for the Union Pacific and the Southern Pacific in the interchanging of cars, is that right?

A. That is right.

Q. So therefore when the Rio Grande delivers cars to the Depot Company the legal effect, according to your testimony, is a delivery to the Southern Pacific, that is where the cars are going, or to the Union Pacific if that is where the cars are going——

Mr. Collins: I object to his asking the legal effect.

Exam. Mullen: You are not testing the legal effect.

Mr. Quirk: Well, I will omit the legal then.

By Mr. Quirk:

Q. What is the answer without the legal then?

A. The D&RGW will deliver traffic to an interchange track to the southern Pacific or to the Union Pacific, and from that track that traffic or those cars are handled by the Depot Company.

Q. Yes, so that the delivery to the Depot Company on that track is a delivery to the Union Pacific or the Southern Pacific as the case may be, isn't that true?

A. That is right.

[fol. 898] Q. All right then, what did you mean—I can't locate the statement at the moment—by the statement you made in your direct testimony that the Rio Grande does not bear any of the expense of the Depot Company?

A. They do not bear any expense of the Depot Company with relation to the yard zone; the Denver and Rio Grande are attendant at the Depot Company in the pasture yard zone only.

Q. Is there any reason why the Rio Grande, as a delivery carrier delivering cars to the Southern Pacific, should assume any of the cost of the Souther Pacific of receiving that car?

A. I might explain, Mr. Quirk, that the Depot Company is set up to handle traffic as between the Southern Pacific and the Union Pacific, and any cost of the operation of Ogden Terminal in the handling of freight is apportioned to those two lines on a per-car count basis.

Q. Yes, I understand that. The Southern Pacific and the Union Pacific, if they saw fit to set up this depot company as an agent to do what otherwise would be done by them directly, that is the reason it is there, isn't it?

A. Yes.

Q. Then there isn't any reason is there why the Rio Grande which isn't part owner of the Depot Company should have to assume any of the cost to the Union Pacific or the Southern Pacific of receiving cars from the Rio Grande?

A. Well, it could be in various places. I could refer you [fol. 89c] to the Union Pacific at Salt Lake.

Mr. Collins: Excuse me, Mr. Edens. I object to this line of questioning of Mr. Edens. If Mr. Quirk wants to go into the contract between the Ogden Terminal Company and the two proprietary lines, he may do so. It is in the Commission's files. It has been cited, and has recently been before the Commission. Now, this witness doesn't make these contracts at all. They are made between the two companies and the apportionment of the expense is settled between them, and I suppose the contract undoubtedly will show that the two proprietary companies, the Southern Pacific and the Union Pacific, have control of this terminal, because each of them own 50 percent of it. It is not Mr. Eden's business to deal with those things.

Mr. Quirk: Mr. Examiner, I hope before this case is over that you might admonish Mr. Collins to resist the temptation that he has to make a speech every time he objects to something. There is a way to object without making a speech.

Exam. Mullen: Mr. Collins has the right to state the grounds of his objection.

Mr. Quirk: All right.

Exam. Mullen: On the objection, however, the witness testified to these things as his testimony, and Mr. Quirk is merely cross-examining him on what he said in his direct testimony. I think the cross examination is proper.

Go ahead, Mr. Quirk.

[fol. 90] Mr. Quirk: Can you find that question of mine?

(Question read.)

By Mr. Quirk:

Q. Refer us to it.

A. Any interchange between the Union Pacific and the Denver and Rio Grande at Salt Lake is made by each line to their respective yard. At Ogden I must make the delivery

to the Denver and Rio Grande on the interchange track which is in their freight yard, and I must receive from the Denver and Rio Grande on an interchange track that is a part of their yard.

Q. When you receive—when the Depot Company receives traffic from the Rio Grande or delivers traffic from the Rio Grande that is handled by the Union Pacific or the Southern Pacific, the Depot Company is acting for the Southern Pacific and the Union Pacific; you have already said that?

A. That is right.

Q. All right.

Mr. Collins: Wait a minute. Let's hear that read.

(Question read.)

Mr. Quirk: The witness has answered the question. I don't know what Mr. Collins wants to say now.

Exam. Mullen: Suppose we hear from Mr. Collins.

Mr. Collins: I want to say this, Mr. Examiner: the testimony of Mr. Edens will show if it isn't distorted too much in questioning quite clearly that an interchange is made between the SP and the D&RG by the terminal company, [fol. 901] and the car counts are allocated against the S.P. for that switching. That the switching between the Union Pacific and the D&RG is performed by the Ogden Terminal and car counts there are made against the Union Pacific so that when——

Exam. Mullen: Just a minute, Mr. Collins. All that is in your testimony. It is already in your testimony.

Mr. Quirk: You are testifying.

Mr. Collins: I am telling what the testimony is.

Exam. Mullen: What is your point, Mr. Collins?

Mr. Collins: He has an erroneous statement, through this complicated question, of Mr. Edens, and Mr. Edens didn't intend to misstate the situation in the contract.

Exam. Mullen: Let Mr. Edens explain how his statement made now is different than what he made yesterday. It didn't strike me as being any different. Is there any difference now, Mr. Edens?

The Witness: No——

Exam. Mullen: That is what I thought. Go ahead, Mr. Quirk.

By Mr. Quirk:

Q. Now, you mentioned Salt Lake. You don't think, do you, when the Denver and Rio Grande delivers carload traffic to the Union Pacific at Salt Lake the Denver and Rio Grande pays the expense on the part of the Union Pacific of receiving that traffic, do you?

A. No, but they pay the entire expense from the time that cut of cars leaves their yard until it is delivered to the [fol. 902] Union Pacific in their train yard at Salt Lake.

Q. You mean the Denver and Rio Grande does?

A. Yes.

Q. Isn't it the common practice in railroad interchange work for the delivering line to assume the responsibility and the cost incident to effecting delivery to whoever he delivers it to?

A. I had no testimony relative to costs, Mr. Quirk.

Q. Oh, yes you did.

A. Not in this page 5. I was simply saying that we——

Q. Page 20 of your prepared statement, you refer to the cost of the Depot Company, so you have referred to cost. At page 4 you also say that the Rio Grande does not bear in any manner any part of the expense of operating the freight yard zone which it is necessary to use in the interchange of business with the Rio Grande, so you have referred to costs, haven't you?

A. That is true.

Q. Then on page 22 of your narrative statement, at the bottom, you used these cost figures to raise the impression there is something very unusual about the Rio Grande not participating in a cost that belongs to the line that receives the traffic.

Mr. Collins: I object to that. That is not a question.

Exam. Mulien: It is proper cross examination. The objection is overruled.

Mr. Collins: I would like to know what he could answer.

[fol. 903] Exam. Mullen: We will let the witness decide that.

Mr. Collins: Mr. Edens, can you think of an answer to that statement?

The Witness: I don't know what he is after?

By Mr. Quirk:

Q. Now, Mr. Edens, if the Union Pacific would block the Denver and Rio Grande traffic and the so-called potential business that you have referred to from the Northwest at the New Pocatello yard, so that the business in the train as it arrives at Ogden could be delivered to the Rio Grande, the difficulties that you have described would either be corrected or lessened substantially, would they not?

A. Not necessarily.

Q. You mean even if the cars were all together, blocked off for you?

A. I would still have to receive that train in the Ogden yard, and I would still have to get it to a point in which I could effect a delivery to the D&RGW. The Union Pacific would not make a delivery themselves.

Q. Now, in dealing with the potential traffic that was sketched by Witness Earley at the Salt Lake Hearing, did you cooperate and go over this matter with Mr. Lynch before you made your assumptions?

Mr. Collins: What assumptions, if you please?

Mr. Quirk: He can answer that. He knows whether he did or not.

[fol. 904] Mr. Collins: I think it is only fair Mr. Examiner to know what assumptions Mr. Quirk has in mind.

Exam. Mullen: The question is whether he talked it over with Mr. Lynch. You can answer that, Mr. Edens.

The Witness: I talked it over, not the assumption. I talked over the facts that Mr. Earley had stated that their potential was a certain amount of traffic.

By Mr. Quirk:

Q. Well, at page 19 of your prepared statement you say that Mr. Earley testified for the Rio Grande that the traffic potential is what the Rio Grande seeks, and that it amounted to 157,000-plus carloads annually.

Now, don't you know that what Mr. Earley testified to was that there was some traffic that would be available to move via this route if the joint rates were established and there was other traffic that would move via this route in any event? Did you examine his testimony?

A. No, sir, I didn't.

Q. Don't you know that all he was dealing with was that there was a certain traffic——

Mr. Collins: I object. He said he doesn't know. He has taken this potential.

Exam. Mullen: Wait until the question is finished, Mr. Collins. Finish your question, Mr. Quirk.

By Mr. Quirk:

Q. Where did you get the figure 157,726 carloads?

A. From Mr. Earley's testimony.

[fol. 905] Q. Now, you assumed in making your calculations here that that maximum which Mr. Earley testified would be merely available for solicitation, and routing by the D&RG, would all move through Ogden instead of the way it now moves if this joint rate involved here was established. That is your assumption, isn't it?

A. I didn't assume anything.

Q. Yes, you did, though.

A. No, I didn't.

Q. What did you assume?

A. I accepted the facts as to the number of cars, the potential business.

Q. Yes, that is exactly what I said.

A. That moves through Ogden.

Q. In other words, you assumed that because Mr. Earley figured on a natural maximum potential that it would all move through Ogden, didn't you?

A. I didn't assume anything. I accepted Mr. Earley's testimony, about the potential traffic which they could see that would move through the Ogden gateway.

Q. Well, now as a practical railroad man, keeping in mind what Mr. Lynch has already described as the service of the Union Pacific, do you think that there is any likelihood whatsoever of the Rio Grande being able to persuade shippers to route all of that traffic through Ogden?

[fol. 906] A. I can't answer that. I don't know a thing about it.

Mr. Collins: I object to that question.

By Mr. Quirk:

Q. In other words, you want to make the figures look as good as you can make them?

A. I only accepted the figures Mr. Earley had given.

Q. Why didn't you accept his testimony? His testimony was very clear?

Exam. Mullen: Just a minute, gentlemen. All the witness did was to just use this as a maximum additional use as he anticipates; isn't that right, Mr. Edens?

The Witness: That is right.

Mr. Quirk: There is no doubt about that, Mr. Examiner, he used the maximum, but he introduced the question relying on Mr. Earley's figures. I am simply saying why did he rely on his testimony which described this thing. O. K.

By Mr. Quirk:

Q. Now, turn to page 8 of your prepared statement, Mr. Edens. At that page you stated that the Rio Grande controls an interlocker and when its crews want to cross the Depot Company tracks they unlock the control box and set the signals at stop against all Depot Company switching and UP freight trains from and to the north, and all Southern Pacific freight and passenger trains arriving and departing through Ogden. When the Depot Company, UP and Southern Pacific trains, or engines are in the interlocking limits, can the Rio Grande crews take this crossing away from them, or the Depot Company?

[fol. 907] A. Yes, they can set the signals, even though I am on the crossing.

Q. How can they do it?

A. By semi-automatic interlocking system.

Q. Do you still insist they can take the crossing away?

A. Yes.

Mr. Collins: I am not sure Mr. Edens whether you understood exactly. The train that would be on the crossing could go on past, couldn't it? And the next train would have to stop, isn't that correct?

The Witness: I could best explain that, Mr. Collins by this statement: We have six tracks in which the Denver and

Rio Grande crosses at this location. All of those tracks are protected by the signal indication.

Mr. Collins: Yes.

The Witness: Those signals are normally set for OUR&D.

Mr. Collins: Yes.

The Witness: I may be using any one of those six tracks, and the Denver and Rio Grande crew that operates those signals can unlock the control box and set all signals of all six tracks at stop, or red, and all of the movements in that yard over that cross except the one track which is being used at that moment, are then tied up.

Mr. Collins: But if you have a train on the track, at the crossing, you can move it on off, and then you have to cease [fol. 908] moving until the trains cross the D&RB tracks.

The Witness: That is right. But I couldn't start any other movement then.

Mr. Collins: Yes.

Mr. Quirk: Thank you very much.

By Mr. Quirk:

Q. Will you turn to page 10 of your prepared statement? Beginning at the top there you say these movements of trains to the East Yard and return are extra movements that must be followed by the movement I have already described to effect interchange of cars of such trains to the Rio Grande, and you make some other statements about that situation.

Now, is it a fact that if you had to move trains to the East Yard and switch out cars for the Southern Pacific and then return the cars to the main yard and rehandle the cost will be higher if you could avoid the last charge due to switching and make delivery at any one of the other three main yards, is that true?

A. Sure.

Q. This isn't a local matter with respect to the Rio Grande, is it?

A. No, it was just simply to direct that——

Q. All right.

Mr. Collins: Let him go ahead and explain what it is.

Mr. Quirk: I have not interfered with him.

Mr. Collins: Go ahead.

[fol. 909] A. (continuing) Direct attention to the fact that if it was necessary for me to handle trains into the East Yard, that normally is handled in the yard proper, that it would pyramid costs.

By Mr. Quirk:

Q. On page 18 of your prepared statement, beginning with the first line of the first full paragraph you say that in July, 1949, 2,859 trains, or an average of 76 trains daily were handled through the Ogden Depot facilities, and that you handled a total of 1,955,219 cars through those facilities in 1949. Now, during 1945, you referred to as the all-time peak. Will you state how many trains, engines, were handled through Ogden in that year?

A. I don't have that with me, Mr. Quirk.

Q. Well, you can get it, can't you?

A. Yes.

Mr. Quirk: I wish you would furnish that, Mr. Collins.

Mr. Collins: Will you state it again? I wasn't paying very close attention. You want the number of cars for July, 1945?

Mr. Quirk: We want the same information for 1945, the peak year, which the gentleman, Mr. Edens has given, for 1949.

Mr. Collins: We will give you that.

Exam. Mullen: Can that be supplied at this session of the hearing?

Mr. Collins: As soon as Mr. Edens can get it. I don't know how long it would take.

[fol. 910] Mr. Quirk: I imagine you can get that by telephone, can't you?

The Witness: I may have it with me.

Mr. Quirk: I see.

Mr. Collins: We will get is as soon as we can.

By Mr. Quirk:

Q. Turn to page 11 of your prepared statement. You stated, commencing at the bottom of page 10, and running over page 11, that the average time trains were held in the

ice house yard, in September, 1949, was 4 hours and 38 minutes per train on the Southern Pacific trains, Southern Pacific trains and cars to the Union Pacific, and that on the Rio Grande perishable traffic from these trains the average was 6 hours and 9 minutes from the time of arrival until delivery to the Rio Grande was accomplished.

You also testified that the Rio Grande business was assembled on track 6 or 9 in the ice house yards which was the same yard in which the Southern Pacific and the Union Pacific business is assembled. Will you explain, if you can, the difference in the time that I have already described without repeating it?

A. What do you mean, Mr. Quirk? Why a difference in the time?

Q. Yes.

A. As I have stated in this testimony, Mr. Quirk, during the month of September, 1949, there were received 220 fruit trains from the Southern Pacific. The average time these [fol. 911] trains were held in the ice house yard was 4 hours 38 minutes per train. Those trains normally carry approximately a train east for the Union Pacific. They are interchanged as from the Southern Pacific to the Union Pacific the moment it stops on the receiving track. After that train is inspected, or serviced by the PFE people in the ice house, it is switched and the east traffic is switched direct into a track where a train is assembled, caboosed, and moved east. After that it is necessary then that I take a yard engine and effect a delivery from this yard to the Denver and Rio Grande interchange, which costs and calls for considerably additional time.

Q. On the bottom of page 10 you stated that in September, 1949, you received 220 fruit trains from the Southern Pacific. How many cars would the average be for each train?

A. The average, Mr. Quirk, would be better than 90 cars, pretty close to 100 cars to a train.

Q. Do the car and the trains you receive from the Southern Pacific come to you blocked?

A. No.

Mr. Collins: May we have the question read, and the answer.

(Question and answer read.)

By Mr. Quirk:

Q. Mr. Edens, will you turn to page 20 of your statement. On that page you stated that there is no space available to expand the facilities of the Rio Grande interchange yard at Ogden. Do you recall that?

[fol. 912] A. Where are you reading from, Mr. Quirk?

Exam. Mullen: At the top of page 20.

By Mr. Quirk:

Q. At the very top.

A. There is no space available for expansion by constructing additional tracks adjacent to the existing OUR&D tracks and there is no space available to expand in the vicinity of the D&RGW interchange yard.

Q. You think you really know that, do you? Have you examined that subject specially?

A. Yes.

Q. Now, you heard Mr. Lynch's testimony about the amounts expended by the Union Pacific in recent years for additions and betterments at Pocatello and other places. Do you want to leave the impression with this Commission that the terminal facilities now in existence at Ogden have reached the saturation point?

A. I certainly want to leave the impression with this Commission and with you that they have definitely reached the saturation point in that particular location.

Q. Well, you say you had a great deal of experience in terminal facilities and in terminal operation. Don't you know numerous instances where in order to keep up with the times and keep up with the growth of the country and increase in traffic, potential and otherwise, that these terminal facilities have to be relocated?

A. I didn't testify to anything like that.

[fol. 913] Q. Don't you know that is true?

A. It is entirely possible that you have got to move out. I don't know what they would do.

Q. Didn't you ever hear of the Roper Yard of the Rio Grande near Salt Lake?

A. Yes. I have heard of the East Yard at Ogden, too.

Q. Yes, those are examples of relocating to meet the demands of the times.

Mr. Collins: I object there, Mr. Examiner. The East Yark Mr. Edens testified, was not a relocation, it was an addition two miles away from the main yard. He stated the reason why they had to build that.

Exam Mullen: I think the witness is competent to answer that. Go ahead.

The Witness: The East Yard in Ogden was constructed in 1942 as an expansion and it was necessary that we move to that location which is approximately two miles from the present main yard in which we operate, and operations there are rather expensive.

By Mr. Quirk:

Q. All right. You have said you have reached the saturation point. Now, has the owner of the Depot Company or yourself given consideration to expanding the facilities to meet current and prospective needs?

A. As they are required, yes.

Q. You are giving consideration to that?

[fol. 914] A. There is no program.

Q. There is no program?

A. No, sir.

Q. At the moment?

A. No, sir.

Q. In other words, you will wait until the need is right on top of you, I suppose?

Mr. Collins: I beg your pardon. I don't think that is an appropriate question.

Mr. Quirk: He said there wasn't any program.

Mr. Collins: Wouldn't that be enough?

Mr. Quirk: It wouldn't be for me.

Mr. Collins: Mr. Edens, do you have anything to do with the policy of expansion or settlement?

The Witness: No, sir.

By Mr. Quirk:

Q. You are superintendent over there, aren't you? Have you recommended anything?

A. Yes.

Q. You are the top man over there, aren't you?

A. Yes.

Q. It would be your duty to keep your principals advised?

A. Yes.

Q. You have not made any recommendation?

A. None.

Q. In the last sentence in the first full paragraph of [fol. 917] page 19, you went on to say that you had already shown, since the maximum number of cars the Rio Grande was able to receive from us on any day in its Ogden freight yards in February, 1949, was 369 cars, the zone yards would not be able to handle the traffic potential the Rio Grande seeks.

On that day which is February 24, that you received the maximum, didn't the Denver and Rio Grande deliver to the Depot Company 193 carloads, or cars?

A. I don't have that record.

Q. Well, your 369 figure is in one direction?

A. That is cars that I delivered to the Denver and Rio Grande.

Q. Yes, you didn't deal with the cars you received.

A. No.

Mr. Quirk: That is all.

Mr. Collins: That is all.

(Witness excused.)

A. D. Hanson was sworn and testified as follows:

Exam. Mullen: We will have a ten-minute recess.

(Recess taken.)

Exam. Mullen: We are ready to proceed, gentlemen.

Mr. Collins: I believe I offered and there was received in evidence, subject to Mr. Quirk's objection, this exhibit 14, the map.

[fol. 916] Exam. Mullen: 14 was received without objection.

Mr. Collins: Oh, was it? All right. I want to make the announcement yesterday we didn't have sufficient number of copies for distribution. We now have them on the table

in the back of the room, and anyone who wants one may get it there.

Exam. Mullen: You may proceed.

Direct examination

By Mr. Collins:

Q. Mr. Hanson, you have prepared some testimony and exhibits, have you not, for presentation in this case?

A. Yes, sir.

Q. And are the statements and the exhibits submitted, true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. Will you proceed with your statement?

A. My name is A. D. Hanson. I am General Superintendent Transportation, Union Pacific Railroad, 1416 Dodge Street, Omaha, Nebraska. I entered the employ of the Union Pacific Railroad in May 1917 and practically all of my service has been in the Operating and Transportation Departments in various capacities, having been appointed Assistant to General Manager, Omaha, Nebraska, August, 1942, and General Superintendent, headquarters at Salt Lake City, July 1, 1946, with supervision over the Utah and Idaho Divisions between Salt Lake City, Utah and Butte, Montana and Huntington, Oregon, and which comprise the territory served by the Union Pacific Railroad in [fol. 917] the State of Utah north of Salt Lake City and in the States of Idaho, Montana and Eastern Oregon. I served in that capacity until appointment to my present position on December 15, 1947.

In connection with and as part of my testimony I have prepared——

Exam. Mullen: 15?

Mr. Collins: 15.

The Witness: —Exhibit 15, consisting of 15 pages, to which I will refer later.

Freight Train Schedules.

R. o Grande Exhibit No. 5, submitted by Mr. Bradford, covers condensed eastbound and westbound freight schedules between Chicago, St. Louis and Kansas City on the east,

and Los Angeles and San Francisco on the west via D&RGW and its connections at Denver, Pueblo, Ogden and Salt Lake City. These schedules are comparable to those via Union Pacific routing to and from Missouri River connections and Denver, Ogden, Salt Lake City and California points, and which, for example, provide for 7th morning delivery of traffic at Chicago eastbound from California and 7th morning delivery of traffic westbound to these California destinations from Chicago.

However, I desire to clear up one point mentioned by Mr. Bradford on pages 202, 214 and 215 of the transcript in which he refers to 16-hour run-off time on perishable blocks eastbound. The run-off schedule eastbound is not in effect [fol. 918] at this time, nor has it been in effect since reverting to the present schedules following the war period. In other words, perishable traffic billed on Monday in California and concentrated by the Southern Pacific at Roseville is due to depart Roseville at 11:59 p.m., Tuesday, and arrive at Chicago at 12:30 a.m., Monday, for the 7th morning delivery from date of billing. These perishable blocks are all due to arrive Ogden via the Southern Pacific at 5:40 p.m. MT the second day, or in this case, on Thursday.

It is true the Southern Pacific as they get a trainload of perishables assembled at Roseville will depart ahead of the 11:59 p.m. due time, and when blocks arrive Ogden ahead of the 5:40 p.m. due time and delivered to the Union Pacific or the Rio Grande. They are ahead of time and the intermediate lines have this additional time to apply on their portion of the schedule, although with the number of perishable blocks moving, particularly during peak seasons, the intermediate lines will likewise deliver to their connections a number of blocks ahead of time and which is necessary in order to get the last block of the day into Chicago and other terminating points on time.

Freight train schedules between the Pacific Northwest and Chicago, St. Louis, Kansas City and other Eastern, Southern and Southwestern markets, in both directions via the Union Pacific Railroad through Pocatello, Idaho and Granger, Wyoming, and its Missouri River and Denver [fol. 919] connections also provide for a 7th morning delivery Chicago from the Pacific Northwest, including such points as Spokane, Yakima, Seattle, Tacoma, Portland and

surrounding territory and from Rieth, Oregon which is the perishable concentration point for that area. The existing schedules also provide for 7th morning delivery westbound from Chicago to these Pacific Northwest destinations.

Page 1 of Exhibit 15, Columns 1 and 2, covers these schedules. These schedules enable shippers in the Pacific Northwest and Idaho to compete with shippers in California into all of these markets but this would not be the case if the traffic moved via D&RGW between Ogden and Denver or Pueblo. Perishable traffic in the Nampa territory, which includes Western Idaho and Eastern Oregon, is concentrated at Nampa and due to leave there 3:30 a.m. following the day billed and into Pocatello that afternoon. Perishable traffic from the Twin Falls and Idaho Falls territories is concentrated at Pocatello and which, together with the perishables from the Nampa territory, are due to leave Pocatello at 7:30 p.m. If this traffic is moved to Ogden and thence over the Rio Grande from Ogden to Denver or Pueblo instead of via the Union Pacific through Granger and the shorted route, the perishable blocks would leave Pocatello some time during the evening or night and be delivered to the Rio Grande at Ogden the following forenoon, or some 12 hours after the departure of the Rio [fol. 920] Grande's last perishable block at 9:40 p.m. and as shown on Rio Grande Exhibit No. 5. The traffic would then necessarily take the schedule of that night and as a result arrive Denver, Kansas City, St. Louis, Chicago and other Eastern markets one day later than if moved via Union Pacific from Pocatello through Granger to Denver, Kansas City, or Council Bluffs.

The same situation would prevail westbound and any traffic from Eastern Points to Idaho, Montana and the Pacific Northwest would be one day longer enroute if moved via Rio Grande from Denver to Ogden than if moved via Union Pacific from Council Bluffs or Kansas City direct through Granger, Wyoming.

I have indicated in Columns 3 and 4, Page 1 of Exhibit 15 approximate schedules that would be effective if traffic moved via Rio Grande to and from Idaho and the Pacific Northwest.

It will result also in the reduction in trains handling coal eastbound and empties westbound as follows:

	No. Trains East	No. Trains West	Total Carloads Coal (Average 54.2 tons/car)
Wyoming Division:			
Green River-Rawlins	133	84	8,000
Rawlins-Laramie	110	70	6,628
[fol. 1040]			
Laramie-Cheyenne	92	58	5,519
Nebraska Division:			
Cheyenne-Sidney	82	62	4,949
Sidney-North Platte	66	50	4,002
North Platte-Grand Island	32	24	1,949
Grand Island-Council Bluffs	17	12	1,003
North Platte-Hastings	15	11	910
Kansas Division:			
Hastings-Marysville	10	7	594
Marysville-Kansas City	5	4	332

The foregoing is more fully set forth in Exhibit 15, introduced by Mr. A. D. Hanson and with respect to which he testified, his testimony with respect to this exhibit showing also the further reduction in employment of 60 employees annually of the Union Pacific Railroad Company, with annual wages of $180,802.00.

At all times except in case of emergency such as a strike of the miners or a threatened strike or a slow-up in production, all of the freight trains of the Union Pacific Railroad Company operated between Green River, Wyoming and Kansas City, Kansas are operated by steam locomotives fueled with coal produced, to a large extent, by the mines [fol. 1041] of the Union Pacific Coal Company operated in the State of Wyoming at the points hereinbefore mentioned.

Mr. Collins: If we can avoid a quarrel, we can say a reduction in the number of trains previously mentioned.

Exam. Mullen: The trains previously mentioned, that will be all right.

Mr. Collins: Then cut out those A, B, C's.

The Witness: The reduction in the operation of the trains will consequently reduce the amount of coal used by the Railroad Company and will in turn greatly affect the operations of The Union Pacific Coal Company, as well as employment available to miners in that area. Based on the aforesaid reduction in trains operated per day, I have prepared an estimate, in exhibit form, showing the

loss of employment to employees of the Union Pacific Coal Company which would result from the aforesaid reduction in train operation by the Union Pacific Railroad Company.

By reference to sheet 1 of my exhibit—have we given that a number yet?

Exam. Mullen: No, it will be number 18.

Mr. Collins: 18, all right.

The Witness: —it will be observed:

(1) that the reduction in trains operated by the Union Pacific Railroad Company as aforesaid will result in a reduction in coal consumed annually of 433,985 tons, and [fol. 1042] (2) a reduction annually of 268 employees of the Union Pacific Coal Company, or 64,968 employee days, whose annual wages amount to $1,084,962.50.

The formula on which the aforesaid figures are compiled is fully set forth in my exhibit 18.

In considering the reduction in consumption of coal by the Union Pacific Railroad Company in the amount of 433,985 tons annually, it is necessary to anticipate where and how that loss would be reflected in mine operation of the Union Pacific Coal Company.

Economics of mine operation would not permit a general reduction of production spreading the loss of 433,985 tons over the six operating districts of Rock Springs, Reliance, Stansbury, Winton, Superior and Hanna. On the contrary, it would be necessary to at least temporarily shut down and possible permanently abandon one mining district producing the approximate tonnage which would be lost. Stansbury mine in the Rock Springs district is the mine producing nearest to the tonnage which would be lost. It would therefore be necessary to close the Stansbury mine.

There is shown on sheet 2 of my exhibit 18, under the heading:

"Statement showing loss of mining personnel and others associated with production of coal at Stansbury, Wyoming, together with annual income of wage earnings affected [fol. 1043] in the event it becomes necessary to close the Stansbury mine," an actual inventory of the mining personnel and of other personnel associated with the pro-

duction of coal at Stansbury mine, Wyoming, together with the annual income of the wage earnings affected. This statement includes the 268 miners with an annual income of $1,084,962.50, shown on sheet 1 of my exhibit, and, in addition thereto, supervisory forces, clerical staff, mercantile store and power plant employees directly connected with the production of coal at the Stansbury mine, and also medical and hospital staff, primary and high school staff, post office, recreation hall, law enforcement, bus drivers and retail coal truck drivers, who will be indirectly affected as a result of the closing of the Stansbury mine.

It will be observed from the statement that there will be a loss of 322 wage earnings in the Stansbury community and a loss of their annual income, including, as above indicated, the loss of income of the 268 miners, totalling $1,341,219.50. This includes also the sum of $86,797.00 which would be paid by the Company into the United Mine Workers of America Welfare Fund at the rate of 20 cents per ton of coal mined.

Since this testimony was prepared, there has been a new contract consummated, which raises the welfare fund to 30 cents per ton, and increases the miners' wages 70 cents per day, which is not included in this exhibit.

From sheet 2 of my exhibit 18 it will be observed that [fol. 1044] the closing of the Stansbury mine will displace 322 wage earners who will no longer be required in the community. The majority of those wage earners are heads of families. Assuming an average family of 3⅓ persons, the displacement of the 322 wage earners will result in a displacement of 1,073 persons. The Government of the United States is quite concerned with relocating the displaced persons of Europe and spend millions annually for their welfare, and it is reasonable to assume that the State of Wyoming would be concerned about the displacement of 1,073 persons in one community in its State.

Stansbury is an unincorporated village in the State of Wyoming where the Stansbury mine of the Union Pacific Coal Company is located. In the village of Stansbury there are 110 houses, a boarding house, stores, schools, post office and recreation hall. White Mountain Addition to Stansbury has 130 residences. The Stansbury mine was opened in 1943 and all of the facilities above enumerated were

constructed to accommodate the employees engaged in the operation of the Stansbury mine. All of the facilities have been constructed within the past six years.

This loss of employment in the Stansbury community could very possibly eliminate the entire communities of Stansbury, Wyoming and White Mountain Addition thereto. When I speak of the communities I mean more than the bricks, mortar and machinery which stand as monuments—[fol. 1045] I mean the people who make a community—the children, mothers, fathers, citizens and taxpayers who are the body and soul of every community.

The elimination of the communities of Stansbury and White Mountain Addition thereto would bring about a loss of tax income as reflected on sheet 2 of my Exhibit 18, under the heading:

"Loss of tax income in the event the village of Stansbury, Wyoming and White Mountain residence addition thereto were abandoned."

The statement referred to speaks for itself, but it will be observed that the total of tax income is $113,489.62. That figure does not include federal income tax, corporate or from the individual wage earners.

The amount of tax payable by the Union Pacific Coal Company shown on sheet 2 of my exhibit 18 is part of the general ad valorem taxes paid by the Union Pacific Coal Company in Sweetwater and Carbon Counties, Wyoming, in the amount of $386,000 annually. Of the latter amount, $94,000.00 is contributed to the State of Wyoming for distribution and support of school operation in all of Wyoming's 23 counties.

In addition to the loss of tax income resulting from the discontinuance of use by the Union Pacific Railroad Company of 433,985 tons of coal annually produced by the Union Pacific Railroad Company and the consequent closing of the Stansbury mine as aforesaid, there would necessarily [fol. 1046] result a tremendous loss in general business revenue. This general business loss, totalling $2,654,135.38, is reflected on sheet 3 of my exhibit 18, under the heading:

"Loss in general business revenue resulting from discontinuance of use by the Union Pacific Railroad Company

of 433,985 tons of coal annually and the closing of the Stansbury mine."

It includes the loss of revenue from the purchase of coal by the Union Pacific Railroad Company in the amount of $1,814,057.30, the purchase of commodities by mine employees, real estate rentals, utilities, water and power and transportation of miners and mining supplies and commodities.

Mining communities once active and then closed as a result of an economic condition such as the diverting from the Union Pacific Railroad Company of the traffic originating and terminating in the States of Idaho, Montana, Oregon and Washington of 157,000 carloads of commodities such as are shipped from and destined to those points, creates what is generally known in the west as "ghost towns." The transition from active to "ghost town" status brings about a tremendous loss in property value. This loss applied to the village of Stansbury and White Mountain Addition thereto represents a loss in undepreciated value of property in the amount of $2,910,006.14, as reflected on sheet 3 of my exhibit 18, to the remaining mining districts operated by the Union Pacific Coal Com-
[fol. 1047] pany substantially increasing their operating costs, or charge the entire amount off to profit and loss. Although the total undepreciated value of this property, as shown on sheet 3 of my exhibit 18, is $2,910,006.14, the replacement value of this property is $4,089,304.57.

Although I have selected the Stansbury mining district and housing facilities of White Mountain Addition thereto for the purpose of analyzing the economic effect of the reduction in production of 433,985 tons of coal annually, which is the consequence of the discontinuance by the Union Pacific Railroad Company of the operation of the number of trains previously mentioned, the same or greater loss of payroll earnings, tax income, loss of general business revenue and property value would obtain if the loss in production were assigned to any of the other and/or all of the mining districts operated by the Company.

A summation of the tremendous losses and resulting economic effect on the operations of The Union Pacific Coal Company and the effect on the communities in which the Union Pacific Coal Company operates its mines is set

forth on sheet 4 of my exhibit 18, under the heading:——

Mr. Quirk: Now Mr. Examiner, I want to suggest whether the heading is read or not that it costs money to buy that. The exhibit is self-explanatory. I don't think [fol. 1048] the Government or the parties ought to be subject to unnecessary costs.

Exam. Mullen: I agree, that heading is unduly long, and may be copied in the record.

Mr. Collins: May he refer to the page?

Exam. Mullen: Sheet 4, all right, that is enough.

The Witness: It will be observed from this summary that the total loss of earnings to employees of the Union Pacific Coal Company and persons associated with the production of coal amounts to $1,341,219.50 annually (which includes the loss to the United Mine Workers of America Welfare Fund of $86,797,) the loss of tax income amounts to $113,489.62 annually, and the loss of general business revenue amounts to $2,654,135.38 annually, or a total annual loss of $4,108,844.50. In addition thereto, the loss of property—undepreciated or book value—would amount to $2,610,006.14.

Exam. Mullen: Isn't that repetition? It is all in the exhibit. I don't think you need to summarize it.

Mr. Collins: Why not copy from there on? I think the summarization is helpful to the reader of the material in the record.

Exam. Mullen: All right, let that be copied.

That part on page 10 is argumentative.

Mr. Collins: I disagree with you, Mr. Examiner. He has lived in this country, he knows the effect of the matter he is describing on the community, he knows the relative [fol. 1049] importance of these things, and I think the Commission itself ought to know them. I think it ought to be let in. If the Commission thinks differently from the way I do about it, they can ignore it.

Exam. Mullen: This matter on page 10.

Mr. Collins: Page 10, yes.

Exam. Mullen: I believe it is argumentative. It will be stricken.

Is that all on direct, Mr. Collins?

Mr. Collins: Yes, sir, that is all.

Cross-examination.

By Mr. Quirk:

Q. Mr. Bayless, how long have you been with this company?

A. Twenty years.

Q. Has your coal production increased or decreased in recent years?

A. It increased during the war years.

Q. So did everything else.

A. Yes.

Q. How does it compare now in Stansbury and the other mines with the war years?

A. Comparing with the war years it is reduced approximately 50 percent. It remains now about as it was before the war.

Q. You sell 95 percent of your coal to the Union Pacific Railroad?

[fol. 1050] A. Yes, sir.

Q. Have you ever discussed with Mr. Stoddard, the idea he might keep this town going, if he would quit buying diesels?

A. No, I haven't felt privileged to discuss that too much.

Q. You are President of the company. Now, the use of diesels instead of coal-burning locomotive cars certainly has affected the production of the coal by the Union Pacific Coal Company, hasn't it?

A. The territory now allotted for coal use will consume ordinarily approximately the same amount of coal that was produced before the war and maintain the Union Pacific properties.

Q. Now, how many employees do you have now compared with the war period?

A. We have approximtaely 2400 employees now, and we got up to 3200 employees during the war years.

Q. Are you familiar with an announcement recently made by Mr. Stoddard that the Union Pacific was going to keep running because of the uncertainty of the coal production, he was going to keep buying oil burning locomotives?

A. I am rather familiar with statements that are made that affects the coal company, but I don't think he made the

statement that he was going to continue to buy oil burning locomotives.

Q. I didn't say he said coal-burning locomotives.

A. Oil burners.

Q. Is the Union Pacific buying diesel locomotives right along?

[fol. 1051] A. I understand it they are, yes, sir.

Q. And every time the Union Pacific railroad buys a diesel locomotive, it certainly doesn't help your company, does it?

A. It doesn't necessarily hurt my company. The Union Pacific Railroad, for a number of years, have used fuel oil burning locomotives on certain territory, and while the operating department of the railroad can explain that much better than I can, many of the diesel locomotives have been assigned to take the place of oil-burning locomotives.

Q. This story that you have told about what will happen to everybody and everything in Stansbury, Wyoming is based entirely on what Mr. Hanson told you as to the traffic that may move via the Rio Grande Railroad through Ogden, away from the Union Pacific, if this complaint is sustained by the Interstate Commerce Commission, is it not?

A. It is based on the testimony as given by Mr. Hanson, and on the statement that the number of trains that would be reduced.

Q. You made this statement before Mr. Hanson testified, of course, didn't you?

Mr. Collins: Will you read that question?

Exam. Mullen: We have a request here to read the question.

(Question read.)

The Witness: The same information that was available to Mr. Hanson was made available to me.

[fol. 1052] By Mr. Quirk:

Q. Yes. So that if Mr. Hanson has exaggerated the possible effects of the result of this complaint, if successful, and he should be proven to be in error, then everything you have said here is in error, isn't it?

A. My testimony here is based on the loss of a number of trains, or the reduction of a number of trains on the Union

Pacific Railroad which will affect the Union Pacific Coal Company.

Q. And that in turn is based upon a notion that the Union Pacific Railroad may lose 157,000 carloads of traffic?

A. That is right.

Q. So if that should turn out to be wrong, then everything you said is wrong, isn't it?

A. I wouldn't say that. I would say if there was more or less, if opening of the Ogden Gateway resulted in more or less loss traffic to the Union Pacific, that the figures would somewhat fluctuate.

Q. You have not dealt with it on the theory it might be less. You used the maximum here, haven't you?

A. I don't understand this is the maximum. It is the figure that was given to consider what effect it would have on the Union Pacific Coal Company.

Mr. Quirk: That is all.

Mr. Collins: That is all.

(Witness excused.)

Mr. Collins: I offer exhibit 18, Mr. Examiner.

[fol. 1053] Exam. Mullen: Any objection?

Mr. Quirk: I think I will object to the exhibit on the ground that it is irrelevant and immaterial. It is rather far-fetched.

Exam. Mullen: The objection will be overruled. The exhibit will be received in evidence.

(The document marked Exhibit No. 18, Witness Bayless, was received in evidence.)

Mr. Collins: Mr. Examiner, I had intended having witnesses rushing one after the other until whatever hour you intended to sit, but the thing got crossed up somewhat, and we are now faced with a situation where we don't have a witness, and won't have another until in the morning.

Exam. Mullen: Are there any other persons here who desire to put on a witness, any other defendants?

Mr. Collins: The Northwestern Railroad is here, but they say they are not ready until in the morning.

Exam. Mullen: Are we going too fast for you?

Mr. Collins: No. We just got a little mixed up in our

preparation and in getting a witness from out of town into town.

Exam. Mullen: We will adjourn until tomorrow morning at 9:30.

(Whereupon, at 4:32 o'clock, p. m., a recess was taken to reconvene at Wednesday, April 5, 1950, 9:30 a. m.)

[fols. 1054-1055] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., Defendants

Transcript of Testimony—Wednesday, April 5, 1950

Met pursuant to adjournment, at 9:30 o'clock a. m.

Before Frank E. Mullen, Examiner

[fol. 1056] Proceedings

Exam. Mullen: Come to order, please, gentlemen. We are ready to proceed. Mr. Collins.

Mr. Collins: Mr. Examiner, I understand Mr. Quirk is ready to cross examine Mr. Lynch. Mr. Lynch is here and is ready.

Examiner Mullen: Mr. Lynch.

PERRY J. LYNCH resumed the witness stand and testified further as follows:

Cross-examination.

By Mr. Quirk:

Q. Mr. Lynch, on page 3 of your prepared statement you refer to the history, evaluation of the Union Pacific, and subsidiary lines, as reported in valuation report in Volume

44 of the Commission valuation reports, and that this valuation report discloses that the Union Pacific put more than 14 million dollars into the original construction and equipment of the Oregon Short Line Railway Company.

Now, I assume you know that during the period from 1906 through 1931 that the Oregon Short Line paid to the Union Pacific in dividends the aggregate sum of $252,246,000, in round figures? Do you know that?

A. I don't personally know whether those figures are correct, no.

Q. They don't sound unfamiliar to you, do they?

A. No, not entirely.

[fol. 1057] Q. You have been with the company how long?

A. Over 39 years.

Q. Irrespective, therefore, of the amount that you spent in the original, what you characterize as the original construction of the Oregon Short Line, or the amount you may have since spent in additions and betterments, that has proven to be a very good investment so far as the Union Pacific is concerned, hasn't it?

A. Well, all I can say, Mr. Quirk, is that there has been that amount of money invested in the construction of the lines that we are talking about in this proceeding, and the details of the inter-company financial settlement I am not qualified to talk about. I don't know about them.

Q. Well, there are a lot of other interesting things that bear on the development of these properties in that same valuation report, are there not?

A. Yes sir.

Q. At page 12 of your narrative, the first full paragraph, where you are dealing with the statistics in your Exhibit 12, you say with reference to page 9 of that exhibit, which deals with a comparison of the physical characteristics of the Union Pacific for the year 1948, and for the Denver and Rio Grande Western for the year 1940, and you say that you used the year 1940 in this comparison as far as the Rio Grande is concerned because you did not have the statistics at the time you prepared the exhibits.

[fol. 1058] Didn't Mr. Collins inform you that at his request the Denver and Rio Grande prepared a condensed profile as of November 1, 1949, and that we sent it to him, and that would have enabled you to compare year with year?

Mr. Collins: Mr. Quirk, I have Mr. Backlund here, the engineer who worked on this feature of this matter, and I think if you will look at the footnote at the bottom of page 9 you will see what is the basis for the figures on that page, but if you want to inquire about this, I woud like you to permit me to put Mr. Backlund on the stand.

Mr. Quirk: That isn't my point. The witness went out of his way to say he couldn't make a comparison year with year because he didn't have anything later than 1940 for the Denver and Rio Grande. I am merely calling his attention and your attention to the fact that you did have it.

Mr. Collins: The engineer said he didn't have from that profile that was furnished and that was put in evidence.

Mr. Quirk: All right.

Mr. Collins: I will be glad to put Mr. Backlund on the stand and let him explain why.

Mr. Quirk: No, it isn't necessary.

Mr. Collins: Before we leave that, I call your attention to the fact that bot- sets of statistics are for 1940, Mr. Quirk.

[fol. 1059] The Witness: I want to clear that up in regard to my direct, that the report in the case of the Union Pacific and the Rio Grande is on the basis of 1940, and not a comparison of 1948 versus 1940.

By Mr. Quirk:

Q. Well, perhaps we were confused. I wonder why, then, you say you didn't have the Rio Grande figures for a later period?

A. I didn't have them, and I had no conversation with Mr. Collins about the availability of the Rio Grande later statement.

Q. All right. Thank you very much.

Now, will you turn to page 25. After discussing some of the testimony of Mr. McCarthy, you say that he confirmed the policy and stated at page 35 of the transcript that they want to continue increasing their volume of traffic; they take from the originating and terminating connecting lines and others "because, generally speaking, there is more money in it."

Then you say, "At pages 32 and 33 of the record, Mr. McCarthy made it clear that the only purpose of the Rio

Grande in filing the complaint in this case was 'to improve the financial condition of our railroad.' "

Now, Mr. Lynch, I wish you would look at those pages and tell me where you find anything like that. Read the top of page 33 there, Mr. Collins' question.

Mr. Collins: You might begin at the bottom of page 32.

[fol. 1060] Mr. Quirk: Yes.

The Witness: At the bottom of page 32, the question is: "Question: That is from the standpoint of what I will say the treasury of the Rio Grande and the stockholders that would be the purpose?"

"Answer: Yes, we hope to improve our condition if we can get these through rates.

"Question: Insofar as the corporate management and stockholders of the Rio Grande are concerned, that would really be the only immediate purpose to them, would it not?

"Answer: Yes, that they would want to improve the financial condition of our railroad.

"Question: Yes; that, of course, is apart from what you anticipate or what you have said would be some additional transportation conveniences that you would expect the public to derive."

By Mr. Quirk:

Q. All right. Now, on page 43 of the transcript—I don't think it is necessary to read it—but you will see Mr. McCarthy is still being examined, and he says, "that is true with respect to that," and in answering the position of the Rio Grande, and the convenience to our shippers.

Now, in view of what Mr. McCarthy actually said, don't you think your statement that I have quoted at page 25 of your prepared statement, that Mr. McCarthy made it clear that the only purpose of the Rio Grande is to improve its financial condition, is unfair?

[fol. 1061] Mr. Collins: Mr. Examiner, I object to that line of cross examination. The record will stand for itself. Mr. Lynch is not required to interpret it for Mr. Quirk's benefit.

Mr. Quirk: He has interpreted it for his own benefit here.

Exam. Mullen: I don't think the witness has to testify or

characterize what his own statement is. He has brought out the facts.

Mr. Quirk: All right.

Mr. Examiner, while we are on this subject, if I may digress a moment from cross examination, one of counsel for the complainant here, I want to make it clear, that this complaint is not based upon the financial needs of the Denver and Rio Grande Western Railroad; it is based on the provisions of the Interstate Commerce Act, such rights as we have under that act, and the pleadings in the case, which do not raise any question of aid from the Union Pacific financially.

If we get the joint rates, and any traffic moves, there will naturally be some benefits from it.

Mr. Collins: I would like to state in response to that, that Mr. Quirk is not in position to repudiate Mr. McCarthy's testimony which is in the record.

Exam. Mullen: Mr. Quirk is not attempting to do so.

Mr. Quirk: I am in position to state what our position is in the case.

[fol. 1062] Exam. Mullen: That is correct.

By Mr. Quirk:

Q. Mr. Lynch, page 13 of your prepared statement, you include at the bottom of that page, after discussing the traffic situation on the Union Pacific at the present time, you say, you refer to the fact that in the face of the lower railroad traffic volume——

A. Pardon me. What page number is that?

Q. 13, down at the bottom.

Now, in the face of a lower railroad traffic volume, we are confronted with the threat of losing, according to forecasts by Mr. Earley of the Denver and Rio Grande, a potential of 101,476 loads of eastbound traffic, and 56,286 loads of westbound traffic, or a total of four trains per day eastbound and westbound between Pocatello and Council Bluffs.

Tell me, Mr. Lynch, why did you use the figures that Mr. Earley put in the record merely referring to his estimate of the traffic that would be susceptible to routing over the Rio Grande and not traffic that they could reasonably expect to get?

A. Well, I heard a great deal of discussion about that all day Monday and all day yesterday, and I will say for your information that I proceeded since the start of this case on the basis that that was what the Rio Grande expected to obtain in the event the Rio Grande was successful in this case, and I even disagree with the testimony of some wit- [fol. 1063] nesses yesterday who said that was the maximum. I don't even understand that is the maximum you expect to obtain, because in Mr. Earley's statement at the Salt Lake meeting, he very definitely said he didn't think that exhausted the possibilities.

Now, in the formation of a case of this kind, we have got to naturally start somewhere, and I certainly, in my small way, wouldn't know what figure to place; if they don't want to talk about 157,000, if you could get that, I am sure you wouldn't settle for 150,000. You would obtain the maximum.

Q. Well now, do you think anybody here is naïve enough to believe that the Union Pacific hadn't worked on that itself?

Mr. Collins: I object to the form of that question.

By Mr. Quirk:

Q. Did the Union Pacific work on that subject itself in the preparation for the defense of this case?

A. Did we work on this?

Q. Did you make an independent check of what traffic you might possibly lose?

A. I am not in position to make that, naturally.

Q. Well, you have freely referred to these figures, however.

Mr. Collins: Mr. Examiner, I would like to make a statement about this.

Exam. Mullen: I don't believe it is necessary, Mr. Collins. We have a witness here under cross examination.

Mr. Quirk: I don't think this interruption——

Exam. Mullen: Go ahead, Mr. Quirk:

[fol. 1064] By Mr. Quirk:

Q. I say you didn't hesitate to use these figures, however, I just referred to.

A. No, I state emphatically we did use those figures, and we based our case on it all the way through.

Q. Could it be, Mr. Lynch, that you used those figures for tactical reasons to arouse the interest of your employees in this case?

A. We used it for the reason that I mentioned there a while ago, and I can't enlarge any more on that statement. If you will stipulate what you think the Rio Grande might get in the event they are successful in this case, we might start all over again and work some new figures. I don't know whether that meets with approval of counsel or not, but that is my view of it.

Q. Now, do you know that Northwest, or parts of the Northwest are served by the Great Northern, the Northern Pacific, the Milwaukee Railroad, the Southern Pacific and the Union Pacific?

A. Yes sir.

Q. Do you have any idea what share of the potential traffic in that area is moved by the Union Pacific?

A. No, I do not.

Q. You do not. But you have been with this railroad a long time, and while you are—Mr. Collins is very eager to remind me you are not a traffic man, but I find operating men are very capable men. You know very well, however, that the Union Pacific doesn't get one hundred per cent of [fol. 1065] the potential, don't you?

A. I do.

Q. What makes you think that the mere opening of this gateway at Ogden with competitive rates would enable, as against your service——

Mr. Collins: I object to it. Mr. Lynch says he thought they would get it.

Mr. Quirk: He used the figures.

Exam. Mullen: It is cross examination, Mr. Collins. I see no logical objection to the question. Go ahead, Mr. Quirk.

By Mr. Quirk:

Q. To enable the Rio Grande to get all of the traffic which Mr. Earley estimated was potentially available?

A. Mr. Quirk, I endeavored to give you a concise answer to what I thought about that, and why we used the figure, and I can't enlarge on that statement.

Q. Do you really think as a practical operating man that there is any likelihood whatsoever of the Rio Grande getting 156,000 carloads a year eastbound and westbound through Ogden?

A. I stay with my original statement. I told you before I am basing a lot of this on what Mr. Earley and witnesses at Salt Lake mentioned, and Mr. Earley said, "The Union Pacific traffic susceptible to Rio Grande routing which is termed traffic potential represents a conservative estimate of business available to our solicitation."

Then he went on further to say that he had only taken [fol. 1086] what originates and terminates on the Union Pacific and that there was other traffic out there that he thought was susceptible.

Mr. Collins: Now look at the last page of that, Mr. Lynch, and read that part. This is quoted out of the record.

Mr. Quirk: What page of the record?

Mr. Collins: You ought to be familiar with it.

Mr. Quirk: When you refer to the record, I think you should tell us what it is. That is what I have done.

Mr. Collins: Read that part.

The Witness: "Again, I wish to emphasize the point that the foregoing traffic potential represents to a considerable degree less traffic than what I believe would actually be available to our solicitation for the reason our study includes only the amount of traffic loaded and unloaded on the Union Pacific in the four Northwestern states."

By Mr. Quirk:

Q. What did Mr. Earley say at page 174 of the transcript? Look at the top and read it.

A. "I also wish to point out with additional emphasis that this estimate of the traffic possibilities for the Rio Grande route does not attempt to show the number of cars

which we think will actually move through Ogden by the route of the Rio Grande in connection with the Union Pacific in the event of the establishment of competitive through rates via that junction."

Q. I won't take the time to read the other statements [fol. 1067] made by Mr. Earley——

Mr. Quirk: There is quite a statement made by Mr. Earley prior to this statement that qualifies that.

By Mr. Quirk:

Q. Well, anyway, actually as a practical man, familiar with the situation on your railroad, don't you really think it is rather absurd for you to use a figure that represents merely what might possibly be available?

Mr. Collins: I objected to the question. It is an unfair question. Mr. Lynch doesn't deal with traffic.

Exam. Mullen: The witness can answer, I believe, if he knows.

The Witness: I do not think it is an absurd statement, and I am going to repeat again my original statement on that, and if you have some ideas of what this might be, rather than what Mr. Earley testified to with great emphasis, the testimony, the answer I just read, he didn't say it would be any less. He didn't make any inference. You can draw from that that it might be more.

Mr. Quirk: We have some very definite ideas what it will be. We will put our vice president on for rebuttal, and we will show it can't possibly exceed 20,000 carloads in both directions, and never exceed 15,000.

Mr. Collins: I move that be stricken.

Mr. Quirk: He asked me for it.

Exam. Mullen: That may remain in the record as a state- [fol. 1068] ment of what counsel intends to prove.

Mr. Collins: Counsel doesn't solicit traffic, Mr. Examiner.

Exam. Mullen: It is a statement of counsel, not a question.

Mr. Quirk: Not only that, but the witness stated that.

Exam. Mullen: And it is not evidence either.

Mr. Quirk: That is right.

Mr. Collins: I object to his arguing with Mr. Lynch what this figure would be. They offered the figure, and we used it.

Exam. Mullen: Go ahead, Mr. Quirk: We don't need any more interruptions.

Mr. Quirk: I am going to object to his constant interruptions.

By Mr. Quirk:

Q. You know, I suppose, even if Mr. Collins does not think you do, you probably know that you do have a line of joint rates on your Los Angeles, California, line to Salt Lake and Provo with the Rio Grande east and west?

A. Yes——

Mr. Collins: He hasn't testified about any joint rates, and we have traffic people here who will testify about it. That is beyond his direct testimony.

Exam. Mullen: If the witness knows, he can answer. It is not an improper question. Go ahead, Mr. Lynch. There is a question on the record. Has it been answered?

Mr. Quirk: Yes, he said, "yes."

By Mr. Quirk:

Q. Now, Mr. Lynch, does the Rio Grande, because it has competitive rates through Provo and Salt Lake, get all the [fol. 1069] traffic from California?

Mr. Collins: Do you know that?

The Witness: From California?

By Mr. Quirk:

Q. To and from California.

A. No, I don't think it does.

Q. You know it gets a very small part of it compared with what you get, don't you?

A. I think that is a fair statement.

Q. Now, you had something to say about Ogden, and the facilities at Ogden, operated by the Depot Terminal Company, which is partly owned by the Union Pacific. Did you hear the testimony of Mr. Edens yesterday in which he said that the terminal facilities at Ogden were cursed with old age or something?

Mr. Collins: He didn't say that. I object to that.

Exam. Mullen: He is merely asking the recollection of the witness.

Mr. Collins: He is twisting everything he asks.

Mr. Quirk: You have a right to do that. I submit, Mr. Examiner, you have a right when cross examining somebody to do just that.

Exam. Mullen: Go ahead, Mr. Quirk.

By Mr. Quirk:

Q. Well, you heard the question. You heard Mr. Edens say the terminals at Ogden had reached a saturation point?

A. Yes.

[fol. 1070] Q. Did you hear him say that in the fact of the fact that the terminal facilities at Ogden had reached the saturation point that he, as a manager out there, had never seen fit to make any recommendations about expanding it, relocating it, doing anything about it to improve it? Do you agree with that?

A. I don't understand he testified to that effect. At least I didn't understand it.

Q. He did testify he had not made any recommendations. Assuming I am right about that, is it the policy of the Union Pacific to allow terminal facilities to grow stale and do nothing about it?

A. No sir.

Q. It is not?

A. Emphatically not.

Q. Will it be your policy if the traffic situation justifies it, to make such changes as are necessary there?

A. Well, I don't know of any reason why we should with an adequate plant now, why we should consider expending a tremendous sum of money at Ogden, to help out a situation you mentioned. The Commission, in a report as late as 1949, has admonished the railroads to conserve their income, cut the corners in every way they could. I don't understand the necessity or reason why we should duplicate all or any part of the plant at Ogden to take care of a situation such as that, when we have a direct route that is entirely adequate.

[fol. 1071] Q. You took care of much more than that during the war years there, didn't you?

A. After a fashion, yes.

Q. You took care of them anyway?

A. After a fashion.

Q. What do you mean by "after a fashion"?

A. It wasn't a very satisfactory situation for anyone.

Q. You would like to have that kind of business, though, wouldn't you?

A. I certainly would.

Q. You wouldn't care for war traffic?

A. Not war stimulated traffic; I don't think you want to see it either.

Q. I don't want to see a war; I would like to see more traffic. So you think the services there are adequate now, your terminal facilities at Ogden are now adequate?

A. Is that a statement or a question?

Q. I asked you, are they adequate? Did you say that? I understood you to say that.

A. I think the facilities are inadequate right now.

Q. You do?

A. Yes sir.

Q. But now then you are not doing anything to make them adequate?

A. That is not altogether correct.

Q. Well, what are you doing?

[fol. 1072] A. We are making track changes and other alterations there, and in times past have endeavored to acquire property to make the terminal more adequate, and we were successful. For that reason, we went out to Riverdale Yard and put in quite a plant out there.

Q. Don't you know the Denver and Rio Grande are also improving and expanding their yards at Ogden at the present time?

A. I heard Mr. Bradford make that statement at Salt Lake, that they were spending some money out there.

Q. You described the interchange yard facilities at Pocatello and how you had expanded them in recent years, and that is one of the best classification yards on your system. Despite that fact, isn't it a fact that you handle, through the Ogden terminals, more than twice as much traffic as you do through Pocatello?

A. No so far as the Union Pacific is concerned, no.

Q. Well, you are a part owner of the Terminal Depot Company. Maybe I should have put it that way. Doesn't the Terminal Depot Company handle twice as much traffic at Pocatello as the Union Pacific handles?

A. I don't know exactly, Mr. Quirk. I couldn't say it was twice, but it is substantial. I will agree with you on that.

Q. All right.

A. But I will also want to say, and reiterate what I said in my direct testimony, that a substantial part of the ton-[fol. 1073] nage, the traffic that does more through Ogden, on the face of it, bypasses the terminal by our wye tracks. There are many trains per month that are not received into or dispatched from the Ogden Terminal property.

Q. Will you turn to page 9 of your prepared statement? At this point, and in previous testimony in this prepared statement, you have been dealing with the unused transportation facilities, unused capacity of the Union Pacific at this time.

First of all, most railroads in the United States have a large unused capacity, now, don't they?

A. I wouldn't know, Mr. Quirk.

Q. You wouldn't know? Even I know that. Most anybody—tell me why, at the bottom of page 9, you used October, 1944 in showing you handled through the then existing facilities at Pocatello 2,147 cars per day, and that in January, 1950, you handled only 1367 cars. Why did you compare October, 1944, which was at the very peak of traffic in this country, with January, 1950, when there was a coal strike and the incidental restrictive effects of a coal strike?

A. Because 1944, October, was when we had the hump yard, the retarder yard, and it was one of the most difficult months we ever operated.

Q. That is your only reason for doing that?

A. It is just a comparison of the capacity of the yard when we didn't have the improved facility.

[fol. 1074] Q. Mr. Lynch, isn't it a fact, regardless of what kind of a yard you had at Pocatello in 1944, if you compared the traffic handled through Pocatello or any other yard in 1944 with what you handled in that yard or any other yard in January, 1950, there would be a great gap in the number of cars handled?

A. I think I will go along with that.

Q. Part of your testimony, Mr. Lynch, you indicated how superior the statistical operating figures reveal with respect to the Union Pacific as compared with the Denver and Rio Grande; and then at page 26, when you were trying to demonstrate that the Union Pacific doesn't intend to be a "big brother" financially to the Rio Grande, you make comparisons which show how much better the Denver and Rio Grande operations are than the Union Pacific.

How do you suppose the Rio Grande made such a good showing if they are, as you imply, inefficiently and uneconomically situated and operated?

Mr. Collins: I object to that. Those terms are not in Mr. Lynch's testimony.

Mr. Quirk: Let's don't quibble about such things. That is the impression he left.

Mr. Collins: Mr. Examiner, Mr. Quirk quibbled about everything that was in my testimony.

Exam. Mullen: Just a minute. You need not go into all of [fol. 1075] that. The witness hasn't answered the question, but I don't think he needs to answer if he doesn't wish to.

By Mr. Quirk:

Q. Well, at that point you were referring to page 11 of your Exhibit 12, which is headed "comparative statistics of the Union Pacific." In the face of what you did say about the Rio Grande, and your own service, you do admit the Union Pacific gives the shippers of the country and the public excellent freight train and passenger train service between the territories operated by it, and the particular territory involved in the Northwest; you admit that, don't you?

A. Yes.

Q. Well, what is the Union Pacific staff going to be doing if the Ogden gateway is opened, sit around and allow the business to leave the rails?

A. Oh, I think that is an unnecessary question, Mr. Quirk. I think you know we wouldn't.

Q. You would be very vigilant, wouldn't you?

Mr. Collins: What was the question again, please?

Mr. Quirk: He has already answered it.

Mr. Collins: I would like to have that question read.

Exam. Mullen: The question will be read.

Mr. Collins: I would like the record to show the tenor of this examination.

Exam. Mullen: We will have the question read.

[fol. 1076] (Question read.)

Exam. Mullen: Do you wish a ruling on the objection?

Mr. Collins: Yes, I move to strike the question.

Exam. Mullen: The objection is overruled. Proceed, Mr. Quirk.

By Mr. Quirk:

Q. Now, as has been shown here, and it is generally known, in January and February, 1949, the Union Pacific was faced with a severe blizzard, blocking your lines for many days in the vicinity of Rawlins. Now, if this blizzard had been in the vicinity of Soda Springs, thus blocking the line between McCammon and Granger, would you have been forced to hold the traffic there because of Mr. Eden's idea and your own apparently up to a certain point, that you couldn't get through Ogden?

Mr. Collins: I object. I don't think Mr. Lynch needs to answer any such supposition.

Exam. Mullen: No, he doesn't need to.

Mr. Quirk: All right.

By Mr. Quirk:

Q. The fact is, however, a great deal of the traffic was blocked because of the blizzard, did move through Ogden, didn't it, and the Rio Grande?

A. Part of it, yes sir.

Q. Part of it. Wasn't there more than four thousand carloads of it, and 44 passenger trains?

A. I think those are the right figures.

[fol. 1077] Exam. Mullen: I think we had testimony on that yesterday.

Mr. Quirk: Yes.

The Witness: But I would like to clear up a point here on that Mr. Examiner, on Mr. Quirk's question about a blockade of our line between McCammon and Granger. We have an alternate route, and it would not involve the handling of the traffic through the Ogden terminal that we talked about yesterday and talked about this morning.

Mr. Collins: Would you go a little farther with that and explain. How would it move?

Exam. Mullen: You may answer it.

The Witness: We would move it by the outside wye tracks. The traffic would not move through the Ogden terminal facilities. That is one of the advantages and one of the reasons why in my testimony I mentioned the installation of a new tunnel up there, so we would have a much better through route which could always be used as an alternate route in the event of traffic interruption in the Idaho territory.

By Mr. Quirk:

Q. On page 22 of your prepared statement——.

A. I mentioned Riverdale Yard in answer to your question, and to have it conform with the division of the yard as Mr. Edens put it, it should be the east yard.

Q. On page 22 of your narrative, you are dealing with the tax situation which, I think, is reflected on page 12 of your Exhibit 12, and you pointed out, or another witness of [fol. 1078] the Union Pacific pointed out, if the Rio Grande had succeeded in this case, it wouldn't pay any taxes in Idaho and the other North-e-stern states.

Mr. Collins: I object to that. The record doesn't show that.

Exam. Mullen: Mr. Quirk hasn't finished the question yet.

Mr. Quirk: Yes, I have.

Exam. Mullen: Please have the question read.

(Question read.)

Exam. Mullen: There is no question yet. What is the question?

By Mr. Quirk:

Q. Well, the question is, doesn't the Union Pacific participate in traffic between points on its line and points in practically all the states of the United States, especially in the east?

A. Yes.

Q. The Union Pacific doesn't pay taxes in Pennsylvania, does it?

A. No, not that I am aware of. It may, on the other hand, it may have some property there; I don't know.

Q. It doesn't have any rail property?

A. No rail property, no sir.

Q. It doesn't pay taxes in any of these states in the east, east of Iowa?

A. Yes, we have property in these other states we pay taxes on.

Q. You have no railroad property though, have you?

[fol. 1079] A. What was the last statement?

Q. Let that rest. I will correct it.

You do not operate any railroad as a common carrier or otherwise in any of these eastern states, do you--the Union Pacific I mean?

Mr. Collins: Mr. Examiner, the record shows that very clearly.

Exam. Mullen: Let the witness answer.

By Mr. Quirk:

Q. You can say they do not; that is obvious, isn't it?

A. That is right.

Q. You wouldn't want to be deprived of participating in the heavy traffic that moves east and west from these eastern points merely because you don't have rails there, would you?

A. No, I wouldn't want to see it changed, certainly not. But I don't understand from the page that you are talking about that I said anything about that.

Q. Well, perhaps you didn't.

A. The D&RG taxes up there, I merely mentioned, and they are a matter of record, what the Rio Grande paid in the States of Colorado and Utah, and what the Union Pacific

paid in those states, as well as the four or five northwestern states.

Q. Well now, to clear this up, where you state that if the 156,000 carloads of traffic eastbound and westbound, which Mr. Earley described, should all move through Ogden, it [fol. 1080] would mean the discontinuance of four freight trains each day each way. That is all based on Mr. Earley's estimates, is it not?

A. Just a moment.

Mr. Collins: Page 18 is the discussion of the Ogden terminal.

Mr. Quirk: Page 13.

By Mr. Quirk:

Q. All I am asking Mr. Lynch—perhaps my question is not too clear—all I am asking is this——

A. I think I understand it.

Q. I think it would be simpler if I would restate it. What you said about the trains is based on Mr. Earley's estimates, isn't it?

A. But you changed the figures there from what we were talking about before, and I wanted to see to what extent. It is a lesser number. I am all clear on it now. Go ahead.

Q. What is the answer? Read the question. It is a very simple question.

Exam. Mullen: The answer is "yes."

Mr. Quirk: All right.

By Mr. Quirk:

Q. If it should turn out that the Denver and Rio Grande would only get ten per cent of that potential instead of all of it, as you have assumed, then your calculations about trains and employees and all the other things would be entirely erroneous, wouldn't it?

A. It would be entirely erroneous at all. It would be just——

[fol. 1081] Q. It would be an exaggeration.

A. We would have to approach the thing on an entirely new basis, and I again repeat, and go back to what I originally said in answer to that question, that we based our

whole cost on what the D&RGW have apparently thought was going to be the answer to this thing; otherwise, I don't know why Mr. Earley mentioned it.

Mr. Quirk: All right. That is all.

Exam. Mullen: Any redirect, Mr. Collins?

Mr. Collins: I want to ask Mr. Lynch a few questions.

Redirect examination.

By Mr. Collins:

Q. Mr. Lynch, in connection with Mr. Quirk's discussion with you about the antiquation of the terminal, and finally the saturation point, I would like to ask you if there is any land available that could be had within reasonable terms of business management adjacent to the tracks that are already there, so that you could lay parallel tracks along side those that are already in the yard proper?

A. No sir, there is not, that that is the very reason why we moved out of the yard a mile and a half or two miles and established the so-called east yard, at a heavy expense initially, and a continuing heavy expense to handle cars to and from that yard.

We certainly wouldn't have gone to that trouble and have the continuing burden we have if there was available ad- [fol. 1082] jacent to the present terminal.

Q. Mr. Quirk asked you, with respect to the yard at Pocatello—will you state why that yard was expanded, and what purpose it was intended to serve with respect to the making up and breaking up trains, and actual physical handling of traffic through there?

A. We made that expenditure and that installation because the facilities at Pocatello were not adequate for our purpose. We wanted to improve our service, and improve the handling of traffic east, west, north and south from Pocatello. That location is the center of a hub. We wanted to improve our service.

Q. Did you have in mind in constructing and revamping those facilities the more expeditious breaking up and making up of trains for through movement?

A. We had in mind more particularly the east-west movement, which constitutes a substantial part of the traffic handled through Pocatello.

Q. Did you have in mind, or did you make the expenditure at the Pocatello yard because of handling traffic north and south through Ogden?

A. No, we did not. The north and south traffic through Ogden is virtually non-existent; it is so small it just doesn't enter into the picture.

Q. The Ogden terminal has no retarder operation; it is [fol. 1083] not a retarder operated yard, is it?

A. No, it is not. It is a so-called flat switching yard.

Q. Would it be possible to convert the present flat switching yard at Ogden terminal in its present location into a modern retarder operated yard such as you have at Pocatello or North Platte?

A. No sir, it would not.

Mr. Collins: That is all.

Recross-examination.

By Mr. Quirk:

Q. Now, Mr. Lynch, I did forget to ask you this question: On northbound coal traffic originating on the Denver and Rio Grande, and going up to points up in this territory on the Union Pacific, don't you interchange with the Rio Grande at Salt Lake City?

A. At Salt Lake City and Provo.

Q. And Provo. And you interchange some southbound traffic at Salt Lake City, too, do you not?

A. Coal traffic, or are you talking about any traffic?

Q. Southbound traffic of any kind.

A. Yes, that is right.

Q. Isn't there any reason why it all cannot be changed at Salt Lake City?

A. I don't know if I follow you, Mr. Quirk.

Q. Is there any physical reason why the Union Pacific, and the Rio Grande, couldn't interchange all of the traffic [fol. 1084] moving between those two railroads to and from this territory up here at Salt Lake City?

Mr. Collins: I object to that, Mr. Examiner. The question here is whether the Ogden gateway should be opened, and not the Salt Lake gateway.

Mr. Quirk: Wait a minute——

Exam. Mullen: I think the witness may answer if he knows.

The Witness: I just haven't approached it on that basis. I thought all the time this was the Ogden gateway case.

By Mr. Quirk:

Q. You are taking your counsel's advice?

A. No, I beg your pardon, that is my own idea.

Q. Just answer my question.

A. I would say no.

Q. You say it couldn't be done?

A. No, I think the facilities for that interchange are just about as inadequate as anything I know of.

Q. You haven't studied the Salt Lake City situation as to the interchange, have you?

A. What makes you think that?

Q. I don't know; have you?

A. You made the statement.

Q. I am asking you now——

Mr. Collins: I object.

Exam. Mullen: I think the witness is getting along very well.

[fol. 1085] Mr. Collins: I object to this proceeding descending into any such wrangling as this, because the D&RG said nothing about interchanging at Salt Lake City when they put in their case. He springs a brand new question on Mr. Lynch to see if there isn't some way to find maybe we could deliver this traffic at some other place.

Exam. Mullen: I agree with you, Mr. Collins, it is a new subject.

Mr. Quirk: Mr. Lynch has already——

Exam. Mullen: I would like to have that question developed, if possible.

Mr. Quirk: Mr. Lynch has already said they do interchange at Salt Lake City. Now, I am finished with the witness.

Exam. Mullen: Have you anything, Mr. Collins?

Mr. Collins: I have finished with the witness for this hearing anyway.

Exam. Mullen: That is all. Thank you, Mr. Lynch.

(Witness excused.)

Mr. Quirk: In view of Mr. Collins' remark, Mr. Examiner, I would like to say this: He probably hasn't read the complaint for some time——

Exam. Mullen: I don't think those characterizations are necessary, Mr. Quirk.

Mr. Quirk: I agree with you. I would like to say the complaint seeks joint competitive rates via Odgen and Salt [fol. 1086] Lake, too, in connection with the traffic moving over the Rio Grande through Ogden, and it is not necessarily tied up to Ogden, as Ogden.

Mr. Collins: This is going into the record, is that right?

Exam. Mullen: On the record you may make any statement you please with respect to that, Mr. Collins.

Mr. Collins: I want to suggest, Mr. Examiner, if the D&RG intended to effect interchange at Salt Lake City, or at any particuar point other than Ogden, then they should have disclosed that in their main case. We were quite entitled to be led to the conclusion by Mr. Bradford's testimony that Ogden was the place for interchange, because he said they were spending two hundred thousand dollars to fix up their yard to expand the trackage at their Ogden yard, and this Salt Lake interchange is a brand new approach.

Mr. Quirk: The only purpose of my remarks was to make it clear this is not an interchange case; it is a rate case.

Exam. Mullen: So we understand.

Mr. Quirk: That is all.

Exam. Mullen: Do you have another witness?

Mr. Gault: Mr. Norton.

T. L. Norton was sworn and testified as follows:

Direct examination.

By Mr. Gault:

Q. Will you please state for the record your name and [fol. 1087] occupation?

A. My name is T. L. Norton. I am traffic manager of sales.

Q. Of what company?

A. Chicago and Northwestern Railroad Company.

Q. How long have you been employed by that company?

A. Twenty-nine years and some months.

Q. In the traffic department?

A. Yes.

Q. All in the traffic department?

A. All in the traffic department.

Q. You might state for the record in what capacity you have been employed in that work.

A. Well, in many clerical positions, and as local agent, city freight agent, and general perishable agent, and assistant traffic manager, and presently traffic manager.

Q. Does this area involved in this case come within your jurisdiction from a traffic point of view?

A. It does.

Q. In a supervisory way, is that the situation?

A. That is correct.

Q. Have you ever been in this particular field yourself locally?

A. No, I have never worked here locally.

Q. You have never worked here, but it is under your jurisdiction?

A. Yes.

Q. You have a prepared statement you desire to put of [fol. 1088] record, have you not?

A. I have.

Q. Will you proceed with your statement?

A. The establishment of through rates and routes via Ogden for traffic originating or terminating on the Union Pacific Railroad in the States of Idaho, Montana, Oregon and Washington undoubtedly would result in a serious loss of traffic and revenue to the C&NW system.

Q. Just a minute. What does the C&NW System consist of?

A. The Chicago and Northwestern Railway Company, the Chicago, St. Paul, Minneapolis and Omaha Railway Company.

Q. They are separate corporations, but the two properties are under the same control and so recognized by the Interstate Commerce Commission?

A. That is right.

Q. Control and management?

A. That is right.

Q. All right, proceed, if you will, please.

A. Total value of this business to the C&NW System is approximately $4,020,322. This estimate is based on 1948 traffic as determined from reports of C&NW system traffic representatives located at Salt Lake City, Utah, Portland, Oregon and Seattle and Spokane, Washington, and from reports of cars interchanged between the Union Pacific and North Western at Omaha, Nebraska, and Council Bluffs, Iowa.

[fol. 1089] Q. Just a minute, Mr. Norton. In connection with that figure, $4,020,322, that means a year, does it not, annually?

A. That is correct.

Q. All right, proceed, please.

A. Study and analysis of these reports indicated a potential loss of a large portion of the 23,799 loaded cars as shown in the exhibit originating in the territory involved in this proceeding, and a potential loss of a large portion of the 11,566 cars as shown in the exhibit to the territory involved.

On the basis of the traffic office reports and the interchange records at Council Bluffs, it was found that the 23,799 east-bound cars could be readily sub-divided into four principal groups: lumber, potatoes, other products of agriculture, and miscellaneous. The average revenue per car for each group was determined by using the actual revenues for a number of these cars.

C&NW settlement abstracts for cars terminating in C&NW territory and foreign line abstracts for cars moving overhead were used in this spot check of actual revenues from this traffic. The estimated revenue value to the C&NW System on this eastbound traffic thus determined is $2,632,402.

The revenue per car of $105.90 for lumber is an average of settlements received on actual cars selected at random from the abstracts. There was found a considerable difference in the revenue for these cars of lumber, varying up as high as $141.99. This sampling process used produced an aver-

[fol. 1090] age revenue per car which appears reasonable.

The average revenue per car of potatoes was found to be $106.44. Revenue per car varied up to a high of $124.20.

The revenue per car of the group "products of agriculture other than potatoes" average $110.00. This group included onions, celery, dried beans, lettuce, deciduous fruits, etc.

The average revenue per car in the miscellaneous group was comparatively high. Typical commodities in this group are machinery, canned goods, sugar, seeds, livestock, miscellaneous, iron and steel, etc.

The 11,566 westbound loaded cars terminating on the U. P. in the involved territory consists of a large variety of commodities, most of which would be classified under the general heading of Manufactures and Miscellaneous, and cannot be subdivided readily into a small number of principal groups such as was done with the eastbound traffic.

To obtain the average revenue per car for this westbound traffic, actual revenues for a number of cars were secured from the abstracts for cars terminating in the territory. The revenue value to the C&NW System on the westbound traffic moving to the involved territory thus determined is $1,387,920.

To arrive at the average revenue per car, we used automobiles which were a substantial part of the westbound traffic, paper products, beer, forwarder cars, canned meat, pipe fittings, candy, tractors, machinery, wire fencing, [fol. 1091] engines, cheese, etc. The average revenue per car of $120 for westbound traffic as thus determined appears reasonable.

Thus, the total estimated potential value of this traffic to the C&NW System could approximate $4,020,322.

Exhibit No. 19 shows this revenue value in some detail.

(Defendant's Exhibit No. 19, Witness Norton, marked for identification.)

It is believed that the $4,020,322 is a reasonable estimate of the C&NW System revenue which is jeopardized by establishing competitive through rates via the Ogden gateway. Loss of any substantial volume of this traffic manifestly would be a serious threat to our company's revenues and net earnings.

Q. It would be a serious blow, would it not?

A. It would indeed be a serious blow.

Q. By the way, Mr. Norton, what is the average haul of the Chicago North Western Railway in the year 1948?

A. It was 193.8 miles.

Q. That is a rather low average haul, isn't it?

A. It certainly is.

Mr. Gault: We offer in evidence Exhibit No. 19.

Exam. Mullen: Any objection?

Mr. Quirk: No.

Exam. Mullen: It will be received in evidence.

(Defendant's Exhibit No. 19, Witness Norton, received in evidence.)

[fol. 1092] Mr. Gault: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. Mr. Norton, am I correct in understanding that while the interchange figures, eastbound and westbound, which you have shown represent the traffic to and from what you call the territory involved, and it includes traffic to and from points on the Union Pacific and beyond the Union Pacific?

A. These are the Union Pacific—on the Union Pacific.

Q. Only?

A. On the Union Pacific. That is my understanding.

Q. Well, are they from and to points that are served exclusively by the Union Pacific? Some points are on the Union Pacific, which are competitive points with other railroads?

A. I wouldn't say they are exclusively on the Union Pacific; that I do not know.

Q. What railroads do you connect with at Omaha from whom you could get traffic coming from the west, besides the Union Pacific?

A. Well, we connect mainly and principally with the Union Pacific, and, of course, that is——

Q. Not going east, you don't?

A. I beg your pardon. I perhaps misunderstood your question.

Q. I misspoke myself. Go ahead.

A. You say connecting with Union Pacific at Omaha?

Q. That is right.

A. Our connection there, of course, the principal con-
[fol. 1093] nection is the Union Pacific, and that is, of course, why we are so concerned with that particular case. Now, we also connect with the CB&Q, the Rock Island, the Missouri Pacific, but the CB&Q and the Rock Island are competitive routes.

Q. But if these competitive rates should be established, and a shipper were so inclined, he could route the shipment Union Pacific through Ogden, and Burlington at Denver, and the North Western at Omaha, couldn't he?

A. He could, but he wouldn't likely do that.

Q. Well, but it could be done?

A. I admit it could be, but the portion that we would get out of that after it got on one of those competitive lines would be practically nil.

Q. He could also route it Union Pacific, Rio Grande, back to the Union Pacific at Denver?

A. That can probably be done, and set up as a route, but I again suspect what we would get from it would be just about nothing.

Q. You know what you would get from the Los Angeles line of the Union Pacific, to and from the Los Angeles line that moves via the Denver and Rio Grande through Provo or Salt Lake City?

A. Do I know how much?

Q. Yes.

A. No, I cannot answer that.

Q. You don't know whether the volume is substantial or
[fol. 1094] whether it isn't?

A. Well, I don't think it could be called substantial as compared to the total volume of traffic.

Q. Perhaps not, but don't you know there is—that traffic is routed that way?

A. Yes, that is correct.

Q. What other western connection—what connection do you have with western railroads that handle traffic to and from the west? That is, that would be competitive with the Union Pacific.

A. Well, of course, we have connections with the NP and the Great Northern, and, of course, connections with the Chicago, Milwaukee, St. Paul and Pacific as well. But

that is, of course, in the territory in the Pacific Northwest where there perhaps is not much competitive traffic involved.

Q. There is a lot of competition in the Pacific Northwest, though?

A. I don't just quite see what your question is.

Q. What I mean is, the mere establishment of competitive rates through Ogden wouldn't prevent your solicitors in cooperation with the solicitors of some of these western railroads like the Great Northern, Milwaukee, and the Northern Pacific, in particular the Great Northern and Northern Pacific, to and from competitive points of the Union Pacific, from routing it through the Twin Cities and [fol. 1095] you getting the haul from there to the East?

A. I suspect we are getting the share of the business that they can originate at a competitive point right now. I don't see how that is going to change the picture at all. If you go into a competitive point in this Northwest area, and the Union Pacific gets it, that is what we are talking about. That is where the potential loss comes from.

Q. What I mean is, all the loss that you claim wouldn't necessarily follow, because of the availability of these other routes, isn't that true?

A. Well, I don't see how I can agree with that.

Q. Well, if as you admit, some of this traffic eastbound and westbound to points served by the Union Pacific in the territory involved, which are competitive with other points with other railroads, you could possibly get that, you wouldn't lose it completely?

A. Well, I think, to be specific about it, you might take Yakima, Washington. Whatever we are getting there in connection with the Union Pacific competition, we will continue on that basis, and I don't see that we can do much better if this was opened up. I don't see how it is going to improve our situation, or lessen our serious loss if this particular proposal is approved.

Mr. Quirk: That is all I have.

Mr. Gault: That is all.

[fol. 1096] Exam. Mullen: You are excused.

(Witness excused.)

Mr. Gault: I call Mr. John A. Wood.

JOHN A. WOOD was sworn and testified as follows:

Direct examination.

By Mr. Gault:

Q. Will you please state your name and occupation for the record, Mr. Wood?

A. J. A. Wood, assistant controller, Chicago North Western Railroad Company.

Q. How long have you been employed by that company?

A. Approximately 26 years.

Q. In what department?

A. The entire 26 years has been spent in the accounting department.

Q. But you are a graduate engineer, are you not?

A. Yes sir, I am.

Q. You are familiar with the accounting and also the engineering as far as the railroad business is concerned, is that correct?

A. Yes sir.

Q. You have a prepared statement, have you not?

A. Yes sir.

Q. Will you proceed with that?

Mr. Quirk: Why can't we have a recess for a few minutes?

Exam. Mullen: We will recess for ten minutes.

[fol. 1097] (Short recess taken.)

Exam. Mullen: Come to order, please.

By Mr. Gault:

Q. Mr. Wood, you have an exhibit which I understand will be marked Exhibit 20.

Exam. Mullen: Exhibit 20, yes.

(Defendant's Exhibit No. 20, Witness Wood, marked for identification.)

By Mr. Gault:

Q. That consists of a single sheet?

A. Yes sir.

Q. That is a part of your testimony, is it not, and it will be explained in your statement?

A. That is right.

Q. And referred to possibly orally, is that right?

A. Yes sir.

Q. All right, proceed, if you will, please, with your statement.

A. This exhibit shows the estimated decrease in number of Chicago and North Western employees if all of the traffic here involved moved via the D. & R.G.W. Railroad Company and other carriers.

The establishment of competitive through rates via Ogden for traffic originating or terminating on the Union Pacific Railroad in the States of Idaho, Montana, Oregon and Washington which now moves via Union Pacific to Omaha and east thereof, would produce, according to Rio Grande Witness Earley, a traffic potential of 157,762 loaded cars an- [fol. 1098] nually subject to competitive solicitation.

Of this total, 101,476 loaded cars originate in the territory (eastbound) and 56,286 terminate in the territory (westbound). The loss of all of this traffic to the Union Pacific could result in an annual loss to the Chicago and North Western Railway Company of approximately 21,000 loaded cars eastbound out of Council Bluffs and approximately 10,290 loaded cars westbound into Council Bluffs. This loss to the North Western was determined from study and analysis of interchange reports, C. & N. W. traffic representatives' reports, and other company records.

In 1948, eastbound through trains from Council Bluffs averaged 53 loaded cars per train and westbound through trains into Council Bluffs averaged 41 loaded cars per train. Hence, 396 trains are operated each year to move the eastbound traffic now in jeopardy, and almost as many trains are operated to move the westbound traffic when due consideration is given to the necessary westbound empty car movement.

Therefore, the loss to the Union Pacific of the 157,762 loaded cars could result in the elimination of one train daily each way between Council Bluffs and Chicago.

Q. That is on the Chicago and North Western?

A. That is right.

Q. Go ahead.

A. The discontinuance of a train per day would result [fol. 1099] in an estimated decrease of 57 transportation

service employees, 11 maintenance of way employees, and 32 maintenance of equipment employees, a total of 100. Total annual wages for these employees amounts to $422,795.

Q. The detail for that is in Exhibit 20?

A. That is right.

Q. Now, Mr. Wood, what is the entire mileage of the Chicago and North Western System?

A. The entire operative road mileage of the Chicago and North Western System is 9,693 miles; divided Chicago and North Western Railway, 8,076; Chicago, St. Paul, Minneapolis and Omaha Railway, 1,617.

Q. And the two properties have been recognized by the Commission and are under common management and control?

A. Yes sir.

Q. Operated as one property, is that correct?

A. That is correct.

Q. Now, when was what is now the Chicago and North Western Railway started from Chicago?

A. In 1848.

Q. That was the Chicago and Galena Union?

A. That is correct.

Q. That line gradually was projected to the west and elsewhere, was it not?

A. Yes sir.

[fol. 1100] Q. When did that property enter Council Bluffs?

A. Early in 1867.

Q. Just after the Civil War?

A. Yes sir.

Q. That was the first line that came into Council Bluffs from the East?

A. It was the first line from the East.

Q. Now, does the Chicago and North Western Railway and also the Omaha Railway have considerable branch line mileage?

A. Yes sir, a substantial part of the mileage is classified as branch lines.

Q. And we have several applications now pending before the Commission in connection with the abandonment of branch lines, have we not?

A. Yes sir, we have quite a number of them.

Q. Now, any loss of traffic to this main line would be a severe blow to the whole property, would it not?

A. Very definitely.

Q. Now, in what states does the Chicago and North Western Railway System operate?

A. In Illinois, Wisconsin, Michigan, Iowa, Minnesota, Nebraska, South Dakota, North Dakota, and Wyoming.

Q. North Dakota is about 15 miles, is that correct?

A. It is a very short mileage.

Q. Now, have you some statistics showing the results [fol. 1101] of operation for 1949 which have just become available. Have you those?

A. I have made a condensation, a condensed income statement for 1949.

Q. Will you please make that of record?

A. The revenue in 1949—this is the Chicago and North Western Railway Company.

Q. That is right.

Mr. Quirk: Total revenue?

The Witness: I will have the total revenue.

Mr. Quirk: I am asking for information. You said "revenue."

The Witness: I am going to read in the total revenue, yes sir.

By Mr. Gault:

Q. All right, proceed.

A. The freight revenue was $132,936,697; all other revenue, $40,204,061; for a total revenue of $173,140,758.

Operating expenses, $156,929,211, or a net revenue from railway operating of $16,211,547; and the net rents together amounted to $13,428,928, so that our net railway operating income for the year 1949 was $2,782,619.

Other income amounted to $4,442,217, or a total income available for fixed charges of $7,224,836.

Fixed charges and contingent interest amounted to $6,091,152, so that the net income for the year was only $1,133,684.

Q. That is very slim for a large property, is it not?

A. Yes sir, very definitely.

[fol. 1102] Q. Is there anything further you care to add?

A. No, I believe that covers the situation.

Mr. Gault: Cross examine, please.

Cross-examination.

By Mr. Quirk:

Q. Mr. Wood, for your estimate, your testimony in connection with your estimates, revealed on Exhibit 20, are based entirely on the potential estimates made by Witness Earley in this proceeding?

A. They are based on Mr. Earley's estimate of potential traffic.

Q. They are also based upon the assumption that if the joint rates are established through Ogden, that the North Western will not receive any of the traffic that moves that way either from the Burlington at Denver, or from the Union Pacific at Denver?

A. To this amount only: If there is other traffic received, which is improbable, according to other testimony, it would still result in a decrease of a train per day.

Q. Well, if some of this traffic is moved via the Rio Grande to Ogden-Salt Lake, delivered to the Union Pacific or the Burlington at Denver, it could be given to you at Omaha, couldn't it, or Council Bluffs?

A. It might be given to us, but it would be quite improbable.

Q. It could be routed that way, couldn't it?

A. It could be, but that would be improbable.

Q. Don't you know you actually receive now the traffic from the Union Pacific at Omaha, which originates on the

[fol. 1103] Union Pacific in California, delivered to the Rio Grande at Salt Lake City, Provo, and then back to the Union Pacific at Denver?

A. I am not familiar with that traffic, Mr. Quirk. That is largely a traffic matter.

Q. Well, you expressed an opinion it would be smaller. You just don't know, then, do you?

A. This other traffic you are talking about had to do with California traffic, which is not involved in this, as I understand it. I am basing my opinion largely on the opinions of our traffic men, who are experts in this matter.

Q. I understand, but all I am trying to get from you is that you have two assumptions here; one is that if these joint rates are established, 156,000 carloads of freight, eastbound and westbound, now moving via the Union Pacific east of Granger, we will say, or Ogden, will be given to the Rio Grande at Ogden, and then you will never get them at all, none of them.

The first assumption is that they will move that way; the second assumption is none of them will come to you at Omaha.

A. Not necessarily. Because this is not dependent entirely on the amount of traffic. From the opinions of our traffic department, it is improbable we will get very much of that traffic, and it will be a decrease of a train per day in each direction.

Q. Even though it is not dependent, as you said, on the amount of traffic?

[fol. 1104] A. What wasn't dependent on the amount of traffic?

Q. You said the number of trains per day wouldn't entirely depend on the amount of traffic.

A. No, I think you misunderstood that.

Mr. Quirk: Let's have the reporter read it back.

(Answer read)

Mr. Quirk: All right. That settles it.

Mr. Gault: Is that all?

Mr. Quirk: Yes.

Mr. Gault: We offer in evidence Exhibit 20.

By Mr. Quirk:

Q. I should have asked this of another witness, but I suppose you know this, Mr. Wood: The North Western has soliciting agents in places like Seattle, Portland and Denver and throughout the Northwest and the West, do they not?

A. They are at a good many of the points in the west.

Q. They ware shown in the official railway guides?

A. That is correct.

Mr. Gault: All our competitors have solicitors, too, do they not?

The Witness: Undoubtedly.

Exam. Mullen: Exhibit 20 is received in evidence.

(Defendant's Exhibit No. 20, Witness Wood, received in evidence.)

(Witness excused.)

Mr. Gault: One thing, Mr. Examiner: I expected some [fol. 1105] of our timetable maps that I thought might be of some help to the Commission and the people here in connection with this testimony, and if they come before the adjournment, or the close of the hearing, I should like to offer them.

Exam. Mullen: I assume there is no objection to that?

Mr. Quirk: No, we can take judicial notice of those. I have no objection.

Exam. Mullen: All right.

Mr. Gault: If they get here before we go, I will offer them.

G. T. Wickstrom was sworn and testified as follows:

Mr. Collins: Mr. Examiner, may I have just a moment here? We seem to have an error to correct.

Exam. Mullen: Yes.

Direct examination.

By Mr. Collins:

Q. Mr. Wickstrom, you have prepared your testimony for presentation, have you not?

A. Yes sir.

Q. And you have also prepared a one-page exhibit?

A. Yes sir.

Mr. Collins: That would be numbered Exhibit 21.

Exam. Mullen: Exhibit 21.

(Defendant's Exhibit No. 21, Witness Wickstrom, marked for identification.)

By Mr. Collins:

Q. And the statements and information set forth in your [fol. 1106] testimony and exhibit are true and correct to the best of your knowledge and belief?

A. That is correct.

Q. Will you proceed with your statement?

A. My name is G. T. Wickstrom. I am General Purchasing Agent of the Union Pacific Railroad Company with offices at Omaha, Nebraska. I have been employed by the Union Pacific Railroad Company in various capacities for the past 35 years and in the Purchasing Department since 1932. I have been General Purchasing Agent since February, 1944.

As General Purchasing Agent, I have the responsibility of making purchases of materials and supplies used in the operation of the Railroad.

Exhibit 15 introduced in this hearing by Mr. A. D. Hanson, General Superintendent of Transportation of the Union Pacific Railroad Company, indicates that if the D&RGW secures the routing on the amount of traffic therein shown, which, as I understand it, is based on a forecast given by Mr. T. K. Earley, Assistant Freight Traffic Manager of the D&RGW, in this testimany heretofore given in this case, it will result in a reduction in the operation by the Union Pacific Railroad Company of:

Three trains per day eastbound and three trains per day westbound between Pocatello, Idaho, and Council Bluffs, Iowa, and one train per day eastbound and one train per [fol. 1107] day westbound between Pocatello, Idaho, and Kansas City, Kansas.

Based upon this reduction in business, it is estimated that our purchases will be reduced by $6,889,328 annually, as shown in Exhibit 21 attached to this statement. Exhibit referred to indicates the estimated reduction in purchases by major commodities and by States served by the Union Pacific Railroad Company.

The basis of my Exhibit 21 was total purchases for the year 1949, amounted to $90,032,432, which total was reduced by amount of purchases of materials and supplies relating directly to passenger train service, namely, all materials

and supplies for passenger cars and dining car and hotel supplies.

Total purchases were further reduced by eliminating purchases of diesel fuel and lubricants; also, diesel engine repair parts. This resulted in a total basic purchase of $55,779,282 for the year 1949 and this total was subdivided into the classifications shown on my exhibit. The formula used in calculating the reductions of purchases in each classification shown was as follows, with the exception of the item of coal and the figure used for coal was as prepared by Mr. I. N. Bayless, President of the Union Pacific Coal Company, and as shown on his statement and exhibit:

Total of freight train car miles operated by Union Pacific Railroad Company during the year 1949 was 1,663,571,249.

Using the basic purchase figures mentioned above, the [fol. 1108] cost per freight train car mile was calculated, from which the cost per train mile of 75 cars per train was calculated and this was applied to the number of trains lost per day, as indicated on page one of this statement.

The mileage used was: Pocatello to Council Bluffs—1061.1 miles, less 133.9 miles Ogden to Pocatello or net of 927.2 miles. Pocatello to Kansas City—1175.7 miles less 133.9 miles Ogden to Pocatello or net of 1041.8 miles.

The reduction in purchases calculated by this formula was further reduced by 14.44 per cent, which is the percentage of gross passenger revenue for the year 1949 to the total gross freight and passenger revenue for that year. This reduction of 14.44 per cent was made inasmuch as the ratio of maintenance of tracks, buildings and facilities, as related to passenger train service would continue.

By Mr. Collins:

Q. Mr. Wickstrom, I understand your estimated reduction in purchases has as its basis the forecast of traffic potential given by Mr. Earley?

A. That is right.

Q. If Mr. Earley's forecast should prove to be erroneous, then your forecast would also be as erroneous as Mr. Earley's forecast, would it not?

A. It would be a matter of degree, in direct ratio to what the loss might actually be.

Mr. Collins: That is all.

Mr. Quirk: No cross examination.

[fol. 1109] Exam. Mullen: That is all. Thank you, sir.

(Witness excused.)

Mr. Collins: I offer Exhibit No. 21.

Exam. Mullen: If there is no objection, it will be received in evidence.

(Defendant's Exhibit No. 21, Witness Wickstrom, received in evidence.)

W. T. Burns was sworn and tetsified as follows:

Direct examination.

Q. Mr. Burns, you have your testimony prepared in written form for presentation in this case, have you not?

A. Yes sir.

Q. You also have an exhibit?

A. Yes sir.

Q. Of four pages?

A. Yes sir.

Exam. Mullen: That will be numbered Exhibit No. 22.

(Defendant's Exhibit No. 22, Witness Burns, market for identification.)

By Mr. Collins:

Q. And the statements set forth in your statement and exhibit are true and correct to the best of your knowledge and belief?

A. Yes sir.

Q. Will you proceed with your statement?

[fol. 1110] A. My name is W. T. Burns. I am Vice President in Charge of Traffic for the Union Pacific Railroad Company, with headquarters in Omaha, Nebraska. I have been employed by the Union Pacific since 1922 in various departments, and in the Traffic Department continuously since March 16th, 1926. I have successively held positions of Traveling Freight Agent, Freight Traffic Agent, General Agent Freight Department, Assistant Freight Traffic

Manager, Traffic Manager, Freight Traffic Manager and General Freight Traffic Manager until April 1st, 1949, when I was elected to the position of Vice President.

Exam. Mullen: Just a minute. What is that, Mr. Quirk?

Mr. Quirk: That paragraph is just plain argument, Mr. Examiner.

Mr. Collins: I think this witness is entitled to state how the Union Pacific Railroad regarded this complaint.

Exam. Mullen: I think that is a rather broad statement, Mr. Collins. What we are after here is the fact. It occurs to me that Mr. Quirk is correct. It is straight argument, it seems to me.

Mr. Quirk: Not only that, but it is based on emotion rather than facts, feelings.

Exam. Mullen: What is the purpose of this witness' testimony, Mr. Collins?

Mr. Collins: What is the purpose of his testimony?

Exam. Mullen: Yes.

[fol. 1111] Mr. Collins: You mean all of it?

Exam. Mullen: This early part of it, dealing with publicity and so on.

Mr. Collins: It relates, Mr. Examiner, to the same proposition that I outlined to you in the Salt Lake City hearing. I undertook to discuss with Judge McCarthy, and showed him a yellow packet of information and the statements that were offered to the press, given to the press the day the complaint was filed.

I explained to you there, and I intend to press it here, that——

Exam. Mullen: I think I understand your position, Mr. Collins, but what are the facts you desire to have established by this witness' testimony with respect to publicity and so on, prior to the filing of this complaint?

Mr. Collins: In this order, Mr. Examiner, the Commission can't function in the compulsion of through routes and joint rates unless there is an actual bona fide public interest shown.

Mr. Quirk: Now, wait a minute.

Mr. Collins: Wait a minute. I want to finish my statement.

Exam. Mullen: Let Mr. Collins finish. I have asked for it.

Mr. Collins: Our position is there was no such actual bona fide public interest, and I think we will be able to prove that before we get through. The Rio Grande realizing that situation, set about in this program of publicity and [fol. 1112] urging the witnesses to come in and support them so as to try to show in this record public interest which didn't exist except as incited and generated by the Rio Grande Railroad.

Now, our means of showing it, providing it, part of our means of proving it, is to show how they spread all of this propaganda through the newspapers, and travelled around the country issuing statements and all of that in an effort to try to create that public interest without which the Commission can't function, or can't compel through routes and joint rates.

Now, all of that first part of Mr. Burns' testimony down through page 5 is for that purpose, and I submit to you I am entitled to prove it, and that that is an entirely valid means of proving it.

Exam. Mullen: It seems to me the Commission will have to be governed by the actual testimony of record as to whether or not there is a public interest, but I don't see that this type of testimony would be of any value to the Commission in determining that fact.

Mr. Quirk: Mr. Examiner——

Mr. Collins: May I respond to your question?

Exam. Mullen: You may, Mr. Collins.

Mr. Collins: Then Mr. Quirk can have the floor. We take this means of showing to the Commission that there was [fol. 1113] not a bona fide actual need or public interest, and that what the Commission will have in the record before it is an incited, agitated and stimulated thing called public interest, which has no reality to it.

It is not a natural and bona fide growth of public interest in the sense that the statute uses the term "public interest." And I submit to you that is a valid position for us to take, and the Commission ought to know of the activities of the Rio Grande Railroad applied to stimulate a public interest where it didn't exist, and should take that into consideration in appraising the credibility and the

character of the testimony which the Rio Grande has dragged in through the witnesses it has had to support it in this case.

Exam. Mullen: It seems to me, Mr. Collins, those facts should be established by questioning the witnesses who actually appear here. I don't think that can be established by this indirect means. Witnesses are called here by the Rio Grande or by yourself on the question of public interest. It seems to me that the matter which may have influence should be drawn out on this record by cross examination of those witnesses, and not by this indirect method.

I suppose the parties may stipulate there was an interest on both sides to interest the public in this complaint, and that is the only fact, it seems to me, the Commission should take into consideration.

[fol. 1114] Mr. Collins: Of course, Mr. Burns, if permitted to testify, will explain, and as Mr. Quirk said in the Salt Lake City hearing, did undertake to neutralize the efforts which the D&RG launched the day they filed this complain- in order to try to stimulate public interest, where we say none existed.

Now, Mr. Burns is quite willing and ready to explain his efforts, which was to try to educate the people to the Union Pacific's side of the case, and maybe they would realize the Rio Grande was wrong.

Exam. Mullen: Isn't the sole fact we are concerned with here the fact that there has been wide publicity given to this complaint by both sides?

Mr. Collins: Yes.

Exam. Mullen: I think we will agree to that.

Mr. Collins: You will have to be a little more meticulous in stating it, Mr. Examiner, if I agree to it.

Exam. Mullen: Just let me finish. Now, the effect of that publicity, it seems to me, as far as this record is concerned, would be demonstrated by testimony of the witnesses, direct testimony and cross examination. Now, these various quotations contained in this statement as to announcements in the newspapers, magazine articles, it seems to me, is immaterial.

Mr. Collins: You make no distinction, Mr. Examiner, in the statement you have made, between an actual bona fide

public interest and public need, and one which has been [fol. 1115] cooked up by incitation, agitation, and stimulation——

Mr. Quirk: I object.

Exam. Mullen: My distinction is whatever public interest there is must be demonstrated on this record by actual testimony of record, that is all, by witnesses both on direct and cross examination. If you think witnesses called here have an influence, you have a perfect right to cross examine those particular witnesses, but this kind of evidence, it seems to me, is irrelevant and immaterial and is not competent.

Mr. Collins: Is not what?

Exam. Mullen: Not competent testimony.

Mr. Collins: Included in the part, Mr. Examiner, you are referring to—do you have in mind all of it down to the bottom of page 5?

Mr. Quirk: I have gone that far.

Exam. Mullen: Yes.

Mr. Collins: There are quotations there from a transcript, quotations beginning on page 4, from a certified transcript of an appearance by two officers of the Rio Grande Railroad before the Montana Commission, pleading with the Commissioners there for them to come into the case, and setting forth and describing the very picture, I think, that I have indicated to you.

Now, I have that certified transcript here, and I can't follow the Examiner's reasoning in feeling that there can be [fol. 1116] no relevancy of testimony to show that up to the time of the complaint there had been no demands on the railroads, or at least we will show on the Union Pacific Railroad, and no actual development of a bona fide public need, as contrasted with one which was stimulated by agitation. You may prefer to call it "education," after the D&RG had made up its mind to file this complaint.

I think there is a distinction, and it is important I must get it before the Commission and in this record in some fashion.

Exam. Mullen: On the matter you referred to, you referred to two officers of the Rio Grande, one of whom is Mr. Bradford. I think Mr. Bradford was a witness.

Mr. Collins: Yes.

Exam. Mullen: In this case.

Mr. Collins: Yes.

Exam. Mullen: Do you want to recall him for cross examination?

Mr. Collins: No. I want this in in this way.

Mr. Quirk: Have you finished?

Mr. Collins: No, I am trying to respond to the Examiner, and then you and he can have it.

Exam. Mullen: My ruling is, this matter down to and including page 5 is incompetent. Therefore, I rule it out.

Mr. Collins: Now, Mr. Examiner——.

Mr. Quirk: Just a moment.

[fol. 1117] Exam. Mullen: Mr. Collins still has the floor, Mr Quirk.

Mr. Quirk: I thought he had finished.

Mr. Collins: The ruling is in your favor.

Mr. Quirk: I am not going to talk about the ruling.

Exam. Mullen: Let's proceed, gentlemen.

Mr. Collins: Now, Mr. Examiner, I wish to make an offer of proof for the record of that part of Mr. Burns' testimony, beginning with the second paragraph on the first page, and down through page 5, so that I can pursue the matter with the Commission, and have them pass on the matter, as to whether I am right or wrong about this, with all due respect to your ruling, sir.

Exam. Mullen: All right, that may be done. I think the best way to get that would be to offer this as an exhibit, without putting this physically in the transcript, pages 1 to 5, inclusive.

Mr. Collins: As an exhibit?

Exam. Mullen: As an exhibit.

Mr. Collins: All right, but I have to make the formal offer.

Exam. Mullen: That may be done.

Mr. Collins: Mr. Examiner, I make an offer of proof, in exhibit form, of that part of the statement of Mr. W. T. Burns, beginning at the second paragraph on page 1 of his statement, and extending down through page 5.

May we go off the record, Mr. Examiner?

[fol. 1118] Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

This matter referred to by Mr. Collins will be marked Exhibit No. 23, and is received as an offer of proof.

Mr. Collins: What did you say?

Exam. Mullen: It is received as an offer of proof; the first five pages of this statement will be marked as Exhibit No. 23.

(Defendant's Exhibt No. 23 Witness Burns, marked for identification.)

Mr. Quirk: Mr. Examiner, while you ruled this testimony out, and this is a mere proffer, I want the record to show we object on the ground it is incompetent, irrelevant and immaterial. In view of your ruling, I presume I ought to remain silent, but Mr. Collins has talked for some time about what has been done by the Union Pacific, and what has been done by the Complainant, and I think that in fairness it ought to be shown on this record that the Union Pacific had been very happy in attempting to persuade shippers that would otherwise have been on our side, and have succeeded in some instances, where we have had to subpoena them.

Mr. Collins: This has been let in evidence to show that.

Mr. Quirk: What is that?

Mr. Collins: This admits that.

[fol. 1119] Mr. Quirk: The point I am making here, I realize the Commission is not interested in this, but he made the statement, he left the impression with the public this is a one sided affair, and when anyone seeks relief under the Interstate Commerce Act, they haven't any right to get the public support if they need it. We concede the same right to them. However, they have in some instances, the case of Heidel, testified, the Pueblo man, we had to subpoena that man, and it showed he was clearly on our side.

Mr. Collins: That is argument.

Exam. Mullen: It seems to me it is argument on both sides.

Mr. Quirk: Of course it is. The only reason I am doing it, I think we are entitled to show what has happened. We had the Western Pine Association man coming here, and somehow or other they changed their mind.

Exam. Mullen: Let's proceed from that point.

Mr. Collins: Mr. Examiner, we will strike out the first sentence at the top of page 6.

By Mr. Collins:

Q. I will ask Mr. Burns this question: Mr. Burns, do you recall the date on which the complaint in this case was filed?

A. August 1, 1949.

Q. Will you proceed with your statement beginning after the sentence we have just stricken, and indicate the steps you took?

[fol. 1120] A. One of the first steps we took was to conduct an exhaustive review of correspondence files involving rates between the territories named in the complaint. This review was conducted in the offices of our regional Traffic Managers at Denver, Salt Lake City and Portland and in the general offices at Omaha.

It covered the period January 1, 1940 to July 31, 1949, or for nine years and seven months prior to the filing of complaint on August 1, 1949. This review disclosed that during that length of time, Union Pacific had received but two requests from shippers and/or receivers for rates or routing via the Ogden Gateway.

The first, in 1943, was a request from a shipper at Pittsburgh, Pa., who had a shipment of chinaware destined Portland, Oregon, in which he wanted to include a small portion destined Grand Junction, Colorado, for partial unloading enroute at that point. This shipper acknowledged that he could handle the traffic in the manner desired by routing via D&RGW-Ogden-Southern Pacific, but claimed the service via that route was too slow and for that reason wanted to route via Union Pacific from Ogden.

The second request was in 1944 and likewise involved stopping to partly unload at Grand Junction on a shipment of canned goods from Milton, Oregon, to Denver, Colorado. After explanation of our position in the matter, the requests were dropped.

[fol. 1121] In both instances, transit was desired, which, in effect, gives carload rates on less carload consignments. It is true Union Pacific offers transit privileges, just the same as other railroads, and our reason is the same, too. We do it to attract business to our line; not to force it away from us.

Union Pacific maintains 62 traffic agencies at various points throughout the country, in which a total of 241 representatives are actively engaged daily in contacting shippers and receivers on solicitation, service, rates and related matters. These representatives will average eight such contacts per day; five days per week; fifty weeks per year, so that is not unreasonable to assume a total of 425,000 personal contacts with shippers and receivers each year.

Inasmuch as Union Pacific is the originating or terminating road in the affected territory, and as such is primarily concerned in the publication of rates and routing to and from that territory, it is strikingly significant that through all the avenues of approach open to shippers and receivers and during a period of over nine years, the only requests we have received for rates and routing such as sought in this complaint are the two transit cases mentioned above.

Since the complaint was phrased in only general terms and specific issues would not be made known to us until the initial hearing, we felt it desirable in advance of that hearing to undertake to define the issues with which we might be [fol. 1122] confronted.

We felt a canvass of interested shippers and receivers would give a broad cross section viewpoint of what public interest, if any, there was in this complaint. Accordingly, our traffic representatives engaged in a survey through personal interviews, the results of which were reported to us at headquarters. These reports were tabulated with the following result:

Mr. Quirk: I object to it on the ground it is incompetent, irrelevant and immaterial.

Exam. Mullen: Who made this canvass, Mr. Burns?

The Witness: The representatives in the various agencies throughout the United States for the Union Pacific.

Exam. Mullen: How was it made?

The Witness: By personal contact.

Mr. Quirk: Mr. Examiner, this evidence is not only all that I have already characterized it, but it seems to be based upon the assumption of a plebiscite.

Mr. Collins: I call the Examiner's attention to the ruling you made when Mr. Hogue referred to hundreds of contacts and hundreds of shippers who had indicated a desire for

these routes and rates, and I objected unless he became more specific, and you overruled me.

Exam. Mullen: I want to get a few facts here first.

For what period was this canvass made?

[fol. 1123] The Witness: The canvass was made from the first of August until about the middle of December or a week prior to the opening of the case in Salt Lake City.

Exam. Mullen: Who directed the canvass to be made?

The Witness: The General Freight Traffic Manager.

Exam. Mullen: Is that under your supervision?

The Witness: Under my instructions, yes, sir.

Exam. Mullen: Is it your testimony the table is a summarization of the results of those canvasses?

The Witness: To the best of my knowledge, yes sir.

By Mr. Collins:

Q. Didn't you receive written reports from these agents of yours?

A. I stated that in the testimony here, Mr. Collins.

Mr. Collins: That is right, yes.

Exam. Mullen: It will be received, then, as this witness' testimony as a result of that. The objection is overruled. That may be copied in the record at this point.

(The table referred to is as follows:)

[fol. 1124]

Opposed to the complaint	812
Opposed to the complaint but neutral for policy reasons	28
Strictly neutral	194
Not interested	73
No comment	56
Opposed to all routing restrictions but neutral for policy reasons	7
In favor of the complaint because of possible future use for transit reasons	12
In favor of the complaint for general reasons	8
In favor of the complaint because opposed to all routing restrictions	3
In favor of the complaint for claim retaliation purposes	1
Total	1194

By Mr. Collins:

Q. Go ahead with the next paragraph.

A. In summarizing this survey, it was confined to actual shippers and receivers of traffic moving between the areas involved in the complaint. Where multiple contacts were made with different branches or officers of the same firm, it

was counted only once and based on the opinion of the responsible officer. It should be pointed out that the survey was seeking facts concerning the public interest in this complaint; that we were not looking for compliments. The interviews were made during the period from about August 6th to approximately December 1, 1949 and the program was [fol. 1125] discontinued before the initial hearing opened in Salt Lake City December 12, 1949.

At pages 69 and 70, Mr. Hogue related his experiences with "hundreds of shippers." I should like to point out that during the first ten years of the last twenty years, my service with the Union Pacific has been in Chicago and other eastern cities. For the last ten years, I have divided my time between the east and the west, covering practically the entire United States.

During the entire twenty years, I, too, have been calling on shippers and receivers and in that time have made thousands of such contacts. I have never had any requests made of me for publication of rates and routing such as the D&RGW seeks in this proceeding.

The "one firm of national prominence" to which Mr. Hogue referred at page 70 and many of the "hundreds of shippers" mentioned at page 69 have not made an appearance in this case. Mr. Farley made similar references; at pages 142 and 143 concerning a large dealer in hardware and building supplies headquartering in Salt Lake City; at page 114 concerning a sugar manufacturer with plants in Northern Utah and Idaho who also operates at West Jordon, Utah; at page 145 concerning a shipper of unfinished furniture at Pendleton, Oregon; and at page 146 concerning a shipper of canned goods located at Tremonton, Utah. None of these firms have made an appearance in this proceeding.

At pages 71 through 74, Mr. Hogue refers to pages 4 and 5 of his Exhibit No. 1, which contains a list of 56 carload [fol. 1126] shipments on which combination rates were applied by reason of routing via the D&RGW. His exhibit identified this traffic by car number, shipping date, commodity, origin and destination. He also mentioned at pages 73 and 74 two other cars, viz., CRI&P 64136 and RDG 24221, as additional shipments in the same category. I have had an exhibit prepared, which I offer now for identification as

Exhibit No. 22, which takes these same shipments, seriatum, and shows the identify of shipper and consignee.

A careful comparison of these names with those of witnesses or intervenors in behalf of complainant will show that none of those concerned with the traffic in question have advanced any testimony in support of the complaint. We know that at lease one of these shippers were solicited by the D&RGW to support them in this proceeding, but they declined to do so.

Mr. Quirk: I object to the Exhibit 22 and the statement made by the witness in connection with the exhibit; in fact, the first full paragraph on page 9 of this prepared statement is argument and I object to that. So far as this question of what shippers testified, or what shippers did not testify in the case, that is a matter which Mr. Collins can raise, just like lawyers usually do in their briefs.

It isn't necessary for this witness to take the witness stand to tell us at this stage of the proceeding who testified and who didn't.

[fol. 1127] Exam. Mullen: Can't those remarks be stricken from this statement? After all, the record shows who testified and who didn't testify.

Mr. Collins: Yes, but the record doesn't show the names of the shippers who shipped these cars that Mr. Hogue mentioned in the record.

Exam. Mullen: You are supplying that information now, as I understand it, through the exhibit.

Mr. Collins: Well, if the exhibit is all right, he certainly may discuss it sufficiently to state what it shows and what he has done to prepare it.

Exam. Mullen: Well, the first paragraph on sheet 9, to which Mr. Quirk objected, may remain in the record, and the objection is overruled.

My comment was, throughout the testimony, we might just as well eliminate these comments about who testified and who didn't testify. The record will show who testified.

Mr. Collins: Well, I know——

Exam. Mullen: The witness may proceed.

The Witness: At pages 61 and 62, Mr. Hogue explains Page 2 of his Exhibit No. 1 and comments concerning the changing character of traffic handled by the Rio Grande.

At Page 63 he said "Contributing to the decline in local traffic was the growing scarcity of Colorado non-ferrous ores, which closed Colorado smelters one by one." A simi-
[fol. 1128] lar comment is made by Mr. Earley at Pages 83 and 84.

It is correct that, based on ratio to total traffic, the traffic originated on the Rio Grande constitutes a smaller percentage of their total traffic now than it did previously. Such a relative result is inevitable because of their admitted success in developing their participation in overhead or "bridge" traffic.

Traffic originating on the D&RGW did not decline, but rather it has increased, as will be readily disclosed by reference to Page 2 of Exhibit No. 1; that is Mr. Hogue's exhibit. The column covering total tonnage originating on D&RGW shows that in 1924 this amounted to 8,059,581 tons, while in 1948 it amounted to 8,804,334 tons. This is an increase of 744,753 tons, or 9.24 per cent.

A similar situation is true with respect to traffic terminating on the Rio Grande. Combining the totals of the columns covering local traffic and interline received traffic discloses that in 1924 they terminated 5,822,748 tons and in 1948, 7,129,603 tons, an increase of 1,306,855 tons, or 22.44 per cent.

At pages 63 and 64, Mr. Hogue related certain statistics concerning decline in locally originated coal, coke and forest products traffic, but in this instance he compares results for 1946 with those of 1924. The year 1946 was selected, as he put it, because the absorption of the D&SL in 1947 "dis-
[fol. 1129] torted the 1948 figures for comparative purposes on these particular commodities.

Statement No. 49100, issued by the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission is the source of 1948 figures shown in the following comparison; all figures expressed in tons.

	1924	1946	1948
Coal	4,379,249	3,262,976	3,829,036
Coke	278,043	87,272	122,955
Forest Products	86,608	56,707	85,631

In each instance, it will be noted the 1948 figures exceed those which Mr. Hogue used for 1946 and on which is less

favorable comparisons were drawn. The exclusion of 1948 figures because of absorption of the D&SL reflects an incorrect result. The complaint as filed by the D&RGW includes the former line of the D&SL and any business originated on the former line of the D&SL contributes revenue to the treasury of the D&RGW.

Mr. Hogue states at Page 64 that:

"with the decline experienced in the originated commodities named, plus a heavy tonnage loss of untold volume to other forms of transportation in the states served by the Rio Grande"

they, the D&RGW

"are forced to turn our thoughts and efforts to main line through freight traffic. In no other way could we have survived and continued to render rail transportation service to [fol. 1130] those people of Colorado, Utah and New Mexico who are reached only by the Rio Grande."

The Rio Grande is not the only railroad faced with competition from other forms of transportation in their local territory. A similar situation exists along with the lines of any railroad in the country today, and the Union Pacific's so-called local territory in Idaho, Montana, Oregon and Washington is no exception.

In Idaho, for example, there were 64,151 trucks and 32,607 trailers registered in 1949. This included 42,800 farm trucks, and 3,701 commercial trucks. The trailers were divided 32,062 private and 545 commercial. In addition, there were 467 trucks and 384 trailers designated as common carriers.

As has been testified by other witnesses, Union Pacific has an extensive branch-line territory to serve in Idaho, Montana, Oregon and Washington. Much of that territory is reached only by the Union Pacific and the people who live there are likewise dependent upon the Union Pacific for rail transportation service just as those in Colorado, Utah and New Mexico reached only by the Rio Grande are stated to be dependent upon that railroad.

At pages 62 and 63, Mr. Hogue explains page 3 of his Exhibit No. 1 and shows an unequal interchange of traffic

as between the Union Pacific and D&RGW at their several [fol. 1131] junction points. At Page 109, Mr. Earley states:

"The preponderance of traffic delivered to the Union Pacific both at Colorado and Utah junctions (as contrasted with the traffic received from that line) supports the proposition that the Rio Grande is entitled to better treatment from the Union Pacific in the interchange of traffic."

Examination of page 3 of Exhibit No. 1 discloses the condition specifically complained of during 1948 prevailed throughout the other 24 years covered by the exhibit insofar as the Union Pacific is concerned. With respect to the other railroads included on Page 3 of Exhibit No. 1 a similar disparity is shown via eastern junctions for the entire 25 years insofar as the AT&SF is concerned; and for the other lines except as shown below:

CB&Q, 1942 through 1946, 5 years.
CRI&P, 1942 through 1946, 5 years.
MP, 1943 through 1945, 3 years.
C&S, 1931 and 1942 through 1945, 5 years.

Attention is directed to the fact that with the exception of the year 1931 with the C&S, it was only during the war years that deliveries of any of the D&RGW's connections at eastern junctions exceeded receipts from the D&RGW at the same junctions.

At western junctions, D&RGW's deliveries to Western Pacific there exceeded receipts from the Western Pacific in each of the 25 years, except 1940; while on the contrary, [fol. 1132] Southern Pacific's deliveries to D&RGW were in excess of receipts from that line for all years except 1924 through 1926 and 1943 through 1945, a total of 6 of the 25 years shown.

Based on these same figures, Union Pacific during 1924 received 14.09 per cent of the total traffic which D&RGW delivered to connections at eastern junctions, but only 13.37 per cent for 1948. Union Pacific deliveries to D&RGW in 1924 constituted 11.14 per cent of their total receipts at eastern junctions, while in 1948 this percentage had declined to 9.62 per cent.

At western junctions, Union Pacific receipts from D&RGW in 1924 amounted to 45.01 per cent of their total deliveries, but only 40.11 per cent in 1948. Union Pacific deliveries

to D&RGW at western junctions constituted 18.91 per cent of their total receipts in 1924 while in 1948 this figure had risen to 27.94 per cent.

It is an accepted fact in railroad circles that it is not always possible to balance interchanges between railroads, which is necessarily so because of the wide variation in traffic flow between any given territories. I do want to state for the record that of the 1,693,355 tons which the D&RGW delivered to the Union Pacific at Utah junctions during 1948, 1,266,786 tons consisted of coal traffic to destinations on which the rate was not otherwise applicable.

By that I mean the only through rate applicable was by [fol. 1133] way of the Union Pacific.

Likewise, in the 633,524 tons which the D&RGW delivered to the Union Pacific at Denver in 1948, there was included 121,977 tons of Union Pacific company material which originated at a competitive point on the D&RGW and on which Union Pacific specified D&RGW routing and paid the commercial freight charges properly applicable.

At page 66, Mr. Hogue refers to certain war-time service orders as indicative of the Rio Grande's capacity to handle traffic to and from the complaint territory via the Ogden Gateway. Specifically, he named I. C. C. Service Orders Nos. 94 and 98. These covered coal traffic destined points in Oregon and Washington and instructed that when originating on or moving via D&RGW, thence WP; or D&RGW, thence SP, traffic be rerouted via Union Pacific from Salt Lake City or Ogden.

Of the 16,434 cars diverted to the Union Pacific under these two Service Orders, practically all originated on D&RGW. Mr. Hogue also named Agent Kirk's Orders Nos. 117 and 242. These were identical orders, effective at different times, under which all carload freight originating east of the eastern boundaries of Montana, Wyoming and New Mexico and destined to Washington or Oregon points north of Roseburg, Oakridge or Bend, and were instructed rerouted via UP, CMStP&P, GN, NP or MStP&SSM for movement to destination or proper connection.

[fol. 1134] There were 2,066 cars diverted by D&RGW to Union Pacific under these two orders. Mr. Hogue also named Agent Kirk's Order No. 246, involving 586 cars. This order directed that any traffic originating at or recon-

signed at points Provo, Utah to Ogden, Utah; destined Washington or Oregon points north of Roseburg, Oakridge or Bend, and routed via SP or WP, be diverted to Union Pacific through Huntington, Oregon. This order was later amended to apply only on traffic routed via SP.

Mr. Kirk will testify in greater detail about these service orders, but I want to call attention to the fact that on the entire 19,086 cars involved, the traffic had originally been routed beyond the D&RGW via some railroad other than the Union Pacific. It was diverted to the Union Pacific because we could handle it and the lines via which originally routed could not.

The issuance of the service orders does not demonstrate capacity on the part of the D&RGW insofar as handling traffic to the complaint territory is concerned, but it does confirm that Union Pacific was prepared and equipped to perform in the emergency.

In the direct testimony of Mr. A. D. Hanson, General Superintendent Transportation for the Union Pacific, he testified that a loss by the Union Pacific of 157,762 carloads of revenue freight, such as referred to in Witness Earley's testimony, would represent a decrease of 15 per cent under the total of freight revenue ton miles handled by the Union Pacific in 1949.

[fol. 1135] During 1949, Union Pacific freight revenue ton miles amounted to 25,918,651,000, so the 15 per cent decrease equals a loss of 3,897,797,650 revenue ton miles. Our average revenue per ton mile during 1949 was 1.283 cents, and multiplying the loss of revenue ton miles by the average revenue per ton mile discloses a potential revenue loss to the Union Pacific of $40,008,743.85 per year, based on 1949 averages.

It may be countered by the D&RGW that they have not claimed they will be successful in securing for their line all of the 157,762 cars claimed as their traffic potential. Complainant's witness Earley, however, mentioned several times during his testimony, and re-emphasized the point at page 173, that the traffic potential cited represents to a considerable degree less traffic than he believed would actually be available for their solicitation.

In these circumstances, it is only the exercise of sound managerial judgment to accept complainant's statements at

face value and to set forth, based upon the D&RGW's own statements, the maximum loss with which the Union Pacific is confronted. By these standards, Union Pacific's freight revenue is in jeopardy to the extent of over $40,000,000 each and every year.

By Mr. Collins:

Q. Now, Mr. Burns, to the extent that Mr. Earley's realization of his estimated traffic potential failed, or that his estimate is in error, then your estimated loss would be in error in somewhat the same degree, would it not?

[fol. 1136] A. To the same extent, Mr. Collins.

Mr. Collins: That is all.

Exam. Mullen: We will recess until two o'clock.

(Whereupon, at 12:25 o'clock p. m., the hearing was recessed, to reconvene at 2:00 o'clock p. m., the same day.)

[fol. 1137] Afternoon Session, 2:00 P. M.

Exam. Mullen: We are ready to proceed.

Mr. Gault: Mr. Examiner.

Exam. Mullen: Mr. Gault.

Mr. Gault: If the Examiner please, the map I referred to this morning has been received. I have one here for the reporter and one for the Examiner, and it is self-explanatory and I should like to offer it in evidence.

Exam. Mullen: It will be received in evidence as exhibit No. 24.

(The document referred to, marked Exhibit No. 24, was received in evidence.)

Mr. Gault: Thank you.

W. B. Burns resumed the stand and testified further as follows:

Exam. Mullen: I think Mr. Burns is ready for cross-examination.

Cross-examination.

By Mr. Quirk:

Q. Mr. Burns, you recognize, I take it, a distinction between actual traffic handled and potential traffic?

A. Yes, sir.

Q. What is your conception of the distinction?

A. Actual traffic would be traffic that you handled, potential would be what is there available for you to handle.

[fol. 1138] Q. There is a large potential traffic in the territory which you serve in the Northwest, is there not?

A. Potential traffic?

Q. Large potential traffic?

A. For whom?

Q. Well, for any railroad that can induce the shipper to use that railroad?

A. That is right.

Q. Now, the Union Pacific is competitive with what railroads in Oregon?

A. We have the Pacific Northwest and the Great Northern, the Northern Pacific, and the Milwaukee, the Soo Line, SI.

Q. And in Washington?

A. Well, that would take all of them, both Oregon and Washington.

Q. The same. Yes, and do you have any competition in Idaho?

A. Yes, sir.

Q. With what railroads, and in what part of Idaho?

A. That was the first question you asked me: did we have any competition in Idaho, and the answer to that is yes.

Q. What railroads, I said.

A. No railroads, but we have truck competition in Idaho.

Q. I see. You don't have any rail competition?

A. That is right.

Q. Now, what part of the potential traffic moves from

this part of the country, Idaho—well, leave out Idaho. By [fol. 1139] rail, from Washington and Oregon, to the East, would you say the Union Pacific gets what amount?

A. I couldn't answer that question, because I don't know the figures as far as the other railroads are concerned.

Q. You do know, Mr. Burns, you don't get all of it, do you, where it is competitive?

A. That is right.

Q. And you don't have even a rough idea as to what share of the competitive potential traffic the Union Pacific gets?

A. No, sir.

Q. Do you try to get as much of it as you can?

A. Yes, sir.

Q. Now, let's skip this part of the country for a moment, and go down into your Los Angeles Line. You have good competition down in California, don't you?

A. Yes, sir.

Q. With the Southern Pacific?

A. Yes, sir.

Q. And the Santa Fe?

A. Yes, sir.

Q. And the Union Pacific maintains a competitive line of rates eastbound and westbound through Provo and Salt Lake City with the Rio Grande to and from those points?

A. Yes, sir.

Q. Well now, does the Rio Grande get more of that traffic than the Union Pacific does, the potential down there—po-[fol. 1140] tential to your line, we'll say, for the first?

A. Potential to our line?

Q. Yes.

A. I couldn't answer that question. That isn't involved in this proceeding, is it?

Q. Yes, it is involved in this way, Mr. Burns: we are talking for the moment about what potential means, and how much a carrier might expect to get of it.

A. Are we talking about potential insofar as it pertains to Idaho and the Pacific Northwest, isn't that right?

Q. I asked the question.

A. I answered it.

Q. But you said you didn't think it was relevant. That is for the Examiner to decide. There is no objection. I ask

that you tell me, if you know, what part of the traffic is potential to the Union Pacific on the so-called Los Angeles Line, to and from which points the rates apply via the Rio Grande the Union Pacific gets.

Mr. Collins: I object to it, Mr. Examiner. I don't think it is relevant.

Exam. Mullen: The witness may answer if he knows.

The Witness: I did answer it, and I said I didn't know.

By Mr. Quirk:

Q. Oh, well, I didn't hear that. Sorry.

Now, you testified, Mr. Burns, and I have known you a long time myself. You are a man of large experience in [fol. 1141] transportation matters, especially in what is designated as traffic matters, are you not?

A. Yes, sir.

Q. I think maybe you are too modest to answer that.

A. The answer is yes.

Q. Don't you know, Mr. Burns, that the estimates made by Mr. Earley merely pointed out as best he could ascertain them, and you know more about that than he does no doubt, your company, that might be available and susceptible for routing via the Ogden and the Rio Grande Line if the shippers east and west could be induced to use that line—you know that?

Mr. Collins: Mr. Examiner, I think all this time is wasted because I asked Mr. Burns on direct if the full potential that Mr. Earley had set up were not realized, realized, whether the damage to the Union Pacific would not be as much less than the realization of the potential, and he said that is right.

Mr. Quirk: And you took over my function. That isn't the point.

Exam. Mullen. This questioning is proper in my opinion.

Mr. Quirk: Now, there is another question all messed up.

Exam. Mullen: Read it please.

By Mr. Quirk:

Q. You know what Mr. Earley did was merely to state potential possibility, don't you?

A. No, sir, I take it it was a statement of fact.

Q. In other words, you take that to mean that if these [fol. 1142] joint rates are established the Rio Grande will be able to cause the shipping public to use it in connection with 157,000 carloads that he mentioned?

A. That is what Mr. Earley said.

Q. He didn't say anything of the kind. You answer my question instead of talking about what Mr. Earley said.

Mr. Collins: Mr. Examiner, may I——

Exam. Mullen: No. The question is all right.

Go ahead, Mr. Burns.

The Witness: What is the question?

Exam. Mullen: Go ahead, Mr. Quirk.

Mr. Quirk: The witness wants the question read back.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

By Mr. Quirk:

Q. Does the Union Pacific have a competent group of traffic agents whose business it is to induce the movement of traffic over your line?

A. Yes, sir.

Q. How many do you have in this Northwestern territory? Roughly.

A. Well, I couldn't answer that. I don't have the figures available or broken down. I can give you the total. I did give that in my testimony this morning.

Q. Well, if the Rio Grande should be successful in getting all of this traffic, what would you do with the Granger Route? [fol. 1143] A. I think Mr. Lynch answered that, and Mr. Hanson, as to what would happen to that route.

Q. Do you think that your soliciting staff, or your traffic representatives, are as competent as the soliciting staff and traffic representatives of the Rio Grande?

A. Yes, sir.

Q. Do you believe as a practical business man, and experienced in this work, that there is any likelihood that the Rio Grande can induce the movement of the potential, the 157,000 cars, via the Rio Grande route?

A. The statement was made that was the potential, and it was a conservative figure, and I accept that as a statement of facts.

Q. That isn't the answer to my question.

A. That is the only answer I know to it.

Mr. Quirk: I submit, Mr. Examiner, I am entitled to an answer.

Exam. Mullen: I think so. The answer is not responsive to the question. Do you recall the question, Mr. Burns?

The Witness: No, have him read the question.

Exam. Mullen: We will have the question read.

(Question read.)

The Witness: Yes, sir.

By Mr. Quirk:

Q. Why would they be able to persuade shippers to do that? The route must be in the public interest then, isn't [fol. 1144] it? You said awhile ago it wasn't. Can you answer that?

A. I can answer it in this way: Any additional route would get business.

Q. Well, a moment ago you said this route would get all the business. We will let it go at that. You think this route would get all the business and I have the right to draw my own inferences from that.

Now, in the event that this should happen, the thing that you say will probably happen, would you cancel the joint rate that now exists through Granger?

Mr. Collins: Mr. Examiner, there is no use to speculate about what will be done in the future. That question is irrelevant.

Exam. Mullen: I think it is irrelevant. The objection is sustained.

By Mr. Quirk:

Q. Now, on page 8 of your prepared statement, you have put down the result of your census. I take it when you send agents around to call upon potential shippers or actual shippers, they try to interest that shipper in the virtues of the services of the Union Pacific, don't they?

A. Yes, sir.

Q. They don't go around soliciting for the Rio Grande?

A. No, sir.

Q. Therefore, when this census was taken by your various agents, I imagine they would attempt to persuade the [fol. 1145] shipper to be opposed to this complaint by extolling the virtues of the Union Pacific, which has many. That is natural, isn't it?

A. I presume so.

Q. Do you know—you have this all done up here—do you know in fact how many of these shippers that you have listed as being opposed to the complaint were opposed to it because of your persuasiveness, or the persuasiveness of your agents?

A. We have records of these interviews in Omaha that would answer that question.

Q. You didn't bring them here?

A. No, sir.

Mr. Collins: I doubt, Mr. Burns, that they would answer his question as to whether they actually tried to——

Exam. Mullen: Just a moment, Mr. Collins. That is not necessary.

Mr. Quirk: Mr. Collins just can't resist the temptation to comment.

Mr. Collins: I don't like the thing to be distorted.

By Mr. Quirk:

Q. Don't you think it is rather strange you wouldn't know that when you have the total result here, that you wouldn't have those figures here?

A. The figures on the interviews?

Q. Yes. These that were opposed to the complaint, you probably persuaded them to be opposed to, didn't you, if you could?

[fol. 1146] A. No, sir. I think that the question was put up on the basis of the facts in the case, and the answers were given on that basis.

Q. You mean your agents went around like nice little fellows and put the question up in strict neutrality. You don't want the Commission to believe that, do you?

A. I didn't use the words "strict neutrality," did I?

Q. I did. Do you think they went around there with any kind of neutrality?

A. Yes, I suppose they did.

Q. Well, if you are losing business, maybe that is the reason you are losing it.

A. We are not losing any business in Idaho except to trucks.

Q. I didn't confine this to Idaho. This statement on page 8 of your narrative isn't confined to Idaho, is it?

A. It is confined to the complaint, the territory under the complaint.

Q. That includes, Washington, Oregon, Idaho, and some other states?

A. Yes, sir.

Q. You have solicitors in the east, don't you?

A. Yes, sir.

Q. Don't you actively solicit westbound business as well as eastbound business between the eastern points and this territory?

A. Yes, sir.

[fol. 1147] Q. You actively solicit that, don't you?

A. Yes, sir.

Q. Just in the course of these neutral solicitors that you had, can you say—you have some good records on this—how many shippers that when first confronted with this matter were actually supporting or going to support the Rio Grande and you succeeded one way or another of persuading them not to?

A. No, sir.

Q. I think we ought to have the files on that, as long as Mr. Collins seems to think it is so important in this case.

Exam. Mullen: I don't see any necessity for that.

Mr. Quirk: Well, you allow this to go in, Mr. Examiner, and it is not very informative the way it is.

By Mr. Quirk:

Q. Well now, don't you know you have persuaded certain shippers that were committed to the Rio Grande and somehow or other you got them over on the other side?

A. No, sir.

Q. You don't?

A. No, sir.

Q. What happened to Mr. Heidel?

A. Mr. Heidel testified as I remember.

Q. Yes, he testified to facts which showed it was to the interest of his company to have this route, but we had to subpoena him after he told he would come voluntarily.

A. I know nothing about that, Mr. Quirk.

[fol. 1148] Q. Maybe your agent in Philadelphia does. Didn't you get a report from him on that?

A. I have no report from him.

Q. Don't you think when your agents were out, and they succeeded in persuading somebody that was already committed to the Rio Grande in this case, to get on the other side, that is something an agent naturally would brag about to his boss?

A. Not necessarily. And if they did persuade him, and they got the story from him, they knew what was the right side of this complaint.

Mr. Collins: Mr. Examiner, I object to any further inquiry into this so-called campaign, because you ruled out evidence about the campaign.

Mr. Quirk: Well, you brought it back in with this statement.

Mr. Collins: No, I didn't.

Exam. Mullen: How much more examination do you have on this point, Mr. Quirk?

Mr. Quirk: I don't have very much.

Exam. Mullen: Let Mr. Quirk continue, and we will see what will happen.

Mr. Quirk: I do think, Mr. Examiner, it is a bit unusual for any party in the case just to list a lot of unnamed people, so many for and so many on the other side, without knowing just how this vote was taken.

Mr. Collins: That is exactly, Mr. Examiner, what I [fol. 1149] thought when I challenged Mr. Hogue at Salt Lake City and you told me he would be permitted to make a statement of his experience and survey without mentioning names.

Exam. Mullen: That is correct. There is no use getting into an argument on that, Mr. Quirk.

Mr. Quirk: Mr. Examiner, it isn't entirely correct. Mr.

Hogue didn't have anything like this. He didn't have a number of names for and against. He told them his every day experience and his personal experience.

Exam. Mullen: As I recall the testimony, that is correct.

Mr. Quirk: This witness doesn't even know.

Exam. Mullen: He has listed the numbers of persons who were interviewed by his representatives, and I allowed it in for that purpose only.

Mr. Quirk: And there are names.

Exam. Mullen: Named where?

Mr. Quirk: They are not named here in this.

Exam. Mullen: I thought you said they were named.

Mr. Quirk: No, I said they were not named.

Exam. Mullen: We will take that into consideration when we are considering what weight to give to this testimony.

By Mr. Quirk:

Q. Have you given any thought to the fact, Mr. Burns, that if the joint rates here sought should be established that you would still have the opportunity to induce the shipper who wanted to use the Rio Grande for any reason, going [fol. 1150] East, to route it back to your line at Denver?

A. Yes, sir.

Q. And you know that that could be done, don't you?

A. No, sir.

Q. You are doing it. You know traffic is moving from the Los Angeles line that way, don't you, through the Rio Grande?

A. To some extent; yes, sir.

Q. Well, do you know to what extent?

A. No, sir.

Q. Well, the rate and the routes are there, and they are used, aren't they?

A. That is right.

Q. You mean you really don't know whether it is a large or small extent?

A. No, sir.

Q. Now, in this effort to get support in dealing with these various shippers——

Mr. Collins: Mr. Examiner, I object again. Because that was settled by your ruling awhile ago, any question about getting support.

Exam. Mullen: I have not heard the question yet.

Mr. Quirk: Strike that.

By Mr. Quirk:

Q. In this census that you have here, you have a comparatively few that you say were in favor of the complaint. Now, isn't it a fact that there are many shippers depending [fol. 1151] on who you might call on that would be uninformed about such a matter, and they therefore would be naturally neutral, isn't that true?

A. If they are uninformed about it, how could they take a position?

Q. Well, you caused them to take a position, didn't you, in many instances?

A. No, sir, after putting up the story they take their own position.

Q. Now, let me put it this way to you: Isn't it a fact that generally speaking the shippers, at least the shippers who are large enough to have traffic managers, naturally favor as many routes as they can possibly get?

Mr. Collins: Many groups?

By Mr. Quirk:

Q. Routes, and competitive rates.

A. Well, I wouldn't say that was a fact. I don't know.

Q. Well, you have noticed these cases that arise don't you, when bills are introduced in Congress. Don't the shippers from the state bodies generally support lifting the restrictions if any, on the power of the Commission to deal with this matter?

A. I wouldn't know that any one shipper would use, because of available routes and rates, every one of those routes.

Q. Apparently this census represents the views or the votes of 1194 shippers, were they?

[fol. 1152] A. I think it says shippers and receivers, doesn't it?

Q. Shippers and receivers. I embraced them both in the term shippers. How long did you work on that?

Exam. Mullen: The date is given here.

The Witness: I think it was given in there.

By Mr. Quirk:

Q. Well, was it three months?

A. It says from August 6, to approximately December 1, 1949.

Q. And you also testified that your soliciting staff made 425,000 personal contacts with shippers and receivers each year?

A. That is right.

Q. And therefore that would be at the rate of about 35,000 contacts per month?

A. Approximately, yes.

Q. Notwithstanding that great activity, you saw fit for some reason to call on 1194?

A. That is a cross section, yes, sir.

Q. You mean one of these Gallup things, sampling?

A. It might be.

Mr. Quirk: That is all I have.

Mr. Collins: Are you finished?

Mr. Quirk: Yes.

Redirect examination.

By Mr. Collins:

Q. Mr. Burns, do you know whether representatives of other railroads, traffic solicitors of other railroads, do solicit [fol. 1153] traffic in Idaho?

A. Yes, sir.

Q. I mean other than the Union Pacific?

A. Yes, sir.

Q. Do you have in mind now any solicitors of particular roads?

A. Well, it would be the Northwestern, the Illinois Central, the Wabash, the CGW, the Burlington, the Rock Island, the Missouri Pacific, and the Santa Fe, for example.

Q. Yes, all right.

That is all.

Mr. Quirk: One more question.

Recross Examination.

By Mr. Quirk:

Q. Do you know whether the Rio Grande solicitors solicit any freight in Idaho?

A. No, sir, I don't. I am not acquainted with any of them in Idaho.

Q. Now, getting back to this matter of what the shippers might ask you to do, you realize, I suppose, that the average informed shipper with a traffic organization knows that the joint rates do not apply via the Ogden Gateway, and that the request for you to establish such a rate would be utterly futile. May that not account for the fact that you had very few requests for the joint rates via that route?

A. You mean that the shipper with a traffic department wouldn't ask us to establish a joint rate in connection with the D&RGW in Idaho via Ogden because it would be futile?

[fol. 1154] Q. Yes.

A. No, sir.

Q. Isn't it the traditional position of the Union Pacific to refuse to do that?

A. He has avenues of how to approach that question, if he wanted to.

Q. But the informed shipper is pretty well informed. He knows what your position is.

A. He still has an opportunity to approach that question through proper avenues.

Q. That is true, but when an informed shipper knows what the answer will be, he is not likely to ask for it, is he?

A. He has other means of getting the answer to that, if he wants it.

Q. You mean a complaint to the Commission?

A. Yes, sir.

Q. That is the means we have adopted here. You don't seem to like it.

A. You said shippers; you didn't say railroads.

Q. The railroads have rights to, we discovered that. Now, there is one more question. You have indicated from time

to time that the Union Pacific pays taxes up in Idaho and Washington and the Rio Grande does not, and that we are not here seeking to build an extension of the Rio Grande [fol. 1455] Railroad into Idaho. What would be your position if we did file an application to extend our line into Idaho? Would you support it?

Mr. Collins: Do you know the answer to that?

The Witness: I am afraid I am not in position to answer that question.

By Mr. Quirk:

Q. You certainly wouldn't support it, would you?

A. I said I was not in a position to answer the question.

Mr. Quirk: All right. That is all.

Mr. Collins: That is all.

(Witness excused.)

A. J. STILLING was sworn and testified as follows:

Exam. Mullen: A little quiet, please. We are ready to proceed. Mr. Collins.

Direct examination.

By Mr. Collins:

Q. Mr. Stilling, you have prepared your testimony in writing, and that includes your qualifications and so forth for presentation in this case?

A. I have.

Q. And you have also prepared an exhibit of some 15 pages?

A. I have.

Mr. Collins: May we have the number on that?

Exam. Mullen. The exhibit number will be 25.

(The document referred to was marked Exhibit No. 25, Witness Stilling, for identification.)

[fol. 1156] By Mr. Collins:

Q. And are the statements in your testimony and the data in your exhibits true and correct to the best of your knowledge and belief?

A. They are.

Q. Will you proceed with your statement?

A. My name is A. J. Stilling and I live in Omaha, Nebraska. I am Assistant Freight Traffic Manager of the Union Pacific Railroad Company and my business address is 1416 Dodge Street.

My experience in freight traffic work consists of 33 years continuous employment in the headquarters office of the Freight Traffic Department of the Union Pacific Railroad Company at Omaha. I have held clerical positions in the tariff, rate and service bureaus and for several years served as Chief Rate Clerk. For a period of six years I was Chief Clerk and Rate Assistant to the traffic officer in charge of transcontinental rates.

In July, 1941, I was appointed to the position of Assistant to the Freight Traffic Manager and in 1943 to my present position of Assistant Freight Traffic Manager. In July, 1941, I was placed in direct charge of our Interstate Commerce Bureau and since then it has been my duty to make necessary traffic department preparations for formal and informal proceedings before the Interstate Commerce Commission and state regulatory bodies.

Although approximately two hundred rail lines are named [fol. 1157] defendants in this case, complainant's evidence shows that the complaint is directed principally against the Union Pacific Railroad Company.

History of Union Pacific Railroad

The map on page 3 of Exhibit 25, shows, in red, the rail lines that comprise the present Union Pacific Railroad. The following brief remarks relating to the history of the Union Pacific were taken from official records on file at Omaha, Nebraska. This includes annual reports to the stockholders and the final valuation report in 44 (Val.) ICC 1.

The original Union Pacific consisted of the line from Council Bluffs, Iowa, through Granger, Wyoming, to Ogden, Utah.

At this point, I would like to call attention to Mr. Stanger's comment appearing on page 349 of the transcript, in which he stated that if the through rates applied via Ogden and the Rio Grande, and if the Union Pacific failed to furnish him cars, then as retaliation he could take the freight away from the Union Pacific and ship it over the Rio Grande. From what I have already shown, it is clear that Mr. Stranger's threat to penalize the Union Pacific and route the car via the Rio Grande would mean an additional day's delay in the arrival of his car at Chicago or other distinations.

Service.

[fol. 921] An effort has been made by the Rio Grande to show that if the Ogden Gateway is opened, service better than presently being provided will be afforded shippers located on the Union Pacific in Idaho and surrounding territory. We appreciate that the people located in the areas of Idaho, Montana and Oregon which are served exclusively by the Union Pacific Railroad are entirely dependent upon us for all rail service and equipment and for this reason it has always been and is now the policy of the Union Pacific to treat this territory, as well as all other so-called non-competitive territory, the same as competitive territory in the way of service, equipment, facilities, and so forth.

In fact, our records show such territories served exclusively by the Union Pacific Railroad have been and are receiving more service in many respects than is afforded in some competitive territories. The fact we have provided freight train schedules to and from Idaho and Pacific Northwest territory that are competitive with schedules to and from California substantiates this and disproves the accusation that the Union Pacific Railroad is neglecting or discriminating against the shippers of Idaho on the assumption that if it doesn't move their freight today it will move over its line tomorrow.

To further refute such accusations, refer to page 2 of Exhibit 15 which is statement of gross tons handled in freight trains, various branches, for the year 1949. The [fol. 922] territory in Idaho from Pocatello north to Idaho Falls, including branch line territories out of Idaho Falls,

and from Pocatello west to Huntington, Oregon, including branch line territories, cover the area in which practically all of the perishable traffic in Idaho is produced. In this area there are 29 branch lines involving 1317 miles and main line territory involving 375 miles. A great portion of the perishable traffic is shipped from branch line stations. It will be noted from Page 2 of Exhibit 15 that branch line freight trains on the Idaho Division during the year 1949 averaged but 662 tons per train, as compared with 1087 tons per train on Nebraska Division branches, 1054 tons per train on Kansas Division branches, 817 tons per train on Oregon Division branches and 902 tons per train on all branch lines on the Union Pacific Railroad. Freight train miles operated on Idaho Division branches during the year 1949 amounted to 28.2 percent of total branch line freight train miles operated on the entire Union Pacific Railroad, but gross ton miles, Idaho Division Branches, amounted to only 20.7 percent of the total gross ton miles on all branch lines.

Shippers of perishable traffic, as well as grain, stock, and other commodities, to and from the branch line territory in Idaho are afforded a tremendous amount of freight train service. Some glaring examples will be noted in the average tons per train handled on some of the branch lines. [fol. 923] For example:

Hill City Branch, 283 tons.
Mackay Branch, 311 tons.
East Belt Branch, 417 tons.
West Belt Branch, 487 tons.
Teton Valley Branch, 263 tons.

Taking the East Belt Branch, for example, and which serves a territory between Idaho Falls and Ashton, a total of 435 trains were operated eastbound and westbound during the year 1949, handling an average of only 417 tons per train, which means each train handled an average of approximately nine cars.

Daily except Sunday service is provided on most of the branches serving Idaho and in most instances the entire year. This is another indication of the manner in which we have taken care of non-competitive territory and this has

been done for the reason we appreciate there is no other railroad service in this territory. However, the service afforded on many of these branch lines is not warranted on the basis of tonnage handled, nor is such comparable service provided on many of our branch lines in Nebraska and Kansas in competitive territory.

The gathering of traffic in originating territory, coupled with the distribution of empty equipment for the loading of such traffic, and particularly on branch lines, is expensive. [fol. 924] This will be covered more in detail by another witness. However, if the Ogden Gateway is opened the Union Pacific must still assume the gathering expense and if we are to get only the short road haul from Pocatello to Ogden as against our present haul from Pocatello to Missouri River connections at Council Bluffs and Kansas City, or to connections at Denver for the Southwest territory, curtailment in service must necessarily follow to offset the loss in revenue. Daily service now being provided in many instances is not justified, excepting for the long haul presently enjoyed from concentration points, and service would have to be reduced to tri-weekly or twice a week on a number of the branch lines if the long haul is lost.

All of the loss in revenue could not, of course, be offset in the States of Idaho, Oregon, Washington and Montana, with result that shippers and receivers of freight would be affected in other territories.

For example: During the stock shipping season in Montana, Idaho and Eastern Oregon, we operate a number of stock schedules into Pocatello and from that point we have in the past operated four stock schedules daily into Ogden and Salt Lake City. These schedules have been arranged each year after meeting with representatives of stock growers and wool growers associations and are set up to provide them with the best possible service into Ogden and [fol. 925] Salt Lake City for connection with our fast live stock special train to Los Angeles and which operates from Ogden to Los Angeles on a 29-hour schedule. This puts stock loaded in Western Idaho, for example, on Monday morning into Los Angeles Wednesday afternoon and with but one feed enroute. Stock moving into Ogden for feed and then east from that point, and stock moving east from Pocatello, connects with a fast stock schedule from Ogden

to Denver and to North Platte, Nebraska, enabling the livestock to move from Ogden and Pocatello to North Platte for feed, and in many cases connecting with another schedule at North Platte that has put the stock through to Chicago for the next feed, or with only one feed from Ogden to Chicago.

A reduced stock movement east from Pocatello or east from Ogden via Union Pacific Railroad, in the event the Ogden Gateway is opened, would necessarily result in adjustment of schedules and four stock schedules daily from Pocatello to Ogden and Salt Lake City would not be justified for the short haul that we would receive. Such adjustments would necessitate a return to former arrangements of feeding stock at Laramie, Wyoming and Valley, Nebraska, on shipments moving from Ogden and Pocatello to Chicago.

We are presently operating two freight trains each way between Laramie, Wyoming and Denver, Colorado, affording good service to and from Denver in connection with our main line freight trains. Notwithstanding the fact our fast livestock special from Ogden and Salt Lake City to Los [fol. 926] Angeles from Colorado and Nebraska points one full day earlier than by any other route, there is a lot of this stock originating in Nebraska territory off of the Union Pacific Railroad that moves into Denver and thence via Rio Grande to Salt Lake City because of an earlier departure from Denver of their evening stock train. The Union Pacific Railroad could meet this earlier departure but instead have kept our 10:00 p. m. departure from Denver for the reason there is considerable traffic from Denver to points such as Pocatello, Boise, Idaho Falls, Idaho, Butte, Montana, and so forth, that we get switched out and moved from Denver on this 10:00 p. m. train, affording second morning delivery in Idaho. Otherwise, the traffic would arrive destinations one day later, and in the event the Ogden Gateway is opened and such traffic would move from Denver via Rio Grande it would reach Idaho destinations one day later than at present.

This is another example of the Union Pacific Railroad taking care of the traffic destined to Idaho points, rather than delay it another day by advancing our 10:00 p. m. train out of Denver with view to taking away from the Rio Grande some of the stock business which they are presently handling. However, the service which we are now providing

between Denver, Colorado and Laramie, Wyoming for connection with our main line freight trains could not be justified in the event of a reduction in tonnage as result of Rio Grande routing.

Similar service is provided between Denver and North [fol. 927] Platte, Nebraska, connecting with main line trains at latter point and this would also be affected.

Loss of its long haul on traffic from Idaho and the Pacific Northwest with resultant tonnage loss would have serious effect on the Union Pacific Railroad all the way to Council Bluffs and Kansas City and fewer freight trains would be available to shippers and receivers of freight in Wyoming, Nebraska and Kansas. This would be particularly noticeable in connection with movement of stock, grain, coal and perishable products from and to the communities in those States.

Loss in our earnings will certainly result in less service than is presently being afforded to the shippers in Idaho and the surrounding territory. Mr. Hogue, Vice-president of the Rio Grande, in his testimony on page 64 of the transcript commenting regarding reduction in traffic in the territory served exclusively by the Rio Grande, states:

"We were forced to turn our thoughts and efforts to main line through freight traffic. In no other way could we have survived and continued to render rail transportation service to those people of Colorado, Utah and New Mexico who are reached only by the Rio Grande."

If the Rio Grande has been able to continue rail transportation service to communities served exclusively by it only because of the increased through freight traffic they have enjoyed, then it naturally follows that taking away through [fol. 928] freight traffic that the Union Pacific is now handling a distance of 1038 miles from McCammon to Council Bluffs and 1159 miles from McCammon to Kansas City, and giving it a haul of only 111 miles from McCammon to Ogden, will result in less rail transportation service to the people of Idaho, Oregon, Montana and Washington and in other areas served by the Union Pacific Railroad.

Our eastbound perishable schedules from the Pacific Northwest, Idaho and Utah, as well as those from Southern, Central and Northern California, are consistently main-

tained as will be indicated by the fact perishable traffic has been delivered to our connections at Council Bluffs as follows:

March	1949	95.7	percent on time
April	1949	96.9	percent on time
May	1949	99.7	percent on time
June	1949	99.93	percent on time
July	1949	99.0	percent on time
August	1949	99.5	percent on time
September	1949	95.5	percent on time
October	1949	97.3	percent on time
November	1949	100.0	percent on time
December	1949	99.05	percent on time

Delivery of perishable traffic through the Kansas City Gateway has been comparable and our westbound manifest schedules to Ogden, Salt Lake City, Southern California, [fol. 929] Idaho and the Pacific Northwest have been consistently maintained during this period.

Freight Car Miles Per Day

On page 210 of the transcript Mr. Bradford refers to Rio Grande Exhibit No. 7 covering serviceable freight car miles per freight car day. I am unable to reconcile the figures appearing on this Exhibit with the figures submitted by the Rio Grande on Interstate Commerce Commission statistical Form OS-F and appearing as Item 14-01 on these forms, which cover the month and the period and the period for which submitted.

Page 3 of Exhibit 15 shows car miles per serviceable freight car taken from Forms OS-F submitted by the Union Pacific Railroad and the Rio Grande to the Bureau of Transport Economics and Statistics, Interstate Commerce Commission. The exhibit shows the average car miles per serviceable freight car day for the year 1948, as well as by months and by periods for the year 1949.

On page 211 of the transcript Mr. Bradford states, in part:

"The Denver and Rio Grande serviceable freight car miles per freight car day exceeds the average of all other railroads in the Western District."

and further states:

"These figures indicate the effiiciency in the movement of the business."

It will be noted from page 3 of Exhibit 15 average car [fol. 930] miles per serviceable freight car day on the Union Pacific during the year 1948 were 93 percent greater than on the Rio Grande and notwithstanding the comparatively low mileage made on the Union Pacific during the storm period, January and February, 1949 the average car miles per serviceable freight car day on the Union Pacific during the year 1949 were 84 percent greater than on the Rio Grande. In other words, applying Mr. Bradford's efficiency test, the Union Pacific during the years 1948 and 1949 was 93 percent and 84 percent more efficient than the Rio Grande in the movement of the business.

Refrigerator Car Supply and Perishable Loadings

While Mr. Plummer, Vice-president of Pacific Fruit Express Company, has testified as to the functions of the Pacific Fruit Express Company, its car ownership, facilities, and so forth, inasmuch as the movement of equipment, both loaded and empty, on the lines of the Union Pacific Railroad is a responsibility of the General Superintendent Transportation, I consider it extremely important that these features be covered in considerable detail, particularly in view of the fact that a few of the perishable shippers in Idaho appearing in support of the Rio Grande's petition for the opening of the Ogden Gateway referred to car shortages and testified to the effect that if the Ogden Gateway is opened such action would be of benefit to them in obtaining equipment.

Interstate Commerce Commission Service Order No. 95, [fol. 931] effective November 9, 1942, covers the appointment of an Agent of the Interstate Commerce Commission vested with authority to control the movement of Refrigerator cars and authority to supervise, coordinate and direct the distribution of all refrigerator cars according to the needs of the various loading areas, and with due regard to economy in their use and mileage. The agent was authorized, as and when necessary, to direct the distribution of all refrigerator cars, regardless of ownership, in a common

pool, taking the control out of the hands of the owners. This control of refrigerator cars continued under the jurisdiction of the Interstate Commerce Commission until June 30, 1949.

Mr. Plummer has testified to the effect that for 12 years prior to 1942 there was no shortage of any consequence of refrigerator cars on the Union Pacific Railroad. During the war years there were, of course, periods of shortages of refrigerator cars on the Union Pacific Railroad. During the war years there were, of course, periods of shortages of refrigerator cars in Idaho, as well as in other territories served by the Union Pacific Railroad, and there were shortages in other territories and on other railroads throughout the entire United States, over which neither the refrigerator car lines, whether railroad controlled or non-railroad controlled, nor the railroads had any control.

While the authority of the Agent of the Interstate Commerce Commission, more commonly known as the Refrig- [fol. 932] erator Car Pool Manager, did not expire until June 30, 1949, conditions throughout the country were such he exercised little authority over the handling of refrigerator cars during the year 1948 and up to the expiration of his authority on June 30, 1949, leaving the matter pretty much up to refrigerator car owners.

Pages 4, 5 and 6 of Exhibit 15 show the record of refrigerator car placements, reported shortages, and number of cars of perishables billed in Idaho territory during so-called periods of car shortages subsequent to November 22, 1947 and up to present date.

For the past several years it has been our plan when conditions indicate there are prospects or possibilities of refrigerator car shortages in the Idaho territory to notify shippers several days in advance, requesting them to place orders for their requirements two days in advance of the date they desire to load. For example, on Monday they would place orders for the number of cars they desired for loading on Wednesday, and on Tuesday place orders for the number of cars they desired for loading on Thursday, and so forth. This is done to enable the Pacific Express Company and the Union Pacific Railroad to better figure in advance the proper distribution of the available equipment as between the several districts and as between sta-

tions and shippers in those districts. This plan of handling has resulted in a tendency on the part of at least some [fol. 933] of the shippers to immediately inflate their orders for cars, anticipating that the greater number of cars ordered the better possibility of obtaining the number of cars they actually require.

It will be noted from pages 4, 5 and 6 of Exhibit 15 that there were reported shortages on three days during the month of February, 1948, although on two of these three days there were fewer cars billed than placed, and on one day a greater number of cars billed than the combined total of placements and reported shortages. On February 9 and 10, 1948, a total of 440 refrigerator cars were placed with no shortages reported and a total of only 336 cars of perishables billed on those two days, or a total of 104 more refrigerator cars placed than billed. Notwithstanding this situation, on February 11, 1948, we placed 147 additional refrigerator cars, reported shortages of 31, but only 135 cars billed.

During March, 1948, there were reported shortages on twelve days, although on seven of these days the number of cars billed was less than the number of cars placed.

Exam. Mullen: May I interrupt there, Mr. Hanson. How were these shortages reported?

The Witness: By the agents at the respective stations.

Exam. Mullen: The railroad agent?

The Witness: Yes, sir.

Exam. Mullen: From what records do they report shortages? Do they have a record of the number of cars asked for?

[fol. 934] The Witness: They have a record of the number of cars asked for, the number of cars placed, and the cars short.

Exam. Mullen: Then your records show the number of cars short?

The Witness: Through our office. Through the PFE Office. Yes, sir.

By Mr. Collins:

Q. They also have a record of the number of cars billed and the number of empties, not loaded or not billed?

A. That is correct.

During the months of September and October, 1948, shortages were reported on two days each month, but the record of placements and of cars billed speaks for itself.

A thorough analysis of pages 4, 5 and 6 of Exhibit 15 will show there were few, if any, days on which a shortage actually existed and that the reported shortages shown are due, at least to a considerable degree, to shippers inflating their car orders.

The period of January 13, 1949, to February 26, 1949, inclusive, covers the January and February storm period. There was not a shortage of refrigerator cars on the Union Pacific Railroad during this period, but we were unable to get all of the cars into Idaho that were needed due to storm conditions that prevailed the greater part of these two months, and also to the snow blockade that existed during a portion of the month of February.

Although there were shortages reported on the 39 working [fol. 935] days of this period, the fact is that on 21 of these 39 days a less number of cars of perishables was billed than was actually placed. On some days the difference was considerable and while we fully appreciate a shortage of equipment in Idaho actually existed during part of that time, the record clearly shows that the shipper's orders were inflated and the shortages were not as serious as would appear.

Pages 4, 5 and 6 of Exhibit 15 shows that the Pacific Fruit Express Company and the Union Pacific Railroad during the period November 22, 1947, to present date, exclusive of the January and February, 1949, storm period, have taken care of the shippers of Idaho with refrigerator cars in almost a 100 percent manner. This covers a period of almost two and one-half years, since the time of virtual relinquishment of control by the Refrigerator Car Pool Manager.

As heretofore stated, storm and snow conditions during January and February, 1949, prevented our getting sufficient refrigerator cars into Idaho to take care of all orders. We had hundreds of cars available between Cheyenne, Wyoming, and Council Bluffs-Kansas City which could not be moved through to Idaho. However, during this period the Union Pacific Railroad backhauled out of Southern California a total of approximately 1100 empty refrigerator cars

through Salt Lake City and into Pocatello for distribution among Idaho shippers. This involved a movement of empty [fol. 936] cars some 900 miles from Southern California to Pocatello at a cost of approximately $100,000. If the Union Pacific took the position of not furnishing shippers of Idaho refrigerator cars when needed on the theory that if the traffic didn't move today it would move over the Union Pacific Railroad tomorrow, as suggested by Mr. Stanger on page 347 of the transcript, we certainly would not have incurred an additional expense of $100,000 in backhauling empty refrigerator cars from Southern California into Idaho. This action alone disproves Mr. Stanger's accusation.

During the February, 1949, snow blockade on the Union Pacific Railroad it would not have been possible for the Rio Grande to handle any empty refrigerator cars from Denver to Ogden for movement into Idaho, unless it had handled empty refrigerator cars instead of loads, because the Rio Grande was unable to handle all of the westbound loaded traffic we had to offer them at Denver. In fact, more than double the number of loads were rerouted south from Denver via the Colorado and Southern and Santa Fe Railroads than were rerouted via the Rio Grande west from Denver.

The number of empty refrigerator cars backhauled by the Union Pacific Railroad from Southern California into Idaho during the storm period exceeded the number of rerouted loads that the Rio Grande could handle for the Union Pacific Railroad for movement west from Denver.

[fol. 937] Mr. Bradford, in his testimony on page 209 of the transcript, stated that the capacity of the Rio Grande's motive power, and power which it could obtain from its connections was reached in the peak of the storm. This in itself shows that the Rio Grande could not have been of any assistance in the movement of empty refrigerator cars during the February 1949, shortage in Idaho.

Furthermore, I have telegrams in my files from the Rio Grande during January and February, 1949, urging the need for refrigerator cars on that railroad and showing that shortages on placements on the Rio Grande existed at times during this period.

In this connection, and to indicate the variety of conditions that affect refrigerator car supply, some severe storm

conditions and unprecedented cold weather prevailed during January of 1950 in the Northern part of the United States, extending from Minnesota to the Pacific Northwest. A meeting of refrigerator car lines advisory committee was held in New York City on January 31, 1950, attended by representatives of twelve refrigerator car lines and railroads, as well as representatives of the Interstate Commerce Commission, Association of American Railroads, and U. S. Department of Agriculture. The following excerpts of the minutes of that meeting are pertinent:

"Severe weather conditions and heavy seed potato orders [fol. 938] have caused large shortages to be reported in the Red River Valley of Minnesota and North Dakota. Below zero temperatures have been experienced almost every day since the first of the year making it impossible to load potatoes most of the time. It has also prevented railroads from conditioning and moving cars into territory currently."

Mr. Quirk: May I interrupt, Mr. Examiner. It seems to me these quotations could be copies without being read. We are little ahead of him anyway on those.

Exam. Mullen: Is that agreeable?

Mr. Collins: Yes, sir.

Exam. Mullen: That may be done.

Mr. Collins: Excuse me, Mr. Hanson. What you suggested applied through to the middle of page 25?

Mr. Quirk: It isn't necessary to read those quotations; they can be copied in the record.

Mr. Collins: All right.

The Witness: "Mr. Mattson, in reporting for the Northern Pacific Railroad, said they have had considerable difficulty since the first of the year in keeping Red River Valley and Yakima supplied with cars. The main difficulty has been the severe cold weather seriously interfering with their operations rather than the shortage of cars. If and when weather moderates in the Northwest, he thought the car supply and general overall picture would show a marked improvement."

[fol. 939] "Market conditions have not been conducive to the prompt release of cars and reports indicate a considerable number of perishables are diverted and reconsigned in

order to hold cars under load as long as possible without causing too much demurrage and storage expense. All of these conditions in addition to the severe operating conditions in the West have caused the tight car situation now being experienced in all the heavy producing areas. Car Lines have been giving assistance whenever possible to other than their contract lines. All car lines present promised their full cooperation to the fullest extent of their ability in an effort to see that relief is afforded in areas where shortages are threatened."

The coal strike situation in January and February 1950 also affected refrigerator car supply in some territories on some railroads. "The Packer," a weekly paper published for produce dealers and shippers at Kansas City, Missouri, issue of February 18, 1950, contained an article entitled:

"Car Shortage Threat in Coal Crisis."

The article, datelined at Kansas City, February 17, stated in part as follows:

"A check on conditions in various shipping districts by members of the Packer's field staff indicates that the situation for the most part has not yet reached the state of resulting in serious refrigerator car shortages, except in [fol. 940] areas served by certain northern railroads, notably the Pacific Northwest and the Red River Valley, and there is some question as to the actual causes of the car shortages, except in areas served by certain northern railroads, notably the Pacific Northwest and the Red River Valley, and there is some question as to the actual causes of the car shortages in those districts, which have been short of cars for some weeks."

The article also included news item datelined Grand Forks, North Dakota, February 17, reading in part as follows:

"The car situation in the Red River Valley remains acute although there has been some slight relief during the past week. * * * During January when temperatures were low, loadings ran about 20 cars a day."

The article also included news item dated at Los Angeles, February 17, reading in part as follows:

"* * * Refrigerator car lines were having no difficulty in supplying shipper requirements, even in the face of a rather sharp increase in lettuce movement over the past several days."

The article also included a news item datelined Seattle, Washington, February 17, reading in part as follows:

"Northwest apple shippers say that failure of the railroads to place cars for loading at shippers' orders over recent weeks has caused losses of sales of 2,000 or more cars of Washington applies on the best markets of the entire season."

[fol. 941] "Complaints come particularly from Wenatchee and the up-river districts. This entire area is served exclusively by the Great Northern Railroad and its associated refrigerated car service."

"Also there have been reported equally bitter and pronounced complaints of lack of refrigerator cars along the Northern Pacific Railroad which with its associated refrigerator car service serves Yakima and neighboring apple shipping points in the Yakima Valley area."

"On the other hand it is not claimed that the Union Pacific Railroad has had any reefer car shortage as it serves the apple deal. It comes across northeast Oregon from Boise in southern Idaho and has terminus at Yakima."

"Also there has been no shortage at any recent time of refrigerator cars in the big potato deal of eastern and southern Idaho, or the big onion deal of southwestern Idaho and eastern Oregon. There is fast service and no shortage in Utah. It is reliably reported, and the fact is evident from the service and from the looks of hold yards and sidings that this carrier and also the Southern Pacific, which two are jointly served by the Pacific Fruit Express, have protected each deal they were responsible for with a smooth

flow and even quite a reserve of reefer cars in good condi-
[fol. 942] tion and at the usual points on a stand-by basis."

These reports show there can be refrigerator car shortages in any area and on any railroad as a result of adverse operating conditions due to emergencies of one kind or another, over which the railroads have no control. Such conditions, in my opinion, do not justify shippers served by the railroad temporarily affected, simply as a measure of retaliation, supporting a petition of a railroad far removed from the originating territory to participate in the haul of the traffic as a bridge line.

At no time subsequent to February 26, 1949 has there been a refrigerator car shortage in the territory served by the Union Pacific Railroad, and the above comment appearing in "The Packer" with respect to the situation on the Union Pacific Railroad is an indication of how the Union Pacific Railroad normally takes care of its shippers and how it performs when the Pacific Fruit Express Company and the Union Pacific Railroad have control of its equipment and when serious emergencies, such as the blizzard of 1949, are not involved.

Mr. L. E. Stephens in his testimony on page 337 of the transcript, referred to car shortage, principally for potatoes, and stated that two or three years ago the car supply was such that he received less than one car per day for a period of 60 days. The fact is that at only one time in all the past years did any car shortage period on the Union
[fol. 943] Pacific last 60 days. Check of records shows a refrigerator car shortage prevailed in the Idaho territory from November 14, 1945 to February 5, 1946. This is a period of 84 days and excluding Sundays and holidays, a period of 69 working days. A check of our records also shows Mr. Stephens was furnished and loaded a total of 157 refrigerator cars on these 697 working days, or an average of 2.27 cars per day. The number of cars furnished ranged as follows:

None on 10 days
1 car on 19 days
2 cars on 11 days
3 cars on 13 days
4 cars on 9 days

5 cars on 4 days
6 cars on 2 days
9 cars on 1 day

The period of lowest placement was the 15-working day period December 13 to 1, 1945, inclusive, during which time Mr. Stephens was furnished a total of 14 cars.

During the 11-working day period November 1 to 13, 1945, inclusive, immediately preceding the period of shortage in question, Mr. Stephens loaded a total of 26 cars, or a daily average of 2.36 cars.

During the 9-working day period February 6 to 15, 1945, inclusive, immediately following the period of shortage, Mr. [fol. 944] Stephens loaded a total of 22 cars, or a daily average of 2.44 cars.

It will be observed from this record Mr. Stephens loaded only an average of one, or two tenths of one car per day more during the period when no shortage existed immediately preceding and following the period in question than he loaded during the period of shortage.

In this connection, records also show during this period of shortage, 28 of the 157 cars furnished Mr. Stephens were on hand two days each before billed; that is, cars were placed, for example, on Monday morning but were not billed until Tuesday evening. Three of the cars furnished during this period of shortage were on hand three days each before billed by Mr. Stephens.

Check of records during another period of shortage, November 14, 1946 to December 31, 1946, or a total of 39 working days, shows Mr. Stephens was furnished 97 refrigerator cars, or an average of two and one-half cars daily.

Records show during the storm period when shortage existed in Idaho from January 13 to February 26, 1949, a total of 39 working days, Mr. Stephens was furnished and loaded 63 refrigerator cars or an average of 1.62 cars daily.

Mr. Jack Adams stated on page 671 of the transcript:

"The opening of the Ogden Gateway would eliminate considerable discrimination, especially in times of car short- [fol. 945] ages, from the fact it would be used as a competitive weapon."

While Mr. Adams has not cited any specific case of discrimination, it is a fact that during a period of refrigerator car shortage in Idaho the latter part of September, 1947, some charges of discrimination as between Idaho and Colorado were made and Idaho-Oregon Shippers Association also handled with Interstate Commerce Commission relative to refrigerator car supply in Idaho. Investigation at that time developed that during the 1947 season up to September 20, Colorado has loaded 5138 cars of potatoes as against Idaho's loading of 5931 cars. In other words, during the 1947 period up to September 20, Idaho loaded approximately 1900 cars less than the previous year, although only light spotted shortages existed during this period. The reason for this decrease was due to the fact that the potato crop north of Pocatello was set back by early frost which in turn brought on a later movement, where as the Colorado crop started as usual and gained headway before shortage took place. These figures refer only to potato loading. In this connection, Refrigerator Car Pool Manager, Mr. C. W. Taylor, under date of October 2, 1947, telegraphed Idaho-Oregon Shippers' Association as follows:

"Your wire reference movement perishable from Idaho.

"For period August 18 to September 27, 1947, total refrigerator car loadings from Idaho amounted to 9690 cars compared with 8514 cars same period 1946 and 8896 cars [fol. 946] same period 1945. Last week apple shipments were 226 cars compared with 176 same week last year. Onions 267 compared with 163 cars last year. Potatoes 979 cars compared with 937 cars last year. Lettuce 18 cars compared with 125 last year. Total 1536 cars compared with 1433 last year, or 7 percent increase.

"Increase in fruit and vegetable shipments for the nation last week was 1.9 percent.

"Other sections of the U. S. also having difficulty moving heavy volume of fruits and vegetables and with limited car ownership necessary for fast movement of both loads and empties which the carriers are providing as evidenced by high loading past three weeks.

"Your territory has received and will continue to receive equitable proportion of available cars."

In this connection, during a period of refrigerator car

shortage, allocation of the available equipment is made by Pacific Fruit Express and Union Pacific Railroad personnel between the loading districts, the stations in those districts, and the shippers at the station, based on past loadings, ability to load, together with any subsequent changed condition and conditions that might prevail at the time, resulting in a most equitable distribution. While conditions sometimes prevail so that the apportionment cannot be made to the exact percentage or cars every day, but such instances were corrected by adjustments from day to day and week to week. [fol. 947] Our records show that Messrs. Stephens, Adams, Stanger and all other shippers shared proportionately and equitably in the available supply of cars during periods of shortages and without any discrimination whatsoever.

On page 208 of the transcript Mr. Bradford in referring to the Rio Grande contract with the American Refrigerator Transit Company has stated:

"We have at our command a total of approximately 11,500 refrigerator cars."

"We supplied to our Western connections, other than Union Pacific, a total of 11,320 ART cars for return loading during past five years."

"We would be in position to contribute to alleviation of any car shortage in territory north of Ogden."

As of January 1950, the ART owns only 11,457 refrigerator cars. The Rio Grande contract with the ART Company provides, in part, that the Car Line shall furnish the railroad suitable refrigerator cars in such numbers and at such times as to enable the railroad to accept and carry with reasonable dispatch all of the fruit, potatoes and other vegetables shippers may actually tender to the railroad at stations on its line of railway for transportation in carloads, and that the railroad shall give the Car Line not less than 30 days written notice of the cars it will require from time to time under this contract.

[fol. 948] Mr. Collins: Mr. Hanson, I think the record should show at this point that Exhibit 11, which was introduced yesterday, has a slight addition to the provisions which Mr. Hanson described.

Exam. Muller: Has a slight what?

Mr. Collins: Some additional language, a slight addition.

The Witness: The ART Company as of January 1, 1950

has contracts to furnish refrigerator cars to the following railroads:

Name of Railroad	Total Refrigerator Cars Loaded Year 1949
*Ann Arbor RR.	495
Abilene & Southern Ry.	
Arkansas & Louisiana Missouri Ry.	
Asherton & Gulf Ry.	
Ashley, Drew & Northern Ry.	
Bamberger RR.	
Dardanelle & Russelville RR.	
*Denver and Rio Grande Western RR.	19,340
Doniphan, Kensett & Searcy Ry.	
*Gulf Coast Lines	28,990
*International-Great Northern RR.	5,273
*Kansas, Oklahoma & Gulf Ry.	
Kansas City, Kaw Valley R.R., Inc.	
*Louisiana & Arkansas Ry.	184
*Midland Valley RR.	318 (Inc. KO&G)
[fol. 949] *Missouri-Illinois RR.	19
*Missouri Pacific RR.	33,644
New Jersey, Indiana & Illinois RR.	
New Orleans & Lower Coast RR.	
Pecos Valley Southern Ry.	
Prescott & Northwestern RR.	
Red River & Gulf RR.	
San Antonio Southern Ry.	
*San Antonio, Uvalde & Gulf RR.	
San Luis Central RR.	
Seatrin Lines, Inc.	
*Texas & Pacific Ry.	10,706
Texas Short Line Ry.	
Texas-New Mexico Ry.	
*Wabash RR.	8,947
Warren & Ouachita Valley Ry.	
Weatherford, Mineral Wells & N. W. Ry.	
Total	107,916

*(Indicates Class I railroad)

This shows that the ART Company has contracts with 33 railroads or transportation lines, including the Denver & Rio Grande Western, of which 12 are Class I railroads.

These 12 Class I railroads during the year 1949, and as reported on Form CS-54-1B, issued by the Car Service Division, Association of American Railroads, Washington, [fol. 950] D. C., January 12, 1950, loaded a total of 107,916 refrigerator cars, and as shown above, the Rio Grande loaded 19,340 or 17.9 per cent of the total refrigerator car loadings on these 12 Class I railroads.

The ART Company has just as much obligation to take care of their other 32 contract lines as they do the Rio Grande, and with only 17.9 percent of the refrigerator car loading on the Rio Grande and 82.1 percent on the other 11 Class I railroads having contracts with the ART Company, it would appear the Rio Grande does not have command of the ART refrigerator car ownership.

Regarding Mr. Bradford's reference to 11,320 ART cars having been delivered its western connections during the past five years for return loading, these deliveries would, of course, be to the Western Pacific and Southern Pacific Railroads at Salt Lake City and Ogden. Mr. Plummer, in his testimony explains the assistance given by refrigerator car lines to other refrigerator car lines during periods when perishable loading in the territory served by one particular car line is light and perishable loading in other territories served by other car lines is heavy. The Pacific Fruit Express Company as well as the Union Pacific Railroad, handles directly with the ART Company as well as with a number of other refrigerator car lines, for use of such equipment during periods of peak perishable loading in our territory.

[fol. 951] The ART Company has always fully cooperated with the Pacific Fruit Express Company and the Union Pacific Railroad in this matter and it is something over which the Rio Grande has no control nor is it involved in such transactions. During the period of refrigerator car pool, from November 1942 to June 30, 1949, refrigerator cars of the different ownerships were controlled by the Refrigerator Car Pool Manager under authority of the Interstate Commerce Commission and during this period,

particularly until early 1948, distribution into and out of the different perishable loading territories throughout the nation was handled as a pool regardless of ownership, resulting in many ART refrigerators released in western territory being put in PFE service and PFE refrigerators released in eastern, southern and southwestern territory, including territories served by ART Company, being put in ART service, as well as in service of other lines, in order to get the greatest utilization possible out of refrigerator cars during the war emergency period.

The Rio Grande handles a certain volume of perishable traffic eastbound from Ogden and Salt Lake City originating, for example, in California and which is delivered to the Rio Grande by the Southern Pacific and Western Pacific, and, of course, the Rio Grande has an obligation to equalize in the interchange of refrigerator cars. The delivery of 11,320 empty ART cars by the Rio Grande to the Western Pacific and Southern Pacific during the [fol. 952] last five years were cars placed in PFE service by the ART company, over which the Rio Grande had no control, but did have an obligation to move these empties west into Ogden and Salt Lake City for delivery to the Southern Pacific and Western Pacific on an equalization basis inasmuch as they received the loaded haul eastbound. In this connection, the Rio Grande as of December 31, 1949 is short in delivery of refrigerator cars westbound to the Pacific Fruit Express Company contract lines at Ogden and Salt Lake City a total of 8099 cars under the equalization agreement which the Rio Grande has with the Pacific Fruit Express Company.

In other words, as of December 31, 1949, Rio Grande has an obligation to deliver 8099 refrigerator cars in PFE service to its western connections at Ogden and Salt Lake City.

The ART Company, as well as other refrigerator car line companies, are anxious to get their cars into PFE service when not required on the railroads with whom they have contracts, and the reason for this is obvious.

Page 7 of Exhibit 15 shows average daily mileage made by refrigerator cars by months during they ears 1948 and 1949 on the Denver & Rio Grande Western Railroad and the Union Pacific Railroad. This page also shows the percent

of empty refrigerator car miles to total refrigerator car miles on both railroads.

It will be observed from page 7 that refrigerator car miles per day on the Union Pacific Railroad greatly exceed [fol. 953] the daily mileage per car on the Rio Grande. The average of the figures shown by months during the year 1948 will indicate daily average miles per car on Union Pacific Railroad was 137.8 as compared to 61.2 on the Rio Grande. The daily average mileage on the Union Pacific Railroad druing 1948 was 125 percent greater than that on the Rio Grande. During the year 1949 average on the Union Pacific Railroad 132.1 as against 71 on the Rio Grande or 86 percent greater. The decreased mileage per day on the Union Pacific Railroad during the January and February 1949 storm period affected the average mileage for the year as compared to 1948 and the ten months subsequent to February 1949.

It is easy to understand from these figures why the ART Company and other private refrigerator car lines desire to get their cars into PFE service on the Union Pacific Railroad as such car line companies are paid a mileage rate of three cents, both loaded and empty, and their daily earnings while cars are in PFE service on the Union Pacific Railroad greatly exceed the earnings while the cars are in service on the Rio Grande.

Regarding Mr. Bradford's reference to the Rio Grande's "command" of a total of approximately 11,500 ART refrigerator cars, I call attention to the fact during the heavy perishable loading in Colorado, in territory served exclusively by the Rio Grande, during August 1948 when the peach harvest reached its peak, and at a time when the [fol. 954] Refrigerator Car Pool Manager exercised no control over refrigerator cars, the Rio Grande was unable to obtain a sufficient number of ART refrigerator cars, or cars of miscellaneous foreign ownership, to handle the peach harvest.

After several telephone calls from Superintendent Transportation of the Rio Grande, as well as exchange of several telegrams between that officer and myself with respect to the refrigerator car situation in that territory, the Union Pacific Railroad delivered to the Rio Grande at Denver several

hundred PFE refrigerator cars to assist them in the handling of the crop and to assist the growers in getting their peach crop moved.

The delivery of these PFE refrigerator cars to the Rio Grande was made without any strings attached thereto and without any request on the part of the Union Pacific to use these cars for return loads routing via the Union Pacific. The following telegram dated Denver, Colorado, August 30, 1948, was received by me from Mr. L. H. Hale, Superintendent Transportation, Denver & Rio Grande Western Railroad:

"Your timely assistance has saved serious shortage for peach loading and is deeply appreciated. Believe if you will give us 50 cars per day balance of this week can protect perishable loading without delay. Will advise last of week what situation is at that time as North Fork peach crop will be ready to move starting about September 5th."

[fol. 955] The Rio Grande is not in a position to contribute to the alleviation of any car shortage that might exist in the territory north of Ogden as indicated by Mr. Bradford in his testimony on page 208 of the transcript. On the other hand, the Pacific Fruit Express Company and the Union Pacific Railroad have in the past contributed to the alleviation of car shortage in the territory served exclusively by the Rio Grande.

During a period of refrigerator car shortage on the Rio Grande in January, 1949, that railroad refused to accept same ART and miscellaneous foreign ownership refrigerator cars from the Union Pacific at Denver account not being cleaned when offered the Rio Grande, stating they knew of no reason why the originating line should stand the entire expense of cleaning cars any more than other roads getting the haul. After an exchange of telegrams between my office and the Rio Grande, the ART Company and the refrigerator Car Pool Manager, the Rio Grande cancelled its instructions and accepted such cars from the Union Pacific at Denver.

This action on the part of the Rio Grande demanding clean cars was a radical departure of established handling and of its obligation, but it does indicate the attitude assumed at the time. The Pacific Fruit Express Company

and the Union Pacific Railroad in periods of car shortages have worked forces overtime cleaning and conditioning refrigerator cars for the shippers of Idaho and operated [fol. 956] additional trains to get such cars to loading stations as quickly as possible, but the action on the part of the Rio Grande at a time when shippers served exclusively by that railroad were short of refrigerator cars does not indicate the same interest it has displayed toward the shippers located in Idaho in its efforts to open the Ogden Gateway.

With respect to the handling of loaded perishable traffic, Mr. Bradford in his testimony on pages 209 and 210 of the transcript refers to the ice capacity of the Rio Grande, stating there appears to be no shortage of ice in that territory. Mr. Bradford did not state, however, the Rio Grande was in a position to handle the icing of perishables, and in this connection I call attention to the fact during the peak loading season on the Rio Grande for a number of years past, perishable traffic routed from the Rio Grande at Denver to the Union Pacific Railroad has been delivered by the Rio Grande to the Union Pacific Railroad without reicing, due to Rio Grande's inability to handle without excessive delay, and this service has been performed by the Pacific Fruit Express Company at Denver prior to departure of perishables via the Union Pacific Railroad.

The Union Pacific Railroad and the Pacific Fruit Express Company have taken on this additional handling in order to expedite the movement of the Colorado peach crop to market and which has been of considerable benefit, not only [fol. 957] to the Rio Grande, but to the shippers.

Freight Car Equipment Situation:

In addition to refrigerator car assistance given the Rio Grande by the Union Pacific Railroad, the Rio Grande has been and is dependent upon the Union Pacific for considerable assistance in the way of other equipment, such as box cars, coal cars, stock cars and flat cars. I have in my office files many, many telegrams over a period of several years from the Rio Grande requesting such assistance, which has been given them when consistent.

For several years we obtained from the Chicago and

North Western Railway a number of ore cars for use in taking care of the steel plants in the Utah area. These cars were moved empty from the Great Lakes region to Council Bluffs on the C&NW and thence to Utah via Union Pacific, and returned empty to the C&NW at Council Bluffs each spring. C&NW ore cars were obtained as follows:

397 received from C&NW Council Bluffs January 20 through 27, 1947, and returned to the C&NW during the period April 15 to May 8, 1947.

500 received during period November 28 to December 11, 1947, and returned March 20 to April 6, 1948.

351 received between November 14 and 27, 1948 and returned between March 17 and 28, 1949.

The Union Pacific paid the C&NW Railway 5 cents per [fol. 958] mile per car for their handling between the Great Lakes region and Council Bluffs in each direction and this mileage payment amounted to $86,840.

The Union Pacific paid to the C&NW Railway $1.50 per day per car while these cars were on our line, or a total per diem payout of $185,808.

The Union Pacific handled repairs to equipment after being in service in the amount of $8,156.

In addition, the Union Pacific incurred expense of moving these 1,248 C&NW ore cars from Council Bluffs to Salt Lake City and return, and also expense of equipping cars with new type retainer in order to make them entirely satisfactory for mountain handling.

The out-of-pocket expense of the Union Pacific to the C&NW Railway Company for the use of these cars amounted to $280,805, in addition to the expense incurred by the Union Pacific in moving these cars to and from the C&NW and repairs incidental to use in ore service.

These ore cars were obtained at a time when there was a shortage of open top equipment throughout the nation and at a time when coal loading was heavy on the Union Pacific, as well as on the Rio Grande and Utah Railroads in Utah, and during the beet harvest on the Union Pacific and Rio Grande. These ore cars, of which we had 397 during the 1947 period, 500 during the 1947-1948 period and 351 in the [fol. 959] 1948-1949 period enabled us to release a like number of coal cars for utilization at coal mines and we were

able to keep all industries going without a shutdown, although the open top situation was very acute during these periods. However, the Union Pacific spared no expense in obtaining this equipment to ease the coal car situation to the extent possible, and enabled us to also take care of the beet harvest in Idaho and Utah to the satisfaction of the sugar companies and in a territory exclusively served by the Union Pacific Railroad.

This action does not indicate any necessity for shippers located on the Union Pacific Railroad to have routes via the Rio Grande as a "competitive weapon" in order to obtain equipment for the handling of their products.

During the month of February, 1948, when ore stock piles at Geneva and Iron ton, Utah were brought up to capacity through the use of these ore cars and with Colorado Fuel and Iron Company stock pile at Minnequa, (Pueblo) Colorado down to less than a two-weeks supply, we suggested to the Rio Grande that they use the ore cars for the handling of ore from the mines at Iron Mountain, Utah, located on the Union Pacific Railroad, to Minnequa, (Pueblo) Colorado, routing Rio Grande from Provo, Utah, which would enable the Colorado Fuel and Iron Company to replenish their stock piles. The Rio Grande wanted to handle the ore in coal cars only and was unwilling to use the ore cars on its line. Mr. W. R. McPherson, then Superintendent Trans- [fol. 960] portation, under date of February 15, 1948, advised me that as they handled this business as fills on manifest trains it was not consistent to accept it in ore cars because those cars would restrict the speed of its trains.

I suggested to Mr. McPherson that he give the subject further consideration and also advised him we could deliver the loaded ore cars in solid trains, eliminating the necessity of the Rio Grande handling small lots as fills on regular trains. Mr. McPherson advised me under date of February 21, 1948, the Rio Grande was still of the opinion it would be inconsistent for them to attempt to handle these ore cars between Provo and Pueblo.

These ore cars were not suitable for coal loading and the Rio Grande would have had to return them empty from Minnequa to Provo. The Colorado Fuel and Iron Company was quite disappointed in this action on the part of the Rio

Grande as they had made arrangements after our handling with them to use these cars in order to build up their storage supply. During the same period we received telegrams from the Rio Grande, as well as the Open Top Section of the Car Service Division of the Association of American Railroads at Washington, D. C., urging us to assist the Rio Grande with coal cars.

The refusal of the Rio Grande to use the C&NW ore cars, at no greater per diem expense to them than coal cars, and would have kept that many additional coal cars in coal [fol. 961] service, indicates they were not as interested in taking care of the needs of the Colorado Fuel and Iron Company's steel plant, which is served by them, as was the Union Pacific Railroad in taking care of industries located on its lines.

The Rio Grande has endeavored to show in this case that if the Ogden Gateway is opened, shippers in Idaho served by the Union Pacific Railroad will receive more empty car equipment.

During early January, 1949, the Rio Grande asked us for assistance in the way of box cars through Denver for coal loading in the Moffat district. This was at a time when we encountered interruptions in Eastern Wyoming and Western Nebraska due to blizzard conditions and when we had surplus box car equipment at the West end of our railroad which we offered to the Rio Grande at Salt Lake City or Provo.

However, under date of January 10, 1949, Mr. L. H. Hale, Superintendent Transportation of the Rio Grande, advised me by telegram to the effect they did not need any box cars in the Salt Lake City territory and could not haul them empty 700 miles to protect the Moffat territory.

This is a further indication of the Rio Grande being unwilling to incur empty car mileage to take care of industries exclusively served by that line.

The Union Pacific Railroad hauls empty box cars, as well as empty refrigerator cars or any other equipment, from as far as the Missouri River and Los Angeles territory into [fol. 962] Idaho and the Pacific Northwest—empty movements of as much as 2000 miles—to take care of the shippers served by the Union Pacific Railroad.

Mr. W. S. Young, Manager, Farmers Grain Cooperative,

Ogden, Utah, wrote Mr. A. E. Stoddard, President, Union Pacific Railroad, under date of August 2, 1949, regarding box car situation for grain loading, stating in part as follows:

"We are advised by our friends on the Denver And Rio Grande Western Railroad that if the Ogden Gateway could be opened they would be most happy to furnish equipment for any movement eastbound which we could route over their lines."

This position taken by the Rio Grande further shows they are not interested in whether or not the shipper's business is moved or in supplying empty cars unless they get loaded routing. The Union Pacific Railroad did not advise the Rio Grande's Colorado peach growers in August, 1948, that we would furnish the refrigerator cars to move their crop only if the traffic was routed over our line from Denver. Five days after Mr. Young wrote the letter to Mr. Stoddard, or on August 7, 1949, the Rio Grande wired me asking for box cars from the Union Pacific for coal loading in the Moffat district.

To handle the beet crop each year in Nebraska, Colorado, Wyoming, Utah, Idaho and Eastern Oregon it is necessary for the Union Pacific Railroad to place approximately 3000 coal cars in this service, of which about 1500 are needed [fol. 963] in the Utah, Idaho and Eastern Oregon territory. In the past, we have used, to a small extent, Rio Grande equipment returning east empty from the Pacific Northwest to load beets at stations west of Nyssa, Oregon and Nampa, Idaho factories, and when released from the load moved them on east empty for return to the Rio Grande. This handling is permitted under Car Service Rules and avoids some cross haul of empty equipment.

However, shortly after the start of our beet loading the latter part of September and early October, 1949, the Open Top Section of the Car Service Division, Association of American Railroads, Washington, D. C., issued instructions due to Rio Grande coal car shortage to keep Rio Grande open top cars out of sugar beet traffic. These instructions were complied with and Rio Grande coal cars returned to that line empty, notwithstanding the fact this meant a cross haul of empty coal car equipment on the Union Pacific Rail-

road and also meant moving Rio Grande coal car equipment to that line empty and backhauling Union Pacific coal cars to beet loading stations. Some of the beets from Union Pacific loading points moved to a beet factory located on the Rio Grande. The assignment of cars to move loads to that factory was completely filled with Union Pacific cars and the Rio Grande did not furnish any cars for this assignment even though the industry was located on its lines.

In this connection, I have received letters the past couple of years from all of the sugar companies served by the Union Pacific Railroad in Nebraska, Colorado, Wyoming, [fol. 964] Utah, Idaho and Eastern Oregon, expressing appreciation for the manner in which they were taken care of with equipment and the excellent service rendered in the handling of the beet harvest.

During this same period, notwithstanding the heavy load the Union Pacific Railroad was carrying in taking care of coal and ore mines, steel mills, and the sugar beet harvest, the Rio Grande continually called on us for assistance to keep their Utah mines operating. An indication of the manner in which we assisted the Rio Grande is given in the following telegram from Mr. L. H. Hale, Superintendent Transportation of the Rio Grande, dated at Denver, November 10, 1949, addressed to me:

"Appreciate this help. As a result will be able to work Sunnyside today. Hope you will continue to give us all assistance you can as loading very heavy and our supply of empties extremely tight. All coal mines Utah want to work tomorrow if we can protect them."

On February 28, 1950, Mr. L. H. Hale of the Rio Grande sent me the following telegram from Denver:

"Have order for 100 flat cars to protect SP rail loading via our line to Ogden starting March 3. If you have any surplus flats or are moving empty flats, to SP, Ogden will accept 75 from you Denver to apply on this order. Cars, of course, can be used for lumber loading when SP releases. Advise prospects. N-375-A."

[fol. 965] The Rio Grande had an ownership of only 239 flat cars as of February 1, 1950, which means 41 percent of

their ownership would be required to protect this order, and although the Union Pacific Railroad would not in any way participate in the haul of the loaded traffic and, based on past experience together with some facts presented in this testimony, the Rio Grande would expect the loaded eastbound haul if these cars were utilized for lumber loading when released, the Union Pacific Railroad was called upon by the Rio Grande to assist in furnishing this equipment.

On September 18, 1949, Mr. Hale wired me from Denver as follows:

"Account coal mines Utah idle due to labor trouble are you agreeable to waiving per diem on your open top cars on our line for coal loading to avoid moving these cars home to you empty, then returning when mines resume work. Appreciate prompt reply. M-32."

On March 1, 1950, I received the following telegram from Mr. Hale on the Rio Grande:

"Account coal mines idle will you accept your cars released from Iron Mountain ore at Denver instead of Provo? N-382."

The last telegram refers to cars loaded with ore at Iron Mountain, near Cedar City, Utah, and moved by the Union Pacific 245 miles to Provo, Utah, where they were interchanged to the Rio Grande for movement and delivery to [fol. 966] Colorado Fuel and Iron Company at Minnequa, (Pueblo) Colorado. Although the Rio Grande had a haul of the loads of about 580 miles, while the Union Pacific's loaded haul was only 245 miles, nevertheless, instead of the Rio Grande hauling the empty cars from Pueblo back to Provo, where it had received the loads, they wanted to haul them a distance of only 119 miles to Denver for delivery to the Union Pacific Railroad and then expect that railroad to haul the empty cars all the way back to Iron Mountain, Utah, for ore reloading to Minnequa, Colorado.

Mr. Quirk: Mr. Examiner, we have been quite patient here. We were wondering at what point we ought to raise a question and object to so much argument here, and criticism. Is the Union Pacific Company a complainant in this case?

Mr. Collins: What did you say?

Mr. Quirk: Has the Union Pacific Company become a complainant in this case?

Exam. Mullen: That question is not proper. Are you referring to the paragraph on page 49?

Mr. Quirk: There is a great deal of argument here.

Exam. Mullen: There is considerable argument.

Mr. Quirk: "To shirk his responsibility," and similar statements. When statements are prepared in this fashion it is rather hard to get at them by objection.

Mr. Collins: Mr. Examiner, I had shared, when I looked at this testimony, before Mr. Hanson prepared it for final [fol. 967] reading, I had some such misgiving myself. As I understand it he does regard it, as among railroad men, he does regard this as an actual refusal to accept a comparable responsibility. Maybe the word "shirk" isn't a good one.

Exam. Mullen: The point, as I understand it, that is pure argument, if there is objection to it I will have to sustain it.

Mr. Quirk: There is so much more argument in there. That is not all the argument.

Exam. Mulen: This particular part is purely argumentative. That should be stricken.

Mr. Quirk: There is another ground of objection too, Mr. Examiner. To avoid making an objection to each paragraph, each line, each page, the issues in this case involve an attempt to obtain joint rates at the Ogden, Utah Gateway. Now, there is some testimony in the case that shows as an incident to sending cars up into the Idaho Area it would be some help. As a result, this joint rate, if established, the car supply, in the Northwest Territory, wherever there was a shortage, and all railroads suffer shortages at times——

Now if this witness, there is his testimony, is making a sort of a major issue of this question, as though the Union Pacific were complaining against the Denver and Rio Grande, because the Denver and Rio Grande isn't as nice to the Union Pacific as the Union Pacific claims it has been [fol. 968] to the Denver and Rio Grande. I say that is irrelevant and immaterial. They have gone too far with it with this witness. I make that objection.

Exam. Mullen: Do you want to answer, Mr. Collins?

Mr. Collins: Yes, I want to answer.

Exam. Mullen: You may do so.

Mr. Collins: This record will show, if it doesn't show already, that one of the inducements that the Rio Grande used in the hope of stimulating an interest and obtaining help from shippers in Idaho in this complaint, or in prosecuting this complaint, was the holding out of a promise of additional equipment, and prodding the Union Pacific into better service. Everything Mr. Hanson has in this document, with respect to those two subjects, is directly responsive to the claims that the D&RGW have made to the shippers and the claims that the shippers made, or the charges the shippers made against the Union Pacific Railroad in the record at Salt Lake City. It is perfectly proper, and we can make the explanation as big as the facts permit, and there is a big explanation. It all comes from the relationship, the dealings rather, and Mr. Hanson's own experience in dealing with the Rio Grande, with respect to cars, and the attitude the Rio Grande takes.

Mr. Quirk: Wel now, the Rio Grande has merely taken the position that if we have traffic that moves freely to and from the closed door territory involved, there is bound to be [fol. 969] some cars up there that don't get there—, and there will be as an incident to the main issue he— an improvement in the car shortage in the North West Territory if there was a car shortage. Now, some of the witness-, I admit, some of the witnesses that were put on the stand—some on their own behalf and some we obtained—made particular complaints about car shortages that they suffered on the Union Pacific.

Mr. Collins: We have a right to meet that.

Exam. Mullen: It is my understanding that was the purpose of the testimony put in by the Rio Grande at Salt Lake City.

Mr. Collins: It certainly is.

Exam. Mullen: And the answer put in through the testimony of this witness I think is proper. However, there is a certain amount of argument in this, and it would be well if that could be avoided as much as possible.

Now, the particular paragraph mentioned is to my mind argumentative and should not ever been included in the statement.

Mr. Collins: I suggest we cut it out.

Exam. Mullen: That will be stricken out. All the way through I have been looking a little bit ahead. There is here and there a matter that is argumentative.

Mr. Collins: I think we will have to meet them when we overtake them in the testimony, Mr. Examiner.

Exam. Mullen: Yes.

Mr. Quirk: I would like to make my objection in a more [fol. 970] formal line. I object to the statements made by the witness thus far orally that contain argument as incompetent and improper, and I object to the testimony in which he has dealt at great length on specific instances in which the Union Pacific has helped out the Denver and Rio Grande with respect to certain particular car situations, and his views as to per diem and other things, as being incompetent, irrelevant and immaterial to the issues in this case.

Exam. Mullen: No response is necessary to that. The objection will be noted, and in reading the record the points that are argumentative in this statement will be ignored.

Mr. Collins: You mean in reading his testimony? The Commission's use of the record, is that what you mean?

Exam. Mullen: That is what I mean. In reading the record, those statements which are argumentative will be ignored.

Mr. Collins: Very good.

Exam. Mullen: All right, proceed.

The Witness: The Rio Grande is not in a position to contribute to the alleviation of any equipment shortage that might exist in territory served by the Union Pacific Railroad in the event the Ogden Gateway is opened.

Mr. Quirk: Mr. Examiner, I object to that. That is just a plain conclusion.

Mr. Collins: Which is that, the first sentence in that paragraph?

[fol. 971] Mr. Quirk: Yes. That is argument and a conclusion. The witness doesn't know the situation. He doesn't know that there might be cars up there now more than before. We made movements up there.

Exam. Mullen: Off the record, gentlemen.

(Discussion held off the record.)

Exam. Mullen: On the record.

I believe the rest of that statement is argumentative, and there is a good deal of repetition in it.

Mr. Collins: How far down do you mean?

Exam. Mullen: The last part of that statement which ends on page 51. I suggest that be omitted, and you start on page 51.

Mr. Collins: Why not put it in the category that you just mentioned? Let the reader of the record in Washington, when they start to write the report, ignore any part of it that he considers argumentative. I would like to have that settled.

Mr. Quirk: I suggest that you stand by your ruling, Mr. Examiner. I think your ruling is correct.

Exam. Mullen: I think so, too; we will strike the balance of that.

Mr. Quirk: Mr. Collins won't have to write a brief at all.

Exam. Mullen: All right. It seems to me it is argumentative, and I notice there is some repetition in it. That will be stricken.

[fol. 972] Blizzard of 1949 and Detouring and Rerouting of Passenger and Freight Traffic:

Reference has been made by both Mr. Hogue and Mr. Bradford to the Rio Grande's handling of detoured and rerouted Union Pacific traffic during the February, 1949, storm and I consider it important to cover this handling somewhat in detail. The unusual severity of the storm and the area it covered are matters of common public knowledge. Insofar as Union Pacific Railroad is concerned severe blizzard conditions started in Western Nebraska and Eastern Wyoming on January 1, 1949, later extending to other areas, with storm continuing at intervals for approximately seven weeks, the greatest severity centering in Wyoming, Northern Utah and Southeastern Idaho the early part of February, 1949. It will be recalled the President of the United States detailed Army Corps of Engineers to take charge of the situation throughout Nebraska, South Dakota and Wyoming in connection with clearing of highways and affording relief to isolated communities.

As a result of blizzard conditions several freight trains became stalled in snow in the territory between Rawlins,

Wyoming and Wamsutter, Wyoming the morning of February 6, 1949, and the Union Pacific Railroad was blocked in this territory from that time until early morning of February 18th when one of the two main tracks was cleared and the second track cleared on the following day.

[fol. 973] Interruptions in service were also encountered during this period in two or three other localities in Utah and Idaho. During the peak of the storm in Wyoming territory winds reached a velocity of 80 MPH and temperatures dropped to as low as 51 degrees below zero with snow drifts reaching height of as much as 30 feet. During this period the Union Pacific Railroad in fighting the storm had in service 48 rotary, wedge and spreader plows, 124 flame throwers, 180 bulldozers, carry-alls and other equipment, in addition to hundreds of locomotives and some 14,000 employees.

On February 9, 1949, we placed embargo on freight traffic for movement through the storm area in Wyoming and asked authority from Interstate Commerce Commission to reroute freight traffic which was covered under King's Orders 50 and 51.

On February 9, we also started the detouring of passenger trains and during the period February 9 to 20, inclusive, the Rio Grande handled 21 westbound passenger trains on detour basis from Denver to Salt Lake City and 23 eastbound passenger trains from Salt Lake City to Denver.

The 21 westbound passenger trains were delivered to and departed Denver on Rio Grande as follows:

	February 9	2
	February 10	3
	February 11	1
	February 12	1
[fol. 974]	February 13	1
	February 14	1
	February 15	1
	February 16	1
	February 17	2
	February 18	3
	February 19	2
	February 20	3

The eastbound passenger trains were delivered to and departed Salt Lake City on the Rio Grande as follows:

February	9	3
	10	9
	14	2
	16	1
	17	1
	18	3
	19	2
	20	2

The Union Pacific Railroad owns 45 powerful oil burning passenger locomotives which are normally used in the territory east of Ogden handling other than streamline passenger trains. The Rio Grande cannot use oil burning locomotives as they have no facilities for fueling. They could not at that time use our coal burning locomotives due to the fact at least some of their coaling stations were frozen up and coal in cars frozen to extent could not be dumped. In [fol. 975] order for the Rio Grande to handle these 44 Union Pacific passenger trains on detour basis it was necessary for us to furnish Diesel locomotives with each and every train. The Union Pacific furnished 3 and 4 Diesel locomotives with each detoured passenger train, or a total of 144 single units, or 44 complete locomotives, most of which were 6000 horsepower.

The Union Pacific also furnished on each of the 44 passenger trains detoured two full train crews and two full engine crews, or a total of 10 Union Pacific train and engine employees on each train so that it was not necessary for the Rio Grande to use any of their train or engine crews, other than a conductor and engineer pilot.

During this period we detoured via the Santa Fe between Denver, Colorado and Barstow, California a total of 13 passenger trains that we would have detoured over the Rio Grande had that line been able to handle, but to avoid further delay these passenger trains were detoured via the Santa Fe at greater expense, due to th distance involved.

One freight train consisting of 41 cars of locomotive fuel oil was handled on detour basis over the Rio Grande from Denver to Salt Lake City.

During the period February 9 to 19, 1949, inclusive, the Union Pacific rerouted a total of 5538 westbound loads of freight traffic, as follows :

[fol. 976] 1,092 via D&RGW Denver to Salt Lake City.

549 via AT&SF from Denver to Barstow-San Bernardino.

1,818 via C&S to Dalhart, CRI&P to Tucumcari, SP to destination or for return to UP at Colton.

816 via CB&Q from Sidney, Nebraska to Laurel, Montana and thence NP and GN to Butte and Spokane.

317 via CMStP&P from Council Bluffs, Iowa to Marengo, Washington.

263 via CRI&P from Topeka, Kansas to Tucumcari for delivery to SP.

107 via CRI&P from Kansas City to Tucumcari for delivery to SP.

56 via AT&SF from Kansas City to Barstow for return to UP.

520 via SP from Ogden for return to us at Portland, Oregon.

It will be noted from the above only approximately 21 percent of the westbound freight traffic which we rerouted was handled over the Rio Grande and this was due to the fact that line could not handle any additional traffic during this period. We offered them all of the traffic they could handle and kept several hundred loads in our Denver yard at all times for the Rio Grande to take as and when they could handle. We rerouted 2367 westbound loads from Denver over the C&S and Santa Fe in order to get the traffic to destination as quickly as possible, although this resulted in the Union Pacific having considerably less haul than would have obtained if the Rio Grande had been able to [fol. 977] handle this traffic from Denver to Salt Lake City and returned to us at that point.

During this same period we rerouted 2557 eastbound loads of freight traffic as follows:

649 via D&RGW from Ogden to Denver.

721 via D&RGW from Salt Lake City to Denver.

523 via CMStP&P at Marengo, Washington to eastern destinations and lines.

253 via GN,

312 via NP and

31 via CMStP&P from Spokane, Washington to eastern destinations and other carriers. Some of this traffic came back to us from CB&Q at Sidney, Nebraska.

68 via SP from Colton to Tucumcari for delivery to CRI&P.

Our records show a total of 304 cars of mail and express were rerouted over the Rio Grande during this period, although some additional cars may have been rerouted by Railway Mail Service and Railway Express Agency prior to the traffic reaching the Union Pacific and we would have no records of these diversions. The same is also true of eastbound freight traffic as the Southern Pacific was rerouting the traffic to the Rio Grande before it reached Ogden and under those conditions there would be no interchange between the Southern Pacific and Union Pacific.

The Union Pacific Railroad paid to the Rio Grande for [fol. 978] detour of passenger and freight trains a total of $91,372.83 for detour service. Additional expense of $40,923.85 was incurred account necessary to furnish two fulls train and engine crews with each passenger train detoured, resulting in our paying one crew while deadheading and paying the other crew while on duty. These payments cover only the detoured service. The rerouted freight traffic was handled on a division of the freight revenue.

In handling the detour of passenger trains and rerouting of freight traffic we backhauled a number of our passenger trains from Green River, Wyoming, Pocatello and Montpelier, Idaho to Salt Lake City for eastbound movement, and from Laramie and Cheyenne to Denver for westbound movement. A considerable amount of freight traffic was backhauled from Laramie and Cheyenne to Denver and Sidney for rerouting westbound, and from Montpelier and Pocatello, Idaho to Salt Lake City for rerouting eastbound, and some traffic that was rerouted through Marengo and Spokane, Washington was backhauled from as far east as Nampa, Idaho, or approximately 500 miles. This handling resulted in considerable additional expense to the Union Pacific in our efforts to get the traffic moved through to destination as quickly as possible.

While the Union Pacific main lines between Rawlins and Wamsutter, Wyoming were cleared February 18 and 19, we detoured several passenger trains over the Rio Grande [fol. 979] between Salt Lake City and Denver on these two dates and on February 20th, and which are included in the total of 44 passenger trains detoured. This was done for the reason the snow cuts between Rawlins and Wamsutter were of considerable height and necessary for work trains to scale these drifts back. There was also considerable damage to rail in this territory which made it necessary to relay several miles of rail and repair signals for two or three days after this territory was opened and we did not want to take passenger-carrying trains through that territory until conditions were entirely safe.

During the period of the snow blockade, in addition to furnishing locomotives to handle detoured passenger trains, the Union Pacific Railroad leased the Rio Grande on a rental basis the following Diesel and steam locomotives:

2 Diesel switchers	5 days each
4 sets of Diesel freight locomotives with 4 units each, or a total of 16 single units	4 to 13 days each
19 single Diesel passenger locomotive units	4 and 5 days each
4 3900 class steam locomotives	8, 9 and 11 days each.

The Rio Grande paid the Union Pacific Railroad a total of $30,402.00 for rental of these locomotives.

The Rio Grande advised me on February 13 their coal chute situation at that time was such they could then use [fol. 980] coal burning locomotives. We could have furnished the Rio Grande additional locomotives if they could have used oil burning locomotives of our larger coal burning freight locomotives.

I am showing below Union Pacific road locomotives on the Rio Grande by dates during the period February 11 to 24, 1949, inclusive, and these figures do not include the Diesel Passenger locomotives that were on the detoured passenger trains, but only the locomotives that were leased to the Rio Grande for the handling of rerouted freight traffic:

Date	Number of Diesel Units	Steam Locomotives
February 11	15	
12	23	
13	23	1
14	23	3
15	20	4
16	16	4
17	16	4
18	16	4
19	12	4
20	8	4
21	8	4
22	8	3
23	8	1
24	8	

Mr. McCarthy on page 25 of the transcript, states 70 [fol. 981] per cent of freight traffic on the Rio Grande is handled by Diesel power. Mr. Bradford on page 207 of the transcript states the Rio Grande has an ownership of 215 steam and 67 Diesel locomotives. Of these 67 Diesel locomotives two are passenger locomotives, 40 are switch locomotives and 25 are freight locomotives. It will be noted from the above tabulation Union Pacific Diesel and steam locomotives on the Rio Grande at one time amounted to as much as nine or ten complete locomotives, or about 40 percent of the Rio Grande's entire freight Diesel ownership.

Movement of freight traffic by the Union Pacific was resumed through the storm area on February 18, at which time we cancelled the embargo covering freight traffic and requested Interstate Commerce Commission to cancel King's orders 50 and 51.

I am showing below the number of freight trains operated and cars handled by dates, eastbound and westbound out of Green River and eastbound out of Ogden:

Date	Green River Eastbound		Green River Westbound		Ogden Eastbound	
	Trains	Cars	Trains	Cars	Trains	Cars
2-18-49	4	299	3	145	4	124
2-19-49	21	1295	8	522	4	41
2-20-49	18	1191	18	854	5	284
2-21-49	21	1700	18	1293	9	634
[fol. 982]						
2-22-49	21	1564	21	1535	7	423
2-23-49	24	1759	15	1045	6	338
2-24-49					5	268
2-25-49					6	343
2-26-49					6	315

By February 22, 1949 traffic conditions were entirely normal on the entire Union Pacific system. It will be noted, however, movement of traffic east from Ogden was exceptionally light during the period February 18 to 26, inclusive. There were only 4 to 6 freight trains operated daily, excepting 7 on one day and 9 on another, while as many as 15 to 21 freight trains were operated west from Green River. We were in a position to handle considerable volume of traffic east from Ogden starting February 18, but due to the Southern Pacific rerouting traffic under King's Order 50 during the storm period, and also due to embargo we had placed, considerable traffic that would normally route Union Pacific east from Ogden was being routed via Rio Grande and due to these conditions the Rio Grande had considerable backlog of traffic at Ogden for movement east during the period February 17 to 26, inclusive. Records at the Ogden terminal show the Southern Pacific reclaimed on the Rio Grande for per diem because [fol. 983] the Rio Grande was unable to accept loads and empties by midnight on the following dates:

February 1949	Loads	Empties	Total
17th	144	7	151
18th	370	20	390
19th	589	47	636
20th	528	33	561
21st	535	32	567
22nd	460	105	565
23rd	417	113	530
24th	429	15	444
25th	187	29	216
26th	120	23	143

77 of the cars arriving Ogden on the 18th were delayed 4 days before accepted by the Rio Grande.

54 of the cars arriving on the 18th were delayed 3 days.

75 of the cars arriving on the 19th were delayed 4 days.

13 of the cars arriving on the 19th were delayed 5 days.

63 of the cars arriving on the 20th were delayed 3 days.

7 of the cars arriving on the 21st were delayed 5 days.

27 of the cars arriving on the 22nd were delayed 4 days.

Notwithstanding this situation and the fact considerable of this traffic would normally route Union Pacific, and the further fact the Rio Grande during this period had a number of Union Pacific locomotives handling freight

[fol. 984] traffic, the Rio Grande was unwilling to reroute or divert any of this considerable backlog of traffic being delayed at Ogden to the Union Pacific after our line was cleared on February 18 and with extremely light traffic moving east from Ogden on our line. In this connection, I call attention to Mr. Bradford's comments appearing on page 228 of the transcript, as follows:

"* * * I am satisfied if Union Pacific were unfortunate enough to be snowed in again they would not wait quite as long to let such an amount of business back up. An even flow of business is important to keep it moving and the even flow is what tests capacity of the railroad and not dumping stuff on it at very short notice as had to be done at that time."

Exam. Mullen: Just a moment, that really appears purely argumentative.

Mr. Collins: How far do you mean, Mr. Examiner? I thought you made a ruling, Mr. Examiner, in reading the record the part the Examiner, in writing the report, or the record here would be made, with the understanding whoever is reading this, may be there would be something argumentative, the argument would be ignored.

Exam. Mullen: This is pure argument, nothing else. I don't think that ought to be in the record. It runs down to the first four lines on page 63.

Mr. Collins: The first four lines on page 63?

Exam. Mullen: Yes.

[fol. 985] Mr. Collins: All right. Cut that out.

Mr. Quirk: In addition to that, the subject matter is irrelevant and immaterial.

Exam. Mullen: It is out. It is time to recess at this time. We will recess until 2 o'clock.

(Whereupon, at 12:23 o'clock, p. m., a recess was taken, to reconvene at 2:00 o'clock, p.m. of the same day.)

[fol. 986] Afternoon Session, 2:00 p. m.

A. D. Hanson resumed the stand and testified further as follows:

Direct examination (continued):

Exam. Mullen: Are you ready to proceed, Mr. Collins?

By Mr. Collins:

Q. Go ahead, Mr. Hanson.

A. It was to be expected there would be delays to detoured passenger trains and rerouted freight traffic on the Rio Grande in their handling this additional amount of business, whether it be referred to as congestion, lack of motive power, or man-power.

However, I call attention, in particular, to nine symbolled Idaho perishable trains that we moved from Montpelier and Pocatello to Ogden and Salt Lake City for rerouting over the Rio Grande during the period February 11 to 19, 1949, inclusive. Eight of these trains were delivered to the Rio Grande at Salt Lake City and one at Ogden, the deliveries at Salt Lake City being made at the request of the Rio Grande in order to avoid their having to run power and crews to Ogden for the traffic. These nine Idaho perishable blocks, from the time accepted by the Rio Grande until time returned to the Union Pacific at Denver, consumed 37 hours 05 minutes to 63 hours, or an average of 49 hours per train. However, these same nine Idaho perishable blocks, from the time of arrival and ready for the Rio Grande at Salt Lake City or Ogden until returned [fol. 987] to the Union Pacific at Denver, actually consumed from 51 hours 30 minutes to 123 hours 10 minutes, or an average of 73 hours per train. Most of these blocks were delayed at Salt Lake City waiting for the Rio Grande to take them which they could not do any sooner for one reason or another.

For example, Idaho perishable train PNF-90 arrived Salt Lake City 4:05 p.m., February 14, but the Rio Grande could not accept the train until 7:05 a.m., February 16, or 39 hours later. The traffic in this train was returned to

the Union Pacific at Denver at 1:05 p.m., and 4:20 p.m. February 18, and some of it on February 19.

At this time I call attention to statement made by Mr. W. B. Long on page 673 of the transcript and which reads as follows:

"There was a period, I believe, of 26 days when no freight, with exception of one day and a half, moved through Wyoming by Union Pacific. Potatoes blocked in snow in Wyoming. Had Ogden Gateway been open perishables could have moved via Ogden."

There was a period of 11 days, February 7 to 17, inclusive, when no trains were operated through the storm area in Wyoming and not 26 days as stated by Mr. Long.

Other than at terminals, there were three Idaho perishable trains, consisting of 148 cars, held and delayed at intermediate stations in the Wyoming storm area. However, work trains, trucks and tractors, with supplies and [fol. 988] PFE personnel, were operated with snowplow equipment to these stations and the perishables given heater service. We even arranged to have heater charcoal dropped from airplanes into one of the storm isolated communities to enable us to continue the servicing and protection of delayed perishable traffic during the storm period.

Also call attention to the fact we moved nine Idaho perishable trains to Salt Lake City and Ogden, and rerouted this traffic over the Rio Grande during this period. Additional trains would have been moved from Idaho to Salt Lake City during this period had the Rio Grande been able to handle them, but as heretofore indicated that line had a backlog of traffic at Ogden which they did not clear up until February 27.

During the snow blockade on the Union Pacific we exempted perishable shippers of Utah and Idaho and Eastern Oregon in the territory exclusively served by the Union Pacific from the provisions of the embargo, and I have heretofore explained our handling of empty refrigerator cars from Southern California into Idaho, and as a result Idaho loaded from 73 cars to 156 cars of perishables each working day during the period February 9 to 18, inclusive; a total of 918 cars, or an average of 102 cars per day.

Notwithstanding storm conditions, during the month of

January, 1949, a total of 5074 cars of perishables were loaded in Idaho as against 4455 during January, 1948, and [fol. 989] 5133 during January, 1950. A total of 4110 cars of perishables were loaded in Idaho in February, 1949, as against 3360 in February, 1948, and 4308 in February 1950.

The Union Pacific spared no expense in its efforts to get traffic moving to destination as quickly as possible during and following the storm period and I would estimate our losses in connection with storm expense, detour and rerouting of traffic, loss of traffic that would otherwise move over the Union Pacific, during the months of January and February, 1949, as approximately thirteen million dollars.

The January and February storms not only affected the Union Pacific Railroad, but covered an extensive area in a number of the Western states, resulting in blockades on other railroads. For example, during the months of January and February, 1949, the Union Pacific Railroad handled over various sections of its lines on a detour basis 61 passenger trains, 26 freight trains, 2 work trains with snow plow equipment, and 4 light power units, for eight different railroads, namely; C&NW, CRI&P, CB&Q, C&S, NP, SP, GN and SP&S.

In this connection, railroads have agreements with each other covering the detour of passenger and freight trains in emergencies such as existed during the blizzard of February, 1949, and the Union Pacific Railroad has in effect with 23 railroads, including the Rio Grande, standard form of detour agreement last executed as of December 1, 1947, [fol. 990] The standard form of detour agreement provides manner of handling, cost of detour service and so forth. As a matter of information, the Union Pacific Railroad during the years 1948 and 1949 handled several hundred detour moves of passenger and freight trains for other railroads, such as AT&SF, CB&Q, CMStP&P, C&NW, CHI&P, C&S, GN, MP, NP, SP and SP&S.

In addition to delay to eastpound traffic at Ogden during and following the snow blockade waiting to be handled out of there by the Rio Grande, similar delays were incurred at Denver with westbound traffic due to Rio Grande's inability to handle more promptly. I am showing below the handling accorded some 200 of the 1092 loads which

were rerouted westbound from Denver via the Rio Grande, showing time of arrival at Denver on the Union Pacific, elapsed time before the Rio Grande could accept cars on its interchange tracks, time pulled by the Rio Grande and the total elapsed time in hours and minutes that cars were delayed in Denver interchange. As previously mentioned, we kept a considerable number of west loads in our yards at Denver for rerouting to connecting lines as fast as they could handle and kept the Rio Grande interchange at Denver filled with traffic to be available to them as and when they could handle:

[fol. 991]

Arrived Denver	Placed on D&RGW Interchange	Elapsed Time	Pulled by D&RGW	Elapsed Time	Total Elapsed Time
4:20 P 2-12	6:05A 2-13	13'45"	11:40A 2-13	5'35"	19'20"
6:50 P 2-12	7:30A 2-13	12'40"	11:30A 2-14	28'00"	40'40"
8:00 A 2-13	10:50A 2-15	50'50"	7:40P 2-15	8'50"	59'40"
12:55 P 2-13	1:50A 2-16	60'55"	12:05P 2-17	34'15"	95'10"
12:55 P 2-13	3:20A 2-16	62'25"	2:15P 2-17	34'55"	97'20"
10:40 A 2-14	1:45P 2-15	27'05"	10:50P 2-15	9'05"	36'10"
5:05 P 2-14	2:50P 2-17	69'45"	10:35P 2-17	7'45"	77'30"
5:50 P 2-14	12:50A 2-16	31'00"	12:05P 2-17	35'15"	66'15"
			2-00P 2-19	85'10"	116'10"
9:45 P 2-16	5:15A 2-18	31'30"	12:20P 2-18	7'05"	38'35"
			11:50A 2-19	30'35"	62'05"

[fol. 992] The above record of handling, covering some typical examples, is self-explanatory, and reflects delays incident to Rio Grande's inability to promptly move the traffic westbound out of Denver.

Road and Tehminal Capacities:

Similar conditions have existed at times other than during the storm period. For example, on October 17, 1948, Rio Grande interchange tracks at Denver had been blocked for some 48 hours and we were holding back empty refrigerator cars for delivery to that line. In handling with Mr. L. H. Hale, Superintendent Transportation, Rio Grande, he advised me by telegram under date of October 18, 1948, that this was due to combination of bad weather and deer hunting season, resulting in delays on transfer over week end.

Another example is indicated in the following telegram

addressed to me by Mr. Hale dated at Denver, September 1, 1949:

"Due to yard conditions Denver account heavy movement of peach crop will be unable to accept any empties at Denver for 48 hours, except will take delivery of refrigerators from Union Pacific over Northwestern terminal and refrigerators from CB&Q at North Yard. Cannot accept any over Denver interchanges. Appreciate your holding up all other empties until we can get perishable cleaned up."

These instances were at times when the Rio Grande was handling only their normal flow of traffic, but if such action [fol. 993] is necessary on their part during such times it is an indication of what can happen if they are called upon to handle an increased volume of traffic such as would be involved by the opening of the Ogden Gateway.

Notwithstanding the delays to traffic encountered when the Rio Grande was called upon to handle an increased volume of traffic during the storm period and at other times, Mr. Bradford in his testimony has endeavored to establish a potential unused road and yard capacity on the Rio Grande.

On page 206 of the transcript, by use of a certain formula, he has stated the potential capacity of the Rio Grande from a gross ton miles standpoint would be approximately 18 billion. He states in 1943 during the peak war period the Rio Grande handled 12,500,000,000 gross ton miles and in 1948, 10,800,000,000 gross ton miles.

Using the 157,762 loads referred to by Mr. Earley on pages 166 and 167 of the transcript as traffic potential for the Rio Grande in the event the Ogden Gateway is opened, together with approximately 50,000 empties, that would move over the Rio Grande in connection with their handling this amount of traffic, and on the basis of this traffic moving between Ogden and Denver and/or Pueblo it would amount to more than six billion gross ton miles, which together with actual gross ton miles handled by the Rio Grande in 1948 would exceed the all-time peak war year handling of [fol. 994] the Rio Grande by some 4,300,000,000 gross ton miles, or 34 percent.

The number of loads referred to by Mr. Earley as traffic

potential for the Rio Grande, together with the number of empties that would be involved, would be a daily average of approximately 560 cars that would be interchanged at Ogden. Mr. Bradford on page 197 of the transcript states during the year 1948 a maximum of 1,018 car moves per day were made in their Ogden yard and during the war years this handling reached a figure over 1200. These car moves reflect a double car count and on the basis of handling an average of 560 additional cars through the Rio Grande yard at Ogden, or approximately 1120 car moves, it will be seen this would be practically double the Rio Grande's handling through that yard during the war years. The same situation holds true with respect to the other yards on the Rio Grande referred to by Mr. Bradford in his testimony.

In this connection, on page 7 of the Rio Grande Exhibit No. 1 submitted by Mr. Hogue, a record is given of the loads and empties interchanged between the Rio Grande and Union Pacific at Ogden during the years 1944 to 1948, inclusive. These figures reflect an average of only 67 cars interchanged per day during the year 1945 and an average of only 22 cars interchanged per day during the year 1948. The interchange of loads and empties during 1949 between the Union Pacific and Rio Grande at Ogden averaged only [fol. 995] 19 per day. Against using Mr. Earley's figures of 157,762 loads as the annual traffic potential for the Rio Grande, together with approximately 50,000 empties that would be involved, would mean a daily average interchange between the Union Pacific and Rio Grande at Ogden of 560 cars or approximately thirty times greater than the daily average interchange during the year 1949.

Referring to Mr. Bradford's statement on page 206 of the transcript to the effect gross ton miles per train hour increased from 41,940 in 1943 to 58,085 in 1948, or 38.4 per cent increase. On page 27 of the transcript, Mr. McCarthy states the Rio Grande has shown proportionately greater gains in recent years than either Class I or Western District carriers as a group in the number of gross ton miles it has produced per train hour operated. The Rio Grande shows an increase of 8,101 gross ton miles per train hour in 1949 over 1943, and the Union Pacific Railroad shows an

increase of 16,145, or practically 100 per cent greater increase than accomplished on the Rio Grande.

By using the same formula as used by Mr. Bradford in his endeavor to establish a potential gross ton miles capacity on the Rio Grande as referred to on page 206 of the transcript, the Union Pacific Railroad in 1943 handled 85,209,091,000 gross ton miles.

In 1943 we operated 2,031,685 train hours. If the same number of train hours had been operated in 1948 our gross [fol. 996] ton miles capacity would have been 118,010,423,000 or 38.5 percent over what we handled from a gross ton miles standpoint in 1943. In August, 1949, and which is the same month referred to by Mr. Bradford, our gross ton miles per train hour were 65,020 so if we operated same train hours in 1949 as we did in 1943 we would have a potential capacity of approximately 132,000,000,000 gross ton miles. Actually, in 1949, we had a gross ton mile figure of 71,497,835,000 which would indicate we have a potential unused capacity at the present time of approximately 85 percent in addition to our present business.

On the basis of Mr. Bradford's figures to the effect the Rio Grande has a potential capacity of an additional 7,200,000,000 gross ton miles, it will be noted from the above the Union Pacific Railroad has a potential capacity of an additional 60,600,000,000 gross ton miles or more than eight times greater than that shown by Mr. Bradford for the Rio Grande.

Mr. Quirk: That is argument. Most of this is argument; he is attempting to test the capacity of the Rio Grande.

Exam. Mullen: We ought to strike out the argumentative matter.

Mr. Collins: Strike out which?

Exam. Mullen: The argumentative matter.

Off the record. Let's get this straightened out off the record.

(Discussion held off the record.)

[fol. 997] Exam. Mullen: On the record.

Mr. Quirk: May I ask the witness a question for information? In January, 1950, was that the coal strike?

The Witness: January, 1950, was a curtailed production month.

Mr. Quirk: There was a coal strike, was there not?

The Witness: In Union Pacific territory?

Mr. Quirk: Yes.

The Witness: No, sir, it was on a curtailed basis during January, 1950.

Exam. Mullen: Off the record for a minute.

(Discussion held off the record.)

Exam. Mullen: On the record.

The Witness: Referring to Mr. Bradford's comments on page 209 of the transcript that "the capacity of the power that was available and the power that we could rent from our connections was reached at the peak of this storm."

Union Pacific had 400 locomotives out of service and idle as of January 1, 1950 account not sufficient traffic to keep these locomotives in service. In addition, the diversion of traffic away from the Union Pacific Railroad to the Rio Grande through the opening of the Ogden Gateway would result in a longer, slower, and circuitous routing which entails expensive, unnecessary, and wasteful transportation practices.

Loss of Employment to Union Pacific Railroad Em- [fol. 998] ployees Which Would Result from Opening the Ogden Gateway:

On pages 8 to 13, inclusive of my exhibit 15, I show the loss of employment to Union Pacific Railroad employees which would result from opening the Ogden Gateway and the Denver and Rio Grande Western Railroad Company securing routing on 101,476 loads eastbound and 56,286 loads westbound of the traffic presently moving via the Union Pacific from and to Missouri River points of the traffic originating and terminating in the States of Idaho, Montana, Oregon and Washington. Mr. Earley in his testimony heretofore given in this case, under the topic: "Estimated Annual Traffic Potential for Rio Grande," referred in Section L of his Exhibit 3 and states:

"In Section L is submitted the results of a comprehensive study made to determine the potential amount of traffic for the Rio Grande each year in the event of the establishment of competitive through rates with the Union

Pacific via Ogden. This study covers only the states of Idaho, Montana, Oregon and Washington and was undertaken to give us some definite idea as to the traffic to and from those states included in our petition."

He further stated that from the study it had been determined there exists for the Rio Grande an annual traffic potential of 157,762 carloads of traffic originated and terminated by the Union Pacific in Idaho, Montana, Oregon [fol. 999] and Washington, and that of this traffic potential, 101,476 cars represent traffic originated by the Union Pacific and 56,286 cars represent traffic terminated by the Union Pacific in those states. He said that:

"This Union Pacific traffic, susceptible to Rio Grande routing, which is termed traffic potentials, represents a conservative estimate of business available to our solicitation."

Further on in his testimony he gave a breakdown between various classifications of the 157,762 cars, and stated again he wished to emphasize the point that:

"the foregoing traffic potential represents to a considerable degree less traffic than what I believe would be actually available to our solicitation for the reason that our study included only the amount of traffic loaded and unloaded on the Union Pacific in the four northwestern states."

My showing of loss of employment is therefore based on the testimony given by Mr. Earley.

On page 8 I have shown that during the year 1948 through freight trains handled by the Union Pacific between Pocatello, Idaho and Council Bluffs, Iowa averaged, per train 64 loads 10 empties eastbound and 40 loads 37 empties westbound; and that during the year 1949 eastbound trains averaged 63 loads per train and westbound trains averaged 37 loads per train.

I also explain on page 8 that not all of the equipment [fol. 1000] involved in the 56,286 loads westbound would be available for eastbound loading when released and that a small percentage of this equipment will return east empty via routes handling the loaded traffic westbound. I explained too, that between 45,000 and 55,000 cars must be

handled westbound empty in addition to equipment released in the States of Idaho, Montana, Oregon and Washington to take care of the 101,476 loads eastbound originating in those states.

I further explain that the 101,476 loads eastbound represent 1,585 trains, or 4.3 trains per day and that the westbound movement, based on the average number of loads, would amount to 1,407 trains per annum, or 3.9 trains per day. For the purpose of my exhibit I conservatively estimated that this loss of traffic potential to the Union Pacific would result in a loss of

(a) four trains per day eastbound and four trains per day westbound between Pocatello, Idaho, and North Platte, Nebraska.

(b) three trains per day eastbound and three trains per day westbound between North Platte, Nebraska, and Council Bluffs, Iowa, and

(c) one train per day eastbound and one train per day westbound between North Platte, Nebraska and Kansas City, Kansas.

Based on that loss of train movements, which is a conservative estimate of the loss if the Union Pacific were to lose the number of cars described by witness Earley as [fol. 1001] the D&RGW's traffic potential, I have shown on pages 9 to 13, inclusive, the direct loss of employment to employees on the Union Pacific Railroad broken down between the railroad divisions of Idaho, Wyoming, Nebraska and Kansas, and broken down further with respect to the various classes of employees and their locations or home terminal.

Summarizing briefly, those pages show the number of employees whose employment with the Company would be discontinued, the annual loss of employee days and the annual wage loss by railroad divisions as follows:

Railroad Division	Number of Employees	Employee Days (Annually)	Annual Wages
Idaho Division	210	66,179	$ 952,064
Wyoming Division	478	149,499	1,909,296
Nebraska Division	490	148,553	1,971,927
Kansas Division	62	18,684	251,174
TOTAL	1,240	382,915	$5,084,461

The territories embraced in the several divisions referred to are explained at the end of the tabulation on page 13.

The movement of freight trains in the territory between Green River, Wyoming on the west and Kansas City, Kansas and Council Bluffs, Iowa, on the east is operated by steam locomotives fueled by coal produced largely by mines of the Union Pacific Coal Company in the State of Wyoming

Pages 14 and 15 show the loss of employment to employees of the Union Pacific Railroad employed in the movement of fuel coal produced in Wyoming by the Union Pacific [fol. 1002] Coal Company which would no longer be needed to fuel the trains which would be discontinued upon the loss of the traffic indicated by Mr. Earley. Pages 14 and 15 show that there would be a daily reduction in the use of coal by the United Pacific Railroad Company of 1189 tons and an annual reduction in the use of coal of 433,985 tons in the event of the discontinuance of

(a) four trains per day in each direction between Pocatello, Idaho and North Platte, Nebraska,

(b three trains per day in each direction between North Platte and Council Bluffs, Iowa and

(c) one train per day in each direction between North Platte, Nebraska and Kansas City, Kansas.

This reduction in use of coal would likewise affect employment of employees on the Union Pacific Railroad which are required presently to move the coal from the mines to the points on the railroad where it is used. The consequences of the reduction in the movement of coal trains would be the further reduction in employment of employees of the Union Pacific Railroad totalling 60 employees annually, or 8,229 employees days annually, with an annual wage loss of $120,892.00.

Page 14 shows the formula on which the reduction in the use of 433,985 tons of coal annually is based. It shows also the loss in train movements in handling of coal between the mines and points where it is used.

[fol. 1003]. As heretofore indicated, the above figures reflect the direct loss of employment to employees of the Union Pacific Railroad Company as a result of the loss of trains heretofore mentioned.

Mr. Quirk: Just a moment, Mr. Examiner.

Exam. Mullen: What is it, Mr. Quirk.

Mr. Quirk: I want to ask the witness one short question, at the bottom of page 79, he says: as heretofore indicated, the above figures reflect the direct loss of employment to employees of the Union Pacific Railroad Company as a result of, and then he enumerates,

You mean there, of course, based on the potential traffic as estimated by Mr. Earley, do you not?

The Witness: That is correct.

Mr. Quirk: I just wanted to get that clear.

The Witness: This does not reflect the entire loss of employment on the Union Pacific in the event the company should lose the amount of traffic which the D&RGW has described as its traffic potential.

For example, it does not include any reduction in the force employed by the Union Pacific in its General Headquarters Building at Omaha, Nebraska, where there are presently employed some 2400 employees. Based on past experience, reduction in employment on the Union Pacific follows percentagewise quite closely reduction in Gross Ton Miles and Revenue Freight Ton Miles handled and Operat-

[fol. 1004] ing revenues.

For example, during the year 1930 Gross Ton Miles decreased 7.1 percent, Revenue Freight Ton miles decreased 10.9 percent, Operating revenue decreased 12.6 percent and Forces decreased 11.5 percent under the year 1929.

During the year 1931 Gross Ton Miles decreased 19.2 percent, Revenue Freight Ton Miles decreased 26.8 percent, Operating Revenue decreased 28.8 percent and Forces decreased 25.4 percent under the year 1929.

Exam. Mullen: I don't think you need to copy the next four paragraphs. It is the same type of information.

The Witness: Yes, sir.

It will be noted from these records of past performance further reductions in personnel throughout the system are inevitable, and on the basis of our keeping pace with Gross Ton Miles and Revenue Freight Ton Miles and Operating Revenue fluctuations, a loss of 157,762 revenue loads referred to in Mr. Earley's testimony represents a reduction of approximately 15 percent in Revenue Freight Ton Miles and a reduction of approximately 11 percent in Gross Ton

Miles under the year 1949, and on the basis of a reduction of approximately 11 percent in Gross Ton Miles a corresponding reduction in personnel would mean loss of employment to a total of approximately 5300 employees instead of some 1300 employees as indicated on pages 8 to 15 inclusive.

[fol. 1005] In this connection, the reply of the Rio Grande, dated March 13, 1950, to petition of the Railway Labor Organizations representing employees of the Union Pacific Railroad, states that the number of employees of a particular railroad in a particular period does not necessarily increase or decrease in any fixed proportion to the increase or decrease of revenue tons of freight handled by such a railroad in particular periods. The Rio Grande's reply states that in the year 1946 the Union Pacific handled 48,002,636 tons of revenue freight with 53,130 employees and in 1948 handled 52,156,787 tons of revenue freight with 49,804 employees.

The tons of revenue freight handled is not always the controlling factor on each and every railroad with respect to employment. For example, it requires just as many locomotives and just as many employees to handled a train of 100 empty refrigerator cars as it does to handle a train of 100 loaded refrigerator cars. However, the tons of revenue freight handled is a controlling factor on the Rio Grande to a much greater extent than it is on the Union Pacific. This is further substantiated by the fact, for example, that during the year 1948 of the total freight car miles on the Rio Grande only 25.9 percent were empty car miles, while on the Union Pacific 33.6 percent were empty car miles.

Again referring to the comparison given between the years of 1946 and 1948 in the Rio Grande's reply of March 13, 1950, these figures show tons of revenue freight handled [fol. 1006] in 1948 increased 8.7 percent over that handled in 1946. However, gross ton miles increased only 4.5 percent in 1948 over 1946 while forces decreased 6.3 percent under 1946.

The conditions obtaining during the year 1948 were entirely different from those in 1946. World War II came to an end in August, 1945, and the year 1946, to a large extent, was a period of reorganization and readjustment insofar as

American Railroads are concerned. It was not possible to obtain to any extent new equipment and locomotives or materials for road and yard improvements during the war years and very little was accomplished in that direction during the year 1946. The Union Pacific Company, for example, did not own any diesel freight locomotives prior to 1947, but during the years 1947 and 1948 we received from builders 262 diesel freight locomotive units, of which 230 were freight units and 23 were heavy duty road-switcher units.

This ownership of new diesel freight locomotives enabled us to take out of service and retire a considerable number of the small, worn out, steam locomotives and transfer the more modern, heavy, steam locomotives, which were released in territories to which the diesels were assigned, to other territories where the smaller locomotives had been assigned.

As a result average gross tons per freight train increased in 1948, 14.4 percent and gross tons per freight train hour [fol. 1007] increased 18.1 percent over 1946. These increases enabled us to handle a greater volume of loaded freight traffic and empty freight car equipment with less force in 1948 than in 1946. The situation on the Rio Grande during 1948 as against 1946 is also comparable, the Rio Grande handling a greater volume with less force in 1948 than in 1946, and this, no doubt, was also due to the acquiring of diesel freight locomotives, enabling that line to increase overage tons per freight train and gross ton miles per train hours.

I have shown decreases in Gross Ton Miles, Revenue Freight Ton Miles, Operating Revenues, and Forces during the year 1947, 1948, and 1949, as compared to the peak year of 1945, and, as stated, reduction in employment on the Union Pacific follows percentagewise quite closely the reduction in Gross Ton Miles and Revenue Freight Ton Miles handled and Operating Revenues.

Mr. Gibson: Mr. Examiner, the next paragraphs are argumentative.

Mr. Collins: They are what? I didn't hear you.

Mr. Gibson: On page 85, starting from the second——

Mr. Collins: It isn't argument at all, Mr. Examiner; it is a statement of fact.

Exam. Mullen: Just a minute, gentlemen, let me read it

first. I think that first paragraph is argumentative and ought to be stricken.

Mr. Collins: I don't see what could be argumentative about [fol. 1008] it.

Exam. Mullen: This witness is commenting on the consistency or inconsistency of the Rio Grande's reply to the petition.

Mr. Collins: Do you mean the paragraph beginning at the middle of the page?

Exam. Mullen: The Rio Grande's reply to petition of railway labor organizations——

Mr. Collins: I thought you were speaking of the one at the top.

Exam. Mullen: No, the one at the middle.

Mr. Collins: All right, strike it out.

Mr. Gibson: I think the next paragraph follows the same point.

Exam. Mullen: The next paragraph will be taken out. The next is argumentative, and that should come out.

Mr. Collins: I will agree to that.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

By Mr. Collins:

Q. Mr. Hanson, Mr. Quirk asked Mr. Edens some questions with respect to the feasibility, as I understood it, of blocking trains at Pocatello to go through Ogden, by-passing the Ogden yard. Did you hear those questions?

A. Yes, sir.

Q. If there were any change in train composition or arrangement, including blocking trains, would that be one of [fol. 1009] your duties?

A. Yes, sir.

Q. What comment have you to make with respect to the suggestion in Mr. Quirk's question, concerning the blocking of these trains?

A. With the yard at Pocatello, we would naturally block trains, but it would not be a solid D&RG train. We would block the D&RG traffic, we would block Ogden setouts, we

would block stock for the Ogden stockyards, we would block traffic going through to Salt Lake City, we would block any traffic for the Bamberger.

In other words, there would probably be 6 or 8 classifications in a train coming out of Pocatello. In addition, the train would pick up any traffic available between McCammon and Ogden moving this way.

Q. You mean toward Ogden?

A. Moving towards Ogden, which would not, of course, be cut into the proper blocks by the road crew. It would still be necessary for that train to go into the yard, as Mr. Edens described, and it would still be necessary for the Depot Company to take the D&RG block out of that train, and interchange it in the manner that was explained.

Q. Now, Mr. Quirk also spoke of icing, the possibility as I understood it, of icing at Pocatello, so as to avoid icing at Ogden. Will you state what the situation is with respect [fol. 1010] to that possibility, and what the present situation is.

A. The perishable tariffs provide that perishables shall be iced or otherwise serviced at regular icing points. Pocatello is a regular icing station. Ogden is a regular icing station. The perishable traffic is so billed, to ice at regular icing stations. The tariff also provides that it is the responsibility of the delivering carrier to ice the perishable prior to delivery to a connecting carrier.

Q. Do I understand from what you have said that a shipment of perishables loaded at Nampa would be iced under this tariff provision at Pocatello?

A. That is correct.

Q. And iced again at Ogden?

A. Yes, sir.

Q. Would it be feasible to perform the icing service at Pocatello and then by-pass Ogden without icing again.

A. No, sir, not without the hazard of considerable claims involved. There would be too much elapsed time from the icing at Pocatello until the delivery of the traffic to the Rio Grande or the next icing point on the Rio Grande.

Q. Would it be permissible under your present tariff provisions?

A. No, sir.

Q. Now, Mr. Law made some comment yesterday with respect to the switching service at Soda Springs. Did you hear his comments?

A. Yes, sir.

[fol. 1011] Q. As I understood him, he said the service had been better in the Fall of 1949 than in previous years, as I understood him, because of the fact they had a regular switching engine to serve Soda Springs. Will you state what the facts are about that?

A. Well, Soda Springs is an intermediate station between a terminal at Montpelier and Pocatello. It is not what you would call a switching engine. We have for a number of years, as far back as 1945, that I personally recall, what is called or referred to as a Bancroft-Soda Springs Local.

Q. What was the last word?

A. Bancroft-Soda Springs Local. That is handled by a road train and engine crew, and is put on each year during the heavy grain and stock-loading period. The crew ties up at Bancroft and leaves there in the morning, goes to Soda Springs, loads all the stock, and handles the elevators, or any other station switching that is necessary. That service has been on for a number of years past, the service was there in 1945, 1946, '47, and '48, the same, and as good as in 1949.

Mr. Collins: All right. That is all.

Mr. Quirk: We would like to defer cross examination of this witness. We may not have many questions. We just don't know. I think with a little time we will shorten it up anyway, and may decide to rebut it.

Exam. Mullen: Will Mr. Hanson be available?

[fol. 1012] Mr. Collins: Yes, will you?

The Witness: Yes, sir.

Exam. Mullen: All right.

Mr. Collins: All right.

(Witness excused.)

Mr. Collins: I offer exhibit 15 in evidence.

Mr. Quirk: Is this subject to objection?

Exam. Mullen: Yes, it will be received subject to objection or a motion to strike if necessary later.

(The document marked Exhibit 15, Witness Hanson, was received in evidence.)

Mr. Collins: Mr. Examiner, two or three of the other defendant railroads want to put in brief testimony, so I will cease in the presentation of the Union Pacific's testimony so they can present theirs and get away because of pressing engagements.

Exam. Mullen: Any objection?

Mr. Quirk: No.

Exam. Mullen: You may proceed.

Mr. Davis: Mr. Clarahan.

L. E. CLARAHAN was sworn and testified as follows:

Mr. Davis: We have fifty copies of these brief statements, and if anyone wants to get them I will be glad to take your name after the witness is finished, and furnish them to you. [fol. 1013] Exam. Mullen: You may proceed, Mr. Davis.

Direct examination.

By Mr. Davis:

Q. Will you please state your name, your address, and official connections?

A. My name is L. E. Clarahan. My address is St. Louis, and I am Vice-President in Charge of Traffic of the Wabash Railroad.

Q. Mr. Clarahan, will you state how long you have held that position, and briefly outline your previous railroad experience?

A. I have been vice-president since March, 1943, slightly over 7 years. I started working for the Wabash Railroad in the freight house in Columbia, Missouri, in 1912. With the exception of 22 months in the United States Navy, during the World War, I have been with them continuously since that time. In that period I have been Chief Clerk, in several division freight and passenger offices, Chief Clerk to some of the traffic executives.

Mr. Gibson: We will waive his qualifications.

By Mr. Davis:

Q. Mr. Clarahan, have you prepared a statement which you desire to give at this time in this case?

A. I have.

Q. Will you proceed please, and present that?

A. As a defendant in this case we registered our appearance at the initial hearing in Salt Lake City and were present at that hearing.

Because the Union Pacific is a very important connection [fol. 1014] of the Wabash we were particularly concerned with the testimony of Witness Earley and his exhibit #3 setting forth the traffic potential for the D&RGW as 157,762 cars divided 101,476 eastbound and 56,286 westbound. We feel that any diversion of traffic such as is contemplated which adversely affects the service and traffic of the Union Pacific likewise adversely affects the service and traffic of the Wabash.

Witness Earley's testimony did not indicate the extent to which traffic of the Wabash might be involved. Accordingly, folowing the Salt Lake hearing we conferred with representatives of the Union Pacific who advised that based on actual traffic handled from the complaint territory in 1948 the Wabash participated to the extent of 9.07 percent. It is reasonable, therefore, to assume we are jeopardized to the extent of 9.07 percent of the D&RGW's claimed eastbound traffic potential of 101,476 cars, or 9,204 cars.

The Union Pacific representatives did not have available similar information covering westbound traffic. For the years 1948 and 1949, however, Wabash deliveries westbound averaged 55 percent of the Union Pacific deliveries to the Wabash east-bound. Application of this per cent to the east-bound figure of 9,204 produces 5,062 cars for a total possible loss of 14,266 cars.

Wabash Railroad average gross revenue per car for 1949 was $119.07. Applied to the above cars it produces a pos- [fol. 1015] sible loss eastbound of $1,095,920.28, and westbound of $602,732.34; for a total potential loss to the Wabash of $1,698,652.62 per annum. I feel the use of our average gross revenue presents a conservative figure because our interchange with the Union Pacific is all at the Missouri

River giving us the opportunity for our longest possible haul.

The traffic received by the Wabash from the Union Pacific constitutes a very important nucleus of the consist of regularly schedules and extra freight trains the Wabash handles eastbound from the Missouri River, thereby enabling the Wabash economically to operate frequent trains attracting traffic from the many other connections at these gateways. Naturally, the diversion of the volume indicated in Witness Earley's testimony would disrupt long-established service practices and the Wabash would additionally suffer a loss on traffic from other connections. Of even greater significance the public would be inconvenienced if not actually harmed by such deterioration in long-established service channels.

Another witness will testify concerning the effect such loss of traffic will have on our train service and upon employment on the Wabash.

By Mr. Davis:

Q. Do you have anything further to add to that statement, Mr. Clarahan, on direct?

A. I do not.

Mr. Davis: Mr. Quirk.

[fol. 1016] Cross-examination.

By Mr. Quirk:

Q. You have been in the railroad business for a long time, haven't you?

A. About 38 years.

Q. Do you always get all of the potentially available traffic in a competitive area?

A. By no means.

Q. What makes you think that because Mr. Earley in a painstaking effort indicated how much traffic could possibly move this way, would be available to solicitors? That represents what actually will move. You take those figures as though they were an actually proven fact, as to the Rio Grande getting all this traffic.

A. Well, Mr. Earley made a very comprehensive survey. He comes up with the testimony that there are in this area some 157-odd-thousand cars available for D&RG solicitation. He sets up that as the potential traffic gain, and I simply set up a potential traffic loss against it. I have no idea to what extent the D&RGW will be able to influence all or any part of this business, but to whatever extent they are optimistic about their chances, I am pessimistic about the effect on the Wabash Railroad.

Q. He didn't say anything about the optimistic. He worked that up because he felt under this classification the Commission was entitled to have some estimate of what is involved.

[fol. 1017] Mr. Davis: I think the record speaks for itself, Mr. Mullen, and I don't think we should try to attempt to qualify the inferences left by the statements of the witness Earley.

By Mr. Quirk.

Q. Mr. Clarahan, do you think as a long experienced traffic man, and now Vice-president of a trunkline, that there is any possibility of the Rio Grande getting all of this traffic, if the joint rates are established?

A. No, they simply set up a potential gain, and I set up a potential loss based upon what they think is there for them.

Q. Mr. Clarahan, Mr. Earley did not set up a potential gain; he set up what he estimated to be traffic that could move this way, because the Union Pacific has a lot of traffic that can't move this way. That is what he set up. Are you familiar with what he did?

A. It is still a gain, if he gets it.

Q. Well, now, let's assume for a moment he does get it. Don't you connect with the Burlington at Kansas City?

A. Yes.

Q. The Missouri-Pacific?

A. That is right.

Q. Don't you interchange a lot of traffic with them?

A. That is right.

Q. Don't you interchange traffic with them now that moves through the Colorado Gateway?

A. Not very much with the Burlington. Some with the [fol. 1018] Missouri Pacific, yes.

Q. Well, with those various lines?

A. Yes.

Q. Santa Fe?

A. That is right.

Q. So that you wouldn't lose this necessarily even if it were routed?

A. Not necessarily, but here is the situation on that: Today that traffic comes to us with whom there is no conflicting interest whatever. It stops where we begin. We compete with everyone of those other railroads for further haul.

Mr. Quirk: That is all.

Mr. Davis: That is all, Mr. Clarahan.

(Witness excused.)

Mr. Davis: I would like to call Mr. Ritter.

E. L. Ritter was sworn and testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you state your name, and address, and official connection, please?

A. My name is E. L. Ritter. I live in St. Louis, Missouri. I am auditor of joint facilities and contracts for the Wabash Railroad.

Q. Would you please state for how long you have held that position, and your previous railroad experience, very briefly?

[fol. 1019] A. I have held that position for the past three years, and in that position I handle all contracts, contract records, settlements under contracts. I also handle the cost-accounting for the railroad. I have been with the Wabash Railroad for the past thirty years, and in that time, the first four years——

Exam. Mullen: I think that sufficiently qualifies the witness.

Mr. Quirk: Yes.

By Mr. Davis:

Q. Have you prepared a statement, Mr. Ritter, that you desire to present now in this case?

A. I have.

Q. Will you proceed to present that?

A. At the prior hearing in this case at Salt Lake City on December 12, 1949, Witness T. K. Earley, testifying in behalf of complainant, stated that 157,762 cars of carload traffic originated and terminated by the Union Pacific in Idaho, Montana, Oregon, and Washington would be susceptible of solicitation by complainant. Based on that traffic potential it has been estimated that, of the carload traffic interchanged by the Wabash Railroad Company with the Union Pacific in the year 1948, 9,204 carloads received from the Union Pacific and 5,062 carloads delivered to the Union Pacific represents the potential loss of traffic to the Wabash. Using this potential loss of traffic, we are able to compute the potential reduction in train service and the potential loss of employment on the Wabash.

[fol. 1020] Carload traffic received from the Union Pacific moves generally Eastward on the Wabash via Moberly, Missouri to St. Louis, Missouri, and to Decatur, Illinois, and points east thereof. Wabash Railroad operating performance for years 1947, 1948, and 1949 shows that train hours operated varies in approximately the same ratio as gross ton miles hauled, after allowing for improvements occasioned by diesels put in service in 1949. Yard engine hours for this same period varies approximately 80 percent with gross ton miles hauled.

Based on our experience, it is estimated that there would be a potential reduction in Wabash trains run Eastward of approximately 418 a year. To haul Eastward loaded cars, empties must be moved Westward in considerable quantities, and motive power and crews must be equalized, making it necessary to run trains Westward to an extent comparable with Eastward train movements. The reduction of Eastward trains would correspondingly reduce Westward trains,

making a potential total train reduction of approximately 836 a year.

In terms of employment this estimated train reduction represents a combined total of 836 crew trips on 4 operating districts between Kansas City, Missouri and St. Louis, Missouri, and Decatur, Illinois. Based on 312 trips per year this potential reduction in train operation would be equivalent to a yearly loss of employment to approximately 3 crews of 5 men each. The elimination of Terminal handling of trains, cars, and engines by the yard and mechani- [fol. 1021] cal department forces, by reason of this potential traffic loss, would indicate a potential reduction in labor forces of 10 Car Department employees, 8 roundhouse employees, and 2 yard crews 5 men each.

By Mr. Davis:

Q. Mr. Ritter, have you made a computation of the total number of man days which would be lost by the employees being displaced about which you have just testified, and have you also made some computation of the amount of wages lost for these same employees?

A. I have.

Q. I wonder if you would state that, please.

A. There is a potential loss of man days of 11,872.

Q. Is that per annum?

A. Per annum, with a potential per annum wage loss of $181,314.

Q. Per annum?

A. Per annum.

Q. Do you have anything further you wish to state on direct?

A. No, I have not.

Mr. Davis: Mr. Quirk.

Cross-examination.

By Mr. Quirk:

Q. Mr. Ritter, your statement, calculations, are based entirely on the assumption that the potential estimate by witness Earley of the potential traffic that would be susceptible to routing via the Rio Grande will move via the Rio

Grande, that you will get none of it through the other gateway to Kansas City, and so on, is that not true?

[fol. 1022] A. That is based on the potential maximum losses of the business, susceptible to solicitation.

Q. If it should turn out that is an erroneous asumption, then your calculations will likewise be erroneous, will they not?

A. They will vary, of course, to the extent that that loss is not realized.

Mr. Quirk: All right.

Mr. Davis: That is all, Mr. Ritter.

(Witness excused.)

Mr. Davis: I wonder, Mr. Examiner, if these gentlemen might be excused at this time with permission of Mr. Quirk.

Mr. Quirk: Oh, yes.

Exam. Mullen: Yes.

We will have a recess of 10 minutes.

(Recess taken.)

Exam. Mullen: We are ready to proceed.

Ernest F. McGuire was sworn and testified as follows:

Exam. Mullen: Let's be in order, gentlemen. Mr. Tornius.

Direct examination.

By Mr. Tornius:

Q. Mr. McGuire, you have prepared your testimony in written form, have you?

A. Yes, I have.

Mr. Tornius: Before you commence with your statement, may we have these exhibits which have been dis-[fol. 1023] tributed, Mr. Examiner, identified as exhibits 16 and 17?

Exam. Mullen: Which will be 16, the map?

Mr. Tornius: The blueprint may will be 17, the map on top which is not a blueprint map will be 16.

By Mr. Tornius:

Q. You may proceed, Mr. McGuire.

A. My name is Ernest F. McGuire. I am Commerce Agent of the Great Northern Railway Company and my residence is at St. Paul, Minnesota. My railroad experience extends over a period of 28 years, of which 25 years have been in the freight traffic departments of the Soo Line and Great Northern Railways. My assignments have been the formulation and preparation of tariffs and the handling of rate and division matters.

I have been with the Great Northern Railway the past twelve years and have occupied my present position since January 1, 1946, in connection with which my primary duties are the preparation and presentation of testimony in proceedings before the Interstate Commerce Commission and the various state regulatory bodies.

The Great Northern Railway is one of four northern transcontinental lines directly serving the Pacific Northwest and participating in the routes covered by the complaint. The three other major northern trans-continental lines are the Northern Pacific Railway, the Chicago, Milwaukee, St. Paul and Pacific Railroad and the joint line of the Canadian Pacific and its subsidiary, the Minneapolis, St. Paul and Sault Sainte Marie Railroad, known as the Soo Line.

[fol. 1024] The Canadian Pacific and the Soo Line also have a line to the Pacific Northwest via Spokane, Washington and the Spokane International, and a portion of the Pacific Northwest is reached by the joint line of the Canadian National and Duluth, Winnepeg and Pacific. All of these lines reach the gateways on the east at the Twin Cities (Minneapolis and St. Paul, Minnesota), the Head of the Lakes (Duluth, Minnesota and Superior, Wisconsin), or both.

Exhibit No. 16 is a map of the Great Northern System. There has been clocked out on the map those junction points between the Great Northern and the other northern transcontinental routes referred to which are west of the Montana-Dakota state line.

The Great Northern, like the other northern trans-continental lines but unlike the Union Pacific, which operates

over a central trans-continental route, does not connect directly with the Denver and Rio Grande Western. Under Mr. Quirk's statement at the initial hearing, the Great Northern and all defendants, other than the Union Pacific, are affected by the relief sought in this proceeding to the extent only that they participate in joint rates with the Union Pacific applicable via Ogden betwen the territories described in the complaint. As I shall explain in more detail later, this means that the Great Northern's direct involvement is principally with respect to trans-continental traffic to and from stations on its line in the Pacific Northwest which might be interchanged at its Spokane, Wash-[fol. 1025] ington junction with the Union Pacific and which might move over the rails of that carrier and its connections east of Spokane at competitive joint rates.

Mr. Quirk: Mr. Examiner, I am not quarreling with this witness' statement of his understanding of what is involved in the case, but I want to state on the record that the issues are shaped by the complaint.

Mr. Tornius: And by your statement at the initial hearing, Mr. Quirk. The record will show what that statement was.

Mr. Quirk: I will stand by that.

Mr. Tornius: That is satisfactory.

Mr. Quirk: I don't want to be bound by what this witness said I said at some other time.

Mr. Tornius: There is no intention that you should be.

The Witness: Contrary to Mr. Earley's testimony at the initial hearing, there is, so far as the Great Northern at least is concerned, no "pattern of agreement" between it and other northern trans-continental lines for a reciprocity of routing short-hauling either the Great Northern or its northern trans-continental connections. This is borne out in the discussion which follows. The routes involved are those provided in Agent Kipp's I. C. C. No. 1516 which operate with the rates in Agent Kipp's I. C. C. Nos. 1521, 1527, 1522, 1502 and 1531, these being the trans-continental tariffs on general commodities, fruit, classes and grain respectively.

[fol. 1026] Dealing first with the Chicago, Milwaukee, St. Paul and Pacific Railroad, which connects directly with the

Great Northern at the western junctions of Everett, Seattle, Tacoma, Chehalis, Bellingham, Newport and Spokane, Washington, and at Butte, Great Falls, Lewistown and Judith Gap, Montana, the universal practice, with but two minor exceptions later referred to, has been for the Great Northern to retain its long hauls and not to participate in joint rates on classes and commodities with the Milwaukee via any of said junctions. (See Route 4 and Note 230, Agent Kipp's I. C. C. No. 1516, which confines routing to and from Great Northern points in the Pacific Northwest to movement via junctions east of Snowden, Montana.)

The Milwaukee follows a similar practice of retaining its long hauls and similarly declines to participate in joint rates with the Great Northern via said junctions on traffic originated or terminated by the Milwaukee.

In this connection, I refer to routes Nos. 3 and 3-A in Agent L. E. Kip's ICC No. 1516, North Coast Territorial Directory 40-J of the Trans-Continental Freight Bureau, which confines movement to C. M. St. P&P Railroad through Mobridge, South Dakota. To or from local points on the C. M. St. P. & P. Railroad in Minnesota, North and South Dakota on the one hand, and Great Northern Railway local points in the Pacific Northwest on the other hand, routes are applicable only via Minnesota or Dakota junctions. In the case of rates between points both of which are served by [fol. 1027] the Great Northern; Trans-Continental North Coast Territorial Directory 40-J, Agent L. E. Kipp's ICC 1516, contains a restriction which limits the application only to the single line routes of the Great Northern.

The situation with respect tot he Northern Pacific Railway is the same as described for the CMStP&P Railroad. The Great Northern has connections with the Northern Pacific at Portland, Oregon; Chehalis, Tacoma, Seattle, Everett, Sedro Woolley, Adrian, Bellingham, Centralia, Lowell, Napavine, Vancouver and Spokane, Washington; Sand Point, Idaho; Helena, Butte, Billings, Laurel and Sidney, Montana. Here again the universal practice, with but one minor exception later referred to, has been for the Great Northern to retain the long hauls and not to participate in joint rates on classes and commodities via any of these junctions. The Northern Pacific follows a similar

practice and similarly declines to participate with the Great Northern in competitive joint rates via said junctions on traffic it originates or terminates in the Pacific Northwest and I refer specifically to route No. 6 of Agent Kipp's ICC No. 1516, North Coast Territorial Directory 40-J, also circle reference (25) of the same publication which restricts movement to the Northern Pacific on traffic between Northern Pacific stations.

On traffic from or to points in the Pacific Northwest on the Spokane, Portland and Seattle Railway, Oregon Elec- [fol. 1028] tric Railway and Oregon Trunk Railway, participated in by the Great Northern Railway, competitive joint rates are confined to routes according the Great Northern its long hauls in the same manner as on traffic to or from Great Northern stations in the Pacific Northwest. (See Route Nos. 99-B, 99-D of Agent Kipp's ICC No. 1516.)

The Spokane International—Canadian Pacific—Soo Line route is treated the same as the routes of the CMStP&P Railroad and the Northern Pacific Railway. Again, to or from local points on the Soo Line in Minnesota, North and South Dakota the Great Northern retains its long haul and additionally limits rates to or from common points to Great Northern direct movement. This is also true with respect to the Canadian National—DW&P route. (See route 4 and Note 230, Agent Kipp's ICC No. 1516.)

In treating with the three routes just covered there are, as I have indicated, two minor exceptions. One is with respect to eastbound fruits and vegetables, also lumber, from stations south and east of Spokane, Washington, on the lines extending to Coeur D'Alene, Idaho, Colfax, Washington, and Moscow, Idaho. The other is on eastbound lumber from stations on the line north of Spokane to Nelson, B. C. In both instances routes are available via Spokane, but on fruits and vegetables are confined to points on the CMStP&P, Northern Pacific and Soo Line, also CB&P Railroad west of the Twin Cities or Missouri River [fol. 1029] and do not embrace the extensive territory in the east, southeast and southwest where the great bulk of these commodities are marketed. The lumber routes from points on the line north of Spokane are similarly confined to stations on the CMStP&P Railroad. Both of these situations came about through the acquisition by the Great

Northern of other lines of railroad, in connection with which the Spokane routes were already established at the time of acquisition.

Origins on the short lines south of Spokane are on the former Spokane and Eastern Railway and Power Company and the Inland Empire Railroad Company, acquired by the Great Northern in 1927. The short line north of Spokane, from which lumber rates apply via Spokane, was the former Spokane Falls and Northern Railway, acquired by the Great Northern in 1908, and the original routing has been continued. It is important to point out that the routing via Spokane to and from the properties acquired from the Spokane and Eastern Railway and Power Company and the Inland Empire Railroad Company was general at the time of acquisition but that cancellation of routes on all traffic except to the extent indicated, was proposed and was found justified in I&S Docket 2999, reported at 142 ICC 230.

At this point I should like to point out that the Great Northern connects at Portland, Chemult and Klamath [fol. 1030] Falls, Oregon, with the Southern Pacific Railway and with the Union Pacific at Portland, Oregon, Seattle, Tacoma, Chehalis, Centralia and Vancouver, Washington, but that joint rates on classes and commodities moving trans-continentally are generally not applicable via these junctions, the Great Northern retaining its long haul.

In 1931, in consummation of a plan through which the Great Northern sought to establish joint rates over a route between California and the Northwest not controlled by the Southern Pacific, a 200-mile-line of railroad between the Great Northern's terminus at Klamath Falls, Oregon and the Western Pacific at Keddie, California was completed—the Great Northern extending south to Bieber, California and the Western Pacific north to that point.

The Bieber route was opened to traffic November 2, 1931. Through it the Great Northern has obtained competitive joint rates over a route on trans-continental traffic to and from California which affords it its long hauls in many cases as far east as the Twin Cities.

Conversely, it was necessary at that time for the Great Northern to afford the Western Pacific and its connections, including the D&RGW some trans-continental routes to and

from Great Northern Pacific Coast territory, but these latter routes at competitive joint rates are confined to Oregon and Western Washington. The scope of the territory af- [fol. 1031] fording the Western Pacific its long hauls to or from the Pacific Northwest is illustrated by circle reference (77) of Supplement No. 71 to Agent Kipp's ICC No. 1516. The right of the Great Northern to retain its long hauls on the bulk of this traffic from Central and Eastern Washington and Idaho was upheld by the Commission in I&S Docket 4126, Trans-continental Traffic Routed via Bieber, California, reported at 213 ICC 487.

The Great Northern's extension to the Pacific Coast was completed in 1893. At that time our western terminus was Seattle, Washington and we were confronted with the serious problem of attempting to obtain some share in the traffic to and from Portland, then the largest city in the Pacific Northwest and an important North Pacific Coast port for the handling of traffic to and from foreign countries and to and from California.

Portland was reputed to be the wealthiest city in the United States in proportion to its population and at the turn of the century was the seat of twenty national and other banks as compared with only six national and other banks at Seattle. (P. F. Collier's University Encyclopedia, published in 1902.) Portland was not reached by the Great Northern, as Exhibit No. 17, a map of our system at that time, indicates, but was served by the Oregon Railway and Navigation Company, which had a junction with the Great Northern at Spokane, Washington. In order that the Great [fol. 1032] Northern might obtain a share in the Portland traffic, the Great Northern and Oregon Railway and Navigation Company established joint rates to and from points on the Oregon Railway and Navigation Company, including Portland, August 1, 1894. At about that time the Great Northern also established joint rates to and from points on its line in the Pacific Northwest via Spokane and the Oregon Railway and Navigation Company, which did not then reach Seattle. This, of course, was different from a reciprocal arrangement whereby both carriers reach a common terminal, for that was not then the situation.

By the tariff publication referred to, shippers on each separate railroad, the Great Northern and the Oregon

Railway and Navigation Company, were able to reach a territory not otherwise available. These joint rates have been carried forward through the years, although in the intervening period the Oregon Railway and Navigation Company has become a part of the Union Pacific System and now reaches Seattle and although since that time the Great Northern has acquired trackage rights over the Northern Pacific south of Tacoma, which enabled it to reach Portland in 1909, and since then and in 1910 through the Spokane, Portland and Seattle Railway, which is wholly owned by the Northern Pacific and the Great Northern Railways, the Great Northern reached Portland via the SP&S route.

Even now, however, the Union Pacific does not have a full [fol. 1033] line of competitive joint rates to and from Great Northern points on trans-continental traffic via Spokane. In fact, that gateway is not now open at joint through rates on wool, livestock, ores, concentrates or smelter products (contained in Agent Kipp's ICC Nos. 1476, 1462 and GN Ry, ICC No. A-7897.) Eastbound fruits and vegetables rates via Spokane are limited to destinations reached by the Union Pacific cannot move via the Union Pacific to markets off that line in the East, Southeast and Southwest.

Tariffs filed to become effective September 15, 1932, closing the Spokane gateway to this traffic, to the extent just indicated, were protested by various shipping interests but permitted to become effective. Eastbound lumber rates via the Union Pacific are confined to a limited destination area on and west of the Missouri River from Council Bluffs, Iowa to Kansas City, Missouri, thence Kansas City Southern Railway to the Gulf of Mexico. The Great Northern territory from and to which these Spokane routes with the Union Pacific apply is confined to the main line for the most part. (See Route 4-B and circle reference (92) of Agent Kipp's ICC No. 1516, also routes in Agent Kipp's ICC Nos. 1474 and 1439).

The Great Northern's policy through the years, as this brief statement indicates, has been to preserve its long hauls to the fullest extent feasible with practical railroad operation. As a carrier which operates for long distances [fol. 1034] between the Pacific Coast and eastern gateways

at the Twin Cities and Head of the Lakes and which has built main and branch lines and supplies railroad equipment to handle traffic on its own line, it is, of course, opposed to the opening of any new routes which will short-haul it and are not clearly shown to be necessary and desirable in the public interest.

Mr. Quirk: I move to strike the rest of that paragraph, Mr. Examiner.

Exam. Mullen: Just a moment, let me read it.

Mr. Quirk: It is pure argument.

Mr. Tornius: I submit, Mr. Examiner, that is a factual statement rather than argument.

Exam. Mullen: I think the next sentence is all right; it is not argumentative.

Mr. Quirk: Which?

Exam. Mullen: "We are convinced that our limited routing with the Union Pacific does not constitute undue preference or prejudice."

Mr. Quirk: I thought the Commission was going to decide that. He is concluding that now.

Exam. Mullen: As I read it, he is stating the kind of order that the Commission should enter in the event they find it is correct. That sentence may stay in; it will not be stricken.

Mr. Quirk: all right.

[fol. 1035] The Witness: We are convinced that our limited routing with the Union Pacific does not constitute undue preference or prejudice. Should the Commission nevertheless conclude that undue prejudice to any carrier results from any joint rates and routes participated in by the Great Northern with the Union Pacific, it is respectfully asked that any order for removal thereof be framed in the alternative so that consideration may be given to a cancellation of existing joint rates and routes with the Union Pacific rather than the extension of joint rates and routes which short-haul our company.

Exam. Mullen: Just a moment, that is objected to, isn't it?

Mr. Quirk: I object to all that follows.

Exam. Mullen: That sentence will be argumentative.

Mr. Tornius: Which sentence is that now, Mr. Examiner.

Exam. Mullen: The one he is starting to read: "In view of the numerous——"

Mr. Tornius: I have no objection to the elimination of the next sentence, and then I assume he may conclude his statement. That last part of his statement is certainly a statement of fact, rather than argument.

Exam. Mullen: Let me read it, please.

The next sentence is eliminated, the one beginning: "In view of the numerous junctions;" that is out.

I find the last sentence argumentative also. That will be stricken.

[fol. 1036] By Mr. Tornius:

Q. Does that complete your statement, Mr. McGuire?

A. Yes, it does.

Q. Are these exhibits, 16 and 17, true and correct to the best of your knowledge?

A. Yes, they are.

Q. Were they prepared personally by you, or under your supervision?

A. They were prepared under my supervision.

Mr. Tornius: You may cross examine, Mr. Quirk.

Mr. Quirk: No questions. I have no questions.

Mr. Tornius: At this time I will offer the exhibits, 16 and 17 in evidence.

Exam. Mullen: Any objection?

Mr. Gibson: No objection.

Exam. Mullen: They will be received in evidence.

(The above-referred documents, marked Exhibits Nos. 16 and 17, witness McGuire, were received in evidence.)

Mr. Tornius: That is all, Mr. McGuire.

Exam. Mullen: That is all, Mr. McGuire; thank you.

(Witness excused.)

I. N. BAYLESS was sworn and testified as follows:

Exam. Mullen: Let's be in order, please. Mr. Collins.

[fol. 1037] Direct examination.

By Mr. Collins:

Q. Mr. Bayless, you have prepared your testimony in written form for presentation in this case, have you not?

A. Yes, sir.

Q. Are the statements therein, and the exhibit you have prepared true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. Will you proceed to read your statement?

A. My name is I. N. Bayless. I am President of The Union Pacific Coal Company, with offices in Omaha, Nebraska. I have been employed by the Union Pacific Coal Company during the past 20 years, first as Assistant General Manager, then General Manager, and, for the past 6 years, President. In my position as President of the Company I have responsibility for the management and operation of the Coal Company.

The Union Pacific Coal Company is a wholly-owned subsidiary of the Union Pacific Railroad Company. The Coal Company owns and operates mines in the six operating mining districts in the State of Wyoming, namely: Rock Springs, Reliance, Stansbury, Winton, Superior and Hanna, and during the year 1949 mined in excess of 3,400,000 tons of coal, over 95 percent of which was sold to the Union Pacific Railroad Company for use in the operation of its railroad. [fol. 1038] Following its preparation by Mr. A. D. Hanson, General Superintendent Transportation of the Union Pacific Railroad Company, I was furnished with a copy of the statement, introduced in this hearing as Union Pacific Railroad Company's Exhibit 15 and with respect to which Mr. Hanson testified, showing the loss of employment to employees of the Union Pacific Railroad Company which would result from the opening of the Ogden Gateway and the Denver and Rio Grande Western Railroad Company

securing routing on 101,476 loads eastbound and 56,286 loads westbound of the traffic now moved via the lines of the Union Pacific Railroad Company originating and terminating in the States of Idaho, Montana, Oregon and Washington.

Mr. Quirk: Well, even Mr. Hanson qualified that statement, by saying "if the traffic moved." Now this witness is saying that would result, without any qualifications.

Mr. Collins: Let's take it the way—let the record show that Mr. Bayless means the same thing that Mr. Hanson meant.

Mr. Quirk: It don't read that way, you know.

Mr. Collins: It will now.

The Witness: Exhibit 15 introduced in this hearing by Mr. Hanson reflects that if the D&RGW secures the routing on the amount of traffic therein shown, which, as I understand it, is based on a forecast given by Mr. T. K. Earley, Assistant Freight Traffic Manager of the D&RGW, in his testimony heretofore given in this case, it will result [fol. 1039] in a reduction in the operation by the Union Pacific Railroad Company of——

Exam. Mullen: That is the fourth time. We don't need that.

Mr. Collins: Mr. Examiner, this is a rather peculiar situation.

Exam. Mullen: Suppose we copy that in the record.

Mr. Collins: It is all right to copy it in the record, but it will have to be specified in this testimony.

Mr. Quirk: Every witness that goes on doesn't have to go into that.

Exam. Mullen: It will be copied into the record without reading.

The Witness: (a) four trains per day in each direction between Green River, Wyoming and North Platte, Nebraska,

(b) three trains per day in each direction between North Platte, Nebraska and Council Bluffs, Iowa, and

(c) one train per day in each direction between North Platte, Nebraska and Kansas City, Kansas.

That company was incorporated under an Act of Congress, approved July 1, 1862, amended July 2, 1864. It was completed in 1869 and on May 10, 1869, made connection with the Central Pacific Railroad at Promontory Point, Utah, to form the first through rail line to the Pacific Coast. The line from Ogden to Promontory Point was subsequently partially leased and partially sold to the Central Pacific Railroad (now Southern Pacific Company).

The line starting at St. Joseph, Missouri, running in a northwesterly direction through Hiawatha and Marysville, Kansas, to Hastings and Grand Island, Nebraska, was formerly known as the St. Joseph and Grand Island Railway. About five percent of its capital stock is in the hands of the public and the remainder is owned by the Union Pacific [fol. 1158] Railroad.

That part of the Union Pacific extending in a northwesterly direction from Granger, Wyoming, to Huntington, Oregon, and directly north from Salt Lake City through Ogden, Utah, and Pocatello, Idaho, to Butte, Montana (Oregon Short Line Railroad Company), was formerly known as the Oregon Short Line and Utah Northern Railway Company and still earlier as the Oregon Short Line Railway Company. It was incorporated April 14, 1881, in Wyoming Territory, and by Act of Congress April 2, 1882, was made a railway corporation of Utah, Idaho and Wyoming. The line from Granger, Wyoming, to Huntington, Oregon, was completed April 14, 1881. It was built by the Union Pacific Construction Department, was financed by the Union Pacific Railroad and was at all times intended to be a subsidiary of the Union Pacific Railroad Company.

The line west of Huntington, Oregon, to Portland, Oregon (Oregon, Washington Railroad & Navigation Company), was formerly known as the Oregon Railroad and Navigation Company and earlier as the Oregon Railway and Navigation Company. The company was incorporated in Oregon on June 13, 1879, but it was not until November 25, 1884, that the Oregon Railway & Navigation Company completed construction of the line from Portland to Huntington, Oregon, establishing the through route by railroad from Council Bluffs, Iowa, to Portland, Oregon.

In January, 1889, the track and equipment of the Oregon

[fol. 1159] Railway & Navigation Company was leased to the Oregon Short Line Railway Company. In October, 1893, both the Oregon Short Line and the Oregon Railway & Navigation Company went into receivership. On August 17, 1896, the Oregon Short Line obtained control of the OR&N and on January 9, 1897, the Oregon Short Line was sold at foreclosure to the Union Pacific Railroad.

The line extending south from Salt Lake City, Utah, to Los Angeles, California (Los Angeles & Salt Lake Railroad Company), was originally called the Utah Central Railroad and later the San Pedro, Los Angeles and Salt Lake Railroad Company. It was not until April, 1929, that the Union Pacific obtained control of that line. In 1936 all of the lines of the St.J.&G.I. Ry., O.S.L. RR., O.W.R.&N. RR. and L. A. & S. L. R. R. were changed to the Union Pacific Railroad Company as a result of leasing arrangements approved by the Commission in Finance Docket 9722, 207 ICC 543.

Existing Through Routes With the Rio Grande and Its Primary Objective in This Proceeding

The map which is page 3 of exhibit 25 contains an irregular black line beginning in the Pacific Northwest at Vancouver, B. C., running south just east of Seattle and Portland and then in a southeasterly direction to a point just west of Ogden and Salt Lake City. At Lynndyl, Utah, the black line crosses the Union Pacific, and it extends then in a southwesterly direction to a point east and south of San Diego, California. The Rio Grande now participates in [fol. 1160] through routes and joint rates on equal terms with all other carriers applying to transcontinental traffic moving between all points west of that irregular black line, on the one hand, and all points in the United States east of the vertical black line beginning just west of El Paso, Texas, and ending at the Canadian border, on the other hand. The traffic moving between those two territories and available to the Rio Grande to solicit for movement via the entire length of its railroad at rates equal to those applying via all other lines runs into many hundreds of thousands of carloads annually.

The Interstate Commerce Act gives all shippers the right to specify the lines over which their shipments shall move so

the Ogden gateway and route via the Rio Grande is actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington. However, most of that traffic originates or terminates at points on the Union Pacific, and it ordinarily moves via the Union Pacific through Wyoming because the joint through rates to and from that territory are restricted so that they will not apply when traffic is interchanged with the Rio Grande at junction points in Utah.

The primary objective of the complainant (Rio Grande) is to persuade the Interstate Commerce Commission that it should order the Union Pacific to short haul itself by joining in through one-factor rates and routing arrangements under which the Rio Grande could obtain a haul over the [fol. 1161] entire length of its line from Ogden, Utah, to Denver or Pueblo, Colorado, on eastbound traffic from points on the Union Pacific or its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington to destinations anywhere in the United States east of the vertical black line on the map which is page 3 of Exhibit 25 and a haul over the entire length of its line from Denver or Pueblo, Colorado, to Ogden, Utah, on westbound traffic originating at points anywhere in the United States east of the vertical black line consigned to points on the Union Pacific or its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington.

Transcontinental Carload Movement via Union Pacific to or from Idaho, Montana, Oregon and Washington During Year 1948

The statement on page 4 of Exhibit 25 has been prepared for the purpose of giving the Commission some information regarding the volume and the character of the carload traffic moving into and out of Idaho, Montana, Oregon and Washington, which the Rio Grande seeks to divert through Ogden for a maximum haul over its line. The 1948 movement has been selected for this showing because it is the last full year available at the time my exhibit and testimony were prepared. The eastbound movement totalled 116,278 carloads, of which 50,349 carloads or 43.3 percent consisted

of products of agriculture, 37,800 carloads or 32.5 percent [fol. 1162] consisted of forest products. The total westbound movement was 55,631 carloads, of which 34,848 carloads or 62.6 percent consisted of articles classified as "Manufactures and Miscellaneous." The total movement in both directions was 171,909 carloads.

Most of these carloads either originated or terminated on the Union Pacific Railroad and 46.5 percent were loaded or unloaded at points on branch lines.

Although some of our many branch lines do contribute substantially to the total, that contributed by many others is very small and as stated by Witness Hanson they are now receiving more service than is warranted on basis of tonnage handled.

About 50,000 carloads of that total either originated or terminated in Oregon or Washington in the area west of the irregular black line and were available to the Rio Grande for solicitation at equal rates via its long haul route. It is also a fact that many additional thousands of carloads moved into or out of that area via lines other than the Union Pacific, and those carloads likewise were available to the Rio Grande for solicitation at equal rates via its long haul route. The figures on page 5 of Section B of Witness Earley's Exhibit No. 3 confirm my statement in that respect for they show that the Rio Grande received a haul on a very heavy volume of competitive traffic into or from that area. In the year 1948, the Rio Grande's movement amounted to [fol. 1163] 37,628 carloads and that represents an increase of more than 300 percent over the number the Rio Grande handled to and from that area during the year 1944.

The figures shown in column numbers 3 to 8, inclusive, on page 4 represent a territorial breakdown of the total movement shown in column 2. Group 1 covers the northern half of the United States lying east of the vertical black line on the map, Exhibit 25, 83.3 percent of the total movement during the year 1948 either originating or terminating in that group. Group 2 covers the Southwestern states of Oklahoma, Texas, Arkansas and Louisiana. Only 10.6 percent of the total movement either originated or terminated in those states. Group 3 covers the Southeastern states and

only 6.1 percent of the total movement either originated or terminated in those states.

Comparison of Miles via Sought and Existing Routes

A vital consideration in this proceeding is a comparison of the distances via the sought routes through Ogden with the Rio Grande and the distances via the existing routes of the Union Pacific which omit the Rio Grande. There are some exceptions already discussed, but for the present it may be said that traffic to or from points on the Union Pacific and its connections in Idaho, Montana, Oregon and Washington may not be interchanged with the Rio Grande and through one-factor rates applied when from or to points in the [fol. 1164] United States east of the vertical black line on the map, page 3.

All such traffic tendered to or terminating on the Union Pacific and its short line connections ordinarily moves via the Union Pacific to or from, in some cases, Colorado gateways, and, in other cases, Missouri River gateways because the applicable joint rates do not apply via Utah junctions with the Rio Grande. When so handled by the Union Pacific via Colorado or Missouri River gateways, the traffic is always transported via routes that are shorter and in most cases substantially shorter than any route that could be established via the Ogden gateway for the purpose of giving the Rio Grande the maximum haul which it seeks in this proceeding. To illustrate that point, I have prepared a statement of the distances via the Union Pacific routes and via the routes which the Rio Grande wishes to have established via the Ogden gateway. That statement appears on page 5 of Exhibit 25.

McCammon, Idaho, is in the southeastern part of the state at the point where the Union Pacific lines north from Ogden, Utah, and northwest from Granger, Wyoming, converge. All shipments to or from Idaho, Montana, Oregon and Washington points west or north of McCammon moving either via the Union Pacific routes presently in effect or via the routes which the Rio Grande seeks to have established via the Ogden gateway must pass through McCammon. For this reason, McCammon has been used as a rep- [fol. 1165] resentative point in our showing of the differences in distances via the present Union Pacific routes and

those sought by the Rio Grande via Ogden because it is clear that whatever differences exist in the mileages at McCammon would also exist at points north and west thereof.

Denver and Pueblo, Colorado, are the principal eastern terminals of the Rio Grande, and I want to emphasize that between those points and McCammon the proposed routes via Ogden, Utah, with the Rio Grande are longer than via the Union Pacific direct to Denver and through Denver with its connections to Pueblo. These differences are shown on the map, page 3, because the disadvantages in distance via the routes through Ogden with the Rio Grande and the fact that the Rio Grande has no value as a service route on traffic——

Mr. Quirk: Mr. Examiner, it seems to me that is a conclusion that should be omitted from this statement.

Exam. Mullen: I think it is proper. It is the opinion of this witness. He is qualified.

The Witness: —to or from points on the Union Pacific and its connections in Idaho, Montana, Oregon and Washington cannot be fully realized without knowledge of the geographical location of McCammon, Idaho; Ogden, Utah; Pueblo and Denver, Colorado, as well as Cheyenne, Wyoming, and the general geographical location of both the Rio Grande and the Union Pacific Railroads.

[fol. 1166] It should also be noted that traffic moving via existing Union Pacific routes does not reach Denver but passes through Granger and Cheyenne, Wyoming, the latter being 106 miles north of Denver. It is 529 moles via the Union Pacific from McCammon to Cheyenne and 718 miles between McCammon and Denver via the route through Ogden with the Rio Grande. The fact that the Union Pacific from Cheyenne, Wyoming, to Omaha, Nebraska, or to Kansas City, Missouri, is shorter than any line with which the Rio Grande could make connections at Denver, Colorado, to either Omaha or Kansas City further emphasizes the fact that the Rio Grande has no value as a service route on the traffic it seeks in this case. Even between Ogden and Denver the Rio Grande is 607 miles or 78 miles longer than the Union Pacific between McCammon and Cheyenne. Movement of this traffic through Ogden with the Rio Grande means not only handling via a longer route to or from Ogden

than from McCammon but the wholly unnecessary and wasteful transportation of 111 miles between Ogden and McCammon.

Mr. Quirk: Mr. Examiner, I object to these characterizations as being incompetent and irrelevant.

Exam. Mullen: I believe the witness can state his opinion. That is all he is doing.

Mr. Quirk: I merely want the objection on the record.

Exam. Mullen: The objection is noted on the record, and is overruled.

[fol. 1167] The Witness: The distance from McCammon to Denver via the Union Pacific is 623 miles, but via Ogden and the Rio Grande the distance is greater by 95 miles or a total of 718 miles. Even to the Rio Grande's eastern terminal of Pueblo, the distance of 741 miles via the Union Pacific to Denver and the Colorado and Southern Railway beyond is 33 miles shorter, and the distance of 742 miles via the Union Pacific to Denver and the Rio Grande beyond is 32 miles shorter than the distance of 774 miles via the sought route through Ogden via the Rio Grande. It is obvious then that there is no point in the United States where the distance via the sought route through Ogden with the Rio Grande would be shorter than via the more direct route of the Union Pacific, and it is equally obvious that to or from the Missouri River and East where the preponderance of the tonnage sought by the Rio Grande either originates or terminates the distance disadvantage of its proposed route increases because shipments via the Union Pacific do not pass through either Denver or Pueblo but through Cheyenne, Wyoming, 106 miles north of Denver.

The distance via the Union Pacific from Cheyenne to Omaha is 507 miles, and the distance via the CB&Q from Denver, which is the Rio Grande's short single line connection to Omaha, is 538 miles. The Union Pacific distance from Cheyenne to Kansas City, Missouri, is 624 miles, and the distance via the CRI&P Railway from Denver, which is [fol. 1168] the Rio Grande's short single line connection to Kansas City, Missouri, is 636 miles.

Page 5 of Exhibit 25 contains a more elaborate showing of the distance disadvantage of the proposed routes through Ogden with the Rio Grande compared with the distance

via the more direct route of the Union Pacific through Granger, Wyoming. For reasons previously stated, I have used only McCammon, Idaho, as representative of all of the stations west and north thereof. The forty-three points to which distances are shown from McCammon are marked on the map, and they are representative of all of the points in the United States east of the vertical black line on the large map. The figure shown on the map in connection with each point is the distance disadvantage in miles via the route through Ogden with the Rio Grande. The figures shown in Column 1 on page 5 of Exhibit 25 are the distances in miles via the route of the Union Pacific through Granger, Wyoming. Column 1-A makes reference to the routes via which those distances have been calculated. To Denver, Kansas City, and Omaha the distances shown are via the Union Pacific direct. To other points the distances shown are via the approximate short tariff routes. The figures shown in Column 2 are the distances via what would be the approximate short tariff routes through Ogden with the Rio Grande, and they correspond with the figures shown with each point on the map.

As only about 10 percent of the traffic *of the traffic* which the Rio Grande seeks to take away from the Union Pacific [fol. 1169] originates or terminates in the Southwest and the balance, or 90 percent, in the area where the sought routes are approximately 200 miles longer than those presently in effect, it seems obvious that from a standpoint of efficiency and economy the publication of those sought routes through Ogden is not warranted.

The only possible result would be financial gain to the Rio Grande and a disproportionately greater loss to the Union Pacific because we would give up the revenue for a haul of about one thousand miles for one of 111 miles and the Rio Grande would gain the revenue for a haul of about 600 miles.

Mr. Quirk: Mr. Examiner, I want to again object to these conclusions and opinions, because it is incompetent, and I state my grounds. There are many cases in this country where the value of a route is not determined entirely by distance, and that is a well-known fact. For this witness to merely say because there is a difference in distance, in one

route against the other, that that makes the longer route of more value than the shorter route, which is not substantiated by experience, if that was the real issue here——

Exam. Mullen: It is just the opinion of this witness, however. He does show the fact upon which that opinion is based.

Mr. Quirk: He shows one fact, distance.

[fol. 1170] Exam. Mullen: Well, the facts upon which his opinion is based.

Mr. Quirk: All right.

Exam. Mullen: Proceed.

Your objection is noted on the record.

Explanation of Interchange Arrangements Between Transcontinental Lines at Junction Points in Washington, Oregon and California

In Section F of his Exhibit No. 3, complainant's witness, T. K. Earley, shows representative routes through interchange points in Washington, Oregon and California via which the Union Pacific and other defendants permit themselves to be short hauled. His testimony relating to that section begins at page 113 of the transcript covering the first hearing in this proceeding and ends on page 128. As I understand his complaint, it is that the Pacific Coast terminal lines join with each other in what Mr. Earley calls a "smooth and flexible" (transcript, page 122) routing arrangement with each other on certain transcontinental traffic but refuse to let the Rio Grande have its maximum haul as an intermediate carrier on traffic originating or terminating in Utah north of Ogden, Idaho, Montana, Oregon and Washington.

The present routes have been in effect for many years and were for the most part established prior to the time the Union Pacific assumed control of that part of our line west [fol. 1171] of Huntington, Oregon, and south of Salt Lake City. I shall deal in detail with each of the western gateways referred to by Mr. Earley and will show that the entire arrangement redounds to the benefit of the Union Pacific and is of benefit to the public. No such benefit could flow to the Union Pacific or to the public from opening of the Ogden gateway.

Mr. Quirk: Mr. Examiner, this is just not proper for a witness to decide the case here for himself.

Exam. Mullen: Wait a minute. Let me read it.

That sentence appears to me to be purely argumentative. Objection sustained.

Mr. Collins: Which sentence are you talking about?

Exam. Mullen: The last sentence of page 13.

The Witness: Beginning with the word "no."

Exam. Mullen: That is right; that is the last sentence.

Mr. Collins: May I ask him at this point what he means by that sentence, to state it not objectionably?

Mr. Quirk: I think that is improper.

Exam. Mullen: The sentence is objected to as being argumentative. The objection is sustained. Do you desire to ask the witness any questions on direct?

By Mr. Collins:

Q. Do you desire to state, Mr. Stilling, what you mean in that sentence by the use of the words in that sentence?

Mr. Quirk: I object to that question.

[fol. 1172] Mr. Collins: I have a right to ask it.

Mr. Quirk: It calls for the same kind of answer.

Mr. Collins: It does not.

Exam. Mullen: We will wait until the question is answered, then we will see what basis there is for the objection.

Go ahead.

The Witness: I think the same thing will come out later in my testimony, Mr. Collins:

Mr. Collins: All right.

The Witness: Wallula, Washington Gateway—UP R.R.—NP Ry.

The joint rates and routing arrangements with the Northern Pacific via the Wallula, Washington, gateway were established earlier than others in the northwest and will, therefore, be discussed first. The Northern Pacific Railway was the first transcontinental line to reach the North Coast territory, its line to Wallula having been completed in August, 1883. More than two years earlier, April, 1881, to be exact, the line of the Oregon Railroad & Navigation Company, had completed its line from the west into Wallula,

Washington, and continuous service between Portland, Oregon, and Wallula, Washington was inaugurated by that line in November, 1882. In the fall of 1883, the Northern Pacific and OWR&N established joint through service via the Wallula gateway on transcontinental traffic to and from Portland points taking Portland rates. Also to and from Tacoma, Washington, by means of the railroad constructed [fol. 1173] by the Northern Pacific from Portland to Goble, Oregon, 40 miles north of Portland, thence ferry across the Columbia River to Kalama, Washington. That service to Tacoma continued until July, 1887, when the Northern Pacific completed construction of its line over the Cascade Mountains direct to Tacoma.

Exam. Mullen: Just a moment, please.

Off the record.

(Discussion off the record).

Exam. Mullen: On the record.

Mr. Quirk: Mr. Stilling, these 15 pages that the Examiner has referred to: do they describe the reasons why the Union Pacific joins in short hauling itself with other railroads in connection with certain routes and joint rates?

The Witness: It gives the historical background of the interchange with the other northern lines at those junction points, and it gives some information regarding the traffic that moves via those gateways both as to the volume and character of the traffic.

Mr. Quirk: Well, does part of the explanation show that there exists between the railroads involved a reciprocal traffic that does not exist between the Union Pacific and the Rio Grande?

The Witness: No, sir. It is not a reciprocal arrangement.

Mr. Quirk: I mean, is it based on the fact there are reciprocal situations that exist there?

[fol. 1174] The Witness: No, sir, if you leave out that word "reciprocal" we can get along better, Mr. Quirk. There is no reciprocal arrangement. The arrangement is very unbalanced. I am trying to go into the history and show how these interchanges originated.

Mr. Quirk: I see. What is Mr. Collins' attitude on this thing? I of course won't object if it is just copied in the record, but I won't insist on it being read.

Exam. Mullen: I just suggested it in the interest of saving time.

Mr. Collins: May I make a suggestion, Mr. Quirk?

Rather than to have Mr. Stilling read it all, if you can find time to read it over and then if you want to ask Mr. Stilling any question about them later, you certainly can do so.

Mr. Quirk: We still are off the record?

Mr. Collins: No. I am committed.

The Witness: If you want to skip this out of sympathy for me, I would just as soon read it.

Exam. Mullen: Well, all right, go ahead and read it.

Mr. Quirk: All right, I am willing that it be copied.

Exam. Mullen: Copy that into the record then, down to the middle of page 29. It is subject to cross examination and objection in due course.

Mr. Quirk: Yes.

[fol. 1175] The Witness: As stated previously, the OWR&N did not build into Huntington, Oregon, until November, 1884, a year after the joint service had been established via Northern Pacific and OWR&N via Wallula. Furthermore, during the years 1882 to 1889 the two lines, Northern Pacific and OWR&N, were jointly owned and controlled by the Oregon Transcontinental Company. In January, 1889, the track and equipment of the OWR&N was leased to the Oregon Short Line Railroad. The through routes originally established when the Northern Pacific and OWR&N were under common management were continued after the OWR&N was leased to the Oregon Short Line and are in effect today. I feel reasonably sure the Commission will readily recognize the distinction between this routing arrangement between the Northern Pacific and Union Pacific and the opening of the Ogden gateway as sought by the Rio Grande, but it should nevertheless have some information regarding the volume and character of the traffic routed through the Wallula gateway. At my request the accounting department of the Union Pacific made a traffic study of all transcontinental carload shipments interchanged with the Northern Pacific Railway at Wallula, Washington, during the months of April and October, 1948. It was not possible for us to make a more extensive study,

but I believe the two-month period is representative of the entire year, especially since October is normally the heaviest shipping month.

[fol. 1176] During that wo-month period of April and October, 1948, the Union Pacific took a short haul on 52 carloads on which the Northern Pacific received its long haul. Only four of those cars moved westbound. Forty-eight moved eastbound, and thirty-seven of those forty-eight cars contained apples originating at Yakima, Washington. Twenty-nine of those thirty-seven cars were consigned to points in Minnesota, four to Wisconsin, one to Iowa and three to North Dakota. It is axiomatic that many of those cars, moving as they did into Northern Pacific territory were transported via routes that were shorter than via the Union Pacific long haul to the Missouri River and its connections beyond. The remaining eleven cars consisted of steel bars from Albina, Oregon, to Illinois and Nebraska; pears from Yakima to Wisconsin and New York; wrapping paper from Albina, Oregon, to North Dakota; apples from Milton, Oregon, to South Dakota and from Hood River, Oregon, to Wisconsin.

During the same two-month period of April and October, 1948, the Union Pacific received a long haul on forty-two carloads, on which the Northern Pacific took a short haul. The entire movement consisted of lumber and other forest products originating in Washington consigned to points in the territory served by the Union Pacific in Colorado, Nebraska and Kansas. Here again the shipments moved via shorter routes than if they had been retained by the Northern Pacific for its long haul. Obviously this is in the public in-

[fol. 1177] terest.

Spokane, Washington Gateway—UP R.R.—GN Ry.

The joint rates and routes with the Great Northern Railway via Spokane were first established August 1, 1894, shortly after that line completed construction to Spokane. Although that was subsequent to the date the OWR&N made physical connection with the Oregon Short Line at Huntington, Oregon, in November, 1884, and also subsequent to the time the property and equipment of the OWR&N were leased to the Oregon Short Line Railroad, the arrangement

was nevertheless perfected at a time when neither the Oregon Short Line nor the Union Pacific could exercise control of the OWR&N.

A traffic study by our accounting Department shows that during the two-month period of April and October, 1948, the Union Pacific took a short haul on seventy-six carloads on which the Great Northern received its long haul. Twenty of those carloads moved westbound and consisted principally of commodities falling into the classification of "Manufactures and Miscellaneous." Three carloads originated in Minnesota and North Dakota; the balance in eastern and southern territories. Fifty-six or the balance of the seventy-six carloads on which the Union Pacific took the short haul, moved eastbound. Thirty-nine of those cars contained either lumber and forest products or apples and terminated principally in Great Northern territory in North and South Dakota and Minnesota and moved, in the public interest, via [fol. 1178] shorter routes than via the Union Pacific to Missouri River gateways. The balance consisted of miscellaneous shipments of canned goods, furniture, hops and iron and steel articles to various destinations in the Middle West, Eastern and Southern states.

During the same two-month period, the Union Pacific received a long haul on 118 carloads on which the Great Northern received a short haul. Twenty-nine of those carloads moved westbound. These shipments originated in twelve different states in the Middle West, East and South and consisted of commodities classified as Products of Agriculture or Manufactures and Miscellaneous. Eighty-nine carloads moved eastbound and consisted primarily of lumber and other forest products consigned to points in Union Pacific territory in Wyoming, Nebraska, Kansas and Colorado, and they likewise moved via shorter routes than if they had been retained by the Great Northern for its long haul.

Spokane, Washington Gateway—UP R.R.—SI R.R., CP. RY., Soo Line

The joint rates and through routes via Spokane, Washington, with the Spokane International Railroad, Canadian Pacific and Minneapolis, St. Paul and Sault Ste. Marie Railroad (Soo Line) were first established in May, 1907, at a

time when the Southern Pacific Company and the Union Pacific System lines were under common management and control. The agreement made with those lines at that time [fol. 1179] was the result of our request of the SI-CP lines to establish joint rates and through routes between California and points in the western provinces of Canada. Both areas were developing rapidly at that time, and there was an ever-increasing flow of California produce into Canada that we were anxious to encourage and develop. The Canadian Pacific was not willing to establish joint rates and through routes with the Union Pacific and Southern Pacific on this traffic via Spokane unless there was some compensating advantage to that line.

The opening of the Spokane gateway to the Canadian Pacific, Spokane International and Soo Line on transcontinental traffic, therefore, became part of the trade or agreement made with those lines at that time. During the months of April and October, 1948, the Union Pacific took a short haul on 228 carloads on which the SI-CI-Soo Lines received a long haul. Seventeen of those 228 cars moved westbound, eight of which were lumber from Wisconsin. The balance was miscellaneous commodities from various states. 211 of the 228 cars moved eastbound, and 180 of them contained lumber, terminating in Soo Line territory in North and South Dakota, Minnesota, Michigan, Wisconsin and Illinois. Here again the shorter routes and public interest features are apparent. The balance consisted almost entirely of lumber to other states.

During the same two-month period of April and October, [fol. 1180] 1948, the Union Pacific received a long haul on 118 carloads on which the Spokane International took a short haul. Nine of those carloads moved westbound and consisted almost entirely of lumber to the Middlewest and Miscellaneous originating in the Middle West, East and South. The balance, or 109 carloads, moved eastbound and consisted almost entirely of lumber to the Middle west and Southwest and Aluminum sheet to the Middlewest, Southwest, East and Southeast. During the same two-month period the Union Pacific received a haul on 419 carloads moving between California and the western provinces of Canada. 119 of those cars moved Union Pacific long haul between Spokane and Southern California. The balance

of 300 cars moved Union Pacific between Portland, Oregon, and Spokane, Washington, and moved via Southern Pacific south of Portland.

Marengo, Washington, and Plummer, Idaho Gateways
UP R.R.—CMStP&P R.R.

The Chicago, Milwaukee, St. Paul and Pacific Railroad was the last one of the lines to be constructed through to the North Pacific Coast, its through transcontinental line having been opened for freight traffic on August 1, 1909 (131 ICC 619).

As early as 1902 the Milwaukee Railroad and Union Pacific Railroad had entered into an agreement relating to interchange of traffic at Council Bluffs, Iowa, and Kansas City, Missouri, and that agreement was amended after the Milwaukee completed construction to the North Pacific Coast. The amended agreement provided that the Milwaukee was [fol. 1181] to be given access to Portland via Plummer, Idaho, or Marengo, Washington, from all territory north of its main line from Chicago, Illinois, to Omaha, Nebraska.

Also, from eastern territory on traffic handled via car ferry routes across Lake Michigan. Traffic from points on and south of the main line of the Milwaukee Railroad and also traffic moving all-rail from eastern territory was to move Union Pacific from Council Bluffs or Kansas City. The large volume of traffic from California, Oregon and Washington and intermountain states which the Union Pacific delivered to the Milwaukee Railroad was an important consideration in that agreement.

In August, 1922, the Milwaukee Railroad filed formal complaint with the Interstate Commerce Commission seeking an order requiring the Union Pacific to establish joint rates and through routes via Plummer, Idaho, and Marengo, Washington, on traffic originating at points on the Milwaukee's main line from Chicago to Omaha and on branch lines south thereof, also on traffic received from connections when destined Portland, Oregon, and points taking same rates.

The complaint bears the Commission's Docket No. 14167 and is reported in 88 ICC 312. The Commission's findings were in favor of the Milwaukee Railroad, and the routes via

Plummer and Marengo were broadened to cover the addi-
[fol. 1182] tional territory as a result of its order in that proceeding. Both the Plummer and Marengo gateways are shown in the tariff today, but the facilities afforded for the interchange of traffic at Plummer are inferior to those at Marengo and little, if any, traffic moves via Plummer.

No transcontinental traffic was interchanged at that gateway during the months of April and October, 1948. During that two-month period, the Union Pacific received a short haul on 1,093 carloads moving via the Marengo gateway. 300 of those cars moved eastbound, and 222 of those 300 cars moved to destinations in South and North Dakota and Minnesota and consisted almost entirely of lumber and other forest products, a large part of which originated south of Portland on the Southern Pacific Company.

Twenty-two cars, all lumber, terminated in Wisconsin; twenty-six cars, all lumber, terminated in Iowa and nine cars, mostly lumber, terminated in Illinois. The balance, largely lumber, terminated in other states such as Michigan, Ohio, Pennsylvania, New York and New Jersey.

793 cars moved westbound via Marengo during the months of April and October, 1948. 401 of those cars contained miscellaneous freight (ICC Classification 950). They originated at Chicago and were loaded by employees of the Milwaukee Railroad. All were consigned to Portland, Oregon, as final destination with stops for partial unloading at [fol. 1183] Spokane, Seattle, and other points on the Milwaukee Railroad. The tonnage is so loaded by the Milwaukee Railroad that tonnage for each point goes forward in separate cars, thus affording the most expedited service. Although only part of the tonnage actually moves from Marengo to Portland, the Union Pacific shares in the revenue on the total weight, all billing being taken into account at Portland.

Sixty-three similar cars originated in other states, largely New York. There were a few shipments of livestock and grain in the balance of the westbound movement, but the greater part of it consisted of Manufactures and Miscellaneous originating in the East and Middlewest consigned to Portland.

During the same two-month period of April and October,

1948, the Union Pacific received the long haul on thirteen carloads via the Marengo gateway on which the Milwaukee Railroad took a short haul. The Union Pacific also received a long haul on 1,279 carloads interchanged with the Milwaukee Railroad at Council Bluffs, Iowa, or Kansas City, Missouri. That figure covers only cars from or to points on the Union Pacific in Oregon, Washington and California and which originated or terminated on the Milwaukee east of Council Bluffs, Iowa, or Kansas City, Missouri.

Time allotted for preparation of our case did not permit preparation of a statement showing the many hundreds of additional carloads originating or terminating beyond the [fol. 1184] rails of the Milwaukee and Union Pacific which could have moved Milwaukee long haul but on which the Union Pacific received its long haul from either Council Bluffs or Kansas City.

Portland, Oregon Gateway—UP R.R.—SP Co.

Interchange of transcontinental traffic at Portland, Oregon, with the Southern Pacific Company involves long haul movement via the Southern Pacific to and from Portland of traffic originating or terminating at points on the Union Pacific north of Portland and long haul movement via the Union Pacific to and from Portland of traffic originating or terminating at points on the Southern Pacific in Oregon south of Portland. The long haul movement via Union Pacific of traffic originating or terminating at points south of Portland goes back to the time the Southern Pacific was controlled by the Union Pacific, and the arrangement was continued at joint rates and through routes after the Union Pacific was ordered by the courts to divest itself of that control of the Southern Pacific.

Long haul movement via the Southern Pacific of traffic to and from points on the Union Pacific north of Portland began in 1910. Originally, the Northern Pacific Railway was the only line operating between Portland, Oregon, and the Puget Sound ports of Tacoma and Seattle, Washington. Prior to 1910 the OWR&N Company operated a line of railroad between Tacoma and Seattle and in the year 1909 entered into an agreement with the Northern Pacific Rail- [fol. 1185] way which gave the OWR&N equal joint posses-

sion and use in common with the Northern Pacific Railway of the line between Portland and Tacoma for a period of 999 years. Operation under the agreement began in 1910 (96 ICC 116-118), and the OWR&N Company duplicated the joint rates and through routes already in effect via the Northern Pacific to and from points north of Portland. Furthermore, the service of the OWR&N company to and from points north of Portland was also perfected at a time when the Southern Pacific was controlled by the Union Pacific.

During the months of April and October, 1948, the Southern Pacific Company received a long haul on 252 carloads on which the Union Pacific received the short haul either to or from Portland. During the same period, the Union Pacific received a long haul on 389 carloads on which the Southern Pacific Company received a short haul. In both instances most of the eastbound movement consisted of lumber and other forest products while the westbound movement consisted almost entirely of articles classified as Manufactures and Miscellaneous.

Summary of Routing Via Oregon and Washington Gateways.

Interchange of transcontinental traffic at California junction points will be dealt with separately because it presents a different picture, but before passing on to my testimony and explanation of that situation I would like to briefly summarize the interchange arrangements which I have just [fol. 1186] discussed between the North Coast lines at Wallula, Spokane, Marengo and Portland. All such arrangements have been in effect over a long period of years and were for the most part established at a time when railroad construction in that area was at its peak, and some of the lines were under different management and control than at present.

Actual movement of traffic via these routes shows that they are in the public interest, and so far as the carriers are concerned, each shares in the long haul as well as the short haul. The existence of these routes via Oregon and Washington gateways makes it possible to handle traffic via

shorter routes than if the terminal line in the northwest received its long haul.

Consider, for example, the shipments moving via Union Pacific short haul to and from North Coast junctions and which originated or terminated on the Great Northern, Northern Pacific, Milwaukee or Soo Line in the Dakotas or Minnesota. From Chicago, Illinois, to Portland, Oregon, all the traffic interchanged with the Milwaukee Railroad at Marengo moves via a route that is thirty miles shorter than via the route through Council Bluffs.

The distance via the Marengo route is 2,229 miles and via the Council Bluffs route, 2,259 miles. (CMStP&P ICC Nos. B-5894 and B-7594 and UP RR ICC No. 5113). This movement of traffic in the public interest via shorter routes is in [fol. 1187] direct — to the situation that would be created by granting the demands of the Rio Grande in this proceeding which would always involve movement via a longer route and would always mean financial loss to the Union Pacific in a much greater proportion than the gain realized by the Rio Grande.

California Gateways—UP R.R.—AT&SF Ry.—SP Co.

In part of my previous testimony I call attention to the fact that the Rio Grande now participates in joint rates and through routes on equal terms with other carriers applying to transcontinental traffic originating or terminating in the area west of the irregular black line on page 3 of Exhibit 25, beginning south of San Diego, California, and ending at Vancouver, B. C. That, of course, includes practically the entire state of California. On all of the many hundreds of thousands of carloads moving into or from California and the balance of the territory lying west of that irregular black line, the Rio Grande is in position to solicit at equal rates with all other carriers its maximum haul on traffic that it neither originates nor terminates, yet the Rio Grande, through its witness, Mr. T. K. Earley, complains about reciprocal routing arrangements in effect betwen the California Pacific Coast terminal lines via Los Angeles, Colton, San Bernardino and Barstow, California. Territory served by each of the California lines is, in part, subject to routes

via which each of the other lines can obtain a long haul and [fol. 1188] the terminal line receives only a short haul. Like the arrangement on the North Coast, it gives the shipper a choice of routes, including those embracing the Rio Grande, and in many cases the advantage of forwarding shipments over shorter routes than would otherwise be available if each of the transcontinental lines always received its long haul.

All of the routing arrangements via junction points in southern California have been in effect for many years, and those applying in connection with the Union Pacific were established by the Los Angeles and Salt Lake Railroad when it was an independent corporation.

As stated earlier in my testimony, the Union Pacific obtained control of the LA&SL in April, 1921, and all of the joint rates and through routes established by the LA&SL have been continued in effect. Absence of control of the LA&SL by the Union Pacific until 1921, and the additional fact that through routes with the Rio Grande via Utah junctions are in many instances materially shorter than Union Pacific long haul routes, creates a situation directly opposite to that involving traffic to and from Idaho, Montana, Oregon and Washington where no joint rates have been in effect via the Rio Grande's longer route for almost half a century.

There is another important difference between the Rio Grande's participation with the Union Pacific in transcontinental traffic to and from Los Angeles and its nonparticipation in through routes and joint rates to and from [fol. 1189] Portland, Seattle or Spokane, and that is that the total transportation performed to a point like Chicago is substantially greater from the Northwest than from Los Angeles.

From Los Angeles to Chicago via Union Pacific, Provo, Utah, Rio Grande, Denver and the CB&Q it is 2,293 miles. From Portland via Union Pacific, Ogden, thence Rio Grande and CB&Q it is 2,473 miles or 180 miles farther than from Los Angeles via the Provo route.

From Spokane it is 2,483 miles or 190 miles farther than from Los Angeles and from Seattle 2,651 miles or 368 miles farther than from Los Angeles. The reason for this is that Portland and Seattle are approximately six degrees longi-

tude farther west of Greenwich than is Los Angeles, and the Rio Grande lies largely in the southern half of the United States. Through routes via Ogden with that line, on the greater part of the traffic in which it seeks to participate, involves additional and wasteful transportation of 200 miles and more. In contrast, from Los Angeles, California, to Pueblo, Colorado the distance via the Union Pacific, Provo, Utah, and the Rio Grande is 1,332 miles or 181 miles shorter than the distance of 1,513 miles via the Union Pacific long haul to Denver and the Colorado & Southern to Pueblo.

To Denver, Colorado, the distance via Provo with the Rio Grande is 1,276 miles or 119 miles shorter than the distance of 1,395 miles via the Union Pacific all the way from Los [fol. 1190] Angeles to Denver. The Provo route from Los Angeles via Union Pacific and Rio Grande is the shortest to practically the entire United States although at the Missouri River and east thereof the advantage largely disappears because via the Union Pacific long haul all traffic moves through Cheyenne, Wyoming, and our line from Cheyenne to both Kansas City and Council Bluffs is more direct and shorter than any line from Denver to those points. On page 7 of my exhibit 25 is a comparison of the distance via the Provo, Utah, route with the Rio Grande and the distance via routes of the Union Pacific through Wyoming from Los Angeles, California, to the same forty-three points to which distances have already been shown from McCammon, Idaho.

During the two-month period of April and October, 1948, the Union Pacific received a long haul on 1,540 carloads of transcontinental traffic via Southern California junctions on which either the Santa Fe or Southern Pacific took a short haul, and the Union Pacific took a short haul on 985 carloads on which either the Santa Fe or Southern Pacific received the long haul. If we include shipments interchanged with the Pacific Electric Railway, which is a wholly owned subsidiary of the Southern Pacific, the number of shipments on which the Union Pacific received the long haul is increased to 3,033 carloads.

Other Short Haul Routing

[fol. 1191] Witness Earley also testified regarding the fact that certain of the defendants in this proceeding, notably

the CB&Q R. R., CRI&P R. R. and AT&SF Ry., permit themselves to be short hauled via Missouri River junction points instead of demanding their haul to and from Denver, Colorado, on certain traffic moving either eastbound or westbound between points on the Union Pacific or its connections in Idaho, Montana, Oregon or Washington, on the one hand, and points east of the Missouri River, on the other hand. This is an arrangement that has been in effect for approximately thirty-five years and was approved by the Commission in "Lumber Rates from Oregon and Washington to Eastern Points, 31 ICC 191."

That proceeding is frequently referred to as the Colorado Gateway Case. In its report, the Commission called attention to the fact that the Union Pacific afforded the shortest route between the Missouri River and its stations in Oregon and Washington and that is also true of Idaho.

The Commission also commented on the fact that because of its single-line haul to or from the Missouri River the Union Pacific affords the better service. The Union Pacific continues to afford that better service today because of our shorter distance and single-line haul.

The following tabulation shows a comparison of the distance between Omaha or Kansas City, on the one hand, and McCammon, Idaho, on the other, via the Union Pacific [fol. 1192] single-line and via Union Pacific through Denver in connection with either the CB&Q R. R., CRI&P R. R. or AT&SF Ry.:

Via	Miles Between McCammon, Idaho and Omaha	Kansas City
Union Pacific	1036	1153
UP, Denver, CB&Q	1160.3	1286.7
UP, Denver, CRI&P	1204.2	1257.6
UP, Denver, AT&SF		1344

To or from all points on the Union Pacific in Idaho, Montana, Oregon and Washington, the direct route of the Union Pacific from any Missouri River crossing is always one hundred miles and more shorter than via other prairie lines through Denver, thence Union Pacific.

Comparison of Revenue Carload Tonnage Handled by the Rio Grande During the Ten-Year Period from 1939 to 1948, Inclusive, with That Handled by the Union Pacific During the Same Period

Pages 9, 10 and 11 of Exhibit 25 show the total carload revenue tonnage handled by the Rio Grande and also by the Union Pacific during each of the ten years beginning with 1939 and ending with 1948. Also shown on these statements are the number of miles of road operated by each line during each of those years and the tons handled per mile of road operated. The tonnage figures are those reported by each line annually to the Interstate Commerce Commis-
[fol. 1193] sion, and they are reproduced each year by the Commission's Bureau of Transport Economics and statistics, in a statement called "Freight Commodity Statistics, Class I Steam Railways in the United States." The number of miles of road operated by each line are also figures reported to the ICC by each line and they have been taken from the Commission's statement called "Preliminary Abstract of Railway Statistics." These mileage figures do not include switch, industry, siding or passing tracks nor any duplication for double track main lines.

Page 9 shows tons of revenue freight originated by each line. The miles of road operated by the Union Pacific is approximately four times greater than that operated by the Rio Grande so it is to be expected that our total tonnage would be larger than the Rio Grande's. However, when reduced to tons originated per mile of road operated, the Rio Grande is in the lead by a substantial margin in each of the ten years except 1945 and 1946 when the Union Pacific was out in front by a small margin.

On the average for the ten-year period it shows the Rio Grande originated 2,872.8 tons per mile of road operated or 231.4 tons more than the average of 2,641.4 tons per mile of road operated originated by the Union Pacific.

Page 10 shows similar information for revenue tonnage received from connections and which either terminated on the Rio Grande or the Union Pacific or which was delivered
[fol. 1194] to other connecting lines, the Rio Grande or Union Pacific having acted as a bridge carrier. On this type of traffic, the Rio Grande is far in excess of the Union

Pacific in every one of the ten years shown. The averages for the ten-year period show that the Rio Grande handled 3,176 tons per mile of road operated or 1,212 tons more than the 1,964 tons per mile of road operated handled by the Union Pacific.

Page 11 shows similar data covering total tonnage handled by each line during the same ten-year period. Further explanatory statements seem unnecessary, but I do want to point out the figures for the ten-year average because of the marked advantage in favor of the Rio Grande. The average number of cars carried by the Rio Grande per mile of road operated was 169.6 or 25.5 cars more than the 144.1 cars per mile of road operated handled by the Union Pacific. On a tonnage basis the Rio Grande's ten-year average was 6,049 tons per mile of road operated, or 1,444 tons greater than the 4,605 tons per mile of road operated handled by the Union Pacific.

The figures in Table 6 on page 34 of ICC Statement 49100 are of inferest in connection with page 11 of my exhibit because they show that during the year 1948 the Rio Grande and Union Pacific each derived 44 percent of their gross freight revenues from tonnage classified as Manufactures and Miscellaneous.

Page 1, Section B, of Witness Earley's Exhibit No. 3 [fol. 1195] shows tons originated by the Rio Grande during the years 1925, 1930, 1935 and 1940 to 1948, inclusive. He also shows revenue received from that traffic and the ratio of both the tons and the revenue to the Rio Grande's total tons and freight revenue. He testifies (Transcript page 83 and so forth) that freight revenue from that traffic during recent years is a much smaller percentage of total revenue than it was some twenty years ago. It should be noted that although both tons originated and revenue derived therefrom have increased steadily since 1935, the percentage ratio to total tons and revenue is lower. It is obvious that the percentage figure is down because of the sharp and very remarkable increase the Rio Grande has and continue to enjoy in the traffic received from connections. As shown on page 11 of my exhibit, Rio Grande's total tons received from connections in the year 1940 was 3,964,586 tons while in the year 1948 it was 9,628,804 tons.

As shown on page 3 of Witness Hogue's Exhibit No. 1, a very large part of that phenomenal increase was due to receipts from the Southern Pacific and Union Pacific at Utah junctions. In the year 1940 Rio Grande's receipts from the Southern Pacific at Ogden were 707,581 tons while in the year 1948 they were 1,793,239 tons, an increase of over 1,085,000 tons. In the year 1940 Rio Grande's receipts from the Union Pacific at Utah junctions were 94,415 tons, but in 1948 they increased almost a million tons to 1,086,182 tons.

[fol. 1196] Depressed Level of Joint Rates in Which the Rio Grande Seeks to Participate

As previously brought out, the primary objective of the Rio Grande in this proceeding is to have the joint rates applying between Washington, Oregon, Idaho and Montana, on the one hand, and points east of the vertical line running from just west of El Paso to the Canadian border, as shown on the map, page 3 of my exhibit, on the other hand, made applicable with it via Ogden, Utah, so that the Rio Grande may receive a haul for the entire length of its line.

It demands that the Commission order the Union Pacific to establish these joint rates via Ogden regardless of the fact that the routes with the Rio Grande would on the average be about 200 miles longer than those presently in effect on ninety percent and more of the shipments involved.

The Rio Grande also disregards the fact that over a long period of years it has not only originated a greater number of tons per mile of road operated than has the Union Pacific but it has also handled a much greater volume per mile of road operated as an intermediate or bridge carrier than has the Union Pacific.

A third and an important feature which the Rio Grande also ignores and about which I will now testify is the generally depressed level of the joint rates in which it seeks to participate. The rates applying to and from the terri-
[fol. 1197] tory Boise, Idaho, and west are generally referred to as transcontinental rates because they are subject to the jurisdiction of the Trans-continental tariffs. Rates to and from points in Idaho east of Boise are almost invariably lower than those to and from points west thereof,

and that is largely due to Union Pacific's efforts to give Idaho a rate structure that gives due consideration to the difference in distance and, so far as outbound farm products are concerned, gives Idaho a rate structure of material benefit to it in reaching the large consuming area Missouri River and east in competition with local growers and those in other large agricultural districts much nearer those markets.

Exam. Mullen: Just a moment. We will recess now for ten minutes.

(Short recess taken.)

Exam. Mullen: Are you ready to proceed?

The Witness: It has long been conceded by the Commission and others who are well informed about the railroad freight rate structure in the United States that rates applying to transcontinental traffic are different than those applicable east of the Rocky Mountains or locally in the Mountain-Pacific territory. Practically all transcontinental traffic, both carload and less than carload, has always moved at commodity rates, not because of any inequities in the class rate structure but because water competition has [fol. 1198] required special treatment of rates on each individual commodity in a manner not ordinarily present in the making of rail freight rates.

Also, there has been and still is a huge production of agricultural and forest products in the West Coast states which is far removed from the large consuming markets in the eastern part of the United States and must be transported at very low rates to permit sale in competition with local and other production much nearer the market.

Were it not for these competitive conditions, there is nothing that would warrant a rate structure on transcontinental traffic lower than that prevailing in other territories. On the contrary, the more difficult and expensive operating conditions in the intermountain territory would justify a higher rate level on transcontinental traffic. One very important consideration in the maintenance of this depressed transcontinental rate structure is the fact that the traffic can and does for the most part move via the shortest routes to final destination and is long haul traffic for the Pacific Coast terminal lines.

Mr. Quirk: Mr. Examiner, this comes mighty close to being conclusions and argument.

Exam. Mullen: Yes, some of it is, but we will let it go in.

Mr. Collins: Mr. Examiner, may I remind the Examiner and Mr. Quirk, although it is not necessary to remind the [fol. 1199] Examiner, that this gentleman is testifying on thirty years of experience, and is qualified as a rate expert, and as such is entitled to express his views based on his knowledge. He is obliged to draw some conclusions and he is permitted to.

Exam. Mullen: I have already ruled.

Mr. Quirk: I don't object. I want to object formally as to any conclusions as distinguished from factual statements and comments.

Exam. Mullen: That objection will be noted.

The Witness: In American Steel and Wire Company v. Alton Railroad Company, et al., 273 ICC 719, decided March 15, 1949, the Commission pointed to the depressed condition of the west-bound transcontinental rates on iron and steel articles due to water competition. Similar acknowledgements by the Commission relating to transcontinental rates, both eastbound and westbound, on numerous other commodities can be found in many other ICC reports in formal proceedings decided by it.

On the whole, the rate structure in which the Rio Grande seeks to participate is too low to be shared with the Rio Grande when, as already shown, the additional routes that would enable that line to participate involve unnecessary and wasteful transportation of 200 miles and more.

An exhibit of Witness Webb——

Mr. Quirk: Mr. Examiner, can it be understood I objected to all these kind of conclusions and arguments with- [fol. 1200] out repeating my objection each time as being incompetent.

Exam. Mullen: Yes, that is understood.

The Witness: An exhibit of Witness Webb——

Exam. Mullen: Just a moment. Has Witness Webb testified?

The Witness: No, sir.

Mr. Collins: He is going to testify next.

Exam. Mullen: Then we will strike that next sentence out.

Mr. Collins: All right.

Exam. Mullen: All right, go ahead.

The Witness: Before passing on to a more detailed discussion about the low level of the rates on some of the more important individual commodities, I want to say at this point that it is because of the depressed condition of the rate structure, the circuitous nature of the joint routes sought by the Rio Grande, the greater transportation costs over the additional mileage and added interchanges, the possible serious effect upon our revenues and the inherent right of every carrier under the Interstate Commerce Act to the longest haul it can get on all traffic in which it can participate that prompted the Union Pacific to refuse the Rio Grande's request made just before filing the complaint in this case that we voluntarily open the Ogden gateway.

Rates on Potatoes

Column 2, page 4 of my exhibit, shows that during the year 1948 the eastbound movement via the Union Pacific of [fol. 1201] Products of Agriculture from Oregon, Washington and Idaho amounted to 50,349 carloads. Of that total, 28,072 carloads or 55.7 percent consisted of potatoes, 25,870 cars having originated in Idaho and 2,202 carloads in Oregon and Washington. The potato rates from Idaho to the middlewest, east and south have always been on a very low basis for the express purpose of assisting the growers there in marketing their crops in the large consuming areas in competition with production in Maine, New York, Michigan, Wisconsin, Minnesota, the Dakotas, Nebraska and Colorado.

The rates from Idaho have for a long period of years been related to those in effect from the Greeley district in northeastern Colorado. Although the haul from Idaho involves added transportation ranging from 500 to more than 800 miles, the Union Pacific has always insisted that the very low differentials which presently range from 12 to 22 cents per 100 pounds be maintained. One important consideration in maintaining these low rates was the fact that we could and did receive our long haul to Colorado and Missouri River junctions. The Commission itself has recognized the very low level of these rates but has refused to

require a greater spread over Colorado in formal proceedings where the Union Pacific has been called upon to defend them because the Union Pacific has pleaded that the low rates were necessary to enable Idaho to reach the center of population in the eastern half of the United States [fol. 1202] in competition with growers in other areas. See Greeley Commercial Club v. C&S Ry. Co., et al., 53 ICC 66.

In a later proceeding, Chamber of Commerce of Greeley, Colorado v. Union Pacific Railroad, et al., 210 ICC 753, the complainant alleged among other things that rates on potatoes from Idaho Falls were relatively lower than those from Greeley and were preferential of shippers in Idaho and prejudicial to shippers in Colorado.

Exam. Mullen: Now, just a moment. I notice the rest of this is a discussion of that case. I don't think that is necessary to put in this man's testimony. The report in that case will speak for itself.

Mr. Collins: Do you mean he can not point to the Commission's holding as confirming his own expert views?

Exam. Mullen: Yes, that is exactly what I mean.

Mr. Collins: Well, he cites a case on the next page. I don't understand quite, Mr. Examiner, what you think should be done with it.

Exam. Mullen: I think it is sufficient that the witness cite the cases, but not comment on what the Commission has found in those cases. I notice down at the middle of page 39, the sentence beginning "The very narrow spread," that seems to me is testimony of this witness, and I think you should continue from there. He can cite these cases if he desires, but the point is, those decisions speak for themselves.

[fol. 1203] Mr. Collins: Mr. Examiner, I can't see any harm in his indicating what the Commission held, because it ties into his testimony, and it shows the confirmation of the views, or maybe the basis part lies for the views expressed. Would you cut out from the beginning there where he says: A Witness, on page 38?

Exam. Mullen: What page?

Mr. Collins: Page 38.

Exam. Mullen: That is right; cut that out.

Mr. Collins: "A witness for the Union Pacific testified in that proceeding——"

Exam. Mullen: That is right.

Mr. Collins: Cut that out down to where it says on page 39: Another and more recent case——

Exam. Mullen: Yes, he can cite that next case.

Mr. Collins: All right, start reading there on page 39.

The Witness: With the word: Another?

Exam. Mullen: "Another more recent case," and so forth.

The Witness: Another and even more recent case in which the Commission has dealt with the level of the rates on potatoes from Idaho and Greeley is Idaho Public Utilities Commission v. Alton R. R. Company, et al., 251 ICC 93. In dismissing that complaint the Commission called attention to the fact that the assailed rates were upon relatively lower levels than rates in effect generally on similar agricultural products and stated specifically that the [fol. 1204] established differential basis, southern Idaho that are much lower than they would be if made upon the same basis as the rates from Greeley. The very narrow spread in rates Idaho over Colorado remains in effect today, and page 12 of my exhibit has been prepared for the purpose of showing the present rate adjustment. The statements are largely self-explanatory, but I want to make a few brief comments about some of the figures.

Rates from Monte Vista, Colorado, representing a producing area served only by the Rio Grande, and from the Greeley, Colorado, area are generally the same. Salt Lake City, which is representative of Utah shipping points, has rates ranging from 12 to 21 cents higher than Greeley and Monte Vista although the added distance to destination is generally more than 500 miles. The differential Salt Lake City over Greeley was at one time a flat 12 cents to all destinations, but it varies now because of differences in general rate increases and so far as destinations east of Chicago are concerned it also varies because of rate increases made from the Greeley district in 1935 following the sixth supplemental report of the Commission in Western Trunk Line Class Rates Docket 1700, part 2, 204 ICC 595, while related increases were not made from Utah and Idaho. Rates from Idaho Falls are on the Utah basis although the distance to market is approximately eighty miles further

than from Utah, and the Nampa area in the far western [fol. 1205] part of Idaho has rates only three or four cents higher than Idaho Falls, although it involves added transportation of over 200 miles more than from Idaho Falls. The differential Nampa over Greeley for added distances of about 800 miles was at one time a flat 15 cents to all destinations, but it also varies now for the reasons previously explained in connection with the differential from Utah. The rate structure on potatoes from the shipping areas farther west are low because of the low basis the Union Pacific has found it necessary to maintain for the shippers in Idaho.

The rates on potatoes from Idaho and also from shipping points in Oregon and Washington to the territory east of the Rocky Mountains are too low to be applied via the Ogden gateway over routes that involve additional interchange points, other lines among which to divide the revenue, additional circuitous transportation of 200 miles and a short haul for the Union Pacific that supplies the equipment and must absorb the high gathering costs to be testified to by Witness Webb. The opening of the Ogden gateway on this traffic and movement of a substantial part of the tonnage via the Rio Grande can and will in my opinion, lead to a generally higher level of rates not only on potatoes but also on other agricultural products of Idaho, Oregon and Washington which rates I shall show are also on a depressed level.

I make reference to this possibility of increased rates [fol. 1206] knowing very well that it will make it more difficult for the Idaho growers to compete in the middlewest and eastern markets with the ultimate tendency to dry up the traffic to some extent. On the other hand, the Union Pacific cannot possibly maintain its some 3,000 miles of expensive branch lines and its present standards of maintenance and service in Idaho, Oregon and Washington on the meager revenues we could expect to receive for the short haul via the Ogden gateway.

Exam. Mullen: Just a minute. This next sentence, I think, should come out. That is argumentative.

Mr. Collins: All right.

Exam. Mullen: Strike that out.

Mr. Quirk: I suppose that broad objection of mine would apply on the other hand, if that is their conclusion. It is more or less argument.

Mr. Collins: Well, you already have that arranged for.

Exam. Mullen: That is right.

The Witness: Rates on Dry Onions.

The movement on dry onions from Idaho, Oregon and Washington during the year 1948 to destinations east of the Rocky Mountains amounted to 1,774 carloads, 1,245 of which originated in Idaho. The balance originated in Oregon and Washington but practically all from eastern Oregon in the area subject to the same low joint through rates as apply from Nampa and Boise, Idaho.

[fol. 1207] Over a long period of years the rates on dry onions have been closely related to those on potatoes, and my testimony about the low rates on potatoes applies with equal force to rates on dry onions. The several ICC cases I referred to involved onions as well as potatoes, and the Commission's remarks about the low level of the rates related to both commodities.

Page 13 of my exhibit contains a statement of the present rates from and to representative origins and destinations. The rates differ somewhat from those on potatoes, but the comparisons that I have made are the same; and they show that distance considered, rates from Idaho, Oregon and Washington are substantially lower than those from Monte Vista and Greeley, Colorado.

Rates on Lettuce and Other Fresh Green Vegetables

An additional movement of Products of Agriculture from Idaho, Oregon and Washington during the year 1948 was 2,000 carloads of fresh green vegetables. Of these 2,000 carloads, 1,548 contained lettuce forwarded from the Boise Valley, including eastern Oregon points such as Ontario and Nyssa. The rates on lettuce and other fresh vegetables grouped therewith from Idaho and eastern Oregon have, like those on potatoes, been made with relation to the rates from Colorado, and rates on green vegetables from both Colorado and Idaho have for many years been made with relation to those on potatoes. (Lettuce and other vege-

[fol. 1208] tables from Idaho and Oregon, 228 ICC 572-577.

and 253 ICC 143-146.) Therefore, all that has been said about the low level of the rates on potatoes and onions applies with equal force to rates on lettuce and other green vegetables. In the two proceedings just referred to, the Commission stated specifically that rates on lettuce from Idaho and Oregon were considerably less than reasonable maxima. The narrow spread Idaho and eastern Oregon over Colorado also remains in effect today on green vegetables, and the statement on page 14 of my exhibit has been prepared for the purpose of showing the present rate adjustment. That statement is self-explanatory, and further comments and comparisons seem unnecessary.

Rates on Deciduous Fruits

There is a rather heavy production of deciduous fruits in Idaho, Oregon and Washington, a large part of which moves to the large consuming markets in the east and middle-west. Fruits moving in substantial quantities from that area via rail are apples, pears, fresh prunes or plums and some apricots, peaches and cherries. Having had personal contact over a long periods of years with the actual making of transcontinental rates on all commodities, I have personal knowledge of the fact that the railroads have made every effort to hold the rates on these commodities to the very minimum. Apples move in greater quantities than the other fruits mentioned, large orchards being located in the Yakima-Wenatchee, Washington, area served [fol. 1209] by the NP Ry., GN Ry. and UP R.R. A brief history of the rates, reference to the economic ills of the industry and its efforts to survive as well as reference to the many contributions in the way of reduced rates on the part of the rail lines to help save the industry are contained in the Commission's report covering Apples, Transcontinental, Eastbound, 258 ICC 177. Although a slight restoration of part of the many reductions made through the years was allowed in that proceeding, the rates are still materially below a maximum reasonable level.

Fresh prunes, commonly known as Italian plums or prunes, also move eastward in fairly substantial quantities from the Milton-Freewater, Walla Walla District in Oregon and Washington and from the Boise-Payette area in south-

western Idaho. Rates from both areas were under attack in Idaho Public Utilities Commission v. A&R R.R. Co., et al., 246 ICC 183, and related cases.

In discussing those complaints, the Commission noted and commented on the fact the rates were lower than those prescribed or found reasonable by it for application on deciduous fruits. In California Growers & Shippers Protective League v. SP Co., et al, and related cases, 185 ICC 299, decided in June, 1932, the Commission found a rate of $1.73 per 100 pounds to be reasonable for application on all deciduous fruits (except apples) from Oregon, Washington, Idaho and California to transcontinental destina-
[fol. 1210] tions. That rate, plus the general increases authorized by the Commission subsequent to 1932, would now be $2.24, and that figure is materially higher than the present rate on prunes and other deciduous fruits moving from Oregon, Washington and Idaho to points east of the Rocky Mountains. The statement on page 15 of my exhibit shows a comparison of present rates on fresh prunes, pears and other deciduous fruits, except apples, with the prescribed rate of $1.73 which is now $2.24.

Rates on Lumber from Idaho, Oregon and Washington

There are thee major sources of timber supply in the Pacific Northwest and California. West of the Cascade Mountains where fir predominates, east of the Cascades where pine predominates, and the northern California area where there is a large production of redwood tributary to the ocean and heavy production of redwood tributary to the ocean and heavy production of pine inland. Hemlock, spruce and cedar are found in smaller quantities both east and west of the Cascades. (210 ICC 317-319) Lumber and other forest products from the west have always been a major source of tonnage and revenue for the transcontinental lines, but being far removed from the center of population it was necessary from the beginning that it be transported eastward at low rates that would permit sale in competition with local lumber and that produced in other areas, principally the southeast.

[fol. 1211] Prior to 1920 practically all west coast lumber marketed in the eastern part of the United States moved

overland, but thereafter the trend shifted rapidly to the intercoastal steamship lines operating through the Panama Canal. (210 ICC 317-319) That competition brought about some rather sharp reductions in the all-rail rates. The eastbound transcontinental rate structure on lumber in effect today reflects not only the effects of water competition but also the commercial competition that originally made it necessary to carry low rates from the west. Evidence of the depressed level of the lumber rates from the west can be found in the Commission's report covering lumber from the Pacific Coast to eastern points, 210 ICC 317, and in the reports covering many formal cases referred to therein. It is interesting to note from an examination of I.C.C. Freight Commodity Statistics Statement No. 49100 that during the year 1948 both the Rio Grande and Union Pacific derived approximately ten percent of their gross freight revenues from lumber and other forest products which represented approximately nine percent of total tonnage carried for the Rio Grande and ten and one-half percent for the Union Pacific.

The Rio Grande now participates in through routes and joint rates on equal terms with all other carriers on lumber from all of California and the heavy producing territory in Oregon and Washington west of the Cascade Mountains. [fol. 1212] From the interior territory east of the Cascades the rates are generally lower than the depressed rates from the Coast group, and they are too low to be applied via additional circuitous routes through Ogden with the Rio Grande. The rates from the interior origin groups in Oregon, Washington and Idaho, differentially lower than the rates from the Coast group, were fixed many years ago by the Commission in Potlatch Lumber Company, et al, v. Northern Pacific Ry. Co., et al, 14 ICC 41, and have quite generally been observed since that time.

Low Rates on Other Commodities—Eastbound

Other commodities of importance moving from Idaho, Oregon and Washington to points east of the Rocky Mountains are:

Grain and Grain Products
Newsprint and other paper articles

Woodpulp
Furniture
Sugar
Canned Food Products
Smelter Products

Rates on grain and grain products are the result of the Commission's order in Western Grain Rates Case, Docket 17000, Part 7, 205 ICC 301, and Western-Southern Grain Rates Case, Docket 17000, Part 7-A, 259 ICC 629. Both proceedings were general investigations by the Commission as directed by Congress in the Hoch-Smith resolution requiring the Commission to establish the lowest possible lawful rates compatible with the maintenance of adequate [fol. 1213] transportation service.

Our heaviest movement of newsprint paper from the northwest is to Colorado where an extremely low rate has been published because of the competition western manufacturers encounter from those located in the north-central states of Minnesota, Wisconsin and Michigan. Trans-continental eastbound rates on other paper articles are influenced by the same competition.

Rates on woodpulp are extremely low, both for the purpose of meeting intercoastal competition and foreign imports, especially from Sweden.

Rates on furniture are depressed both by water competition and the competition the western manufacturer encounters from those in the middlewest and the east. Over a long period of years the rates on sugar from Idaho, Oregon and Washington have been based on very low differentials over Colorado, and the rates from Colorado itself to middle western markets such as Chicago, St. Louis, and so forth have been held down because of low rates to those markets from the east and south. As a matter of fact, the rates from the west to Chicago and Mississippi River points are so low that we obtained Fourth Section relief from the Commission in order to avoid applying those same routes at intermediate points.

Rates on canned food products, fruit, vegetables, milk and fish are depressed by every conceivable kind of competition such as water (intercoastal and barge), truck and commercial. For many years it was practically impossible

[fol. 1214] to obtain any of the port-to-port business via the overland routes, and the many reductions made in the rates on canned goods were directed toward holding the business to and from the interior.

The low level of the rates on copper, lead, zinc and other non-ferrous smelter products were dealt with by the Commission in another Hoch-Smith proceeding, Docket 17000, Part 12, and related cases, 204 ICC 319. The general question in that case was not whether the rates were too high but whether they were too low. The finding was that the rates were less than maximum but not less than minimum reasonable rates, but no increases were required because of existing conditions in the metal industry in 1934 at the time the case was decided. Those rates are still on a very low basis.

Alleged Violation of Section 1(4)

Complainant, the Rio Grande, alleges, among other things, that the Union Pacific and other defendants are in violation of the provisions of Section 1, paragraph 4, of the Interstate Commerce Act because we refuse to join with the Rio Grande in establishing competitive joint freight rates with it via Ogden, Utah.

At the initial hearing the Rio Grande's Witness Earley stated that the level of the going through competitive freight rates which they are attempting to have made applicable over the Rio Grande is in no way assailed and that if any rates are assailed it is the combination rates that [fol. 1215] apply on shipments moving via Ogden with the Rio Grande.

Counsel for complainant then proceeded to state definitely that the combination rates are alleged to be unreasonable, and I assume complainant believes them to be unreasonable to the extent they exceed the joint rates applying via the route of the Union Pacific through Wyoming.

In Section 1 of Exhibit 3, Witness Earley makes numerous comparisons of the through rates based on combinations over Ogden that are applicable on shipments routed via the Rio Grande, with the one-factor through rates that apply via the route of the Union Pacific through Wyoming. He has also shown the Rio Grande's rates from or to Ogden,

Utah, and elsewhere in his exhibit the factor or rate applying via the Union Pacific to or from Ogden. The Commission should take note of the fact that the combination rates applicable via the route through Ogden are less than the aggregate of the present local rates because those combinations are arrived at by first combining the old basic locals to and from Ogden and then adding a single increase as provided for in Tariffs X-162, X-166 and X-168 series, Agent L. E. Kipp's ICC Nos. A-3706 and A-3728.

I find no allegation in the complaint that any of the local factors to and from Ogden are unreasonable or otherwise unlawful, and although the combination rates are alleged to be unreasonable I have been unable to find in the record any evidence of the type usually offered by [fol. 1216] complainants in formal proceedings before the Commission to support such allegations.

Mr. Quirk: Mr. Examiner——

Exam. Mullen: Yes, I have been reading ahead on it.

Mr. Quirk: I object to that statement. If he couldn't find it, I might be able to find it, you might be able to find it.

Exam. Mullen: That is true.

Off the record a moment.

(Discussion held off the record.)

Exam. Mullen: On the record.

The Witness: In section J of Exhibit 3, Witness Earley shows numerous car mile and ton mile returns both under the present and sought rates via the through routes with the Rio Grande, but his testimony about that section is to the effect that it is intended to prove that the returns under the one-factor joint rates via the longer routes of the Rio Grande would not be unreasonably low. Because of the complete absence of testimony or exhibits relating to the alleged violation of Section 1, it seems unnecessary to deal further with that phase of the complaint.

The situation complained about by the Rio Grande of higher through rates via the route through Ogden than via routes of the Union Pacific through Wyoming is no different than that brought about by the publication of specific routing by any other railroad in any tariff applying [fol. 1217] anywhere in the United States. Practically all tariffs carry such specific routing, and combination rates

apply in all instances where a shipper elects to use different routes than those specified in the tariffs. All tariffs covering a large area contain not only specific routing but many individual lines' exceptions as well. The transcontinental tariffs applying as they do to cross-country shipments are subject to both the specific western gateway routes in the transcontinental territorial directories and also to many pages of specific limitations published by and for individual lines in each of the rate tariffs.

Exam. Mullen: Just a moment, please. All of that is argumentative. I don't see any value in it.

Mr. Collins: How far?

Exam. Mullen: Just the "If the higher combination through rates complained about by the Rio Grande in this proceeding" and so on, that sentence, and the next sentence, and the first paragraph on page 52.

Mr. Collins: All right. Where did you start cutting it out?

Exam. Mullen: I started cutting it out on the middle of page 51, beginning with the sentence: "If the higher combination through rates complained about—" the balance of that page and the first paragraph of page 52.

Mr. Collins: All right.

The Witness: I have previously discussed the depressed level of the rate structure that the Rio Grande seeks to [fol. 1218] have made applicable via the longer routes through Ogden, but I would like to make a few additional remarks about it because what I have said is rather forcibly confirmed by some of the rate statements in Section I of Witness Earley's Exhibit 3. On page 2 of Section I he shows Rio Grande's rates on apples from Ogden to fourteen representative destinations Denver and east. To all destinations except Denver the one factor rates from Boise and Payette are the same as from Ogden despite the much greater distance from Boise and Payette. The rate from Ogden is itself depressed for to Chicago, for example, it is only 21.2 percent of the first class rate of $6.66 per cwt., published in Agent Kipp's Tariff 350-B, ICC A-3202, and that first class rate was prescribed by the Commission in Bintz Co. et al, v. A&S. Ry. Co., et al, 216 ICC 481 and 218 ICC 793.

On pages 3 and 4 of Section I of exhibit 3, witness Earley confirms what I have said about the low level of the rates on prunes, the rates from Nampa, Idaho, and in many cases even Milton, Oregon, being the same as from Ogden.

Pages 5 and 6 of Exhibit 3 show that rates on dried beans and peas from Rexburg and Twin Falls, Idaho, and Armstead, Montana, are the same as from Ogden, and those rates from Idaho are substantially less than prescribed by the Commission in Public Utilities Commission of Idaho v. Oregon Short Line R. R. Co., et al, 181 ICC 731. Rates on lettuce from Wilder and Nampa, Idaho, and Nyssa, Oregon, on page 7 of exhibit 3 are only three cents per 100 [fol. 1219] pounds higher to Chicago, New York and many other destinations than rates from Ogden on page 8, Section I, of Exhibit 3. The rates on sugar on page 9 from Idaho points are the same as from Ogden and other Utah shipping points, and Nyssa, Oregon, is only five cents higher than Ogden.

Pages 13 and 14, Section I, of Exhibit 3 show that rates on potatoes from Malad, Logan and Idaho Falls are the same as from Ogden.

It seems unnecessary to point out more of the almost endless number of situations which prove the low level of the eastbound rates in which the Rio Grande seeks to participate. Beginning on page 33 of Section I of Exhibit 3, Witness Earley makes a comparison of a large number of the single factor westbound rates now applicable via the Union Pacific route through Wyoming with the combination rates applying via the Ogden route with the Rio Grande. I have already testified in a general way about the depressed nature of those rates, and Witness Earley's showing confirms that fact.

Note, for example, that rates on iron and steel articles (page 33, Section I, Exhibit 3) from all points Missouri River and east to Boise are the same as to the ports of Seattle and Portland. In other words, Boise and other inland points feel the effect and obtain the benefit of the water-compelled rates to the ports. Even Ogden (page 34, Section I, Exhibit 3) has the same rates as the ports in [fol. 1220] certain instances. As previously stated in my earlier testimony, the Commission has recently recognized the depressed nature of the westbound transcontinental

rates on iron and steel articles in American Steel and Wire Company v. Alton R.R. Co., et al, 273 ICC 719. Other rate exhibits of Witness Earley covering agricultural implements, canned foods products, alcoholic liquors, tires and tubes, petroleum products, chemicals, roofing and building materials and many others similarly confirm the depressed and consequent blanket nature of the rate structure.

Joint Rates Via Ogden to and From Utah Common Points

My prior testimony deals with the major demands of the Rio Grande which involve publication of single-factor joint rates via Ogden on traffic to or from the territory east of the Rocky mountains. The Rio Grande also demands such joint rates and routing via Ogden on traffic between Utah common points, on the one hand, and stations on the Union Pacific and its connections in Utah north of Ogden and stations in Idaho, Montana, Oregon and Washington, on the other hand. It points to the joint rates we have with the Bamberger Railroad via Ogden and complains of our unwillingness to join in similar joint rates with the Rio Grande. The Bamberger Railroad operates between Ogden and Salt Lake City, Utah. It also serves intermediate points, most of which are also served by both the Rio Grande and Union Pacific.

Our joint rates and through routes with the Bamberger [fol. 1221] have been in effect for many years, and our relations with that line are no different than those between the Bamberger and the Rio Grande.

It is a fact that we have through single-factor rates between stations in Idaho, Montana, Oregon and Washington, on the one hand, and stations in Utah south of Ogden to and including Salt Lake City, on the other hand, which will apply via Ogden with the Bamberger but not with the Rio Grande. It is also a fact that the Rio Grande has through single-factor rates between local stations on its line in Colorado, on the one hand, and stations in Utah, Salt Lake City and north to and including Ogden, on the other hand, which will apply via Salt Lake City with the Bamberger but not with the Union Pacific. See, for example, Rio Grande Tariff 7000-A, ICC No. 699, containing class rates and classification exceptions applying from Grand June-

tion and other stations in Colorado to Ogden and other points in Utah on the Bamberger. See also Rio Grande Tariff 6853-D, ICC No. 824, which also contains joint rates with the Bamberger but not with the Union Pacific.

The effect of granting the Rio Grande's demand for joint rates via Ogden with the Union Pacific would be to accord that line an opportunity to serve territory that we adequately and efficiently serve ourselves while at the same time the Rio Grande refused to be as liberal with the Union Pacific to and from its local territory in Colorado.

[fol. 1222] The Bamberger now handles some business with the Union Pacific that the Rio Grande could handle, and it probably also handles some business with the Rio Grande that the Union Pacific could handle. Publication of a new route via the Union Pacific with the Rio Grande is not necessary so far as the public is concerned, but it would establish a new route that could and probably would deprive the Bamberger of some business it now handles.

Exam. Mullen: Mr. Quirk?

Mr. Quirk: I want to renew my objection and remind you of the objection. That goes to the witness saying it is not necessary as far as the public is concerned.

Exam. Mullen: That is the opinion of this witness, and is stated as his own opinion.

The Witness: The Rio Grande is also seeking joint rates via Ogden between Utah common points south of Salt Lake City, on the one hand, and points on the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon and Washington, on the other hand. This also involves movement to and from many points in Utah that are adequately and efficiently served by the Union Pacific, and the public in that area of Utah could not be more economically or efficiently served with additional joint rates with the Rio Grande via Ogden.

Some joint rates are now in effect with the Rio Grande to or from that area because it has been our policy over a [fol. 1223] long period of years to join with the Rio Grande in through routes and joint rates on specific commodities when and where it was apparent that the Union Pacific alone could not provide service equal to that via the joint through route with the Rio Grande. Paragraph B, page

2, Section 3, of Witness Earley's Exhibit 3, refers to a few tariffs containing such specific joint rates with the Rio Grande. There are other tariffs containing additional joint rates on other commodities.

Transit Privileges

A large majority of the shipper witnesses offering testimony at the initial hearing in support of the Rio Grande's demand for application of joint rates via Ogden, Utah, made it clear that their interest was limited to having the new route available for one or more transit operations at points on the Rio Grande.

Although transit privileges of various kinds are quite well embedded in the freight rate structure of the railroads throughout the United States and in a number of instances they have been said to be a commercial necessity, it seems appropriate and I think important that the Commission consider the reasons why the railroads originally granted these concessions and why after once being established they continued to expand and additional and different privileges were granted.

Exam. Mullen: Off the record.

(Discussion held off the record.)

[fol. 1224] Exam. Mullen: On the record.

The Witness: A transit privilege——

Mr. Quirk: I notice the comment in the third paragraph under transit, on page 57: "A transit privilege is in the nature of an authorized rebate"——.

Exam. Mullen: Let it be copied in.

The Witness: A transit privilege is in the nature of an authorized rebate to the shipper because it results in the application of something less than the local rates that would otherwise be applicable on the two separate shipments to and from the point where the transit privilege is in the nature of an authorized rebate to the shipper because it results in the application of something less than the local rates that would otherwise be applicable on the two separate shipments to and from the point where the transit privilege is taken.

In B. S. Crews v. The Richmond and Danville Railroad Company (1 ICC 401) relating to transit privileges on grain, the Commission said they were the result of a desire of the carriers transporting the wheat to millers at points on their line to control the transportation of the manufactured article and keep it from passing to the hands of competing transportation agencies.

In Duncan & Co. v. NC&StL Ry. (et ICC 477), the Commission states that about 1879 the NC&StL inaugurated the practice of rebilling or reshipping grain at Nashville [fol. 1225] and that it was the first transit privilege permitted in the United States. The report in that proceeding states further that the privilege was established by the NC&StL Railway for the purpose of meeting competition of the boats on the Cumberland River. The present widespread use of transit on grain and grain products has grown from that initial arrangement, and as its value as a weapon in meeting competition became apparent it was applied to other commodities and for many purposes besides milling.

For example, the privilege of stopping cars to complete loading or partly unload was the exception rather than the rule in western territory in the early 1930's. During those depression years the trucks were each year taking an ever-increasing volume of the tonnage available for transportation in much smaller lots than rail carloads but at railroad carload rates or lower.

Effective October 15, 1932, carriers in Western Trunk Line Territory adopted widespread use of the privilege as a means of meeting that competition. Similar privileges became effective about that same time in Mountain-Pacific Territory. The truck competition and competition between the rail lines themselves brought about the publication of numerous out-of-line haul provisions so that important communities intermediate via one line and not another could be served on equal terms by both lines. A number of such out-of-line haul privileges are in effect on the [fol. 1226] Union Pacific in Utah and will be discussed later.

Much more could be said about the many other transit privileges that are in effect, and the underlying reasons

for them could be explained. That, however, seems unnecessary, but it is a fact that regardless of how all of these transit and out-of-line privileges originated and developed, the only possible incentive for a railroad to give a shipper a discount under the charges applicable to the separate movements to and from the point at which the transit privilege is accomplished is an anticipated improvement in net revenues to the railroad making the concession by securing an additional haul or a longer haul than it would otherwise have received. There is an expense attached to a transit arrangement not present in connection with separate movements in and outbound such as keeping records of the inbound and outbound movements, balancing the account and refunding a portion of the charges or splitting the bills. Hence, no railroad traffic officer would grant such an arrangement causing such extra expense if he did not believe that in so doing he would improve his company's revenue.

The carriers have always contended that transit privileges may be granted or withheld by them so long as no unlawful discrimination resulted therefrom. The Commission has quite generally agreed with that view and has, [fol. 1227] for the most part, refused to require the establishment or extension of transit privileges except where necessary to remove discrimination or undue prejudice.

The transit privileges discussed by the shipper witnesses testifying for the Rio Grande in this proceeding are already in effect on the Rio Grande in the tariffs enumerated in Section H of Witness Earley's Exhibit 3, and they can, for the most part, be used in connection with the present rates and charges applying via the routes through Ogden to or from Utah north of Ogden, Idaho, Montana, Oregon and Washington as well as in connection with the joint rates and through routes with the Rio Grande on traffic to and from the area west of the black line running from San Diego, California, to Vancouver, B. C. As early as 1922 in Beaver Sand Company v. Director General (66 ICC 285)——

Exam. Mullen: Mr. Quirk:

Mr. Quirk: I object to that.

Exam. Mullen. That statement is objectionable. Strike that, please, beginning with "Therefore," if you will.

don't understand why you have that in here, Mr. Witness. That is more argument. I think it should have been edited. The balance on sheet 60 and the part in 61 is objectionable. What do you wish to state, Mr. Collins?

Mr. Collins: I want to suggest to you before you make a ruling on this, in the Wool Rates Case, which rates involved [fol. 1228] a long and tedious history, Commissioner Patterson and Examiner Mattingly—I am not saying that they are right, or that you are wrong—let stand what you might call a recital of the history of those rates by Mr. Stilling, this same witness, through the citation and mentioning of what the Commission held, and while he wasn't trying to argue with anybody as to what effect the decision should have here, he pointed to them for the convenience of the Commission, and I should think this mere reference to these decisions, where the Commission has dealt with the spbject of a transit privilege, would be of convenience, and the Commission certainly in pursuance of the ruling you have made, that if they find anything argumentative under the citation of those decisions, they can ignore it. I have understood they have always done that. But the citation of the decision, it seems to me, is entirely appropriate.

Exam. Mullen: It is appropriate in brief, and not in testimony, Mr. Collins. I adhere to my ruling: that is objectionable, and will be stricken.

The Witness: Out-Of-Line Transit Privileges in Effect At Points on the Union Pacific Railroad South of Ogden.

I called attention to the fact that numerous out-of-line haul provisions have been established and that a number of such provisions were in effect at points on the Union Pacific in Utah. I would like to discuss a few of the more [fol. 1229] important ones to the extent that they may be applied in connection with traffic moving via the Union Pacific route through Wyoming to and from points in Utah north of Ogden, Idaho, Montana, Oregon and Washington. The privilege of diversion and reconsignment in transit is probably employed to a much greater extent than any other privilege so it seems appropriate to first discuss the out-of-line haul privileges applying in connection with diversion or reconsignment in transit.

Item 595, UP RR Tariff 6061-K, ICC No. 4965, provides

that fruit, melons and vegetables from points on the Union Pacific and its connections in Washington, Oregon, Idaho and Utah north of Ogden consigned to points south of Ogden, to and including Salt Lake City, may be diverted or reconsigned to points east of Ogden without additional charge for the out-of-line haul service.

Under the provisions of Item 160 of the same tariff, freight other than fruit, vegetables, grain, livestock, coal and coke, originating at Cheyenne, Wyoming, or points east or south thereof consigned to points south of Ogden, may, prior to passing Salt Lake City, be diverted to Ogden or beyond, including Utah north of Ogden, Idaho, Montana, Oregon and Washington.

No additional charges are involved for the out-of-line haul service. Item 165 provides that similar freight from points in Oregon and Washington consigned to points south of McCammon, to and including Sandy, Utah, 13 [fol. 1230] miles south of Salt Lake City, may be diverted without additional charge to points east of Ogden. Many similar privileges covering specific commodities and specific situations are published in other items of the same tariff. Liberal out-of-line haul privileges are also in effect in UP Tariff 6086-I, ICC No. 5146, covering transit stops for partial unloading or to complete loading. Item 635, for example, provides that carload freight for which transit privileges are provided may be taken to points south of Ogden, to and including Payson, Utah, 64 miles south of Salt Lake City, without additional charge for the out-of-line haul service. That rule covers traffic moving between Cheyenne, Wyoming, and points east or south thereof, on the one hand, and all stations north of Salt Lake City, including all of Idaho, except east of McCammon, Montana, Oregon and Washington, on the other hand.

Other liberal out-of-line haul privileges are in effect on this traffic on specific commodities as follows: Grain and Grain Products, Tariffs 7181-A and 7271-C, UP r.r. ICC Nos. 4886 and 5132; various commodities for different purposes such as storing, grinding, mixing, freezing, and so forth, in Tariff 213-Q, Agent L. E. Kipp's ICC No. A-3636; ore and concentrates, Tariff 6000-H, UP R.R. ICC No. 4981; various commodities, Tariff 7114, UP R.R. ICC 565 (LA&SL series); canned goods, Tariff 7180-H UPRR ICC 5050;

beans, peas and lentils, Tariff 7182-B, UPRR ICC 4798; [fol. 1231] dairy products, Tariff 7183, UPRR ICC No. 5158; livestock Tariff 7184-D, UPRR ICC No. 4893; potatoes, onions and other vegetables, Tariff 7185-K UPRR ICC No. 4975.

Other tariffs are in effect on vegetable oils, sugar, iron and steel articles, wool and mohair, lumber and casein. It is a rare occasion when we make additional charges over and above the line haul rate and the regular nominal charge for transit privileges. The Union Pacific has always given very sympathetic consideration to all requests from shippers or receivers of freight in Idaho, Montana, Oregon and Washington for transit privileges of all kinds at our stations in Utah, Ogden and south to and including Payson, Utah, and we will continue to do so.

On page 144 of the transcript covering the prior hearing in this proceeding, Witness Earley called attention to the fact that a sugar manufacturer with plants in northern Utah and Idaho also operated a plant at West Jordan, Utah, a local point on the Rio Grande, and that because of the absence of through rates via the Ogden gateway it was not possible to store in transit at West Jordan and move east on one-factor joint rates. Prior to the abandonment of the Salt Lake & Utah Railroad early in 1946 storage and other transit privileges were in effect at West Jordan on that line on sugar moving from Idaho and Northern Utah to the East via the Union Pacific.

In the disposal by auction of the physical properties of [fol. 1232] the SL&U R.R., the Rio Grande acquired ownership of certain segments of trackage serving the Utah-Idaho Sugar Company plant at West Jordan, and Traffic Manager H. W. Ansell of that company by letter dated August 23, 1946, addressed jointly to the Rio Grande and Union Pacific requested amendment of the tariffs to provide the same transit arrangements at West Jordan in connection with the Rio Grande that had been available under SL&U ownership and operation. The Union Pacific has always been willing to establish that arrangement, but the Rio Grande has been of the opinion that after sugar from Union Pacific points in northern Utah and Idaho reaches West Jordan it should move eastward via the Rio Grande and not be returned to the Union Pacific.

On December 15, 1946, Mr. W. M. Carey, General Freight Traffic Manager of the Rio Grande, addressed Mr. H. W. Ansell, Traffic Manager of the Utah-Idaho Sugar Company, and his letter reads in part as follows:

"In your letter of November 4 you state that the local Union Pacific people in Utah were agreeable to going along with this proposal. That is true; however, the proposal as presented to us would entail the publication of rates out of West Jordan on non-transit tonnage via D&RGW to Salt Lake City, thence UP to Colorado common points and east thereof, to which, of course, we are not agreeable. We feel we are entitled to our long haul on this traffic. Our counter [fol. 1233] proposal that rates be established from these certain Utah and Idaho origins, with transit at West Jordan and subsequent movement via D&RGW east thereof, has similarly been rejected by the Union Pacific.

Rates on Livestock

A number of shippers of livestock testified at the initial hearing beginning December 12, 1948, and urged the Commission to require the application of joint rates on livestock from Utah north of Ogden, Idaho, Montana, Oregon and Washington to Pueblo and Denver, Colorado, and points east thereof in order that they might avail themselves of the feeding or grazing in transit privileges in effect on the Rio Grande and in the Arkansas Valley east of Pueblo.

The rates on edible livestock in the western district, which, generally speaking, comprises the territory lying west of the Illinois-Indiana State line and the Mississippi River, are on the basis prescribed by the Commission in Livestock—Western District Rates, Docket 17000, part 9. That proceeding was one of a large number instituted by the Commission on its own motion pursuant to the Hoch-Smith resolution, 43 Stat. L. 801. That resolution is dated January 30, 1925, and provided in part that because of the then existing depression in agriculture the Commission should effect with the least possible delay such lawful changes in the rates as will promote the freedom of movement by common carriers of the products of agriculture, [fol. 1234] including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate trans-

portation service. The Commission's report was released on June 8, 1931, and rates in compliance with its order became effective January 25, 1932, and with the addition of general increases authorized subsequent thereto are still in effect.

Exam. Mullen: Just a moment, you don't need the rest of that.

Mr. Quirk: Beginning with: The rates prescribed.

Exam. Mullen: Beginning with: The rates prescribed, and down to the quotation.

Mr. Quirk: That comes out?

Exam. Mullen: That comes out.

The Witness: A distance scale of rates was prescribed in that proceeding, and although certain grouping of origins and destinations was authorized the Commission required that the rate between any two points should be determined by the shortest route over which carload traffic could be moved without transfer of lading but that where such short routes would, within the meaning of Section 15(4) of the Interstate Commerce Act, short haul a carrier, they would not be required to maintain through rates via such routes but only over the routes which did not require short hauling a carrier. The rates on livestock between points in Idaho, Montana, Oregon and Washington, on the one hand, and Denver and Pueblo, Colorado, and all other points in western [fol. 1235] territory east thereof, on the other hand, are based on the short-line distances as required by the Commission's order, and those short-line distances embrace the long haul of the Union Pacific through Wyoming and most of Nebraska and Kansas.

In that proceeding, Docket 17000, Part 9, the Rio Grande insisted that because of its high operating costs it could not and should not be expected to maintain as low a level of rates as other lines in Mountain-Pacific territory. The Commission recognized the existence of that situation and because of it approved a basis of arbitraries for application at points on the Rio Grande. (176 ICC 1, 190 ICC 175, 200 ICC 535.) Those arbitraries range upward to 12 cents per 100 pounds and are in effect today not only on Rio Grande local movements covered by its Tariff 6776-E,

ICC 793, but also on joint line movements with the Union Pacific and other lines in Agent J. P. Haynes' ICC No. 1441.

Exam. Mullen: Just a moment. This next paragraph should come out. That is argumentative.

Mr. Collins: All right.

The Witness: How far?

Exam. Mullen: Including the first four lines on page 69.

The Witness: When the prescribed rates are applied via other than the short-line rate-making route for the purpose of giving the origin line the long haul as authorized by the Commission in its report in Docket 17000, part 9, the origin line may, by reason of having obtained its long haul, receive [fol. 1236] sufficient return to pay operating costs and still have a small margin of profit, but those same rates are much too low to be applied via new routes that not only short haul the origin line but involve expensive switching services at additional interchange points and, above all, are circuitous by ninety-five to more than 200 miles.

I have previously given some information regarding the character and volume of the total movement from and to Idaho, Montana, Oregon and Washington via the Union Pacific for the year 1948. The data is carried on page 4 of my exhibit and shows that the eastbound movement of animals and animal products in 1948 was 6,453 carloads, practically all of which terminated in the northern half of the eastern half of the United States. Of the total movement of 6,453 carloads, 5,094 originated on the Union Pacific in Idaho and Montana where we would receive an extremely short haul and very little revenue if movement was via Ogden with the Rio Grande.

Moreover, 61 percent of all traffic originating in Idaho is loaded at branch line stations and involves very high gathering costs such as will be testified to by Witness Webb.

Shipper Testimony About Rates and Routes on Potatoes and Onions.

Several shippers of potatoes or onions, or both, testified in support of the Rio Grande's request for joint rates via the Ogden route because they wanted to consign shipments

[fol. 1237] to points on the Rio Grande with the privilege of reconsigning to Denver or beyond. Grand Junction, Colorado, was mentioned as typical. They also wanted to be able to avoid what they called "pocket markets," and Wichita, Kansas, was mentioned as typical of such pockets.

Grand Junction, Colorado, is the largest local station on the Rio Grande. The 1940 census fixed its population as 12,479, and the Rand-McNally Company Atlas estimates the 1949 population to be 18,000. Omitting those Colorado and Utah Common Points served by the Rio Grande in common with other railroads, there is no other station on that railroad with population of even 10,000 people.

The Colorado Common Points are now adequately and efficiently served by the Union Pacific direct or with its connections at Denver, including the Rio Grande, via shorter routes than via Ogden with the Rio Grande, and from such as Idaho Falls and Pocatello, which are 185 miles and 134 miles, respectively, north of Ogden, the rates on potatoes and onions to Denver and east thereof are the same as in effect from Ogden.

For the purpose of again emphasizing the low level of the rates from Idaho, I call attention to the following relationship of the potato rates to first class:

[fol. 1238]

		From Idaho Falls Potato Rates			
		Via UP		Via Ogden & D&RGW	
		Rate	% of 1st	Rate	% of 1st
Denver, Colo.	409	69	16.9	108	26.4
Kansas City, Mo.	577	82	14.2	121	21.0
Chicago, Ill.	703	114	16.2	142	20.2

The potato rates are taken from Exhibit No. 3 in this proceeding. The first class rate to Denver, Colorado, is published in Union Pacific Tariff 3030-F, ICC No. 4749. The first class rates to Kansas City and Chicago are published in Western Trunk Line Tariff 350-B, Agent L. E. Kipp's ICC No. A-3202.

27.5 percent of first class has quite generally been considered a reasonable basis of rates on potatoes and has frequently been prescribed by the Commission for application in western territory.

In Idaho Public Utilities Commission v. Alton. R. R., 251

ICC 93, the Commission, on page 103 of its report, called attention to the fact that rates on potatoes from Idaho to all points in the United States were substantially less than 27.5 percent of first class.

ICC Freight Commodity Statistics Statement 49100 shows that 147,568 tons of potatoes, other than sweet, originated on the Rio Grande during the year 1948. I shall have to rely on the Rio Grande to tell the Commission how [fol. 1239] many of those tons were loaded at Grand Junction, Colorado, or other points in the vicinity of Grand Junction. However, the production in that area is substantial, and although actual production figures are not yet available, the U. S. Department of Agriculture, Office of Agricultural Economics at Denver, Colorado, on basis of preliminary reports, estimates it to have been forty-five million pounds or about 1200 carloads in the three counties of Mesa, Delta and Montrose. With that much local production and population of only 8,000, it seems doubtful that there is actually a market for Idaho potatoes at Grand Junction.

The so-called pocket market situation at Wichita, Kansas, and other points complained about by a few shipper witnesses does not actually exist. Rates on potatoes and other vegetables from Utah north of Ogden and from Idaho to Wichita, Kansas, are published in Western Trunk Line Tariff 297-B, Agent L. E. Kipp's ICC No. A-3511. They apply via the Union Pacific, Denver, Colorado, AT&SF; Union Pacific, Denver, Colorado, CRI&P; Union Pacific, Kanopolis or Salina, Kansas, MoPac; Union Pacific, Ellsworth, Kansas, StL-SF.

If movement into Wichita is via Denver and the AT&SF Ry., shipments may be diverted to any point on the Santa Fe System lines in Kansas, Oklahoma or Texas and to destinations on many other lines in Texas with which the Santa Fe makes connection. If movement into Wichita is via Denver, Colorado, and the CRI&P Railroad, shipments [fol. 1240] may be diverted to points on that line in Kansas, Oklahoma and Texas and to Little Rock, Arkansas, and Memphis, Tennessee, also to destinations on many other lines in Texas with which the Rock Island makes connection.

If movement into Wichita is via Kanopolis, Kansas and

the Missouri Pacific Railroad, shipments may be diverted to stations on Missouri Pacific System lines in Kansas, Oklahoma and Texas, also to destinations on many other lines serving Texas, Arkansas, Tennessee and Alabama, including such points as Shreveport and New Orleans, Louisiana, Mobile, Alabama, and Memphis, Tennessee.

If movement into Wichita is via Ellsworth, Kansas, and the StL-SF Railway, shipments may be diverted to all stations on that line and to stations on many connecting lines in Oklahoma, Texas, Arkansas, Louisiana, also to St. Louis, Missouri, and via St. Louis to the entire southeast or to Chicago and quite generally to other points in Illinois and to Iowa and other points in Western Trunk Line Territory. Routing via Ogden with the Rio Grande to Denver or Pueblo and its connections beyond would not give the shippers any greater outlet beyond Wichita, Kansas, than they have via routes presently in effect unless some of the prairie lines lines permitted expensive out-of-line hauls via Wichita.

During the year 1948, 5,295 carloads of potatoes moved out of Idaho into Oklahoma and Texas. The movement of [fol. 1241] dry onions amounted to 145 carloads. Many of those carloads undoubtedly did move through Wichita; and, if sufficient time was available to determine the actual Oklahoma or Texas destination of each car, it could be shown that most of them could have tried the Wichita market and then have been diverted to its actual destination at the through-one-factor rate.

Many additional cars terminating in the southeast and in Western Trunk Line Territory could also have tried the Wichita market via the route through Ellsworth with the StL-SF Railway.

The preceding remarks about routing on potatoes and onions to Wichita, Kansas, and points beyond also applies to lettuce and any other vegetable shipped out of Idaho.

Shipper Testimony about Rates on Livestock

Practically all of the livestock shipper witnesses testifying in support of the Rio Grande's request were interested in lower rates on so-called feeder stock that originates north of Ogden in Utah, Idaho, Montana, Oregon and Washington, stopped at points on the Rio Grande or at points in

the Arkansas Valley east of Pueblo to be fattened and then reshipped to market points Denver, Pueblo, Missouri River or still farther east at the balance of the through rate on fat stock from the origin point of the feeders to final destination of the fat stock.

Because of the low level of the rates prescribed by the Commission in the Western Livestock Case, and its ex-
[fol. 1242] pressed view that the the traffic should be retained by the carriers for their long haul, there are a number of instances where a basis of rates higher than prescribed by the Commission has been established in the public interest for the purpose of trying certain markets or making available feeding or grazing in transit privileges on other lines. An example of such an arrangement is Item 80 of UP Tariff 6085-B, ICC No. 4783. Under the provisions of that item, cattle, calves, sheep and goats from points on the Union Pacific and its connections west of Cheyenne to and including Butte, Montana, and Huntington, Oregon, consigned to the Missouri River and east, may be handled via the longer routes through Denver with our connections beyond at an arbitrary of 5.5 cents (general increases make it 8.5 cents) in addition to the through rate applying via the Union Pacific direct to the Missouri River.

That basis of rates applies via Denver with the AT&SF or with the Rio Grande to Pueblo with the Missouri Pacific, and, of course, all of the feeding or grazing in transit privileges published by those lines at points in the Arkansas River Valley may be used.

The CB&Q has a similar basis of rates in effect via Denver on livestock originating at points on its line in Montana and Wyoming. See Item 30 of CB&Q Tariff 15025-H, ICC No. 19767.

Attention is also directed to the rates and routes published in SWFB Tariff 189-E, Agent Marsh's ICC 3567, under which livestock originating in Arizona, New Mexico [fol. 1243] and Western Texas moving to Missouri River markets or east thereof may be handled via the longer routes through Denver, Colorado, and prairie lines through either Kansas or Nebraska at rates higher than those applying via the more direct routes through Texas and Oklahoma in SWFB Tariff 188-E, Agent Marsh's ICC No. 3476

Another example of rates via longer routes based on arbitraries higher than the rates via the direct routes of the Union Pacific is Item 85 in Union Pacific Tariff 6085-B, ICC No. 4783. Under that item, double-deck shipments of sheep or goats originating on the Union Pacific in southern Idaho and in eastern Oregon and destined to the Missouri River and east may be routed via Ogden or Salt Lake City and the D&RGW Railroad to Denver, thence Union Pacific and its connections, at an arbitrary of 13 cents (Ex Parte 162, 166 and 168 increases make it 19 cents to Missouri River and 20 cents to Chicago) in addition to the through rate that applies via the shorter and more direct route of the Union Pacific.

To the best of my knowledge we have never had any requests to make the same basis of rates applicable on cattle. The arbitrary basis via Ogden on sheep, double-deck, was established in 1932 shortly after rates were published in compliance with the Commission's order in the Western Livestock Case. It was based on the difference between the Docket 17000, part 9, scale rates for the average distance [fol. 1244] via the Union Pacific to the several Missouri River markets compared with the average distance to the same markets via the routes through Ogden with the Rio Grande.

Since 1932 the distance via the route through Ogden with The Rio Grande has been shortened by the Dotsero Cutoff and the Moffat Tunnel route. Applying the same formula that we used in 1932 to the present distances from twelve representative origin points Pocatello and north to Butte, Montana, and west to Pendleton, Oregon, would result in average differentials on cattle and sheep, double-deck, of five cents to Denver and Pueblo and fifteen cents to the Missouri River markets. Different and higher arbitraries would apply on other shipments of livestock subject to different rate scales. The Commission is urged not to issue any orders in this proceeding requiring application of the low 17000, Part 9, basis of rates via the longer routes through Ogden with the Rio Grande because the inevitable result will be demands for similar circuitous routing from other areas previously mentioned.

We have no objections to revising the existing arbitraries

via the Ogden route to reflect the present differences in distance via the route of the Union Pacific through Wyoming versus the Rio Grande's route from Ogden to Denver through the Moffat Tunnel nor would we have any objections to the application of that same basis on cattle.

Shipper Testimony About Eastbound Lumber Rates

[fol. 1245] Three witnesses interested in eastbound lumber rates and routes testified for the Rio Grande and expressed a desire for routing via Ogden for the purpose of using one or more transit privileges at points on the Rio Grande. All of the state of California, all of the western half of Oregon served by the Great Northern Railway and Southern Pacific Company, and practically the entire fir lumber producing area in Washington now have joint rates and through routes via the Rio Grande on a parity with all other lines. This makes unlimited quantities of both pine and fir lumber available to transit operators on the Rio Grande.

If the position of those transit operators is to be improved, it will have to be at the expense of the railroads, and especially the Union Pacific, because rates on lumber from eastern Washington and Oregon and from Idaho are on a lower basis than from the Coast group, and transportation of lumber from that interior territory via Ogden with the Rio Grande would be more expensive because of the greater distance. Some of the largest pine mills in Oregon are located at Bend, Oregon, from which point the rates via the routes that included the Rio Grande are on a parity with rates via other lines.

Mr. J. A. Hayley (transcript pages 533-542) testified as manager of the Monarch Lumber Company with a plant at Military Jct., Colorado. The plant was located at Military Jct., Colorado, about two and one-half years ago, [fol. 1246] presumably with full knowledge of the fact that the Rio Grande's Denver switching limits ended about one mile short of their plant. If any change in the existing situation is required, it can and should be accomplished by the publication of a reasonable switching charge by the Rio Grande and not by additional routes which would be

ninety-five miles and more longer than those presently in effect.

Witness Hayley also testified regarding the desire of his company to purchase Douglas fir lumber at Seneca, Oregon, and Grangeville, Idaho. Both points are east of the Cascades, and there is no substantial commercial production of fir lumber available there. As previously stated, the Rio Grande now has access at equal rates to practically all of the fir lumber producing area.

Exam. Mullen: Just a minute. The next paragraph is all argument. As I see it, that should be eliminated.

Mr. Collins: Mr. Examiner, just to review what Mr. Stilling is undertaking to do is to answer testimony submitted by shippers, or witnesses, rather, who testified about lumber, and he is discussing this Mr. Titus, and if he leaves him out, why then his plan is incomplete. That is, if you strike this out entirely, it indicates that he had left him dangle without any response to his testimony.

Mr. Quirk: Mr. Examiner, may I make this comment?

Exam. Mullen: Go ahead.

[fol. 1247] Mr. Quirk: That paragraph, which you suggest should be stricken, is a paragraph which Mr. Collins can characterize in a brief in that manner if he wants to, but I don't see why one witness should get on an argue about the significance of another witness' statement.

Exam. Mullen: That is the reason why I think it should be excluded.

Mr. Collins: What I have said is on the record. I am perfectly willing to strike this out, if what I said is retained.

Exam. Mullen: What you have said is retained, but that paragraph is stricken.

Mr. Collins: All right.

The Witness: Shipper Testimony About Rates On Fruit For Freezing in Transit At Delta, Colorado.

Mr. Donald K. Reed (transcript pages 174 to 188) wants to buy apples, apricots and peaches in Utah north of Ogden and in Idaho for freezing at Skyland Food Corporation Plant at Delta, Colorado, moving the frozen fruit to the territory Colorado and east at the balance of the through rate from point of origin of the unfrozen fruit. His pres-

ent transit operation is under the provisions of Item 301-C of D&RGW Tariff 7283-A, ICC No. 792, which the Rio Grande, for reasons of its own, has limited to apply only on fruit originating in Colorado and Utah.

[fol. 1248] The transit privilege will not apply on shipments originating in Idaho, Oregon or Washington nor in California even though the production of fruit in California far exceeds that in any other state and through one-factor rates apply via Ogden and the Rio Grande. The witness stated at transcript page 183 that he did not want lower rates but only a freezing in transit privilege. Apparently the Rio Grande can satisfy that particular witness by broadening the scope of its transit tariff. Regardless of that I would like to discuss the rates from the territory north of Ogden and the quantities of peaches, apricots and apples readily available to the Skyland Fruit Company.

The witness testified that his plant capacity was fifteen million pounds annually (transcript page 175) but that operation was limited to fifty percent of that capacity because of inability to get sufficient quantities of fruit. (Transcript page 183) The plant is located in Delta County, Colorado, and the adjoining counties are Mesa and Montrose. The Denver Office of the U.S. Department of Agriculture estimates the 1949 production of peaches in those three counties to have been two million bushels or ninety-six million pounds. The production of apples was estimated to be one and one-fourth million bushels or sixty million pounds, and apricots sixty thousand bushels or 2,880,000 pounds. The Salt Lake City office of the U.S. Department [fol. 1249] of Agriculture estimates the production in Utah last year to have been 428,000 bushels or 20,544,000 pounds of apples, 778,000 bushels or 37,344,000 pounds of peaches, and 7,400 tons or 14,800,000 pounds of apricots. It was also stated by the U.S.D.A. that most of that production was in Weber County and south thereof. Ogden is in Weber County, and rates via the Rio Grande from all of the territory Ogden and south are on a parity with the Union Pacific and other lines. The total of these U.S.D.A. estimates in Utah and three counties in Colorado is 231.5 million pounds of apples, peaches and apricots. If Skyland Fruit Company is having difficulty in operating its plant

to capacity, it would appear to be for reasons other than adequate supplies of fruit.

The following remarks about rates on fruit via Ogden from the territory north thereof will have reference not only to the testimony of Witness Reed but also to that of Witness LeRoy Snooks (transcript pages 258-271) who testified regarding the sale of ripe peaches and apricots to the Skyland Fruit Corporation at Delta, Colorado, and that more could be sold if the rates from Brigham, Utah, on the Union Pacific north of Ogden to the territory Denver and east were reduced when via the Ogden route with the Rio Grande. The rates on peaches and certain other deciduous fruits from the western slope (Grand Junction) district in Colorado, also from Utah and Idaho, are depressed by reason of both common carrier and the itinerant truck competition.

[fol. 1250] Present rates from Brigham and Logan, Utah, to Chicago are as follows:

Apples from Logan	$1.81 per 100 pounds.
Apricots and Peaches from Logan	2.00 per 100 pounds.
Apricots and Peaches from Brigham	1.82 per 100 pounds.

Those rates are based on combination over Ogden and include all general increases and will apply via Ogden with the Rio Grande. Factors to and from Ogden are published in Union Pacific Tariff 2048-G, ICC No. 4693, and Rio Grande Tariff 4925-L, ICC No. 746.

In Chamber of Commerce of Grand Junction, Colorado, v. A. & R. R.R., et al, 190 ICC 233, the Commission found $1.63 per 100 pounds to be reasonable on peaches from Grand Junction to Chicago and east. Rates from Utah are generally slightly higher than from Grand Junction. When increased as authorized by the general increases approved by the Commission, the prescribed rate of $1.63 per 100 pounds becomes $2.13 per 100 pounds and is higher than the present rates via the Ogden route. It should be borne in mind that the comparison I make is of a prescribed rate from Grand Junction, Colorado, with present rates via the Ogden route from the more distant points in Utah. Obviously, the present rates cannot be condemned as being unreasonably high.

Witness Reed also expressed a desire to purchase apples from growers in the Boise-Payette district in western Idaho.

[fol. 1251] As shown on pages 1 and 2 in Section L of witness Earley's Exhibit 3, the present rate from both Boise and Payette to Chicago is $1.41, the same as in effect from Ogden despite the much greater distance. The rate on apples from Boise and Payette to Chicago via the longer route through Ogden with the Rio Grande is $1.88. In California Growers & Shippers Protective League v. S.P. Co., et al, 185 ICC 299, the Commission found $1.50 per 100 pounds to be a reasonable basis. The general increases approved since that case was decided would make that rate $2 per 100 pounds. The present rate of $1.88 via the Ogden route with the Rio Grande is twelve cents per 100 pounds lower than the figure found reasonable by the Commission plus the subsequent general increases, and Witness Reed could have the benefit of that rate of $1.88 if the Rio Grande would amend its transit tariff to apply on shipments originating in Idaho.

Shipper Testimony About Eastbound Rates on Grain and Grain Products.

Two witnesses (transcript pages 499-522) representing the Kansas Milling Company at Wichita, Kansas, testified in support of the Rio Grande's request for opening the Ogden gateway but admitted the results they desire could be accomplished by broadening the application of rates via the route of the Union Pacific to Denver and its connections east or south thereof.

[fol. 1252] To my knowledge the Union Pacific has never been requested to establish additional routes via Denver or interior Kansas junctions. Certainly whatever need, if any, there may be for new routes to permit greater freedom in transit operations at Wichita or any other point in Kansas should be accomplished via the routes of the Union Pacific through Denver or interior Kansas junctions and not via the longer routes through Ogden with the Rio Grande, which line is wholly unnecessary in the transportation of grain originated by the Union Pacific in Idaho, Oregon, or Washington for transit at Kansas points and movement

beyond. In its analysis of the testimony of these two witnesses, I urge the Commission to consider also the fact that the grain rates are fixed by it on a low basis, and the carriers should be permitted to confine the application of those rates to the more direct routes and the long haul routes of the origin line whenever possible.

It is important also that the Commission bear in mind that Wichita, Kansas, is not on the main line of any railroad from Colorado junction points to Kansas City or any other Missouri River market. That is also true of the transit point Moundridge, Kansas, which is a local point on the McPherson, Kansas, branch of the Missouri Pacific Railroad.

If the Union Pacific is to be short hauled via Ogden as demanded by the Rio Grande or even via Colorado or Kansas junction points for the purpose of making additional transit privileges available at Wichita or other [fol. 1253] points in Kansas that can only be served via longer routes than presently apply to Missouri River and east, we, and the Commission as well, are immediately confronted with the question of what new and still longer routes must be established on grain from Idaho, Oregon and Washington for the purpose of making additional transit privileges available to transit operators in Oklahoma and even Texas.

Enid, Oklahoma, and Wichita, Kansas, are both very important milling points, and there is very keen competition between them. (Western-Southeastern Grain Case, 259 ICC 629.) There are other mills in both Oklahoma and Texas that compete with those at Enid and Wichita. The grain rates from the northwest to the east must be restricted in some manner if unduly circuitous movement is to be avoided. The direct route of the Union Pacific to Missouri River markets is the logical place for that restriction.

I have previously explained that from McCammon, Idaho, for example, to Kansas City, the distance is 199 miles longer via the route through Ogden with the Rio Grande than via the Union Pacific direct. Via the Union Pacific to Denver and the CRI&P to Kansas City it is 105 miles longer than via the Union Pacific direct; via the AT&SF

from Denver 191 miles longer than via the Union Pacific direct; and via the Rio Grande to Pueblo and the Missouri Pacific to Kansas City 215 miles longer than via the Union Pacific direct.

[fol. 1254] When all of the facts are known and considered, it is doubtful if Wichita is handicapped in any manner whatever in the use of Idaho, Oregon and Washington wheat. First of all, grain transit operators may indulge in unlimited substitution of billing.

Second, there is a complete line of through one-factor rates on grain from northern Utah and from Idaho to Texas in SWFB Tariff 182-F, Agent D. Q. Marsh's ICC No. 3832, which apply via the Union Pacific to Denver and via connecting lines through Wichita for transit privileges. Third, all grain from Idaho, Oregon and Washington given transit at points in Kansas moves to the east and southeast at proportional rates beyond Missouri River crossing and beyond St. Louis and Memphis. The proportional rate from Kansas City to Memphis City to Memphis applies via the CRI&P R.R. or the Missouri Pacific R.R. through Wichita with transit at that point. (See SWFB Tariff 223-H, Marsh's ICC 3827.)

This makes a very large part of the southeast available to the transit operator at Wichita as a market for disposing of Idaho, Oregon and Washington wheat at rates on a parity with all other transit operators. The southeastern states use large quantities of flour manufactured from Idaho wheat, the state of Georgia alone having received 495 carloads during the year. Grain and grain products is another commodity on which the rates from Idaho to Denver and [fol. 1255] east are only a few cents higher than from Ogden—Pocatello and American Falls, Idaho, being only four cents over Ogden to Missouri River and Rexburg, Idaho, only six cents over Ogden.

All three stations are important grain shipping points. Similar rates only slightly higher than rates from Ogden apply from all other points in Idaho.

The testimony of these two witnesses does not justify the application of these low grain rates via the longer and more expensive new routes which they and the Rio Grande seek to have established.

Exam. Mullen: Just a moment, as to that. That looks to me as being argumentative, entirely.

Mr. Collins: I think he is entitled to draw a conclusion as an expert witness. That is his opinion.

Exam. Mullen: Yes, commenting on the testimony already in the record. That is argumentative.

Mr. Collins: Which is that?

Exam. Mullen: Beginning on page 86, under the heading, "Other Shipper Testimony," all of page 87, page 88, 89, inclusive. That is argumentative, and I think should be excluded.

Mr. Collins: Suppose I say I think it ought to stay in, and then you go ahead and rule.

Exam. Mullen: I rule it should be excluded, and it is stricken.

[fol. 1256] The Witness: The Commission's records covering the ex parte 162, 166 and 168 proceedings contain a large volume of factual material relating to the sharp increases in recent years in all phases of the rail lines' operating expenses, and rate increases have been authorized to partially offset them.

Mr. Quirk: Mr. Examiner, I think this is argumentative with the other page.

Exam. Mullen: Let me read it.

Yes, I think that is argument, all of page 90, and page 91, except the last paragraph. That will be eliminated as argumentative, except the last paragraph on page 91.

Mr. Quirk: How would you characterize that?

Exam. Mullen: I don't need to characterize that.

Mr. Quirk: Is that argument?

Exam. Mullen: No, he can read that in. Go ahead.

Mr. Collins: Read beginning with the last paragraph on page 91.

The Witness: I have called attention to the fact that on those heavy moving commodities the present rates from Idaho origins are in some cases identical and in other cases only a few cents higher than those from Ogden, notwithstanding the greater mileage and consequently greater expense to the carriers in the movement from Idaho. This

situation exists because the Union Pacific has consistently and continuously adhered to a policy of according Idaho [fol. 1257] shippers the lowest possible level of rates consonant with the cost of providing the required service. We have always recognized this as necessary in order to permit the broadest possible distribution of the products of Idaho as well as those of Oregon and Washington in the important and distantly removed consuming markets.

The Rio Grande is not attempting in this proceeding to increase any existing rates to provide adequate revenues via the new and longer routes but seeks to share in the traffic at the present rate levels. It will be apparent that any action tending to divide the already low revenue with another carrier or other carriers, over still longer routes involving still further increased costs to the carriers, cannot help but result in a strong deterrent to any future reduction in rates if it does not, in fact, result in increases in rates.

Mr. Collins: Mr. Examiner, I would like to be permitted to call Mr. Stilling back to the stand at some later time after he completes some development of some data that he is having worked up or looked at. It would only be for five minutes or ten minutes or so.

Exam. Mullen: All right, that will be done.

We will adjourn until 9:30 tomorrow morning.

(Witness excused.)

(Whereupon, at 5:10 o'clock, p.m., a recess was taken to reconvene at 9:30 o'clock, a.m., Thursday, April 6, 1950.)

[fols. 1258-1259] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL, Defendants

Transcript of Testimony—Boise, Idaho, Thursday, April 6, 1950.

Met, pursuant to adjournment, at 9:30 o'clock a.m.

Before:

Frank E. Mullen, Examiner.

[fol. 1260] Proceedings

Exam. Mullen: We are ready to proceed, gentlemen.

Mr. Collins: I am through with Mr. Stilling on direct.

Exam. Mullen: Mr. Stilling is ready for cross examination.

Mr. Quirk: Well, Mr. Examiner, we are not prepared to cross examine Mr. Stilling at this time. My impression is we will probably not have much cross examination, but we would like to defer the matter until we have time to analyze all the statements and the exhibits he has filed.

Exam. Mullen: Mr. Stilling will be here at this hearing.

Mr. Collins: He will, Mr. Examiner, but counsel is considerably confusing our efforts to run off some kind of a schedule to save time in the matter of getting other witnesses here, and getting them on the stand and off. This is the third witness whose cross examination he has deferred, and it prevents us from following any kind of a set schedule.

Exam. Mullen: Well deferring cross examination might save considerable time, however. Have you another witness ready now?

Mr. Collins: Yes.

Exam. Mullen: We are ready for him now.

Mr. Collins: What I am referring to, though, after I get through with the next two witnesses, we have people in here from considerable distances, and I hate to have them here on the theory they are going to testify and then he will want to put back on the deferred cross examination, [fol. 1261] and interrupt that program.

Exam. Mullen: When will you be ready to cross examine this witness?

Mr. Quirk: I don't know just at this moment.

Exam. Mullen: Will it be this week?

Mr. Quirk: I think so. I doubt very much whether we will have very much cross examination.

Exam. Mullen: All right.

Mr. Quirk: Mr. Collins remembers he didn't cross examine Mr. Earley at all. The testimony is all alike. There is too much to this to do it overnight unless you do nothing but work on it all night.

Exam. Mullen: Have you another witness now?

Mr. Collins: I can't say this, Mr. Examiner, I can't promise Mr. Stilling will be here after this week, he has no reason to be here. He may be, I am not sure.

Mr. Webb.

P. V. Webb was sworn and testified as follows:

Mr. Collins: Mr. Examiner, we have found that on Page 15 of Burns' statement that some arithmetical or typographical errors have crept in, or both, perhaps. On the ninth line in the first full paragraph on Page 15 that figure 3,897,797,650 should be 3,887,797,650.

The figure $40,880,443.85 should be $49,880,443.85.

[fol. 1262] Mr. Quirk: Is that 49 million?

Mr. Collins: Yes, sir.

Mr. Quirk: What is the next digit?

Mr. Collins: $49,880,443.85.

Exam. Mullen: Is that all?

Mr. Collins: Yes, that is all.

Exam. Mullen: All right, sir.

Direct examination.

By Mr. Collins:

Q. You have been sworn, Mr. Webb?

A. Yes, sir.

Q. Have you prepared some written testimony and some exhibits?

A. Yes, sir.

Q. For presentation.

A. Yes, sir. I have three exhibits.

Q. I see you don't have your name written out on the sheet. Will you state your full name?

A. My name is P. V. Webb.

Q. And your position?

A. I am a statistician on the staff of the general auditor of the Union Pacific Railroad Company, at Omaha, Nebraska.

Q. And the address there?

A. Omaha, Nebraska, 1416 Dodge Street.

Q. How long have you been connected with the accounting department of the Union Pacific Railroad?

A. For the Union Pacific Railroad Company, and one of [fol. 1263] its leased lines, the Oregon-Washington Railroad and Navigation Company, I have been employed for approximately thirty years.

Q. Are the statements and the data in your written testimony and the exhibits you have prepared true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. Will you proceed with your statement, indicating which statement you are talking about first?

Mr. Collins: I wonder, Mr. Examiner, if we hadn't better give those exhibits a number.

Exam. Mullen: The first one will be 26.

Mr. Quirk: Which one is that?

Mr. Collins: The first one will be——

The Witness: A five-page statement.

Exam. Mullen: All right, Exhibit 26.

(Defendant's Exhibit No. 26, Witness Webb, marked for identification.)

Exam. Mullen: 27 will be which one?

The Witness: Showing the gathering costs, Mr. Examiner.

Mr. Collins: That is a two-page statement.

Exam. Mullen: All right, that will be 27.

(Defendant's Exhibit No. 28, Witness Webb, marked for identification.)

Exam. Mullen: The last one will be 28.

(Defendant's Exhibit No. 28, Witness Webb, marked for identification.)

[fol. 1264] The Witness: Exhibit No. 26 shows shipments of various commodities originating on Union Pacific Railroad; total revenue and revenue per car mile earned on basis of routing via UPRR and routing via D&RGW; total cost and cost per mile of handling computed from Bureau of Accounts and Cost Finding, Statement No. 3-49 "Rail Carload Cost Scales by Territories as of January 1, 1949" and the net profit or loss based on such revenues and expenses.

The information shown in columns 1 to 8, inclusive, (except as to the class of car shown in column 1 in which the shipments were assumed to move) was taken from Section J of Mr. T. K. Earley's Exhibit No. 3, submitted at the hearing held in this case at Salt Lake City commencing December 12, 1949. The class of car shown is the class in which the shipments normally move. The information shown in columns 9 and 10, was computed from the Bureau of Accounts and Cost Finding Statement referred to.

The cost scales, as indicated in explanatory remarks accompanying the statement, were compiled by the Bureau of Accounts and Cost Finding, to bring up to date past studies showing various levels of rail carload freight service costs by territories (i.e., Eastern District, Pocahontas Region, Southern Region and Western District). The figures used in compiling the cost scales were based on rail carrier's operations during the year 1947 with an adjustment to reflect wage and price level changes up to January 1, [fol. 1265] 1949.

Exam. Mullen: Just a moment, that is the Bureau of Accounts and Cost Finding of the Commission?

The Witness: Yes, sir.

In preparing the study on which the cost scales were based, it was the intention, also as indicated by the explanatory remarks, to show territorial figures which will reflect the costs for carload freight service under a range of operating conditions, including the territory in which the haul is performed, the type of car (considering the tare weight and per cent of empty return movement), the net weight of load, the length of haul, and the type of train, whether way or through. The scales were constructed on the basis of transporting the freight for 50 miles in way trains and the remaining distance in through trains.

Therefore, when a shipment moved in more than one territory it was assumed that 25 miles in each the origin and destination territory was in a way train and the remaining distance in a through train. The costs are territorial figures and, aside from the factors listed, represent average operating conditions in each territory.

Two levels of costs are shown by the cost scale, i.e., out-of-pocket and fully distributed. The fully distributed costs represent a full prorata proportion of operating expenses, rents and taxes, a 4-per cent return on investment and the [fol. 1266] passenger and less-carload deficits, and are the costs reflected by this exhibit.

In computing the costs shown in this exhibit, the miles shown in columns 4 and 5 were segregated between territories and the miles applicable to the origin and destination territory were segregated as between miles hauled in way trains and miles hauled in through trains.

Any overhead or bridge moves were assumed to be in through trains. The miles thus segregated as to territories and as to way trains and through trains were respectively inflated by 12 per cent to allow for circuity of movement (i.e., the amount by which the actual miles of haul exceeded the short line or rate-making miles). This adjustment is provided for in the explanation accompanying the cost scales.

The adjusted miles were applied to the appropriate line haul unit costs as given in the cost scales to arrive at the line haul cost per hundredweight after first adjusting such unit costs to the actual weight of the shipment shown paren-

thetically in column 1 of the exhibit. Similar adjustment was made with respect to the unit cost shown in the cost scales for terminal expense.

These adjustments were necessary because the costs shown by the cost scales are for shipments of various weights in multiples of 5 tons. The adjustments were made by interpolation and are also provided for in the explana- [fol. 1267] tion accompanying the cost scales. The figures representing the line haul costs per cwt. for the respective hauls in way and through trains for each territory were then added to the appropriate terminal costs per cwt. (i.e., the full terminal cost where the shipment was handled in only one territory or one-half of the terminal cost for the origin and destination territory where the shipment was handled in more than one territory) and the resultant sums representing the cost per cwt. for the movement via the UP and the movement via the D&RGW was applied to the weight of the shipment shown in column 1 to arrive at the costs shown in columns 9 and 10, respectively.

The costs per car mile shown in columns 11 and 12, were determined by dividing the cost per car shown in columns 9 and 10, respectively, by the miles shown in columns 4 and 5.

Columns 13 and 14, and 15 and 16, show the net profit or loss per car and per car mile, respectively, for all lines included in the selected tariff routes. These figures were computed on basis of the revenues and expenses shown in columns 6 to 12, inclusive. It will be noted that in practically every instance the haul via the D&RGW results in a lesser profit or a greater loss than the haul via the UP, also that for a considerable number of movements a profit for the haul via the UP is turned into a loss for the haul via the D&RGW.

In this connection, as has been previously mentioned, the cost scales were compiled from carriers' reports submitted [fol. 1268] for the year 1947, with an adjustment to reflect wage and price level changes up to January 1, 1949. The revenues shown are, as testified to by Mr. Earley in connection with his Exhibit No. 3, computed on basis of rates in effect on September 1, 1949.

Therefore, to the extent of any increase in wage and price levels between January 1 and September 1, 1949, the ex-

penses are not comparable to the revenues and the net profit or loss is over or understated proportionately. Also since the costs for each district represent the average of the costs of all roads in that district, those for the Western District do not reflect actual costs over the UP and D&RGW to the extent that the cost on those roads are greater or less than the average of all roads in that district.

As an indication of what this difference would be, I have calculated for the year 1948 (the latest year for which such information is available) the cost per revenue ton mile of the freight proportion of operating expenses, rents and taxes, for the UPRR, D&RGW and for all roads in the Western District. This calculation shows that such costs for the UP were 6 per cent less than for the average of all roads in the Western District and for the D&RGW were 5 per cent greater than the average of all roads in the Western District.

Attention is also directed to the fact that the costs for the Western District, as included in the cost scales are [fol. 1269] comprehensive of the average number of interchanges and the average cost of such interchanges as of January 1, 1949. Since the movement via the D&RGW as shown by this exhibit would involve at least one, and in some cases two additional interchanges the costs shown are understated proportionately.

We have no recent studies which show the cost of a car interchanged; however, in a report by the Federal Coordinator of Transportation, Section of Transportation, entitled "Freight Traffic Report," Volume 1, it is stated on Page 104:

> "In 1932 there were over 50 million interchanges reported at an aggregate cost of 330 million dollars. The cost per car interchanged was $10.78 * * *".

Using the average cost per yard engine hour in freight service for the Union Pacific for the years 1932 and 1948 as a basis, I have calculated the percentage ratio that the latter is of the former. Applying this percentage ratio of 189.60 to the $10.78 indicates that the approximate cost to interchange a car in 1948 was $20.44.

By Mr. Collins:

Q. Go ahead, Mr. Webb.

A. Exhibit No. 27 shows the approximate gathering cost to Union Pacific Railroad of handling shipments of various commodities destined to Denver, Colorado or points beyond, from point of origin to point at which placed in through line-haul trains, computed from Bureau of Accounts and Cost Finding, Statement No. 3-49, "Rail Carload Cost [fol. 1270] Scales by Territories as of January 1, 1949."

As an indication of what this difference would be, I have shipments covered by my exhibit No. 26 and the data in columns 1 to 4, inclusive, were taken from that exhibit. Columns 4, 5 and 6 indicate the movement and the miles hauled in way trains or in instances where columns 5 and 6 are blank, indicate that the shipment was placed in a through line-haul train at the point of origin. It will be noted that the miles hauled in way trains range from 4 miles for a shipment originating at Pendleton, Oregon to 177 miles for a shipment originating at Ketchum, Idaho.

The amounts shown in column 7 represent the terminal costs at the origin station and, where appropriate, the costs of hauling in way train from the point of origin to the point at which the shipment was placed in a through line-haul train. These costs are based on data shown in Bureau of Accounts and Cost Finding Statement No. 3-49, "Rail Carload Cost Scales by Territories as of January 1, 1949", and were computed in exactly the same manner as costs described in my exhibit No. 26, except that the unit costs for way trains were used for the entire haul and, since the miles shown in column 6 represent the actual road miles, no expansion was made for circuity.

The costs range from $18.99 for a shipment originating at Nampa, Idaho, and placed in a through line-haul train at that point, to $106.12 for a shipment originating at [fol. 1271] Kellogg-Wardner, Idaho and hauled 171 miles in a way train to Ayer, Washington. The simple average of the costs for all movements covered by this exhibit is $45.59.

Attention is directed to the fact that these gathering costs are and would be borne entirely by the Union Pacific in addition to the costs to it of the line-haul through move-

ment to Ogden, while the D&RGW would incur no gathering costs whatever on the traffic it seeks and would bear only the cost of its line-haul.

Q. Mr. Webb, this statement No. 3-49, from the Bureau of Accounts and Cost Finding, is the Bureau of the Interstate Commerce Commission, and that statement is distributed by the Commission, is it not?

A. Yes, sir.

Q. All right. That is what you referred to each of these statements in connection with Exhibits No. 26 and 27; is that correct?

A. Yes, sir.

Q. All right.

A. Exhibit No. 28 shows total railway operating revenues of (a) all Class I railroads in the Western District, (b) CMStP&PRR Co., GN Ry. Co., NP Ry. Co., and UPRR Co., and (c) D&RGW RR Co. for each of the years 1930 to 1949 inclusive, and the percentage ratio that the respective revenues for each of the years 1931 to 1949 inclusive bears to [fol. 1272] the revenue for the year 1930; also comparison of such percentage ratios for the D&RGW RR Co. with corresponding percentage ratios for roads in groups (a) and (b).

The railway operating revenues shown on this exhibit for the years 1930 to 1947 inclusive were taken from Annual Reports on Statistics of Railways in the United States prepared by the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission. Similar data for the years 1948 and 1949 were taken from Statement No. 1649 prepared by the Statistical Bureau-Western Lines, Chicago, Illinois.

Particular attention is directed to the figures shown in the last two columns of this exhibit. It will be noted that the percentage ratio for the D&RGW exceeds corresponding ratio for all Class I railroads in the Western District in each of the 19 years 1931 to 1949 inclusive, and that such excess ranges from .67 per cent in 1931 to 58.05 per cent in 1945. Similarly, as compared with the four transcontinental roads, the CMStP&P, GN, NP, and UP, the D&RGW ratio is greater in all but two years, the excess ranging from .61 per cent in 1931 to 46.32 per cent in 1945.

Attention is also directed to footnote[2] shown at the bottom of this exhibit. The Denver & Salt Lake Ry. Co. was merged into the D&RGW in 1947. The railway operating revenues shown for the D&RGW for the years 1947, 1948, and 1949 are for the consolidated company and are, [fol. 1273] therefore, not comparable with the D&RGW railway operating revenues for the year 1930. If the D&RGW railway operating revenues for the year 1930 were restated to include the railway operating revenue of the D&SL, and the percentage ratios for the years 1947, 1948, and 1949 recalculated, the results would be as follows:

	Column (c)	Column (d) Excess of D&RGW ratio over ratio for	
	DRGW ratio to 1930	All Class I Railroads in Western District	CMStP&P, GN, NP UP
Year 1947	178.31	2.64	9.21[1]
Year 1948	207.93	12.49	3.50
Year 1949	199.39	21.08	7.77

[1] Excess over D&RGW.

Q. Now, Mr. Webb, you heard the correction that was made on Page 15 of Mr. Burns' testimony?

A. Yes, sir.

Q. You have given consideration to those corrected figures and the effect of them upon the financial results of the Union Pacific Railroad as of 1949, have you?

A. Yes, sir.

Q. Will you state just what you have to say in that connection?

A. I calculated the operating expenses, rent and taxes, that would be applicable to the ton-miles given on Page 15 of Mr. Burns' exhibits, as corrected this morning, by first determining the average cost per revenue ton mile, and [fol. 1274] applying that cost to the ton mile shown.

This calculation indicated that it would cost the $41,557,835 to transport the traffic represented by the revenue given by Mr. Burns. That would indicate a reduction in our net railway operating income for 1949 of $8,322,608.85.

In that connection, on Page 26 of Mr. Lynch's prepared testimony, he gave the net railway operating income of the Union Pacific for the year 1949. That figure was $21,707,-

437. Subtracting the $8,322,608.85 from that figure would indicate that had the Union Pacific lost the revenue referred to by Mr. Burns for the year 1949 its net railway operating income would have been $13,384,828.15.

Also, referring to Page 26 of Mr. Lynch's prepared testimony, with respect to the actual net railway operating income for 1949 he says, "This amount was insufficient by $10,269,865 of an amount necessary to pay the interest on funded debt and the dividends that were declared."

Taking into consideration the reduction in net railway operating income, which I have previously given, that insufficiency would have been for the year 1949 $18,592,473.81.

Q. Does that complete your statement?

A. Yes, sir.

Mr. Collins: That is all in direct.

Mr. Quirk: Mr. Examiner, could we have about a ten-minute recess. I think perhaps we can go on with this [fol. 1275] witness. There are a lot of figures here.

Exam. Mullen: All right, we will take a ten-minute recess.

(Short recess taken.)

Exam. Mullen: All right, we are ready to proceed.

Cross-examination.

By Mr. Quirk:

Q. Mr. Webb, the so-called cost data reflected on Exhibit 26 is, I believe, based on the cost formula used by the Bureau of Accounts and Cost Findings of the Interstate Commerce Commission.

A. That is correct, yes, sir.

Q. Is that the one that is quite commonly characterized as the Dr. Ford Edwards formula?

A. I believe it is, yes, sir.

Q. Well, do you think that formula is a sound formula?

A. I believe that for the purpose for which I have used it it is sufficiently accurate.

Q. You think it depends on the purpose you have in mind as to whether it is sound or not?

A. I believe that is a fair statement.

Q. On Page 4 of your prepared statement in connection with Exhibit 26 you say at the bottom, you say "I have calculated for the year 1948 the cost per revenue" and so forth. You don't submit the data on which that calculation is made, do you? It isn't here, is it?

A. That was a simple calculation, Mr. Quirk. The bas-[fol. 1276] ing figures for that calculation was taken from a statement prepared by the Association of American Railroads. It has no number, but the title of the statement is "Revenues, expenses and freight traffic Class I railways of the Western District, calendar year ended December 31, 1948."

Q. All right.

Now, how did you go about selecting these commodities that are shown on Exhibit 26? Did you select the ones with the lowest car mile per car earnings?

A. No, sir. They were selected with the view of obtaining representative shipments.

Q. Now if you had selected canned goods, sugar, for example, from the Earley exhibit 3, you would have found heavier commodities, and heavier per car and per car mile earnings, would you not?

A. I believe that is correct, yes, sir.

Q. You didn't use any westbound traffic at all, did you?

A. No, I didn't.

Q. Page 3 of the narrative in connection with Exhibit 26 you say—it begins over on Page 2 of the narrative—you say "The miles thus segregated as to territories and as to way trains and through trains were respectively inflated by 12 per cent to allow for circuity for movement (i.e., the amount by which the actual miles of haul exceeded the short-line or rate-making miles.)"

[fol. 1277] Now, is the 12 per cent allowance for circuity a constant figure?

A. Yes, sir, as used in the cost scales that figure is constant.

Q. You mean as used in the cost scales of Dr. Ford Edwards?

A. Yes, sir.

Q. You think that is a reliable factor to be used in determining the cost figures generally?

A. In the explanation of the cost scales Dr. Edwards, or rather the Bureau of Accounts and Cost Finding, indicate that it is an average figure.

Q. Have you, in your Exhibit 26, any of the calculations you have made, attempt to reflect the decrease in cost, 1949, as compared with 1947, as a result of increased efficiency and economy in operation?

A. No, sir. I used the cost as shown by the cost scales.

Q. Well, it is almost a matter of common knowledge there has been a great increase in economy and efficiency in railroad operation since 1947.

A. I wouldn't know as to that, Mr. Quirk.

Q. Now, turn to your Exhibit 27. That could be characterized as reflecting what might be called "gathering costs" or assembling costs on the branch lines; is that correct?

A. Yes, sir.

Q. Well the Union Pacific will have to bear these costs no [fol. 1278] matter where the traffic went, wouldn't it?

A. Yes, sir, that is correct.

Q. And in the divisions which railroad work under, is there an allowance made for the extra service performed by originating railroads and terminal railroads, generally speaking?

A. I am not familiar with divisions, Mr. Quirk. I couldn't answer that question.

Q. Don't you think it would have been advisable to have become familiar with it in view of this statement you made here?

A. My statement deals only with costs, and has no relation to divisions.

Q. Yes, but if I am right in assuming that the divisions in effect generally throughout the country do allow the originating line more than the straight mileage or percentage basis to reflect the extra cost he is put to in assembling the traffic, so you didn't concern yourself with that at all, did you?

A. No, sir, my exhibit deals only with costs.

Q. All right. Now in your Exhibit 28, why did you lump for the Union Pacific in the comparison made with the Denver and Rio Grande Western, the Milwaukee Railroad, the Great Northern Railroad, and the Northern Pacific Railroad?

A. I used those four roads with the thought that the operating conditions on those roads would be somewhere near comparable to operating conditions on the Denver and Rio Grande.

Q. In other words, you think that the operating conditions [fol. 1279] on the four railroads that you used are similar to the operating conditions on the Rio Grande?

A. Somewhat similar, yes, sir.

Mr. Quirk: Mr. Gibson has one or two questions.

Exam. Mullen: All right.

Cross-examination.

By Mr. Gibson:

Q. Mr. Webb, referring to your estimate of a revised figure of $18 million plus, by which you estimate the Union Pacific 1949 net railway operating revenue would have been unsufficient to meet fixed charges and dividends. Have you included, as an item of expense, ahead of the net railway operating income, the Federal income taxes in other income?

A. Yes, I have.

Q. That other income includes the considerable revenue collected from your oil operations; isn't that true?

A. Yes, sir, that is correct.

Q. And to that extent the net railway operating revenue has been distorted, hasn't it?

A. I believe you should have said net railway operating income.

Q. That is right.

A. Then your statement is correct, yes, sir.

Q. Now, Mr. Webb, referring to your cost figures covering the operations of the Denver and Rio Grande, does that cover the entire system, including the D&SL?

A. Yes, it does. Perhaps I should qualify that. I as- [fol. 1280] sume that it does. It was a published figure that I used, and I assumed that it includes the D&SL for the year 1948.

Q. And your figures also cover the operation of the narrow guage trackage of the Denver and Rio Grande.

A. I assume those figures are included in the published figures of the Denver and Rio Grande, yes, sir.

Q. Did you know, Mr. Webb, we have established the operating ratio over the narrow guage territory is 161 on an out-of-pocket basis, and 181 on a full cost basis?

A. I did not know that. I have never seen any published figures on your narrow guage operation.

Q. If that were true, your figures would be distorted to that extent, wouldn't they, as comparing it to the Union Pacific which is a standard guage operation?

A. To some extents, yes, sir.

Mr. Gibson: That is all.

Mr. Collins: That is all.

(Witness excused.)

Mr. Collins: Mr. Examiner, I offer in evidence Exhibits 26, 27 and 28.

Exam. Mullen: Any objection?

(No response.)

Exam. Mullen: The exhibits will be received in evidence.

(Defendant's Exhibits 26, 27 and 28, Witness Webb, received in evidence.)

[fol. 1281] W. F. Kirk was sworn and testified as follows:

Direct Examination.

By Mr. Collins:

Q. Mr. Kirk, you have prepared testimony in written form for presentation in this case.

A. I have.

Q. The statements you have made in your prepared statement are true and correct to the best of your knowledge and belief?

A. They are.

Q. Will you proceed with the statement.

A. My name is W. F. Kirk. I am a Railroad Operations Consultant. My address is 325 North Tejon Street, Colorado Springs, Colorado.

I have been employed by the Union Pacific Railroad Company to investigate and testify on behalf of defendants in Docket 30297 with respect to the matters which will be detailed later in my testimony.

My railroad experience began in 1898 with the Santa Fe Railway as Telegraph Messenger Boy at Osage City, Kansas. I have worked as a Section Laborer, Telegraph Operator and Train Dispatcher. In 1901 I was employed by the Missouri Pacific as Telegraph Operator and later as Chief Train Dispatcher, Trainmaster, Division Superintendent, Superintendent and General Superintendent.

In June 1934, I was given a leave of absence from the Missouri Pacific Railroad and became connected with the [fol. 1282] staff of the late Joseph B. Eastman, Federal Co-ordinator of Transportation. I served in that capacity from June 1934——

Exam. Mullen: Just a minute, gentlemen. May I confer with Mr. Quirk and Mr. Collins for a minute.

Mr. Collins: Yes.

(Discussion off the record.)

Exam. Mullen: On the record.

By Mr. Collins:

Q. Go ahead, Mr. Kirk.

A. I served in that capacity from June 1934 until June 1935, as Assistant Western Regional Director, and later as Eastern Regional Director. While serving with the Federal Co-ordinator, my duties were to study terminal operations and consolidations of railroads.

Mr. Collins: Now, Mr. Examiner, at this point, and pursuant to the discussion had at the bench with the Examiner and counsel for the complainant, I am willing that the first eight pages of Mr. Kirk's statement be included in the record in exhibit form as Exhibit No. 29. I understand it will have the same force and effect as if it were copied into the record.

Exam. Mullen: It will be a part of the record.

(Defendant's Exhibit No. 29, Witness Kirk, marked for identification.)

Exam. Mullen. It will not be copied into the record.
Mr. Collins: That is right.

By Mr. Collins:

Q. Now, go ahead at the top of Page 9, Mr. Kirk.

[fol. 1283] Exam. Mullen: Just one moment.
All right, proceed.

By Mr. Collins:

Q. All right, go ahead.

A. Prior to my taking office in Chicago, Illinois, as Associate Director of the Office of Defense Transportation on February 1, 1943, and as Agent of the Interstate Commerce Commission on February 3, 1943, it had been necessary for that Commission, due to interruptions of normal traffic movement and accumulation of cars on the Western Pacific railroad and the Southern Pacific railroad, in order that all coal originating on or moving via the D&RGW railroad and the Utah railway to destinations in the States of Oregon and Washington be diverted to the Union Pacific Railroad.

These diversion orders remained in effect until August 17, 1945. They were ICC Service Orders 94 and 98, mentioned by witness Hogue at page 66 of the transcript. They applied to only one commodity and that was coal originating on or moving over the D&RGW Railroad. The orders changed the routing to the Union Pacific Railroad from the Western Pacific Railroad at Salt Lake City, Utah, and to the Union Pacific Railroad from the Southern Pacific Railroad at Ogden, Utah.

This diversion was necessitated by the discontinuance of coastwise shipping between the Puget Sound area and California, which placed the burden of moving the traffic that [fol. 1284] had formerly moved via coastwise vessels upon the Southern Pacific Railroad and the Western Pacific Railroad, (with their connections at Portland, Oregon, and Bieber, California) and on the Union Pacific Railroad between Portland and Los Angeles.

My greatest concern, upon taking the office just mentioned, was to avoid an accumulation or congestion at terminals, where interchange of traffic was made between the

various railroads. To further relieve the terminal situation at Ogden, Utah, where interchange of traffic is made between the Union Pacific Railroad, Southern Pacific Railroad and the D&RGW Railroad, and at Salt Lake City where interchange is made between the Union Pacific, Western Pacific and the D&RGW, early in 1943 I issued diversion orders that all carload traffic originating east of the States of Montana, Wyoming, Colorado, and New Mexico, and a line drawn through Texas to Mexico, having destination in the States of Oregon and Washington, north of Oakridge and Westfir, Oregon, be routed to the railroads directly serving the Northwest, that is, the Union Pacific, Great Northern, Northern Pacific, and Milwaukee Railroads, and that all traffic originating on the Southern Pacific Railroad north of Westfir and Oakridge, Oregon, having destination east of the Missouri River, be routed via the Union Pacific, Great Northern, Northern Pacific and Milwaukee.

Q. Mr. Kirk, you took office on February 1, 1943, which would appear in Exhibit 29, but that was the date that you [fol. 1285] took the office and under what title?

A. I took office as Associate Director, Office of Defense Transportation, on February 1, 1943.

Q. That gave you the authority?

A. And as agent of the Interstate Commerce Commission on February 3, 1943, and worked under ICC Service Order 99.

Q. That gave you authority to direct traffic movements as between the 24 western railroads?

A. The railroads in the 24 western states.

Q. Oh, excuse me.

A. And the order also gave me authority to divert, if in my opinion it was necessary from an overloaded railroad to one with an under-capacity.

Q. All right. Go ahead, Mr. Kirk.

A. This relieved the Western Pacific and Southern Pacific of considerable traffic moving to and from Oregon and Washington through the Ogden and Salt Lake City interchanges.

As agent of the Interstate Commerce Commission and Western Regional Director, Office of Defense Transportation, it was necessary to be informed as to the daily traffic movement on each railroad and its capacity to move the greatest amount of traffic without congestion. So that I might have an overall picture of the conditions on each railroad, reports of the daily car movement, the volume left on hand to move in each direction, and other pertinent information concerning the operating conditions during the [fol. 1286] past 24 hours ending 11:59 p.m., of each day, were received by telegraph from each railroad. In addition, it was necessary to have daily advice of the offshore movement of vessels having destination in the Pacific war area, to avoid congestion of the port facilities.

It must be understood that to permit more traffic to move from the east into and accumulate at the Salt Lake City and Ogden, Utah, terminals than could be dependably moved out would make it necessary to backhaul the over-capacity traffic load from those terminals to Denver and Pueblo, Colorado, or to Cheyenne, Wyoming, in order to reroute such traffic over other railroads with a capacity to by-pass the Salt Lake and Ogden terminals.

The information furnished by the various railroads as to their daily movement, number of cars on hand awaiting movement, and advice from the Transportation Officers as to their operating conditions, enabled me to divert traffic before it reached the interchange terminals west of the Rocky Mountains.

The preponderance of traffic moving prior to 1943 being eastward, the transcontinental railroads had arranged their facilities to give volume expedition for all eastward traffic.

When the war came on and the volume of traffic turned westward it placed a double burden on those carriers, not only by giving them a full train load in both directions, but tending in general to give the westward traffic a longer uphill movement as compared with what they had been accustomed to.

[fol. 1287] Early in 1943 a forecast had been made of the probable requirements of railroad service to the Pacific Coast ports to meet our Pacific war operations. This forecast indicated that the westward traffic volume would tax

the capacity of the transcontinental railroads. The forecast further indicated that the movement into California would be three loads as against one load to the Pacific Northwest.

The forecast was analyzed as crowding the transcontinental lines serving California to the limit of their capacity and leaving the direct Northwest Pacific lines with less than their capacity load. It was also assumed that there would be the usual temporary and intermittent interruptions and slow downs of service on the different lines of railroads during the period of the war, due to such occurrences as floods, train accidents, shortage of motive power and especially of man power.

Efforts were made to increase the load of the Northwestern Pacific railroads and give relief to the California lines which were hard pressed at times to meet their transportation burdens. This necessitated an intensive survey at all times, and the issuance of a considerable number of diversion orders to avoid any serious congestion and threatened embargoes in the Pacific Coast area.

As it was, traffic was diverted to and from practically every railroad west of the Missouri River, at times when retardation of traffic movement threatened or became apparent.

[fol. 1288] Witness Hogue, at page 66 of the transcript, referred to Kirk's Orders No. 117, 242 and 246 without stating the originating points of the traffic delivered to the Union Pacific under those orders.

Order 117 was effective from January 10, 1944, until April 15, 1945, and Order No. 242, a reissue of Order 117, was effective from May 12, 1945, until September 5, 1945, only permitted westbound traffic originating west of a line drawn from the Canadian border along the east state lines of Montana, Wyoming, Colorado, New Mexico and extending to the Texas-Mexico border, to move via railroads west of that line.

All traffic originating east of that line was to be diverted to the Union Pacific and other northwest lines, so that the traffic which was diverted by the D&RGW to the Union Pacific was not traffic from the east through their connections at Denver or Pueblo. It is my thought that this delivery of less than 4 cars per day was traffic originating

in the military storage depots in the Provo-Ogden, Utah, area.

Early in May, 1945, the military people complained of the poor movement of traffic originating or reconsigned in the Provo-Ogden, Utah, area. An investigation was made to find a remedy. It developed the D&RGW railroad was handling traffic into Salt Lake City for the Western Pacific and into Ogden for the Southern Pacific and the Union Pacific was doing the same.

[fol. 1289] Order 246 was issued effective May 17, 1945, providing for all carload freight traffic originating or reconsigned between Provo, Utah, and Ogden, Utah, including the switching limits of Provo, Salt Lake City and Ogden, having destination in the States of Washington or Oregon north of a line drawn through Roseburg, Oakridge and Bend, Oregon, including those stations, and routed via Southern Pacific or Western Pacific, would be diverted to the Union Pacific for movement to destination or proper connection in Washington and Oregon. This eliminated a considerable interchange of traffic from both the D&RGW and Union Pacific to the Western Pacific and Southern Pacific through the congested terminals at Ogden and Salt Lake City, Utah. In other words, this was simply a switching relief order.

Q. Now, Mr. Kirk, you stated on the bottom of Page 9 and the top of Page 10 of your statement that on taking office as the agent of the Office of Defense Transportation of the ICC your greatest concern was to avoid accumulation or congestion at terminals where interchange of traffic was made between railroads.

Will you state what conditions you found after taking office in February 1, 1943, in the terminals at Ogden, Utah, and at Salt Lake City, and what you did as a result of the conditions you found?

[fol. 1290] Mr. Quirk: Well, were you located at Ogden and Salt Lake City at the time of which you are speaking?

The Witness: No, I was located in Chicago.

Mr. Quirk: I object to any statement like that. I think he is incompetent to make it.

Exam. Mullen: May I have that question read.

(Question read.)

Exam. Mullen: Did that come within the duties of your office, Mr. Kirk?

The Witness: Yes, sir.

Exam. Mullen: How did you get those reports?

The Witness: From the railroads, and from the Office of Defense Transportation employees who reported direct to me and the Interstate Commerce Commission employees located in the territory who reported direct to me.

Exam. Mullen. As to the condition at the terminals mentioned?

The Witness: Yes, sir.

Exam. Mullen: The witness is competent to answer that question.

The Witness: As early as April 18, 1943, I had found that the methods of handling the cars through the Salt Lake City and the Ogden gateways was such that an improvement could be made, so I invited all of the operating officers of the western railroads into my office in Chicago and informed them that in view of the fact that I had the authority [fol. 1291] to reroute traffic from an overloaded railroad to an underloaded railroad that I had considered it my responsibility to avoid congestion which was also required by my authority under the Office of Defense Transportation, to improve the movement of traffic, and that there was too much delay at terminals. There was too much switching at the terminals.

By Mr. Collins:

Q. Well now what did you find out with respect to conditions at Ogden, and Salt Lake City, specifically?

A. On February 4, 1943, the D&RGW had ten trains arriving in Salt Lake City.

Mr. Quirk: From what is the witness reading?

The Witness: A memorandum that I made and presented to the railroad men that were present at the meeting on February 18, 1943.

Mr. Quirk: Is that a Government record you retained when you left the service of the Commission?

The Witness: I wouldn't say it was a Government record.

By Mr. Collins:

Q. Go ahead.

A. D&RGW ten arrivals with a total of 607 cars, and had 204 cars for the Union Pacific in 41 places.

Q. In what?

A. In 41 places in the train. 130 cars for the Union Pacific in 36 places, 162 cars for the Southern Pacific at Ogden in 31 places. The UP with arrivals of a total of 701 cars had 98 cars for the Western Pacific at Salt Lake [fol. 1292] City in 40 places, 62 cars for the D&RG in 27 places, and 499 cars for the UP in 78 places.

Q. For the UP?

A. For the UP, which went through.

Q. Oh.

A. By assembling this traffic——

Q. Mr. Kirk, may I interrupt you there? It is not clear to me what you mean by "in so many different places."

A. Well, it means just this. You had a train of 40 cars, there was one for the UP, and one for the D&RG, one for Salt Lake proper, one for the UP, one for the D&RG, and one for Salt Lake proper.

Q. OK. Go ahead.

A. I asked that the railroads assembly this traffic into solid trains for northern and southern California at their eastern terminals.

Q. Why did you do that?

A. So as to avoid the switching at these intermediate terminals.

Q. Why was it necessary to avoid the switching?

A. Because they were short of men, and they were congested.

Q. What terminal are you talking about now?

A. Both Salt Lake and Ogden.

Q. By "congestion," just what do you mean?

A. I mean they had more business than they could handle.

Q. Yes, sir. Go ahead with any further explanation.

[fol. 1293] A. On May 13, 1943, I again called all of the representatives of the western railroads into my office in Chicago, and informed them I had not found any improvement, and that I had issued an order under the authority

that I had for them to hold, if necessary, and consolidate traffic at the eastern terminals, so that it could move through without switching enroute. The order was to become effective 12:01, May 15th.

Q. May what?

A. May 15, 1943. I was asked if they could have some time to think it over. I told them surely, that we didn't want to do anything radical. They had to run the railroads, and they were still their railroads. I didn't have anything to do with them. They asked for ten days, and I said "Take thirty, but give me between May 20th and May 25th an outgoing consist of all of the trains in those five days to develop whether or not there would be any improvement." I found they were doing what I asked them to do without an order, and I never issued the order.

Q. That is, they were making solid trains where they could?

A. Where they could, even holding traffic. I told them any time they wanted to hold the traffic to make a solid train I would give them an order to hold it for 24 hours if necessary.

Q. Why was that necessary?

A. To avoid congestion at terminals. The switching at intermediate terminals was the greatest thing we had to [fol. 1294] run into. We were short of men. We were short of power.

Q. Was Ogden an exception?

Mr. Quirk: I object to the counsel leading the witness. He is just leading the witness in saying Ogden was the only place there was congestion during the war.

Mr. Collins: I didn't suggest any such thing.

Mr. Quirk: I am objecting to him leading the witness, and he doesn't need to be led by the counsel.

Exam. Mullen: Answer the question as given. Go ahead.

The Witness: I want to say this, that Ogden and Salt Lake gave me the greatest headaches while I was on the job on account of the amount of traffic that was routed through those particular points, and the necessity of using those routes when the lines to the south went out, and vice versa.

By Mr. Collins:

Q. All right. Will you go ahead now, Mr. Kirk, at the middle of Page 14, unless there is something else you feel you could add.

A. Order 246 was issued effective May 17, 1945, providing for all carload freight traffic originating or reconsigned between Provo, Utah, and Ogden, Utah, including the switching limits of Provo, Salt Lake City and Ogden, having destination in the States of Washington or Oregon north of a line drawn through Roseburg, Oakridge and Bend, Oregon, including those stations, and routed via Southern Pacific or Western Pacific, would be diverted to the Union Pacific for movement to destination or proper [fol. 1295] connection in Washington and Oregon. This eliminated a considerable interchange of traffic from both the D&RGW and Union Pacific through the congested terminals at Ogden and Salt Lake City, Utah. In other words, this was simply a switching relief order.

Trains consisting of military personnel and equipment route in connection with D&RGW and Union Pacific during the years 1941 and 1942, mentioned by witness Hogue at page 67 of the transcript, were not routed by the ICC or the ODT. The arrangements as well as schedules were all set up by the railroads through their representative at Chicago, Illinois, who was not empowered, to my knowledge, with any governmental authority. I did not at any time have authority to divert any military personnel movements.

In order to avoid as far as possible disturbance of the routing and the regular routing by shippers of carload traffic as well as the movement over intermediate lines, I requested the shippers to maintain their regular routing schedules that had existed prior to the heavy westward movement. This proved very helpful, as it enabled me to gauge from the daily volume movement out of Chicago, St. Louis, Kansas City, The Twin Cities, Omaha, Council Bluffs, Memphis and New Orleans the volume that would reach the terminals at El Paso, Texas, Amarillo, Texas, Salt Lake City, and Ogden, Utah, and advance advice was given the railroads beyond Ogden, El Paso and Amarillo, [fol. 1296] advance notice of the approximate volume of traffic that would reach them 24 to 48 hours before its ar-

rival at those terminals, thus enabling arrangements to be made to reroute traffic that would or might cause an accumulation or congestion at such terminals.

It was also necessary to provide for a continuous flow of refrigerator cars to the loading points in California, Oregon, Washington, Idaho, and Montana, not only because of the heavy demands for fruits and vegetables to meet the requirements of the people who were making our war materials, but also for our military forces.

During the period of my office, there moved a total of 6,796,984 loads to and from California, Washington and Oregon, and there were diverted 332,746 loads, or, in other words, about 95% of the total number of loads moved on the original shipper's routing.

Of the total diversions, 202,757 cars, or about 60%, were diverted to by-pass and avoid congestion at certain terminals. From the D&RGW, 8,942 cars, or about 2½ per cent of the total diversions, were diverted on account of a tunnel fire which caused an interruption on its Moffat Tunnel line for 71 days in 1943; 8,998 cars, or over 2½ per cent, were diverted from the Western Pacific due to tunnel fires and slides which caused intermittent interruptions for about 60 days in 1944; 1,039 cars, or about .3 per cent of the total, were diverted from the various lines due to high water [fol. 1297] conditions; and 111,018 cars, or a little over 33⅓ per cent of the total diversions, were diverted from the various lines due to their having or being threatened with an over-capacity load.

While the volume of traffic on the D&RGW increased greatly because of the war, as it did in varying degrees on nearly all railroads, the increased volume on the D&RGW was due only to an insignificant extent to diversion orders. Only a negligible amount of traffic to or from the northwestern states of Idaho, Montana, Oregon and Washington was ordered to be diverted to the D&RGW, and my reasons for not diverting that traffic to the D&RGW are apparent.

The Union Pacific and the three northwestern lines not only had capacity to carry the traffic at all times, except in the insignificant instances mentioned; the Union Pacific's route to the Northwest was shorter and direct and by-passed the highly burdened Ogden and Salt Lake City interchange gateways; it could move the traffic faster in addition to

avoiding additional interchanges and delay which always results from interchanges between carriers.

If I had diverted to the D&RGW traffic to or from the northwestern states it would have been delayed some 24 hours because of the D&RGW's slower movement and delay that would have occurred in interchanges at terminals that were by-passed via Union Pacific. In other words, the D&RGW was neither a logical nor comparably efficient [fol. 1298] route for traffic to or from the Northwestern states.

The D&RGW was a participating line for California traffic and I so dealt with it. It handled a heavy load of California traffic and even if I had needed or wanted to divert it to any noticeable quantity of Northwest traffic, it would have been necessary first to divert away from it some of the California traffic because of the capacity volume it was hauling.

Union Pacific dependably and efficiently carried a tremendous load through the Pocatello gateway, including diversions to it of coal originating on or moving via the Rio Grande, carload traffic from southern California destined to the States of Oregon and Washington, diverted due to disabilities of the Southern and Western Pacific, and the traffic originating on the Southern Pacific north of Oak Ridge and Westfir, Oregon, moving both to the west as well as to southern California, besides its own traffic.

In addition, it kept a steady flow of empty cars moving into that territory for return loading. During the entire period, March 1, 1943, to October 31, 1945, the Union Pacific also moved an average of 326 empty cars per day west from Pocatello.

Traffic was not diverted from the Union Pacific in any significant volume during the war period for the reasons:

First, the Union Pacific was always able to take the traffic routed via its lines and some from other lines, except in a few instances and for very short periods, and that [fol. 1299] applied particularly to traffic west of Idaho and Montana.

Second, the Union Pacific line was the shortest, most direct and efficient route to these Northwestern states.

The greatest transportation performance of the transcontinental lines as a group was during the first eight

months of 1945 when our total war requirements in the Pacific War Theater had reached their peak. In those months of 1945, as compared with the entire year of 1940, before we entered the war, freight train miles on those lines had increased 55 per cent, passenger train miles had increased 38 per cent, gross ton miles had increased 91 per cent, gross tons per train mile, 24 per cent.

While train miles per train hour decreased 9 per cent, this decrease was brought about by the increase in gross tons per train mile plus the additional up-hill pull of a preponderance of the westward traffic volume. The above figures are based on the performance of the seven western railroads, i.e., Santa Fe, Southern Pacific, Union Pacific, Western Pacific, Great Northern, Northern Pacific and Milwaukee, which are considered the Transcontinental Lines.

Railroad service available to shippers in the States of Idaho, Montana, Oregon and Washington, served by the Milwaukee, Great Northern, Northern Pacific and Union Pacific which were operating with less than a capacity load during the war period, was uniformly good although, due to some local and brief interruptions, it was necessary [fol. 1300] infrequently to divert some traffic as between these four railroads. However, it was never necessary or logical to reroute any noticeable amount of traffic, either originating or terminating in the above-mentioned states to the D&RGW through the Salt Lake or Ogden gateway.

During the war period those four railroads serving the Northwest handled, as measured in gross ton miles, approximately 75 per cent more traffic than they handled in 1940. Assuming that the gross ton miles moved in 1944 was their extreme capacity, which it was not, the number of gross ton miles had decreased, during 1948, on the Milwaukee, 11 per cent; on the Great Northern, 23 per cent; on the Northern Pacific, 34 per cent; and on the Union Pacific, 25 per cent, which means as of the year 1948, there was to the extent indicated, unused transportation capacity on these railroads.

It is common knowledge that since V-J Day, materials have become more plentiful and that generally all railroads in the United States have made progress in improving their transportation facilities and capacities. These improvements in many instances have created a greater in-

crease in capacity than that made by the decrease in gross ton miles from their peak war year to gross ton miles handled in 1948. With this idle and unused capacity available, there appears no need for any additional transportation capacity or service to or from this Northwest area.

[fol. 1301] The four transcontinental railroads serving the States of Idaho, Montana, Oregon and Washington have maintained through freight schedules with connecting lines to and from the east, south and west for many years. These through schedules afford frequent and dependable service to their patrons in those states.

The Union Pacific Railroad traverses the most productive portion of Idaho. It has, of course, the obligation of providing empty equipment for the commodities produced. Perishable commodities and livestock require equipment that ordinarily does not move into that territory under load, which necessitates long empty hauls of as much as 1,000 to 1,500 miles from Omaha or Kansas City.

Improvements in the operations of the Union Pacific Railroad and the D&RGW Railroad as of 1948 compared with their last pre-war year, 1940, and with their peak war years indicates a greater capacity in 1948 over 1940 than is reflected by the reduction in gross ton miles handled during their peak war years.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record. Let's proceed. This table may be copied in the record, Page 21. Go ahead.

[fol. 1302]

UNION PACIFIC				D&RGW	
Gross Ton Miles (in thousands)					
1940	42,246,489	100%	1940	6,834,669	100%
*1944	89,274,713	193%	1943	12,969,770	190%
1948	76,243,067	168%	1948	10,305,816	160%
Tons per Train Mile					
1940	1992	100%	1940	1865	100%
1944	2472	124%	1943	2227	119%
1948	2777	139%	1948	2306	123%
Train Miles per Train Hour					
1940	22.1	100%	1940	16.5	100%
1944	19.0	86%	1943	13.5	82%
1948	21.2	96%	1948	16.5	100%

* Indicates Peak Year.

		Gross Ton Miles per Train Hour			
1940	43,607	100%	1940	30,633	100%
1944	46,470	107%	1943	29,747	97%
1948	58,085	133%	1948	37,848	123%
		Car Miles per Car-Day			
1940	61.6	100%	1940	29.7	100%
1944	80.9	125%	1943	41.5	140%
1948	80.1	122%	1948	41.5	140%

[fol. 1303] The Witness: The measure of operating efficiency, accepted by most railroad men, is the gross tons per train hour, which includes gross tons per train-mile and the miles traveled per train hour. The above figures show an appreciable increase in efficiency in 1948 over the peak years.

However, the comparison of the Union Pacific and the Rio Grande shows that the Union Pacific hauls more tons per train and at faster train speed than the Rio Grande. In other words, the Union Pacific has surpassed the D&RGW in operating improvements since its peak year and has a greater idle or unused capacity than the D&RGW resulting from both reduced gross ton miles handled in 1948 compared to 1944, and from increase in operating efficiency in 1948 over 1944.

Mr. Quirk: Mr. Examiner, I object as this is incompetent, irrelevant, immaterial; and argumentative, the remainder of this statement.

Exam. Mullen: All of it?

Mr. Quirk: Yes, Page 22 to the end, Page 30. Mr. Examiner, there is nothing he says there that can't be said in a brief by the lawyers.

Exam. Mullen: Just a minute, we will take time out to examine it.

(Balance of statement is examined.)

Exam. Mullen: I find parts of it at least are argumentative, and in my opinion rather remote to this case. If you [fol. 1304] desire, I will designate those portions.

Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

Mr. Quirk has made objection to certain portions of the testimony of this witness contained in the witness' state-

ment. I have indicated to the counsel the portions which I believe to be incompetent and irrelevant, and to that extent I have sustained Mr. Quirk's objection.

Now, Mr. Collins, do you desire to say anything with respect to that?

Mr. Collins: Well, frankly, Mr. Examiner, I don't believe I got the exact portions that you thought were incompetent.

Exam. Mullen: I will repeat them then off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

On Sheet 22, beginning with the fourth line from the bottom, the sentence begins "My experience and observations"——

Mr. Quirk: Mr. Examiner, that stays in.

Exam. Mullen: I beg your pardon, I left that in.

Mr. Quirk: Wait a minute, that means all the rest goes out.

Exam. Mullen: Just a moment.

Beginning with the line "My experience and observations"—and running over to Page 23, the quotation there of the Coordinator, and the paragraph following the two [fol. 1305] quotations I think is incompetent and irrelevant and should come out. Do you have anything to say about that that, Mr. Collins?

Mr. Collins: Well, Mr. Examiner, as to that, all that Mr. Kirk is saying is that the quoted language from the Coordinator's report has his concurrence as a railroad operations consultant, and he is qualified as such to say whether that expresses a sound and proper series of observations. I can't see why he can't adopt it as his own, as a result of his own experience and own qualifications. I can't see how it can be irrelevant here, either.

Exam. Mullen: My ruling is it is irrelevant. If you wish to note an objection, you may do so.

Mr. Collins: I do wish to note an objection.

Exam. Mullen: The objection is noted.

Beginning on Sheet 24, the ninth line from the bottom, and running over to the sixth line on Page 25, that I think is not relevant to this case.

Mr. Collins: Do you want me to speak with respect to that?

Exam. Mullen: You may comment if you wish to do so.

Mr. Collins: That has to do with the subject of circuity and transit shipments, and indicates what an efficient use of the transportation plan, what drastic steps are required. Now the general subject of transit is certainly a very large feature of this case, from the standpoint of the [fol. 1306] witnesses that testified in support of the D&RG, and I want this expert to express his opinion on it as a matter of sound railroading or was the full transportation, to cite whatever authority he can cite.

Exam. Mullen: The ruling still stands. Your objection is noted.

Mr. Collins: All right.

Exam. Mullen: On sheet 25, the last two paragraphs on that page running over on sheet 26 to the end of the quotation, I believe that is too remote.

Mr. Collins: Well——

Exam. Mullen: We have cost studies of later years. Cost studies of today are more pertinent than those referred to in 1932, and also the comment with respect to a quotation from the Federal Coordinator's report. I think that is too remote, and not material here. Now the balance of the statement I believe is competent and relevant.

Mr. Quirk: I want to go on record as objecting to the statement that you have permitted to remain in, beginning with the second full paragraph on Page 26, and running through, to and including the end, Page 30, as incompetent, immaterial and argumentative.

Exam. Mullen: The objection will be noted.

Proceed, Mr. Kirk.

The Witness: I don't know where I am now.

[fol. 1307] Exam. Mullen: Sheet 26.

Mr. Collins: Just after the quotation on Page 26.

The Witness: I think there is another place in here.

Mr. Collins: Mr. Examiner, you left in something on Page 25.

Exam. Mullen: There was one paragraph. That may be copied in.

Mr. Collins: Pardon me, it was on Page 24 I guess. Page 24, there is a paragraph there under those tables, and that may be copied down to——

Exam. Mullen: No, beginning on Page 23 wasn't it?

Mr. Collins: Yes.

Mr. Quirk: May I make this suggestion, Mr. Examiner. Inasmuch as we all had to read this while we were off the record, it seems to me all of it could be copied which you ruled to be relevant and competent, without being read. I had to read it.

Exam. Mullen: That may be done. It begins on Sheet 23, the last paragraph.

Mr. Collins: I am willing it be copied instead of being read by Mr. Quirk, Mr. Examiner, but I would like to reserve until after the noon hour the permission to make some further suggestion, if I conclude, to do with respect to the parts you have eliminated. What I have in mind is the possibility of making an offer of proof on those.

[fol. 1308] Exam. Mullen: You may do that this afternoon.

Mr. Collins: Yes. I thank you.

Exam. Mullen: Now let's understand on sheet 23, the last paragraph goes in. So do the tables on sheet 24. Then the paragraph on sheet 25 beginning "I refer to the car supply——." Then we start with sheet 26 "The tremendous increase——."

The Witness: Intercarrier train lot movements were prescribed during the war by the Office of Defense Transportation and during the war years 1943-4-5, the movement of cars reached their greatest percentage of moving time as will be noted from the following comparisons of hours per day cars were actually moving in trains and hours per day cars were standing:

	Moving	Standing	Total
1932	2.19 hours	21.81 hours	24.00 hours
1933	2.20 hours	21.80 hours	24.00 hours
1942	3.18 hours	20.82 hours	24.00 hours
1943	3.38 hours	20.62 hours	24.00 hours
1944	3.33 hours	20.67 hours	24.00 hours
1945	3.17 hours	20.83 hours	24.00 hours
1948	2.94 hours	21.06 hours	24.00 hours

During this war period it was necessary to secure the greatest use of the available car supply. These calculations were based on a report made by the Federal Coordinator, who analyzed all freight cars terminated on December 13, [fol. 1309] 1933, determining that the total elapsed hours from the time a car was placed for loading until it was

released to the consignee after unloading were 144 hours, distributed as follows:

Utilized by shippers and consignee in loading and unloading	68 hours
Detained by carriers in origin terminal	11 hours
Detained by carriers at destination terminal	15 hours
Detained by carrier at intermediate terminals	27 hours
In road movement	23 hours
Total	144 hours

The necessity of procuring the maximum use of the available car supply during the war period required some drastic action.

I refer to the car supply for the reason that it is now reaching an over-all point in respect to age where good serviceable cars must move more hours per day and reach destinations in shorter periods of time. As of January 1, 1949, 53.61 per cent of freight carrying cars in the United States were over twenty years of age, and the cost of repairs has reached an all-time high of $255.78 per car owned in 1948. We do not now have the restrictions of requiring heavier loading and use of shorter routes that prevailed during the war and our presently available car supply must [fol. 1310] consume less time per shipment to avoid shortage.

The tremendous increase in the railroad expenses brought about by the increase in the cost of materials and wages directly and by the adoption of the 40-hour week indirectly has added, in rate increases, to the expenses that are borne by the shippers, and the present demands of certain railroad employes, now being mediates, if granted, will tend to further increase expenses of the railroads and then the shippers. This applies especially to terminal costs if the 5-day week comes as a result of the demand of the employees.

To overcome any of this expense both to the railroads and the users of railroad transportation, in my opinion, requires the avoidance of any wasteful practices whether in the form of unnecessary multiplicity of routes or needless circuity and greater number of interchanges between carriers.

My study of this case and the circumstances which it involves, including locations, physical characteristics, ca-

pacity, etc., of the Denver and Rio Grande Western and of the defendant lines, and particularly the Union Pacific, plus my personal knowledge of the wartime functioning ability and capacity of the involved lines leads me to the following conclusions as a Railroad Operations Consultant:

First: While the Commission may require a non-consenting railroad to "short-haul" itself by participating in routes with other lines when the route of the nonconsenting [fol. 1311] line is unreasonably long compared to another practicable route, the situation here is just the reverse. To grant the prayer of the complaint would be to take traffic from established routes which are not only the routes of the originating lines, and especially the Union Pacific, but which routes are also as much as 200 miles shorter in mileage and a full day shorter in transportation time than the routes complainant asks the Commission to establish.

Second: While the circuity of the longer routes sought by complainant compared to present established routes via the originating and terminating, direct and shorter lines may not appear to be excessive percentagewise, the circumstances of the circuity are, as I have said, the reverse of those under which the Commission may permit hauling via reasonably circuitous routes, namely, to avoid "short-hauling" the carrier that originates or has possession of the traffic.

Third: The extent of complainant's proposed "short-hauling" of the originating and terminating and direct and shorter present routes is glaringly demonstrated by reference to the situation that would result to the Union Pacific between McCammon, Idaho, and Council Bluffs, and Kansas City: Union Pacific's haul over its present shorter and direct route from McCammon to Council Bluffs is 1038 miles, and to Kansas City, 1150 miles. If traffic were [flo. 1312] diverted at McCammon via Ogden and D&RGW, the Union Pacific's haul would be 111 miles to Ogden, and the Union Pacific would be short-hauled by 927 miles to Council Bluffs and 1039 miles to Kansas City. Assuming that the traffic were returned to the Union Pacific by the D&RGW at Denver for further eastbound movement, which is at least a hazardous assumption, the shorter, direct route of Union Pacific would still be short-hauled by 365 miles to Council Bluffs and 402 miles to Kansas City.

Fourth: In addition to the short-hauling of the originating carrier with the shorter mileage, the short-hauling would also necessarily require additional time and expense of at least one extra interchange, and if it be traffic subject to refrigeration, one additional icing.

Fifth: With respect to overhead or bridge traffic, the line of the D&RGW between Ogden and Denver is not and could not be needed to provide adequate, and more efficient or more economical transportation, because of the following facts:

1. Transportation capacity and ability of the lines participating in present through routes to the east, south and Southwest are such that they are carrying and can easily carry not only all the traffic the D&RGW wants to divert from them or some of them, but also 50 per cent to 100 per cent more than they are now carrying. Adding the D&RGW as another participating carrier would not increase the "adequacy" of existing transportation for since that line [fol. 1313] would neither originate nor terminate such bridge traffic, it would have to be surrendered to connecting lines beyond the D&RGW and the inadequacy, if any, of those connecting lines would still be present in the through transportation, in addition to the fact that movement via the D&RGW would require a day longer than via Union Pacific.

2. Addition of the D&RGW as participating line in present routes would make for less efficient, and could not possibly provide more efficient transportation of such traffic, because the sought routes via that line would in no instance be shorter, but in all instances of importance would be longer—more than 200 miles in most routes to some of the larger consuming centers such as Chicago and Pittsburgh—than present routes. In addition, efficiency compared to present routes would be reduced because of time and expense consumed by one or more additional interchanges, and possibly one additional icing, which could not be avoided if the D&RGW is injected as a participating line.

3. More economic transportation of such traffic would not result to shippers from adding D&RGW to carriers participating in through routes at present rates for the complainant seeks only to participate in the traffic at the same

rates that apply via present through routes. In other words, the D&RGW proposes no lower rates than those already available to shippers of such bridge traffic via existing [fol. 1314] routes. Certainly the proposal of the complainant could not result in more economic transportation but in fact, because of additional mileage, and time and expense of at least one additional interchange, it would result in less economic transportation from the standpoint of the railroads than that presently provided by existing routes.

Exam. Mullen: Is there any further direct examination?

Mr. Collins: No.

Exam. Mullen: All right, Mr. Quirk.

Cross-examination.

By Mr. Quirk:

Q. Mr. Quirk, didn't you offer your services to the Denver and Rio Grande in connection with this case?

A. Oh, yes.

Q. How is that?

A. Yes, sir. They replied that it would take about 20 days to decide, and in the meantime I got an offer from the Union Pacific and accepted,

Q. In other words, you were willing to act for either side?

A. That is correct.

Q. Well, now, you initiated this matter of employment with Mr. Hogue, didn't you, vice president of the Denver and Rio Grande?

A. And with Mr. Burns.

Q. Well did you initiate that at the same time?

A. Yes.

[fol. 1315] Q. Would you mind reading this letter to Mr. Hogue. That is in your handwriting, isn't it, dated August 4, 1949?

A. "Long time no see. Note by the presses that your railroad is filing application for rates from the southwest through Ogden to UP points, which recalls our conversation in Chicago on my diversion orders from the west of the Cascades."

I would like to state what that order conversation was.

Q. No, you read the letter first. We want the letter in the record.

A. "Wondered if this was the same question. Don't see much for the UP to squawk about, if southwestern lines are with you. When using Pocatello as basing point, Little Rock and Fort Worth, on the other, there is only about 30 miles in their favor which is less than an hour's time.

"I have all my ODT records if they are any value in this case.

"Very truly, W. F. Kirk."

Now I want to explain this conversation that I refer to as to diversions. Mr. Hogue came into my office and asked that I divert the traffic that was now moving from the Union Pacific east from the Southern Pacific west of Westfir and Oak Ridge, via the D&RG at Denver, and I told him there was no reason for it, and that I was not opening gateways just to please some railroad. He asked if I had authority to do it, and I told him I did, but that I wasn't going to do it.

Q. I see.

[fol. 1316] But at the time you wrote this letter in longhand to Mr. Hogue you didn't think the Union Pacific had anything to squawk about. Now you are here squawking for them, aren't you?

A. Yes.

Exam. Mullen: What was the date?

Mr. Quirk: August 4, 1949, about four days after the complaint was filed with the Interstate Commerce Commission.

Exam. Mullen: All right.

By Mr. Quirk:

Q. Mr. Hogue, on August 15——

Mr. Collins: Let the record show the witness is not Mr. Hogue.

Exam. Mullen: I didn't catch that.

Mr. Quirk: I didn't say the witness was Mr. Hogue. You can't resist the interrupting.

Exam. Mullen: Please, gentlemen. All I am asking is that the question be read, or the statement, whatever it was, I didn't hear it.

(Question read.)

Exam. Mullen: That interruption should not have been made, Mr. Collins. It is completely unnecessary.

By Mr. Quirk:

Q. On August 15, 1949,—maybe you can understand it this time—Mr. Hogue wrote you, and there is no use quoting the letter, and he told you, you remember, we had a conference with our Washington attorneys in September 12th at which time we hoped to reach a tentative conslusion [fol. 1317] on the testimony to be introduced. We will of course discuss your letter and the information you have available in order to determine the advisability of arranging for you - testify. You remember that?

A. Yes.

Q. Now then on August 8th, a few days before that, that is your letter, is it not—August 8, 1949?

A. Yes.

Q. Addressed to Mr. Hogue. Now it is a rather long letter, but would you mind reading the last three paragraphs of that letter? I mean to read it aloud.

A. I understand. I want to read it first to see whether I want to read it.

Q. I will read it if you don't.

Exam. Mullen: That is unnecessary, Mr. Quirk, the witness has a right to read it before he reads it out loud.

Mr. Quirk: I apologize.

The Witness: Reading part of the letter that I wrote to Mr. Hogue on August 8, 1949: "This memorandum was made for review by the law firm handling the various claims of the government for reparations. They contemplated using me as a witness. As these claims were so ridiculous to me, and so explained to them, it was decided that any testimony that I might present would not be very useful at this time. The memorandum is quite complete [fol. 1318] and the files are open for the perusal of your-

self or the legal department to determine their usefulness in Docket 30297. Without looking the matter up I recall two of my first orders were on request of Union Pacific to reroute traffic from them destined north and west of Pendleton and Portland, Oregon."

I want to comment on that.

By Mr. Quirk:

Q. You can comment on that after you read the letter.

A. "It was unfortunate that the D&RG was, except during the period of disability, tunnels, and so forth, were in position to handle more traffic than the UP, SP, and WP could take away from the western terminals at Salt Lake and Ogden.

"After reviewing this memo, if you desire to have items listed we will be glad to turn them over to your representative here to send to you at Denver. Of course, except for your own railroad, they could not be presented except by me as I personally prepared all the orders and the records were prepared under my supervision."

Now commenting on that, that was due to a wash-out on the Columbia River. Further commenting as to what they could handle: All railroad were at times in the same position. The Union Pacific was; in Denver and the West.

Q. Now, after you received the letter from Mr. Hogue which I referred to, and you had written this letter prior thereto, then on August 16, 1949, you wrote Mr. Hogue [fol. 1319] again. Would you mind glancing at that letter. You recognize it, I suppose. That is your signature, isn't it?

A. Yes.

Mr. Collins: What was the answer, please?

Mr. Quirk: Just read it, please. He said it was.

By Mr. Quirk:

Q. Will you please read it, it is a short letter.

A. "The Union Pacific people called me by phone at 11:45 a. m. today, and asked if I was available as a witness in ICC Docket 30927, and what my charges for such

services were. I informed them my charges would be the same for service in ICC Docket 29886 in the Lincoln Anti-Trust case, both of which would take preference. Also that I had no other request for my services and was available on the terms and conditions quoted them. They telegraphed their acceptance. I regret very much to advise of this turn of events, and if I can be of any help to you and the D&RGW. Please advise."

Q. In other words, you didn't wait to hear from Hogue after the conference with me, which was scheduled to be held August 15th?

A. Well, I don't know.

Q. You didn't.

Mr. Quirk: Mr. Examiner, inasmuch as I have dealt with these—we have some copies—I think it would be advisable [fol. 1320] to make them available to the other side in sequence. We offer them as an exhibit. I would like to offer these letters—carbons of the letters that have been identified by the witness—three of them—as the next exhibit.

Mr. Collins: I object to it, Mr. Examiner, at least until I have had the courtesy of opposing counsel to see them.

Mr. Quirk: Well, here they are.

Exam. Mullen: Do you want to examine those first?

Mr. Quirk: He has heard them read. They are the same letters.

Mr. Collins: I want to see the ones you showed to Mr. Kirk.

Mr. Quirk: Let me show you the originals.

(Handed to Mr. Collins.)

Mr. Collins: Mr. Examiner, I wonder if you would allow us to recess now and come back at 1:30 instead of 2, and pick up where we are at this point?

Mr. Quirk: I suggest this offer I made, that is merely putting it in for the convenience of the Commission what I referred to through this witness.

Exam. Mullen: Have you had a chance to look at those letters?

Mr. Collins: Yes, but I want to confer with my associates before I make a response to Mr. Quirk. And I think

this method would save about 15 minutes' time. I don't think that would be much of an indulgence toward me.

Exam. Mullen: We will recess until 1:30.

(Whereupon at 12:07 p. m. the hearing recessed until 1:30 p. m.)

[fol. 1321] Afternoon Session 1:30 p. m.

Exam. Mullen: We are ready to proceed, gentlemen. Please come to order.

Mr. Collins: I forget just where we stand.

Mr. Quirk: I offered for the convenience of the Commission and the parties these copies of the letters that have been already referred to, and it is immaterial to me whether you put them in or not. They are in the record, but there have been interruptions, and this would be merely a convenience, that is all.

Exam. Mullen: Have all of those letters been read into the record in their entirety?

Mr. Quirk: The three were read, yes.

Exam. Mullen: There is no necessity then for putting it in as exhibits.

Mr. Quirk: How is that?

Exam. Mullen: There is no necessity then for putting them in as exhibits. If the letters have been read in their entirety.

Mr. Quirk: I don't think the long one was read in its entirety, but counsel have had it over the noon hour. As I say, I won't press it. It seems to me, however, it would be of convenience to the Commission to have it, inasmuch as there are some interruptions in the transcript.

Exam. Mullen: Mr. Collins.

Mr. Collins: Mr. Examiner, the originals, this little group [fol. 1322] of originals and copies that Mr. Quirk used in showing to Mr. Kirk does not contain—rather, it is more full than the three letters that he proposes to put into the record from Mr. Kirk to Mr. Hogue. I wish you would look at them with this suggestion in mind from me, that everything that is in—copies of everything that is in this little batch of papers, which includes the three letters that

Mr. Quirk offered in evidence, should be—everything that is in the original files should be included.

I have no objection if all of those letters are put into the record.

(Handed to Examiner.)

There is a letter referred to there in a letter from Mr. Hogue of the 5th, from Mr. Hogue to Mr. Kirk.

Exam. Mullen: These will be received as an exhibit.

Mr. Quirk: We don't want to give up the originals.

Exam. Mullen: No, copies may be submitted later, let's identify them.

Mr. Quirk: I don't understand what Mr. Collins wants that is not in.

Mr. Collins: I object to these three letters going in from Mr. Kirk to Mr. Hogue, without the correspondence being complete with that memorandum he wrote.

Mr. Quirk: Can we go off the record?

Exam. Mullen: Off the record.

[fol. 1323] (Discussion off the record.)

Exam. Mullen: On the record.

Mr. Quirk: We have no objection to filing complete the matter Mr. Collins suggests. We will be glad to do so.

Exam. Mullen: That complete file may be offered later on in this hearing.

Mr. Quirk: Yes.

W. F. Kirk resumed his testimony as follows:

Redirect examination.

By Mr. Collins:

Q. Mr. Kirk, referring to the letters which Mr. Quirk examined you before the noon recess, and particularly to a letter written by you to Mr. Hogue, dated August 4th, and from there on, the additional correspondence in the file of originals you have before you. At the time you wrote this letter of August 4th, to Mr. Hogue, had you seen a copy of the complaint of the Rio Grande in this case?

A. No, sir.

Q. When did you first see a copy of the complaint?

A. It was evidently the time when I wrote him the letter on August 8th—no, it was not on the 8th, because I make reference—yes, on August 8th, acknowledged it on August 8th.

Q. Yes.

A. From Mr. Hogue. He sent me a copy.

Q. He sent you a copy with his letter to you of August [fol. 1324] 5th, I take it?

A. That is right.

Q. Had you prior to that time known what the issues in the complaint were prior to the receipt of Mr. Hogue's letter of August 5th, did you know what the issues in the complaint were?

A. The only thing I knew was the newspaper accounts.

Q. Now you have a statement of your own, a brief statement you care to make, do you not? If not, I will not ask you further. If you do, I think you should proceed to make it.

A. I would like to make this statement:

Since my return from Turkey, in 1948, I have held myself out as a railroad operations consultant. It has not been necessary to seek any jobs or positions of that kind.

Q. May I interrupt you to inquire if you have been on the payroll of any particular railroad or person other than your pension from the Missouri Pacific, if you call that a payroll?

A. Not since February 1, 1947.

Q. Yes. Go ahead.

A. And my services have been asked for by others. In this particular case, having knowledge of what occurred during the war, I offered my services both to the Denver and Rio Grande and the Union Pacific Railroad, just as any lawyer would do if he were seeking——

Mr. Quirk: Mr. Examiner, I move the statement be stricken.

[fol. 1325] Exam. Mullen: The statement may remain. Go ahead, Mr. Kirk.

By Mr. Collins:

Q. May I ask you this, Mr. Kirk: Are you a member of any organization having any code or by-laws or anything

that would forbid you from calling to the attention of anyone that you were available for employment?

A. No, sir, I have not. The only thing, under the Railroad Retirement Board I can't accept a regular position with any railroad.

Exam. Mullen: Does that complete your statement?

The Witness: Yes.

Mr. Collins: I have no further questions.

Exam. Mullen: Any further questions?

Mr. Collins: That is all for me.

The Witness: I may add this, Mr. Examiner, if you please: I made no study of the issues in this case until after I was employed.

Mr. Quirk: No questions.

Exam. Mullen: That is all, Mr. Kirk. Thank you, sir.

(Witness excused.)

Mr. Collins: Mr. Examiner, Mr. Davis of the Northern Pacific has a very brief statement that he wishes to put into the record. Northern Pacific is one of the defendants. Mr. Davis.

[fol. 1326] L. S. Davis was sworn and testified as follows:

Mr. Collins: If they have not already been offered, I offer Exhibits 26, 27 and 28, of Witness Webb.

Exam. Mullen: Any objection?

Mr. Quirk: None.

Exam. Mullen: They will be received in evidence.

How about Exhibit 29?

We will show Exhibit 29 received in evidence.

(Defendant's Exhibit No. 29, Witness Kirk, received in evidence.)

Exam. Mullen: All right, Mr. Davis.

Direct examination.

The Witness: My name is L. S. Davis and I am employed by the Northern Pacific Railway as Assistant General Freight Agent, Room 200, Smith Tower, Seattle,

Washington. I have been in railroad employ continuously since January, 1918, except for about four years spent in the Army during the last war. For a period of about 16 years my work has been directly connected with freight rates and my present duties include the preparation and presentation of testimony before regulatory bodies.

In Exhibit No. 3, Section F, several gateways involving the Northern Pacific Railway are shown in connection with which that line receives less than its maximum haul. In commenting on this subject, Mr. Earley stated that a "pattern of agreement" exists between Northwest carriers with respect to establishment of rates via short haul gate-
[1327] ways that amounts almost to wide open routing.

This statement is not consistent with existing tariff routes of the Northern Pacific Railway, and certainly it is not the policy of that company to permit wide open routing. The general policy of the Northern Pacific Railway is to secure the maximum haul on traffic over its lines whenever possible, and this policy is reflected in North Coast Territorial Directory No. 40-J, ICC No. 1516, of L. E. Kipp, where it will be found that Route No. 6 is published in a manner which prevents short haul of the Northern Pacific by other Trans-Continental Carriers and their connections.

The Northern Pacific does participate in some joint rates and routes to and from Trans-Continental Territory through Oregon and Washington gateways which results in that line receiving a shorter haul than is the case through its eastern gateways. These so-called short haul gateways are not the result of a pattern of agreement, but they were established for specific purposes.

Mr. Stilling has testified as to the origin of some of these gateways, and I have particular reference to those involving the Southern Pacific and Canadian Pacific. In these cases, the Northern Pacific duplicates the Union Pacific route in order to participate in the same hauls enjoyed by the Union Pacific.

[fol. 1328] In the fourth block on Page 7, routing is shown from Grandview, Washington, to Houston, Texas, via Northern Pacific-Billings, Montana-CB&Q and connections. The correct junction point is Laurel, Montana, instead of Billings, but this does not materially change the example. In this case, routing from origin to destination

is made available over rails of the Northern Pacific and lines in which the Northern Pacific has a financial interest; namely, the CB&Q, C&S, PW&DC and B&RI.

These affiliated lines cannot jointly participate in the movement described through eastern gateways of the Northern Pacific because of Fourth Section complications, and it does not appear unusual that a route permitting a 100 per cent movement over affiliated lines is published in this instance. This route is also of value in meeting service competition of other lines.

On Line 3, Page 9, a route on lumber from Tacoma, Washington, to Omaha, Nebraska is shown via NP-Wallula-UP, as well as the long haul route via the Northern Pacific through Laurel, Montana, thence CB&Q. Both Tacoma, Washington, and Omaha, Nebraska, are served by the Union Pacific so, on the surface, it might appear unusual there should be joint rates and routes provided via the Northern Pacific in connection with the Union Pacific. The background of this route dates to the year 1898, which is prior to the entry of the OWR&N into the Puget Sound area from Portland, Oregon, when the Northern Pacific and OSL established joint lumber rates from the territory north of Portland to points on the OSL and connections [fol. 1329] west of the Missouri River via NP-Silver Bow, Montana—thence OSL and connections. In 1910, the OWR&N operation was extended north of Portland, Oregon, to the Puget Sound area which then gave that line direct access to most of the origin territory, Seattle and south. Subsequent adjustments in lumber rates, which placed the Silver Bow Gateway at a rate disadvantage as compared with the OWR&N direct route, brought about negotiations between the Northern Pacific and OWR&N which resulted in cancellation of rates via Silver Bow from Northern Pacific points west of Wallula, Washington, and publication of a revised basis of rates via NP-Wallula-OWR&N.

Previous to this adjustment, it was found that a considerable volume of lumber originating at local Northern Pacific points was moving on a combination of Northern Pacific and Union Pacific local rates made over such points as Seattle, Tacoma and Chehalis, Washington, which combinations were lower than the joint rates maintained be-

tween points of origin and destinations via the Silver Bow Gateway.

As a result of this condition, the Northern Pacific received a very short haul to these various western Washington junctions. The revised rate structure through Wallula eliminated the advantage of the rate combinations to local Union Pacific territory and gave the Northern Pacific more revenue per car than it formerly obtained on the basis of [fol. 1330] the combination rates previously mentioned.

This adjustment via Wallula also provided a more favorable competitive rate situation for mills situated at local points on the Northern Pacific Railway as related to those located on the OWR&N than previously existed.

The examples of short haul routes of the Northern Pacific Railway shown in Exhibit No. 3, Section F, are in the nature of exceptions rather than the rule when related to the many connections that line has with other carriers and through which competitive joint-Trans-Continental rates are not maintained. To mention a few, the Northern Pacific connects with the Union Pacific at Portland, Oregon, Yakima, Spokane, Washington, and numerous other points in Washington.

There are connections with the Milwaukee Railroad at Seattle, Tacoma, Chehalis, Spokane, Washington and at several points in Montana. Likewise, the Northern Pacific connects with the Great Northern at numerous points in these same states. These junctions with other carriers which are published in the Railway Equipment Register, ICC RE 295, are of such large volume that I will not read them into this record, but merely refer to the foregoing typical examples.

The Northern Pacific originates a heavy tonnage of forest products, fruits and vegetables, grain and other products of the soil as well as manufactured products in the States of Oregon, Washington and Idaho, none of which can move to points on that line or beyond via these many short haul [fol. 1331] junctions at rates competitive with the Northern Pacific.

I will not attempt a further detailed explanation of each of the gateways shown in Exhibit No. 3, Section F, but will, in general, state that their background is of a competitive nature and they are of interest to the public from

the standpoint of marketing products having origin tributary to Northern Pacific rails.

It is also desired to point out that these so-called short haul routes shown in Mr. Earley's Exhibit No. 3, Section F, were the result of voluntary action on the part of the Northern Pacific Railway and not by order of the Commission so it may be said that they represent judgment of the management that such routes were in the best interest of the company at the time they were established.

Mr. Earley commented on the route shown on Page 22 to the effect that the Northern Pacific accepts a haul of 127 miles from Sumas to Seattle yet it does not join the D&RGW in a route wholly within the United States through Ogden. In TCFB Tariff 40-I, ICC No. 1516, of L. E. Kipp, Agent, which contains routing for the tariff shown on Page 22, Route 6-HH is shown opposite Seattle, Washington, on the Northern Pacific Railway, and this route enables the movement described on Page 22 at a competitive rate with other routes via connections of the D&RGW to Can-on City, Denever or Pueblo, Colorado, thence D&RGW-[fol. 1332] Ogden, Utah-SP-Portland, Oregon-NP.

By Mr. Collins:

Q. Does that complete your statement?
A. It does, sir.

Mr. Collins: You may cross-examine.
Mr. Quirk: No questions.
Exam. Mullen: No further questions.

(Witness excused.)

Mr. Collins: The Washington Public Service Commission wishes to present some testimony next, Mr. Examiner.

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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

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vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, APPELLANTS,

vs.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

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No. 333

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BARTLETT BURNS was sworn and testified as follows:

Exam. Mullen: You may proceed, Mr. Gallagher.

Direct examination.

By Mr. Gallagher:

Q. You are Mr. Bartlett Burns.
A. Yes.
Q. Have you been sworn?
A. Yes.
Q. Mr. Burns, where is your official residence?
A. Olympia, Washington.
Q. Is that with the Washington Public Service Commission?
A. That is right.
Q. Have you prepared a statement with reference to this hearing?
A. Yes, I have.
Q. Will you go ahead and read that statement, please.
[fol. 1333] A. My name is Bartlett Burns and I am employed by the Washington Public Service Commission at Olympia, Washington. My present title is Assistant Chief of the Tariff Section with duties involving rates and services of all types of transportation companies.

I have been with the commission and predecessor departments for 13 years, being in the Tariff Section continuously except for a brief period in which I assisted in motor truck cost and time studies. Prior to employment with the commission I had six years experience with a large motor common carrier in western Washington.

I am a graduate of the University of Washington and am a registered Class B practitioner. I was in attendance at the previous hearing at Salt Lake City last December and my appearance is entered.

The Public Service Commission is the established department of Washington State government empowered by statute with the duty and responsibility of regulating intrastate rates, charges, services and facilities of various common carriers, including railroads. In addition, it has a

positive mandate under state law to investigate interstate rates and practices and to bring complaints or to otherwise participate in proceedings before the Interstate Commerce Commission on behalf of shippers of the state.

Our commission, consisting of three men, has authorized me to state the position which it takes in this controversy. [fol. 1334] After considering carefully the representations made to them by the Union Pacific and Rio Grande, they concluded that they could serve the interests of the state best by actively supporting the position of the defendant roads. The commissioners are not unmindful of the fact that there may be some shippers who might benefit from transit and reconsignment privileges in the Rio Grande territory which would be opened to them in the event the position of the complainant prevails.

The commissioners have also given thought to the benefits which are theoretically engendered by the existence of competitive through-routes. On the other hand, however, due consideration must be given to the fact that the Union Pacific contributes in several respects to the economic welfare of the state of Washington.

Other witnesses have testified or will testify, as to the nature and extent of such contribution. It is patent that any diversion of revenues from the Union Pacific will impair the ability of that railroad to adequately serve the needs of our state. Taking all aspects into consideration, our commissioners have concluded that the state as a whole would lose more than it would gain if the position of complainant were to prevail.

Apparently the matter of service now being rendered by the Union Pacific, including car supply, has become one of the issues in this proceeding. It can be stated categorically that within, say, the last 12 years there has [fol. 1335] been no formal or informal complaint lodged with the Washington Commission concerning freight services of the Union Pacific, including car supply or car service and including interstate and intrastate commerce; nor have we been aware of any significant dissatisfaction.

This statement is based on my own recollection plus that of four other key personnel, all of whom have been with the commission for more than 12 years and are intimately

acquainted with rate, legal and secretarial details of routine. I also made a complete check of the formal files and an examination of the correspondence files.

It can also be stated categorically that, within the last 12 years, we have not had any requests for assistance to secure the opening of the Ogden gateway nor have we been aware of any desire on the part of shippers for such opening. This statement is based on the same inquiries on my part as previously mentioned. Further, since the filing of complaint in this proceeding, various Washington organizations have gone on record in opposition to the complaint and no person or organization has indicated to the Washington Commission its support of the complaint.

That concludes my testimony.

Q. Mr. Burns, you are testifying down here in behalf of the Washington Public Service Commission, are you not?

A. That is correct.

[fol. 1336] Mr. Gallagher: You may cross-examine.

Cross-examination.

By Mr. Quirk:

Q. Isn't it unusual for the Public Service Commission of Washington - participate in an inter-carrier dispute?

A. Of course inter-carrier disputes are a little unusual too. I don't know whether I could answer that question, whether it is or is not unusual.

Q. You don't know?

A. No, I don't.

Q. Do you know that under Section 116 of the Public Service Laws of the State of Washington that your commission has the power to prescribe joint rates between connecting railroads, whenever it finds it necessary, and so forth? Do you know that?

A. Taking your word for the citation, yes, that is correct.

Q. You were persuaded by the Union Pacific, I take it, and by the consideration given, that you should come here and oppose the opening of the establishment of the joint rates through Ogden?

Mr. Gallagher: Mr. Examiner, I think the statement itself speaks for that.

Mr. Quirk: All right. It does.

By Mr. Quirk:

Q. This is merely a statement of position, isn't it?

A. The first portion is, yes.

Q. All of it is as far as I can see.

[fol. 1337] Mr. Quirk: All right, thank you.

Redirect examination.

By Mr. Gallagher:

Q. Mr. Burns, one more question: Do you know whether or not the question of public interest or the interest of the people of the State of Washington was concerned with reference to your parficipating in this hearing?

A. Yes, it was definitely.

Mr. Gallagher: That is all.

Mr. Quirk: That is all.

Exam. Mullen: That appears to be all.

(Witness excused.)

Mr. Gallagher: I call Mr. J. D. Paul.

J. D. Paul was sworn and testified as follows:

Direct examination.

By Mr. Gallagher:

Q. Your name is Mr. J. D. Paul?

A. Correct.

Q. And you were sworn, were you not?

A. I have been.

Q. You are here as a representative of the Seattle Traffic Association and the Seattle Chamber of Commerce?

A. Yes, sir.

Q. In that capacity have you prepared a statement you would like to read into the record at this time?

A. Yes, I have.

[fol. 1338] Q. Would you like to read your statement.

A. My name is J. D. Paul. I am Secretary-Manager of the Seattle Traffic Association, Seattle, Washington, which position I have held since January 1, 1949. I have been engaged in traffic and transportation work practically all of my business life. I am a practitioner before the Interstate Commerce Commission and the Maritime Commission and have appeared in numerous cases before the Interstate Commerce Commission and other regulatory bodies.

The Seattle Traffic Association is a voluntary non-profit Association composed of approximately 125 of the largest shippers and receivers in Seattle, Washington, and was organized in 1941. Included in its membership are manufacturers of iron and steel articles, industrial chemicals, paints and varnish, airplanes, furniture, machinery, motor trucks, petroleum products, candy and confectionery, bakery goods, paper and pulp, sheet metal; together with flour millers, brewers, wholesale grocers, wholesale hardware houses, fruit and produce distributors, and retailers. In addition the Seattle Traffic Association handles all traffic matters for the Seattle Chamber of Commerce, and to a lesser degree for the Port of Seattle.

Amongst other things the objectives of the Seattle Traffic Association are to protect and promote the interests of the shipping public in Seattle, Washington and the Pacific Northwest generally; to prepare reports and statistics relative to rates, charges and conditions of traffic and [fol. 1339] transportation, both domestic and foreign, and by rail, motor vehicle, water and air; and to do such things as may be deemed best for the interests of the Association, its members, and the general welfare of the commercial, industrial, manufacturing and jobbing interests of the City of Seattle, Washington and the Pacific Northwest area as affected by traffic conditions.

Pursuant to action taken by the Executive Committee of the Seattle Traffic Association at its last regular meeting I appear here today to support the position of the Union Pacific Railroad Company in opposing the application of the Denver and Rio Grande Western Railroad Company for joint rates and through routes with the Union

Pacific to and from points north of Ogden, Utah, including Seattle, Washington. By action of the Board of Trustees of the Seattle Chamber of Commerce I am authorized to speak also for that body which concurs fully in all statements made herein.

No benefits nor advantages would accrue to Seattle or the Seattle area by granting of the joint rates and through routes prayed for, particularly in view of the fact that, except as to lumber, joint rates and through routes via the Denver and Rio Grande Western Railroad Company already are available via Portland, Oregon in connection with the Southern Pacific Company to and from Ogden, Utah as well as via the Bieber Gateway in connection with the Western Pacific Railroad Company to and from Salt [fol. 1340] Lake City, Utah.

Inquiry of a substantial number of our members discloses that as to Eastbound traffic none of them use the Ogden or Bieber Gateways and that while there has been very limited use of these gateways westbound, I have found that in the majority of these cases the cars were stopped for partial unloading at intermediate points.

In most instances members gave as their reasons for not using the Ogden and Bieber gateways the facts that the routes are longer and the time slower than via the Union Pacific direct, with no compensating advantages. In this connection it is also significant that although the Seattle Traffic Association has from time to time been requested by its members to negotiate with carriers for adjustments in freight rates, no member has ever requested that we apply to either the Union Pacific or the D&RGW for the joint through rates and routes sought by the complainant.

On the other hand it is the considered opinion of the Executive Committee of the Seattle Traffic Association and of the Seattle Chamber of Commerce that establishing the joint rates and through routes prayed for would be to our disadvantage. Among the reasons therefor are:

Mr. Quirk: I suggest this is nothing but argument.

Exam. Mullen: No, I don't agree with you on that, Mr. Quirk. He is stating his reasons. I think that is com- [fol. 1341] petent. Go ahead, Mr. Paul.

The Witness: 1. Granting of through routes——

Mr. Quirk: I object to it as incompetent, immaterial and irrelevant.

Exam. Mullen: Objection overruled.

The Witness: 1. Granting of through routes and joint rates would require the Union Pacific to share with the D&RGW revenues on traffic originating or terminating on rails of the Union Pacific.

2. There is no evidence that the joint rates or through routes prayed for would reduce freight charges to or from the Pacific Northwest, increase our markets, or improve rail service.

Mr. Quirk: That is objectionable.

Exam. Mullen: That is objectionable, I will agree with you on that. I think that comment should be eliminated. Are you referring to evidence of record, Mr. Paul?

The Witness: No, I am not, Mr. Examiner.

Exam. Mullen: What do you mean by there is no evidence?

The Witness: None has been adduced to indicate there would be any reduction in freight charges.

Exam. Mullen: You are not referring, then, to any evidence given in this record?

The Witness: No, I am not.

Exam. Mullen: All right, go ahead.

[fol. 1342] The Witness: I don't know all of the record, Mr. Examiner.

Exam. Mullen: All I want to know is, your comment is not directed to evidence of record in this case?

The Witness: That is correct.

Exam. Mullen: All right.

The Witness: 3. The Union Pacific has made heavy capital investments in Seattle, the State of Washington and the Pacific Northwest, and is contributing substantially to our local economy through payrolls, taxes, purchases and other expenditures necessary to provide adequate service and to maintain its properties. In the event the joint rates and through routes sought by complainant in this case are granted and should there be substantial diversion of traffic as a result thereof, the ability of the Union Pacific to continue to provide efficient, dependable transporta-

tion, including road haul and switching, car supply, maintenance of equipment and physical properties, would be impaired and if reductions in expenses necessary to offset the loss in revenues could not be accomplished through the economies mentioned, then it follows that increased rates would be necessary, all to the detriment of Seattle in general and our members in particular.

Mr. Quirk: Don't you think that is argumentative, Mr. Examiner? I object to it.

Exam. Mullen: No, I think it is a statement of this witness.

Mr. Quirk: It is an expression of his opinion, I suppose.

[fol. 1343] Exam. Mullen: Yes, his opinion.

The Witness: 4. The Union Pacific has contributed substantially to the industrial and commercial growth of the City of Seattle, the State of Washington and the Pacific Northwest, and the Seattle Traffic Association and the Seattle Chamber of Commerce are opposed to any action tending to restrict the Union Pacific's ability to contribute further to our future development. Establishing the joint rates and through routes sought would do just that.

Mr. Quirk: I object to that. This witness is certainly not competent to make that dogmatic statement.

Exam. Mullen: Your objection is overruled. It is accepted as a statement of opinion of this witness. Go ahead, sir.

The Witness: 5. In the event the joint rates and through rates and through routes sought are granted by the Interstate Commerce Commission, through traffic moving over the routes proposed would be subject to at least two additional interchanges; whereas, no interchanges are involved when shipments move via the direct route of the Union Pacific, except to or from connections at Denver or at the Missouri River crossings. It has been my experience, gained through supervising the movement of thousands of carloads of transcontinental traffic, that additional interchanges expose ladings to damage in switching from one line to another, and frequently are the cause of delays.

[fol. 1344] Wherefore the Seattle Traffic Association and the Seattle Chamber of Commerce pray that the complaint

of the Denver and Rio Grande Western Railroad Company be denied.

By Mr. Gallagher:

Q. Mr. Paul, in connection with your duties as Secretary-Manager of the Seattle Traffic Association, have you investigated personally the items you have referred to here about a lowering of rates by this joint rate that is referred to?

A. You are referring to item No. 2, on Page 4, are you, Mr. Gallagher?

Q. Yes, that was the one I had in mind.

A. Well I have read the complaint, and I have heard arguments by both complainants and defendants, and nothing has been presented to me that would indicate——

Mr. Quirk: Just a moment, that is objectionable.

Exam. Mullen: Just a moment. Read the question, please.

(Question read.)

Exam. Mullen: That is not responsive to the question.

By Mr. Gallagher:

Q. Mr. Paul, may I ask this question——

The Witness: Mr. Examiner, may I continue, I had not quite finished.

Mr. Quirk: I object to the question, and the answer he has thus far made is incompetent and irrelevant.

Exam. Mullen: Did you understand the question, Mr. Paul?

The Witness: Yes, I did.

[fol. 1345] Exam. Mullen: That has no reference to the evidence offered in this record. As I understood your answer, it was based upon your study of this record and the complaint. That is the reason why I said it was not responsive.

By Mr. Gallagher:

Q. Maybe I can straighten that out. What I wanted to know is whether or not you in your official cap-city here

have made investigations of your own with references to the findings and the statements that are made here as to how it would help or not help the City of Seattle.

A. Yes, I have made inquiries as to whether or not reductions in the freight rates were contemplated if this Ogden gateway were opened. The answers have been in the negative.

Mr. Gallagher: You may inquire.

Cross-examination.

By Mr. Quirk:

Q. Did you make any inquiries of the Union Pacific when you were making them?

A. Yes, I did, Mr. Quirk.

Q. Now you spoke of your item No. 5, of your summation, on Page 5, of your prepared statement, you say that if the joint rates sought should be established, through traffic moving over the route proposed would be subject to at least two additional interchanges, where no interchange is involved in shipments moved direct by the Union Pacific.

That of course depends on where the Union Pacific is taking the shipment, doesn't it? If the shipment is going to Philadelphia from Seattle there would be some inter-[fol. 1346] changes, wouldn't there?

A. That is true.

Q. So much for that.

A. By the same token, if the shipment from Philadelphia to Seattle is turned over to the D&RGW at Denver, for instance, and then is turned back to the Union Pacific again at Ogden, that involves two additional interchanges, does it not?

Q. Well, that would in turn depend upon how many carriers participated in carrying it from Philadelphia, wouldn't it?

A. I can't agree with you on that.

Q. You can't. Are you familiar with the joint rates that exist, and the various routes that exist between Philadelphia and Seattle?

A. To some extent.

Q. To some extent.

I can see why you don't understand that.

Now, how many interchanges would be involved on a shipment from Seattle, via the Union Pacific to Portland, thence via the Southern Pacific down through Stockton and southern California, Santa Rosa, New Mexico, then up to Tucumcari, New Mexico, Rock Island, and whatever line the Rock Island connected with to St. Louis, and/or Kansas City?

Mr. Gallagher: I don't think that is proper cross-examination.

Mr. Quirk: You don't. He just brought up the question. [fol. 1347] Exam. Mullen? I think it is proper. Go ahead.

The Witness: Would you mind, Mr. Quirk, naming the railroads and the junction points.

By Mr. Quirk:

Q. I have named the Union Pacific.

A. That is only one.

Q. Well I have named the Southern Pacific.

A. Two.

Q. I named the Rock Island.

A. Where would the Southern Pacific turn it over to the Rock Island?

Q. They can turn it over various ways. I thought you understood that. I am just a lawyer.

You seem to know about this movement via the Denver and Rio Grande, I thought at least—how many routes could be used that way, traffic originating on the Union Pacific going east via the Southern Pacific through Portland? How many routes are available to the shippers of Seattle?

A. Many of them are available. I don't know how many.

Q. How many?

A. I don't know how many.

Q. I thought you knew about these things.

A. I know about this.

Q. There are various ways that traffic moved after the Southern Pacific got it?

A. That is true. But, Mr. Quirk, my comparison was a movement via the Union Pacific direct with a movement

[fol. 1348] in connection with the D&RGW through the Ogden gateway.

Q. I know that is the story you want to stick to.

A. That is right.

Q. But I am stating it this way, you know the rates apply that way, don't you?

A. That is true.

Q. You seem to be concerned about the railroads joining in new through rates.

A. I'm concerned——

Q. How do you think that route, which is now available, calculates in the matter of distance as compared with what the Rio Grande seeks here?

A. You mean how does the Union Pacific's direct route compare with the Rio Grande's route?

Q. I meant the very thing I'm talking about. The Union Pacific through Portland, Southern Pacific, and around through New Mexico, and back to Kansas City. How do you think that compares with a movement from Seattle to Ogden, thence Rio Grande, thence back to the Union Pacific, or the Burlington or any one of the Prairie lines?

A. Very evidently it is circuitous.

Q. You think it is all right to have that. Would you have it canceled in the interest of the public?

A. I don't think it is used as a matter of fact.

Q. You don't know, do you?

[fol. 1349] A. I don't think it is.

Q. You really don't know?

A. That is my opinion.

Q. Opinion has nothing to do with whether the thing is a fact or not. Do you know as a matter of fact the traffic moves that way or not? All we want——

Exam. Mullen: Well, Mr. Witness, you either know or don't know. What is the answer?

The Witness: I don't know whether traffic moves that way or not.

Exam. Mullen: All right.

By Mr. Quirk:

Q. Now who are on the executive committee of the Seattle Traffic Association?

A. The executive committee of the Seattle Traffic Association is composed of 15 members.

Q. Are there any Union Pacific men on that?

A. There are no transportation people on it whatever.

Q. What type are they, businessmen?

A. They are businessmen, and industrial traffic men.

Q. How is the Chamber of Commerce operated, the Seattle Chamber of Commerce?

A. The Seattle Chamber of Commerce is composed of approximately 4500 members. It is governed by a Board of Trustees of 55, I believe. It may be 50, but it is in that neighborhood.

Q. How many railroads belong to the Seattle Chamber of Commerce?

[fol. 1350] A. I do not know.

Q. Don't you think it is a bit strange you wouldn't know that?

A. I know that some of them do, but as to how many, I do not know.

Q. You seem to know the most about Union Pacific. You know they do, don't you?

A. I do.

Q. Are they on the Board of Trustees, is the Union Pacific on the Board of Trustees of the Seattle Chamber of Commerce?

A. No, I am very sure they are not.

Q. Are there any other railroads on it? Great Northern?

A. I believe Mr. Thomas Balmer, vice president of the Great Northern, is a member of the Board of Trustees of the Chamber of Commerce.

Q. How about the Northern Pacific, are they on the Board of Trustees?

A. No, I believe not.

Q. How about the Milwaukee Railroad?

A. I think not.

Q. Did you say the Union Pacific had a representative on there or not?

A. They do not.

Q. That you seem to be positive about.

A. I know that, Mr. Quirk, because Mr. Arthur Murphy, I believe, was the last officer of the Union Pacific repre-

sented on the Chamber's Board of Trustees, and Mr. Mur-
[fol. 1351] phy is now retired and has been for some time.

Q. Now as a spokesman here for the Seattle Chamber of Commerce, and a man who has shown great concern for public interest, do you think that the Union Pacific should have power and right to determine whether a joint rate should be established or not?

A. I think so, when it affects the Union Pacific, certainly.

Q. Is that the position of the Seattle Chamber of Commerce right along?

A. It is their position in this case.

Mr. Quirk: All right. That is enough.

Redirect examination.

By Mr. Gallagher:

Q. I wanted to ask you, with reference to Mr. Balmer, do you know if he is living in the City of Seattle at this time?

A. Are you referring to his residence?

Q. Either working there or residing there.

A. Yes, his office is in Seattle.

Q. Do you know how the 50 or 55 trustees are made up? Is that an election?

A. They are elected by the membership at large.

Q. It could be any cross-section of the membership?

A. It is.

Q. With reference to your statement to Mr. Quirk, there, as to the right of the Union Pacific to make the determination. Are you referring to a final determination after
[fol. 1352] such a hearing as this?

Mr. Quirk: I suggest that is a leading question from this gentleman. He has answered my question.

Exam. Mullen: I think the witness can answer that.

Mr. Quirk: Sure he can.

The Witness: Would you read the question again, please, Mr. Reporter.

(Question read.)

The Witness: Thd determination in this case of course will be made by the Interstate Commerce Commission.

By Mr. Gallagher:

Q. That will be the final determination in this case.
A. That will be the final determination in this case.
Mr. Quirk: I am very glad to hear that.

(Laughter.)

By Mr. Gallagher:

Q. That is as far as the ICC is concerned.
A. Yes.

Mr. Gallagher: I think that is all.
Mr. Quirk: That is all.

(Witness excused.)

Mr. Gallagher: That is all we had, Mr. Examiner.
Exam. Mullen: Have we another witness available?
Mr. Hobbs: We have about three witnesses, Mr. Examiner, railroad witnesses, that is, they are not being called by the Washington Public Service Commission, but they [fol. 1353] are witnesses from Washington.
I call Mr. Watson.

H. L. Watson was sworn and testified as follows:

Direct examination.

By Mr. Hobbs:

Q. You name is H. L. Watson.
A. That is correct.
Q. And the testimony that you desire to give at this hearing, has that been reduced to writing?
A. Yes.
Q. Will you proceed to read it.
A. My name is H. L. Watson, and I am employed by and am an officer of Pacific Gamble Robinson Company, doing business as Pacific Fruit & Produce Company and Gamble

Robinson Company; general offices of which are located at Seattle, Washington, in which city I reside. I am General Traffic Manager and Assistant Secretary of the company named.

I have direct supervision of all transportation matters involving my company and I have been employed by them for the past 24 years. I am one of the Trustees of Seattle Traffic Association, which organization some time ago passed a resolution favoring the position of the Union Pacific Railroad in this case.

I attended the meeting at which the resolution was passed and voted in favor thereof. I am appearing here in [fol. 1354] behalf of Pacific Gamble Robinson Company, doing business as Pacific Fruit & Produce Company and Gamble Robinson Company, in support of the Union Pacific and the other defendants.

My company is engaged in the wholesale distribution of fresh fruits and vegetables of all kinds, canned goods, sugar, and limited grocery items. We operate extensively throughout the United States and Canada and maintain 118 wholesale distributing branches and 29 fruit and vegetable shipping branches. Through the fruit and vegetable shipping branches located within the principal fruit and vegetable production areas throughout the country, fresh fruits and vegetables of all kinds are purchased and shipped to our wholesale distributing branches. Throughout the Union Pacific territory described in the complaint, there are located many of our wholesale distributing branches and fruit and vegetable shipping branches, and to and from these branches fresh fruits and vegetables are shipped via the Union Pacific route to and from numerous similar branches located at Denver and points east and south thereof.

My company annually ships via the Union Pacific through routes in excess of 5,000 carloads of fresh fruits and vegetables and the limited grocery items handled by it. The transportation service rendered us by the Union Pacific is, and has been, entirely satisfactory, such service including the furnishing of cars, time in transit, protective services, car passing information, tracing and diversions and [fol. 1355] reconsignments.

The through routes available to us via the Union Pacific are entirely satisfactory and meet our needs. Therefore, we do not require, nor have we ever asked, the Union Pacific or the D&RGW to establish any through routes via the latter line. There is no necessity from our standpoint for the establishment of these through routes.

The majority of our shipments involve the transportation of perishable fresh fruits and vegetables in refrigerator cars. The transportation of such shipments via the most direct route and in the shortest possible in-transit time is extremely important to insure arrival at destination in a satisfactory marketable condition, as well as from an inventory and investment standpoint.

The Union Pacific, in conjunction with its subsidiary, Pacific Fruit Express Company, furnishes my company with a very large portion of the refrigerator cars required for the movement of our traffic, the condition of which equipment is maintained at a high degree of efficiency both from a loading and transportation standpoint.

Further the Union Pacific and the Pacific Fruit Express Company handle our perishable shipments in a highly satisfactory manner as regards to protection in transit, the furnishing of prompt advice as to the location of cars while in transit and prompt and efficient execution of all diver- [fol. 1356] sion and reconsignment orders.

It is my opinion, based upon my experience with the handling of perishables by those companies as compared with such handling by other railroads where such combined efforts are not present, that the Pacific Fruit Express Company itself adds greatly to the prompt and efficient handling of perishables. It is our notion that the routes sought in this complaint, because of their circuity compared with the direct routes of the Union Pacific, would involve greatly increased time in transit, and this would be supplemented, too, by the delays incident to the additional interchanges between railroads that would be involved.

By experience, I have found that by using fewer railroad lines on a through movement, and thereby eliminating as many interchange points between carriers as possible, our damage claims are minimized and fewer delays encount-

ered. Passing information is far superior and there are fewer diversion failures.

It is common knowledge that terminal switching incident to interchanges between railroads exposes shipments not only to delay but also to possibilities for damage to lading not encountered via a direct route. It has been my experience that where our traffic is transported by merely bridge lines that such lines are not equipped to promptly handle diversion and reconsignment orders and furnish requested [fol. 1357] passing reports. On the other hand, where our shipments are transported via a through single-line route, we do not lose contact with the shipment while enroute.

There is a considerable carload movement of fresh fruits and vegetables from points east of Denver originating in Texas, Louisiana, Mississippi, Florida, Massachusetts and other southern, southeastern and eastern states to points in the Pacific Northwest. The Denver gateway, with the exception of certain Texas vegetable rate restricted traffic, is used to a very little extent on perishables due to the slower transit running time via this route. Council Bluffs, Kansas City, St. Louis or Chicago direct routes are conceded to provide the fastest service.

There are, and have been for some time, through rates in effect from this east of Denver territory on fresh fruits and vegetables to Portland, Oregon, and Seattle, Washington, and intermediate points via Denver, D&RGW, Ogden, SP and connections, or via D&RGW, Salt Lake, WP-GN.

Our company receives five to six hundred cars of perishables per year from points east of Denver to Portland and Seattle, but the present available D&RGW routing is not used due to scheduled running time being between two to three days longer than the more direct routes.

In the event the routes asked by the D&RGW in its complaint are established, we are fearful of, and would expect [fol. 1358] that, the loss of revenue to the Union Pacific by that line being short-hauled would result in the practicing of economies in operation, such as reduction in train service and less frequent switching, or possibly the seeking of higher rates for the transportation of our shipments.

Any one or all of such contingencies would substantially affect our business adversely. This would be especially true in instances where our plants are located upon Union Pacific trackage as well as our plants located at points served jointly by the Union Pacific and some other carrier, of which there are numerous instances in the territory directly involved.

Under the circumstances and after full consideration of the matter, we see nothing to be gained either by our company or the territory which we serve by the establishment of the through routes sought by the D&RGW, but on the contrary, can visualize where our interests as well as those of the Union Pacific would be most seriously adversely affected thereby. Therefore, we hope the Commission will take no action in this proceeding that will be injurious to the interests of the Union Pacific and my company.

Q. Mr. Watson, your headquarters are located at Seattle; is that true?

A. That is correct.

Q. I think your testimony shows you have many branches throughout Oregon and Washington. Generally speaking, [fol. 1359] are there other routes open for use in Washington besides that of the Union Pacific, east?

A. Yes.

Q. What are they?

A. Well, we have—do you mean by trans-continental lines?

Q. Yes.

A. We have the Great Northern, Northern Pacific, Milwaukee.

Q. I think that is all, unless you care to add something else.

A. I have nothing to add.

Mr. Hobbs: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. Does your company have industrial plants or warehouses which are served by the Union Pacific tracks anyplace?

A. Yes, we have some.

Q. Where are they?

Well, I don't remember all of them. I can probably enumerate them, but they would be quite numerous.

Q. You mean you don't remember the ones——

A. I remember the ones on the Union Pacific, but I don't remember how many. I can enumerate them.

Q. Yes, do that.

A. All right. You want just the ones that are served exclusively by the Union Pacific.

Q. Yes, where you have a switch track at the plant.

[fol. 1360] A. I see.

Aberdeen, Washington; Baker, Oregon; Boise, Idaho; Centralia, Washington; Denver, Colorado; Idaho Falls, Idaho; Kelso, Washington; LaGrande, Oregon; Laramie, Wyoming; Lincoln, Nebraska; Los Angeles, California.

Q. You haven't finished?

A. Oh, no.

Q. Pardon me.

A. I am just about half through.

Omaha, Nebraska; Pendleton, Oregon; Provo, Utah; Pocatello, Idaho; Portland, Oregon; Pullman, Washington; Rock Springs, Wyoming; Seattle, Washington; Spokane, Washington; Sunny Side, Washington; Tacoma, Washington; Twin Falls, Idaho; Walla Walla, Washington.

We also have a shipping branch there on the Union Pacific. Wallace, Idaho, and Yakima, Washington.

Q. Now, at some or all those locations, I assume that your company leased property or tracks from the Union Pacific, does it not?

A. Yes, there are some.

Q. You have side track agreements, I suppose.

A. We have some, yes.

Q. You are pretty well tied up with the Union Pacific, aren't you?

A. I am not directly in charge or have supervision over [fol. 1361] our facilities.

Q. I see.

Now do you know, Mr. Watson, whether there is any—who owns the Pacific Gamble Robinson Company, is that a holding company?

A. It is owned by stockholders.

Q. I see.

Is that a holding company?

A. It is not.

Q. I notice you say Pacific Gamble Robinson Company doing business as——

A. That is right. We retain the trade name of the Pacific Fruit and Produce Company on the West End, and the Robinson Gamble Company on the East End.

Q. Are they both corporations, separate corporations?

A. No, they are not, they are just a trade name.

Q. Oh, I see.

Do you know whether any of your officers are stockholders or bondholders of the Union Pacific?

A. To the best of my knowledge they are not.

Q. That is very unfortunate.

Now, you made it clear that you are satisfied with the Union Pacific services, aren't you, that is what you said?

A. I think the Union Pacific service is satisfactory, yes.

Q. Well, would you oppose a joint rate through Ogden [fol. 1362] and the Rio Grande where shippers have shown that they need transit and they are bottled up down there unless they have it? Would you oppose that? There are some engaged in your type of business. You said you don't need it. Now I'm suggesting if it is shown here some shippers do need it, are you opposed to that?

A. Well, personally I don't think they need it.

Q. Well, that isn't the question. The Commission will determine that. There have been quite a few witnesses you have not heard at all.

A. That is correct.

Q. A great many. Some made it clear they did need it. You are not opposed to those that show they did need it, are you?

A. I could not oppose that, except in general principle.

Q. Now you say you did ship five thousand carloads over the Union Pacific last year.

A. That is correct.

Q. If this joint rate the Rio Grand- seeks here is established through Ogden and Salt Lake, do you deliver all of those five thousand cars to that route?

A. No.

Q. Will you send any of them over that route?

A. No.

Mr. Quirk: Subtract 5,000 from the 156,000.

(Laughter)

By Mr. Quirk:

Q. Turn to Page 4 of your memorandum. "Our com- [fol. 1363] pany receives five to six hundred cars of perishables from points east of the Denver to Portland and Seattle, but the present available D&RG routing is not used due to scheduled running time being between two to three days longer than the more direct routes."

Now, by that do you mean the scheduled running time via the Denver and Rio Grand-, we'll say, from Pueblo or Denver, to Salt Lake, and thence Western Pacific or up over the Great Northern or thence Ogden on the Southern Pacific; is that the route you are talking about?

A. That is correct. As compared with the direct route from Kansas City.

Q. You don't use those routes?

A. No, we do not.

Q. But this route that is being sought here, or rather the joint rate that is being sought here, would be through Ogden, that would be a more direct route, would it not?

A. I don't think there is any difference in the service that is scheduled.

Q. There isn't any now, we don't have the joint rates, but as a practical plan, you can look at the map and see the shipments coming from the east of Denver, going over the Rio Grande, has the shortest route between Denver and Salt Lake, and then up over the Union Pacific, and

Ogden would be a shorter route than the route you now say is too long.

[fol. 1364] A. I think that is correct, yes. That is correct.

Q. By the way, Mr. Watson, do you know this Pacific Seattle Traffic Association voted in this matter? You said you were a trustee, didn't you?

A. I was present at the time the vote was taken.

Q. How did they vote?

A. The matter was——

Q. Was it close?

A. What is it?

Q. Was the vote close?

A. I don't recall.

Q. Oh, I thought you said you were present.

A. I was present, but I don't recall how everybody voted.

Q. Now, how was the vote taken, did they just say aye and no?

A. That is correct. I think there was some——

Q. Sometimes the people that make the biggest noise against, don't they?

A. I won't be acquainted with that.

Q. You have been at meetings—all right.

Mr. Quirk: That is all.

By Mr. Quirk:

Q. Oh yes, I knew I had a question. Weren't you and and your company, at least you as a representative of your company, neutral on this so-called Ogden gateway until very recently?

A. Yes, we were in the beginning, that is correct.

[fol. 1365] Q. When did you change from neutrality—strict neutrality to the kind of position you are in now?

A. I just don't recall, probably within the last month or so.

Q. Who persuaded you to change?

A. Well the persuasion was by ourselves.

Q. You mean you persuaded yourself?

A. That is correct.

Q. Were you called on by the Union Pacific representatives?

A. Well, of course we were called on by both railroads.
Q. Did we call on you too?
A. Yes.
Q. We couldn't persuade you?
A. Evidently not.

(Laughter)

Mr. Hobbs: Is that all you have?
Exam. Mullen: Anything on redirect?
Mr. Hobbs: Yes.

Redirect examination.

By Mr. Hobbs:

Q. Mr. Watson, what other railroads besides the Union Pacific are your facilities located on? I think your testimony shows you have 118 branches. What other railroads are you located on?

A. We have the Northern Pacific, Milwaukee, Oregon Trunk, C&W, CB&Q, BA&P, G&RGW, CAMAS, Prairie, [fol. 1366] CStPM&O,—I'll eliminate Canada, they are not involved—Rock Island. I may be duplicating some of these, because I am going over the list the best I can.

Exam. Mullen: Is that enough for your purpose, Mr. Hobbs?

Mr. Hobbs: I think so.

By Mr. Hobbs:

Q. In answer to a question from Mr. Quirk, Mr. Watson, I understood you to say you would not be opposed to the opening of the gateway for others that might have some use for it.

Did I understand you correctly?

A. Yes, that is correct.

Q. Is that irrespective of the effect the opening might have on the service that you receive at your plants on the Union Pacific?

A. I think I explained in my testimony I was opposed to it in general principle as to the effect it would have in general.

Q. Are we to understand your testimony then that if there is a possibility of your service being affected you are opposing to the opening of the gateway for anybody?

A. Anything that would affect our service.

Mr. Hobbs. That is all.

Recross-examination.

By Mr. Quirk:

Q. During a period until recently, you were in a mood where you didn't know which way to turn; is that right? You were in a neutral mood.

[fol. 1367] A. We were neutral, yes.

Q. You didn't reach and find these great principles until within the last month.

A. That is probably correct.

Mr. Quirk: All right.

(Witness excused.)

Mr. Hobbs: We will call Mr. Graham.

Alfred P. Graham was sworn and testified as follows:

Direct examination.

By Mr. Hobbs:

Q. Your name is Alfred P. Graham.

A. That is right.

Q. Has the testimony which you care to offer in this proceeding been reduced to writing, Mr. Graham?

A. It has.

Q. Will you proceed to read it, please.

A. My name is Alfred P. Graham. I reside at 1935-47th S.W., Seattle, Washington. I am the Traffic Manager for the Boeing Airplane Company with headquarters at Seattle, Washington. I have been employed by the Boeing Airplane Company for nine years; approximately four years as Assistant Traffic Manager and five years in my

present position. I have been admitted to practice before this Commission.

As a member of the executive committee of the Public Carriers Division, Seattle Chamber of Commerce, I voted [fol. 1368] in favor of a resolution passed by and and which subsequently was approved by the Chamber of Commerce, recording its opposition to the application of the Denver and Rio Grande Western Railroad in this proceeding.

I am also a member of the executive committee of the Seattle Traffic Association and voted in favor of a resolution passed by it, recording its opposition to the complaint of the Denver and Rio Grande Western Railroad.

The Boeing Airplane Company is a manufacturer of airplanes and airplane parts at Seattle, Washington; Renton, Washington; and Connell, Kansas. We have a regular carload movement of airplane parts and component materials between our plants at Seattle and Renton on the one hand and Connell, Kansas, on the other hand, and between our plants at Seattle and Renton and Transcontinental Group J and east thereof.

In 1949, the Union Pacific handled for our Seattle and Renton plants, 394 carloads inbound and 102 carloads outbound or a total of 496 carloads. Of the inbound quantity, 44 carloads were received from the territory Missouri River and east and 225 carloads from our Connell, Kansas, plant. Of the outbound quantity, 45 carloads were forwarded to the territory Missouri River and east and 24 carloads to our Connell, Kansas, plant. The Union Pacific also handled 41 carloads inbound and 3 carloads outbound for our Connell, Kansas, plant other than from or to our Seattle or Renton plants.

[fol. 1369] The principal plant of our company is located in Seattle. It is located on joint trackage of the Union Pacific Railroad, Great Northern Railway, Northern Pacific Railway and Chicago, Milwaukee, St. Paul and Pacific Railroad, but under an agreement between the lines, it is switched exclusively by the Union Pacific. Our Renton plant is served by the Pacific Coast Railway Company and the Northern Pacific Railway Company. All of these lines are defendants in this proceeding.

The Union Pacific's service in regard to road haul, switching, car supply, tracing and in all other related respects has been excellent. The Union Pacific has also prepared and supplied special equipped excess height cars for the movement of large airplane components, such as wings, fuselages, etc., which are too large to load in standard cars. We have found the Union Pacific particularly mindful and willing to assist in the special transportation problems of our company prior to, during and since the war. It has been particularly important that special equipment assigned to service between our plants move on an expeditious over-the-road schedule, coordinated with our production schedules.

We have never asked nor do we have need for joint through rates on transcontinental traffic via the Denver and Rio Grande Western in connection with the Union Pacific. The existing routes and services of the Union Pacific are entirely adequate and sufficient for our purposes. We have routed some of our cars to Seattle via [fol. 1370] the Denver and Rio Grande Western in connection with other carriers. Transit time has been two days or more longer than when routed via the Union Pacific.

The exigencies of our production require the fastest transit time possible. If the route proposed, which would short haul the Union Pacific, were established, it is only reasonable to assume that such a situation would result in a loss of revenue to the Union Pacific. It would naturally follow that such a loss would have to be offset by an increase in rates or by savings from a curtailment of service. Either of these results would be to the definite detriment and disadvantage of my company.

Mr. Quirk: I think this is argument, Mr. Examiner.

Exam. Mullen: That is argument. I suggest the last two sentences be stricken.

The Witness: The Boeing Airplane Company desires to go on record in opposition to the establishment of the requested through routes and respectfully requests the Commission to take no action that would possibly impair the ability of the Union Pacific to render the service it has in the past, which is vital to our operations.

By Mr. Hobbs:

Q. Mr. Graham, you state here you are a member of the executive committee of the Seattle Traffic Association. Were you present at the time the resolution was passed by that organization recording its opposition to the complaint?

[fol. 1371] A. I was.

Q. You were?

A. Yes.

Q. Do you recall, or can you tell us how that vote stood?

A. It was unanimous.

Mr. Hobbs: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. It was one voice that guided it, I suppose.

A. No, there was quite a bit of speaking on the subject, and it was unanimous vote in favor of the Union Pacific's position.

Q. Are you opposed to the establishment of the joint rates sought here, even though it is shown in this case that some shippers, that others need it?

A. I am.

Q. You just don't want anybody to have it; is that it?

A. My testimony speaks for itself, Mr. Quirk.

Q. Now on this route, you say you have routed some of the cars to Seattle, via the Denver and Rio Grande, in connection with other carriers.

Where did those cars come from?

A. It was the Swallow Airplane Company, at Wichita, Kansas, routed via the Missouri Pacific, D&RGW, Western Pacific, Great Northern. Service, I think, the minimum we had was about ten days, which would be about three to four days longer than the Union Pacific direct route.

[fol. 1372] Q. Assuming the service via the Ogden and Union Pacific proceeded over the D&RG, would be much shorter than that, you are still opposed to that being established.

A. I am. I believe it would make service on the Union Pacific suffer, as well as revenue depletion.

Q. If the Commission should requ-re the establishment of the joint rate sought through Ogden in connection with the Union Pacific, would you use that route in handling of your traffic?

A. As far as I know, I would continue to use the Union Pacific long haul route.

Mr. Quirk: That is all. Thank you.

Exam. Mullen: That is all.

(Witness excused.)

Exam. Mullen: We will take a ten-minute recess.

(Short recess taken.)

Exam. Mullen: Come to order, please.

FRED H. TOLAN was sworn and testified as follows:

Direct examination.

By Mr. Hobbs:

Q. You have been sworn, Mr. Tolan.

A. I have.

Q. Has the testimony which you desire to give in this proceeding been reduced to writing, Mr. Tolan?

A. It has.

Q. Will you proceed to read it.

[fol. 1373] A. My name is Fred H. Tolan. I am a traffic consultant and industrial traffic manager for many northwest industries, primarily in the States of Washington and Oregon. My address is 1103 Smith Tower, Seattle 4, Washington. I have been in freight traffic matters since 1940, excluding a period when I was in the United States Marine Corps during the war.

Who I represent:

I am retained and have been retained for approximately one year by the Whatcom County Traffic & Rates Bureau of Bellingham, Washington, which is an association of approximately 70 of the principal industries in that north-

west area of Washington. I am Traffic Manager and have been for nearly five years, for the Northwest Produce Association, an association of the principal independent distributors of fresh fruit and vegetables in the State of Washington.

I am Traffic Manager of the Northwest Furniture Manufacturers Association and have held that position for nearly three years. That Association is an association of approximately 70 furniture manufacturers and large distributors of furniture and related products in the States of Washington and Oregon. I am Traffic Manager, and have been Traffic Manager for nearly two years, for the Northwest Fish Traffic Committee, which is an association of practically all the important producers of fresh and frozen fish in Washington, Oregon and Alaska.

[fol. 1374] In addition to the above listed industries, I am Traffic Manager for most of the insulation material manufacturing plants and distributors in Washington and Oregon; I represent the largest Christmas-tree shippers; the largest fern and evergreen shippers; the largest chemical and industrial raw material distributors, and a large variety of miscellaneous manufacturing plants throughout Washington and Oregon not covered by the general industry list given above.

I am Traffic Manager for all of the industries mentioned above with the exception of the Whatcom County Traffic & Rates Bu-eau. I am Traffic Counsel for that association only, so a resolution of the Board of Directors from that association has been obtained at a regular meeting in Bellingham authorizing support of the Union Pacific position in this matter and directing me to register that position at this hearing.

Commodities shipped:

My interest and study of shipments has involved thousands of carloads of almost every commodity and covers practically every region and destination in the United States. As my work involves more than consultation on rate matters, but actually requires routing, shipping instructions and all of the elements of industry traffic management, I have had to familiarize myself with all general

transportation problems of the businesses that retain me. My office maintains a staff of six people to assist in the traffic and management ends for the many industries we [fol. 1375] represent. I am familiar with the commodities shipped, the routings used, and the routings needed by the people that I represent.

It is the opinion of everyone I represent that the opening of the Ogden gateway is not necessary nor desirable, and that the effect of opening the gateway can substantially injure Washington and Oregon shippers.

Mr. Quirk: Does the Commission want opinions, rather than facts, Mr. Examiner?

Exam. Mullen: Well, I think this is all right. This testimony is all right.

Mr. Quirk: All right.

Exam. Mullen: I mean I find nothing objectionable *it in*. Proceed.

The Witness: Why we think we can be injured:

Any answer to the question of why we are appearing here today taking the Commission's time and the time of those present to express opposition to opening another route for transcontinental traffic needs explanation. That explanation must be answered by reference to individual shippers. First, I would like to explain why the Whatcom Traffic & Rates Bureau opposes this application.

We know that any reduction in the system revenues of any railroad serving the State of Washington has the effect of raising our Washington State rail rates. We do not have to speculate to reach that conclusion. The Whatcom [fol. 1376] County Traffic & Rates Bureau is already on record before the Washington Public Service Commission and before the Superior Court for Thurston County in the State of Washington opposing a 4 per cent increase in state rail rates based on system-wide revenue needs.

We have argued before our State Commission and have argued before the court that system-wide revenue figures should not affect state rates. The Washington Public Service Commission, as well as the other Public Service Commissions in California, Nevada, Oregon and elsewhere, has denied our position.

Mr. Quirk: I object to this on the grounds it is sheer argument. This is not the time for argument.

Exam. Mullen: That appears to be argument. Just a moment.

Mr. Hobbs: I think if the Examiner please, what Mr. Tolan is trying to show there, there are instances and there have been instances, where on account of low-system revenues the intrastate rates have been affected, and that is what the Whatcom County organization is objecting to.

Exam. Mullen: Did you say intrastate rates?

Mr. Hobbs: It is on account of that the Washington intrastate rates have been raised, that is what they are fighting. In other words, he is stating the fact if the system revenues of the Union Pacific are reduced then they need not look for any rate reductions, but rather they will [fol. 1377] have no argument against the increases.

Exam. Mullen: He might state that as his opinion, but I don't see why he refers to the argument made before the State Commission. He can state as his opinion he thinks that result may follow. Let us look it over here and eliminate the argument.

The Witness: The top of page 4 documents the basis for our opinion.

Mr. Hobbs: We are taking that——

Exam. Mullen: The last three lines on sheet 3 appear to be argument to me.

Mr. Quirk: The top of Page 4, Mr. Examiner——

Exam. Mullen: I have not come to that yet. Just a minute, please.

Mr. Quirk: All right.

Exam. Mullen: The first eight lines of sheet 4 are argument.

Mr. Hobbs: I think, Mr. Examiner, the witness in lieu of the part you have struck, may state in his own language his opinion as to the effect on those rates.

Exam. Mullen: Let's continue with the statement, and let's finish that one first.

Mr. Hobbs: Proceed, then.

Mr. Quirk: I object.

Exam. Mullen: I will sustain Mr. Quirk's objection as to those particular portions.

Mr. Quirk: At the top of page 4, that is not only objec- [fol. 1378] tionable, for practically the same reason, but it is hearsay, a good deal of this is hearsay.

Exam. Mullen: I have sustained the objection to that portion. That comes out.

By Mr. Hobbs:

Q. Proceed, then, Ir. Tolan.

A. We are very concerned that this Ogden gateway, if opened, will seriously impair the revenues of the rail lines serving Washington. The rail state revenues in Washington on Washington intrastate traffic was over $30 million last year. We feel our huge interest in state rail rates in Washington are further endangered by the proposal of the D&RGW here.

Why the Northwest Produce Association opposes the application:

We are large shippers of fresh fruit and produce from Texas and from Florida during many months of the year to points in Washington and Oregon. I have managed traffic for this Association for nearly five years and have yet to see a car of fresh fruit and produce require a stop at a local D&RGW point.

We have no pocket market at Ogden or Salt Lake via the D&RGW to Seattle, Tacoma, Bellingham, Spokane or any other large consuming point in Washington because there is a full line of rates in conjunction with the D&RGW via the Western Pacific and Great Northern to Washington points, and the Union Pacific makes the entire Salt Lake area intermediate by tariff application so that shipments [fol. 1379] can be diverted on to this area from that point.

As produce distributors, we would not use the D&RGW gateway because of greater time in transit requiring added icing cost under Rule 240 or other non-fixed refrigeration charges. We would not use the Ogden gateway if it was put in, because of the additional time which we estimate to be at least 24 hours over the fast service via the Union Pacific from Kansas City. Most of the fruit and vegetables from Texas and Florida channel through Kansas City to the State of Washington because of faster time in transit in connection with the carriers via that gateway.

Never once have we found it necessary to request the opening of the Ogden gateway for perishable shipments. Never once, to my knowledge, and a survey of all ship-

ments made over the past several years has verified, have we paid a combination rate due to a pocket market on perishables.

We do not desire the opening of the Ogden gateway. We feel that to open the gateway will have an adverse effect on our westbound fast routings via the Union Pacific, for it would tend to siphon off other traffic which is used to make up trains which haul the perishables on fast schedules from Kansas City to the Northwest.

We feel that by splitting the business available and short hauling the Union Pacific, it will only result in lesser number of scheduled trains from Kansas City with conse-
[fol. 1380] quent depreciation in service and greater refrigeration costs on many cars, plus greater depreciation in the quality of the fruit or vegetables due to longer time in transit.

Why Northwest Furniture Manufacturers Association opposes the application:

The members of the Northwest Furniture Manufacturers Association ship large quantities of furniture to the Denver area in less than carload lots. The biggest hurdle we have in obtaining reasonable rates on our commodity is the large amount of damage claims which exist on furniture. The more interchange, the greater the damage to furniture, is almost axiomatic for those shipments.

To points in Denver or east of Denver, we hold interchanges to a minimum. The same comment would apply on carload traffic which moves in large volume to transcontinental territory. Beyong the greater damage hazard of an Ogden interchange on transcontinental traffic from points in Washington and Oregon, there would be the additional time in transit which we estimate to be not less than 24 hours.

Exam. Mullen: Now just a moment. That next paragraph is argumentative, and I think should come out.

The Witness: Absolutely the only freight rates on less than carload lots of furniture which we consider equitable in the entire northwest as a group (and about 70 per cent [fol. 1381] of all furniture moves in less than carload lots)——

Mr. Quirk: Isn't that argument, and also irrelevant and immaterial?

Mr. Hobbs: He is stating facts.

Exam. Mullen: He is stating his reasons for his opposition as I see it.

Go ahead, sir.

The Witness: —are the rates to the Union Pacific points in southern Idaho and Utah. We do not want to endanger our ability to retain those rates by favoring diversions of traffic which can make the furniture traffic subject to greater damage and to reducing the ability of the one railroad in the entire Pacific Northwest that has for many years given the furniture industry of the northwest an equitable and fair rate structure. There is absolutely no industry demand from any of the 70 members from any of our many shipping points for routes over the Ogden gateway in connection with the D&RGW and the Union Pacific.

Why the fishing industry opposes the application:

"The biggest problem of moving frozen fish from the Pacific Northwest to the area covered by the complaint east of the Rocky Mountains is car service. There is a very limited number of high quality refrigerator cars of adequate capacity for the demands of the industry. The largest supplier of refrigerator cars in the west is the Pacific Fruit Express Company, which is the joint operation of the Union Pacific with the Southern Pacific. Unless the [fol. 1382] Union Pacific can be assured——

Mr. Quirk: I think that is argument. He is just assuming unless so and so is so and so, that something is going to happen.

Exam. Mullen: Yes, that appears to be argumentative. It is only one sentence. We will leave it in.

Go ahead.

The Witness: —of every bit of traffic and revenue possible in the handling of refrigerator shipments, we just won't have adequate cars. The situation is not such in the northwest now that we can endanger the present situation. We want the Pacific Fruit Express to put in more cars and not less cars. We urge the Interstate Commerce Commission not to endanger our refrigerator car supply

for the future by killing the desire of the railroads to continue their program of new refrigerator equipment.

The record should also show that if the Ogden gateway was opened, it would not be a practical gateway for the handling of fish——

Exam. Mullen: Just a moment, I don't understand that statement "the record should also show"—what do you mean by that?

The Witness: Rephrasing that, we want to bring to the Commission's attention.

Exam. Mullen: What?

[fol. 1383] The Witness: If the Ogden gateway was opened, in lieu of the first phrase.

Exam. Mullen: Oh, all right. In lieu of that first phrase then.

The Witness: We want to bring to the Commission's attention that if the Ogden gateway was opened, it would not be a practical gateway for the handling of fish eastbound from the Pacific Northwest. All frozen fish moves on a cost of ice basis, putting the penalty on the shipper for any slow time in transit. As the Ogden interchange, as distinguished from a through movement directly east, would be at least 24 hours longer, it would mean the industry would have to pay that much penalty in refrigeration cost to use the Ogden gateway.

On the basis of a complete survey of all the shippers on transcontinental routings, I do not know one shipper of fresh or frozen fish who would even consider the Ogden gateway if it were open today.

Why I am speaking in opposition to opening the Ogden gateway for the general list of industries for whom I am Traffic Manager:

I have been closely connected with preparing route, rate and traffic advice information for a huge number of miscellaneous manufacturers and receivers of freight, primarily in the states of Washington and Oregon for the past several years.

[fol. 1384] Exam. Mullen: Just a moment. I don't think that testimony has any bearing in this case. It is all negative, "I do not know." I think that ought to come out.

Mr. Quirk: The whole think is negative.

By Mr. Hobbs:

Q. Well, aren't you in position, Mr. Tolan, to know whether or not they did have to pay the combination rate?

A. We are, yes. We survey practically all shipments for all clients.

Q. Do you mean rather then, as you state "I do not know" that your investigation has developed that no shipper has paid the combination rates?

A. Yes.

Exam. Mullen: This witness ought to testify of his own knowledge. This to me is plainly negative, "I do not know of one single shipper—" I don't know what weight I can give that kind of testimony. I think it is purely negative, and should be stricken out.

The Witness: In my survey of the shipments made by the clients that I represent I have never once had it brought to my attention, nor have never once discovered a single case where a combination rate into the Northwest was paid over Ogden or Salt Lake, due to the absence of the transcontinental route sought in this proceeding.

I have never once requested an Ogden gateway. On the basis of my experience with over 300 industries in the Pacific Northwest, I can state that as far as they are con-
[fol. 1385] cerned, there isn't the slightest public demand from them for opening of this gateway.

While the Denver & Rio Grande Railway solicited our support for their position in this matter, after the most careful survey, I could not escape the conclusion that for the people I represent, the most serious injury to them could occur if the Union Pacific position is not sustained. For that reason, we want to register our opposition to the relief sought in this action.

By Mr. Hobbs:

Q. Do you have anything further, Mr. Tolan, you care to comment upon?

A. No, sir.

Mr. Hobbs: You may cross-examine.

Cross-examination.

By Mr. Quirk:

Q. Mr. Tolan, are you a member of the bar of Washington?

A. I am.

Q. In other words, you act both in the role of a lawyer and also in the role of a traffic manager?

A. That is right, except I do not take general law cases.

Q. You do file complaints with the Interstate Commerce Commission on occasion, don't you?

A. Quite frequently.

Q. Haven't you filed complaints against the Interstate Commerce - in which you sought to persuade that Com- [fol. 1386] mission to reduce the rail rates of the Union Pacific and others?

A. Yes.

Q. Well do you show the same concern about the effect on your clients' business when you seek a reduction in rates by complaint as you ahve shown here?

A. No, I think Mr. Quirk, your answer on that must be to understand the issues here as contrasted with the issues there, in those cases——

Q. Now you are not answering my question.

A. It can't be answered yes or no.

Q. Well, when you——

Mr. Hobbs: I think the witness is attempting to answer the question, if you give him a chance.

Exam. Mullen: Just a minute now. Mr. Quirk, are you rephrasing your question?

Mr. Quirk: No.

Exam. Mullen: All right, read the question.

Mr. Quirk: Let him answer it in his own way then. I interrupted him.

Exam. Mullen: Proceed, Mr. Tolan.

The Witness: In this proceeding, I can see no possible benefit to any client that I represent. In the cases which you refer to there is a very definite interest, and a very definite benefit to the people of the State of Washington [fol. 1387] that I represent. They are clearly distinguishable on that ground.

By Mr. Quirk:

Q. In other words, you think it always a benefit to the people you represent when you get a rate reduced.

A. If it engineers more traffic, and enables them to get more business. In this case they get nothing.

Q. How many complaints have you filed against railroads in the last five years seeking reduced rates in acting in your role as a lawyer, I imagine, or in any role?

A. Oh, I would say 25, but not all of them have been for reduced rates.

Q. Have you filed some for increased rates?

A. In I&S cases, yes.

Q. Were you directed by any of the clients you pretend to represent to come here and deal with this matter in the way you are?

A. Yes. I have the resolution here in case you would like to see it.

Q. Have you ever been retained by the Union Pacific as an attorney?

A. No, sir.

Q. The Northwest Produce Association is composed of what?

A. The principal fruit and vegetable distributors in Seattle, Tacoma and Spokane.

Q. Are they receivers of freight?

A. Almost entirely.

[fol. 1388] Q. And do you exercise control over routing, yourself, when you are acting in role of traffic manager, and not as lawyer?

A. Yes, we route not all involved in this case, but we provide routing for between 20 and 30 thousand carloads of freight a year.

Q. You do?

A. Yes.

Q. Does it all move over the Union Pacific now?

A. No, most of that in fact is not involved in this proceeding. It is movement between points in the West.

Q. Do any of the people you represent here have shippers involved in this proceeding?

A. Oh, yes.

Q. How much in the way of carloads?

A. I have not computed that number. It is substantial, though.

Q. I thought you had made a very careful survey of this set-up.

A. I have, but not from a per car count. I didn't feel that was necessary.

Q. You don't think it is important to determine how much traffic is involved?

A. I think as long as substantial traffic is involved the exact amount of the substantial quantity is irrelevant.

Q. What would you call "substantial"?

A. Anything about one hundred cars.

Q. You use one hundred as a base?

[fol. 1389] A. That is right.

Q. If this joint rate should be established by the Commission in spite of your opposition, would any of the people that you act as traffic manager for route shipments via the Ogden and the Denver and Rio Grande?

A. As a general policy, no. Infrequent cars, possibly.

Q. If we assume that this record shows already that there are shippers and receivers that need joint rates, for transit reasons or others, would your group be opposed to them getting it even if they need it?

A. In the method proposed here, yes, because, Mr. Quirk, there is adequate machinery now for anyone who has an injury to get it through formal complaint. For example, if a lumber shipper wanted it.

Q. What do you think this proceeding is?

A. This is a blank check.

Q. Don't you know this is formal complaint?

A. An individual formal complaint for the specific problem involved.

Q. In other words, you think the only people that have a right to complain is the shipper?

A. I didn't say that, you said that.

Q. This is a formal complaint anyway, you know that.

A. That is right.

Mr. Quirk: That is all.

[fol. 1390] Mr. Hobbs: That is all. Thank you.

(Witness excused.)

Mr. Hobbs: Mr. Carkin of the Oregon Commission, has a statement to make.

JOHN H. CARKIN was sworn and testified as follows:

Exam. Mullen: All right, you may proceed.

Direct examination.

The Witness: My name is John H. Carkin. I am Director of Transportation for the Public Utility Commissioner of Oregon. I am a graduate of the University of North Dakota in Arts and Law, and practiced for 21 years in general practice. I have been with the state for the last 20 years. I am not a rate man nor a traffic man, but I have been in some of the transcontinental cases. I appear here in making a statement for the Commissioner George H. Flagg, Public Utility Commissioner of Oregon.

The position of the Public Utilities Commissioner of Oregon in this proceeding is set forth in his Petition for Leave to Intervene which was presented at the Salt Lake hearing last December. Under the laws of the State of Oregon, it is the duty of the Commissioner to investigate interstate as well as intrastate rates and practices of common carriers by railroad, and if warranted he is authorized to file complaints with, and/or appear in proceedings before the Interstate Commerce Commission on behalf of [fol. 1391] the State, its shippers and receivers of freight.

After fully considering the issues involved in this case, the Commissioner concluded that the interests of the State as a whole required his intervention on behalf of the defendants in this proceeding.

Defendant Union Pacific Railroad Company has property and other investments in the State of Oregon, and for the purpose of serving shippers and receivers of freight located therein has provided much rolling stock and other equipment for the transportation of the many products produced in the State of Oregon which are marketed in the large consuming centers of the east and middle west.

Its railroad lines serving Oregon constitute, in most instances, the shortest, fastest and most economical route to those consuming markets. Present through routes open to shippers in Oregon, so far as the Commissioner has knowledge, are adequate and sufficient for the purposes of shippers located therein. The routes proposed in this complaint are more circuitous and longer than those of the

Union Pacific between Oregon and the consuming markets referred to, and time in transit for transportation over those through routes would be longer.

The D&RGW can add nothing to the economy of the State of Oregon, but on the other hand through the diversion of traffic from the Union Pacific with the consequent loss of revenue thereon, the ability of the Union Pacific to continue to furnish adequate transportation service to [fol. 1392] shippers in the State of Oregon and to continue the investment of large sums in the State in the betterment of those properties would be jeopardized.

A check of the Commissioner's files discloses no formal or informal complaint against the service rendered by the Union Pacific either with respect to the furnishing of cars or the transportation of shipments handled by it. While it is likely that, during periods of general car shortage, shippers and receivers of freight located in Oregon may have been inconvenienced to the same extent as were such shippers and receivers generally, the record of the Union Pacific in the matter of the furnishing of cars in Oregon, so far as the Commissioner has knowledge, is not open to censure.

The Commissioner has never been asked by any shipper or groups of Pacific Northwest shippers to seek the establishment of the through routes requested by complainant, and since the filing of the complaint herein, neither shippers nor groups of shippers have requested that he support the complainant in this case, and no showing has been made to him that if complainants are given what they seek herein, it would result in either lower rates or better service to shippers in the Pacific Northwest.

Exam. Mullen: Any cross-examination?

Mr. Quirk: Is the witness ready for cross?

Mr. Hobbs: Mr. Carkin is not appearing here as my witness, he is appearing for the Oregon Commission.

[fol. 1393] Cross-examination.

By Mr. Quirk:

Q. Mr. Carkin, you say that no shippers nor group of shippers have requested that the Commissioner of Oregon, for whom you say you speak, has requested that he support

the complainant in this case. Now, hasn't your Commissioner received letters from Mr. Benning of the Amalgamated Sugar Group, and a Mr. Miller, of Milton, Oregon, who represents the cooperative group, and a Mr. Titus, who represents a lumber group within the last month or within the last few weeks, I don't know the date?

A. What was the first man, did you say?

Q. Mr. Titus—who did I mention first, Benning, of the Amalgamated?

A. No, I know nothing of that.

Q. You don't recollect it?

A. No.

Q. Have you received anything from Mr. Miller of Milton, Oregon?

A. We sent a man over there to see what his difficulty was, and he seemed to have some peeve with the Union Pacific, but he had no complaint as to the issues in this case. We were endeavoring—the Commissioner was endeavoring to find out whether there were any people that would be hurt or would be helped.

Q. He testified here just the other day in support of this complaint.

[fol. 1394] A. I don't know anything about that.

Q. Then at least you had that shipper that asked you to act, didn't you?

A. We went over, and he didn't ask us to act at all.

Q. How about Mr. Titus?

A. Mr. Titus wrote us a letter, and I discussed the thing with him, and the letter, as I recall, was to the effect that he was surprised that we were in on behalf of the Union Pacific, but there was nothing further said.

Q. Isn't it a bit unusual for a regulatory authority such as your Commissioner, to take sides in inter-railroad disputes?

A. I don't know as to that. We consider the Union Pacific in a sense a northern railroad, very important to the economy of our shippers, and I think the Commissioner's viewpoint is we should get in on behalf of the Union Pacific.

Q. Are you familiar with Section 113 and 118 of the Oregon Public Utility Law, as to joint rates?

A. Well, I know there is such a provision.

Q. Isn't it the policy of your law on intrastate traffic that joint rates and routes should exist between railroads?

A. I wouldn't say that. I don't know as to that.

Q. Are you familiar with the law?

A. Am I what?

Q. Are you familiar with your law?

A. No, I am not with the detail of it, no, sir.

[fol. 1395] Mr. Quirk: That is all.

Mr. Hobbs: Mr. Carkin, before the Commissioner intervened in the proceeding at Salt Lake last December, and of course before your testimony now, was the Commissioner approached by representatives of the D&RGW?

The Witness: Numerous times, yes, sir.

Mr. Hobbs: Thank you. That is all.

(Witness excused.)

Mr. Hobbs: Mr. Clay.

FRANK S. CLAY was sworn and testified as follows:

Direct examination.

By Mr. Hobbs:

Q. Have you been sworn, Mr. Clay?

A. I have.

Q. Do you have a written statement which you care to read into the record at this time?

A. Yes, I have.

Q. Will you please proceed with it?

A. My name is Frank S. Clay and I reside in Portland, Oregon, and am now and have been for the past nine years, Secretary-Manager of the Portland Freight Traffic Association, Suite 401-02 Spalding Building, Portland 4, Oregon. I have lived in Portland over 40 years and have been engaged in traffic work for the past 30 years.

Portland Freight Traffic Association is a voluntary organization with its offices and place of business at [fol. 1396] Portland, Oregon. It has been actively and continuously in existence for the past 53 years, and its

membership consists principally of persons, firms, and corporations engaged in various lines of business in Portland, Oregon, and the surrounding metropolitan area including Vancouver, Washington.

Most of the members are manufacturers, jobbers, and wholesale distributors of various commodities. Also affiliated with and members of the Association are such public and semi-public bodies as the Portland Chamber of Commerce, Port of Portland, Commission of Public Docks (an autonomous agency of tht City of Portland, Oregon), Portland Clearing House Association of Banks, Port of Vancouver, Washington (a municipal corporation operating the port district in that city), Vancouver Chamber of Commerce, Port of Longview, Washington, and other agencies.

The individual members and the public agencies referred to utilize to a considerable extent the facilities of transportation offered by common carriers by railroad that serve this area. The Association was formed and is maintained to defend, to sponsor, and to develop the interests of its members and broadly of the community at large, in the rates and services of various agencies of transportation, including common carriers by railroad and matters relating to traffic and transportation and in questions or [fol. 1397] controversies in connection therewith.

The complaint in this case seeks to compel the establishment of joint through rates via the D&RGW Railway through the Ogden and Denver gateways on eastbound and westbound Trans-Continental traffic originating at or destined to points in the States of Oregon, Washington, Idaho and Montana, and in Utah north of Ogden served by the Union Pacific Railroad.

The members of the Portland Freight Traffic Association constitute a cross-section of business firms located in this area and in the conduct of their business, they annually ship hundreds of carloads of freight, both eastbound and westbound to and from Trans-Continental territory and to a large extent, utilize the route of the Union Pacific through Omaha and Kansas City gateways.

The service of the Union Pacific has been excellent. I have discussed this case with many members of the Traffic

Association and have found in all instances, our members are not interested in an additional or alternative route in connection with the D&RGW Railway at Ogden or Denver. They regard this route as simply a longer, more circuitous route with no offsetting advantages which, if made available to them, they would not utilize because of the much faster and better service which obviously is offered the shipping public over the direct through route of the Union Pacific via its own rails to and from the Missouri [fol. 1398] River.

Exam. Mullen: Just a moment. I regard the next three paragraphs as purely argumentative.

Mr. Quirk: I concur with you, Mr. Examiner.

Mr. Hobbs: Mr. Examiner, so far as the matter contained in the first paragraph that you referred to, it seems to me it merely states the facts so far as the development in the Portland area, by the Union Pacific Railroad Company. It forms among other things the basis of the opposition of Mr. Clay's association.

Exam. Mullen: Well, that paragraph coupled with the next two, it seems to me is all one argument. I think it should be stricken. That statement should come out.

Mr. Hobbs: We object to it, if the Examiner please.

Exam. Mullen: Do you object to the ruling?

Mr. Hobbs: I beg your pardon?

Exam. Mullen: You object to the ruling you say?

Mr. Hobbs: Yes, sir.

Exam. Mullen: Exception will be noted.

The Witness: The members of my Association are appreciative of the efforts of the Union Pacific in furnishing them with satisfactory transportation service and are desirous of having that service continued to be available to them. However, from experiences in their own businesses, they realize that if the income of the Union Pacific is materially affected through the diversion of traffic now [fol. 1399] handled by them to the D&RGW, that economies must necessarily be made by the Union Pacific to offset such losses.

Any such economies that would result in restricting the present service enjoyed by our members in the way of fewer trains operated, less frequent switching of their plants, etc., would adversely affect their businesses.

Exam. Mullen: Just a moment, that next paragraph it seems to me is argumentative, and should come out.

Mr. Hobbs: If the Examiner please, it seems to me to be coupled in with the paragraph just previous.

Exam. Mullen: I will let that stay in. The paragraph I'm referring to starts off "Another aspect of the situation"——

Mr. Hobbs: Yes, in the previous paragraph it is expressed that the economies would result in fewer trains, and other economies, and in this one it is the same thing only it is a matter of increases in freight rates.

Exam. Mullen: Not the way it is put here, as I read it.

Mr. Hobbs: I am certain that is what the witness meant by that, isn't that true?

The Witness: That is right.

Exam. Mullen: I am reading the statement as I see it, that is argumentative and should come out.

By Mr. Hobbs:

Q. Can you reframe what you had in mind in that paragraph, Mr. Clay?

[fol. 1400] A. Yes, I think I can.

Our position is this: The rail carriers, the transcontinental rail carriers and other carriers have been before the Commission in the Ex Parte cases 162 up to 168, are badly needing revenues. The Union Pacific Railroad Company is one of the principal railroads serving the Pacific Northwest, and particularly Portland and the surrounding territory. It is perfectly obvious to us——

Exam. Mullen: Just a moment, that is argument. What is the point you are trying to make?

The Witness: The point is, if they lose substantial quantities of traffic.

Exam. Mullen: They may have to raise their rates; is that it?

The Witness: We think they will have to raise their rates, yes, sir.

Exam. Mullen: That is your point.

The Witness: Yes.

Exam. Mullen: All right. You can go on from there "In the course of my duties"——

The Witness: In the course of my duties as Secretary-Manager of the Traffic Association, I am in constant and daily touch with our members in the consideration of their shipping and traffic problems. If any of them had any desire for routes or service via the Ogden and Denver gateways in connection with the D&RGW, such desire would be known to the Association. However, I have never had a [fol. 1401] request from any of the members or a desire expressed by them for the establishment of through rates and routes in connection with the D&RGW on Trans-Continental traffic.

Since the Union Pacific has pioneered and developed the territory, and is now serving our members satisfactorily and adequately,——

Mr. Quirk: That is argument.

Exam. Mullen: That is pure argument. Strike that out.

Mr. Collins: Mr. Examiner, may I be heard for a moment?

Exam. Mullen: Yes, Mr. Collins, what is it?

Mr. Collins: By adequate and satisfactory transportation service, that is one of the bases in Section 15 of the Act, which involves the exercise of the power given it in Paragraph 3 of that section. Now what more pertinent evidence could you have, and what more pertinent evidence could the Commission desire to act upon than a statement by this gentleman's traffic manager for so many people, traffic advisor, than the quality of the service that he receives, which he stated, it may be in the words of the statute, but it doesn't seem to me the way this is going on it gives the witness any room to express himself in any kind of words.

Exam. Mullen: He has already expressed himself. I am referring merely to the last paragraph.

Mr. Collins: I thought you were going to strike it out. [fol. 1402] Exam. Mullen: Why, yes, that is straight argument as I see it.

Mr. Collins: The fact that the Union Pacific is serving them satisfactorily is argument?

Exam. Mullen: He stated he received satisfactory service, but the way the last sentence is stated is pure argument and in my opinion should be stricken. At least that is my ruling. Strike that out.

The Witness: Mr. Examiner, do we take the whole last paragraph out or parts of it?

Exam. Mullen: I'm referring to the last paragraph of sheet 4. You read all the rest.

By Mr. Hobbs:

Q. Do you have anything further to add, Mr. Clay? I have some further questions for you, but do you have anything to add?

A. Only this, Mr. Hobbs: That it is the position of our association, summed up in a nutshell, we do not now need, and have not needed, and our members have no desire for the establishment of the Ogden-Denver gateway.

Q. The Union Pacific Railroad is not the only railroad serving the City of Portland, is it, Mr. Clay?

A. No, we have Great Northern, Northern Pacific, SP and S; Southern Pacific.

Q. Now, in connection—directly in connection with this case, your association was approached, was it not, by the [fol. 1403] Union Pacific Railroad representatives?

A. Yes, we were contacted by the Union Pacific in connection with the case, to ascertain our position.

Q. What form did that contact take, Mr. Clay?

A. Well, you mean how——

Q. Was it some personal contact with you?

A. We were called upon by the officials of the Union Pacific to state our position in the case, and the case was explained to us, and we came to our conclusions in connection with that.

Q. Were you also approached by representatives of the D&RGW?

A. We were by the local representative of the Denver and Rio Grande.

Q. Now just to what extent did the D&RG spend their effort in attempting to get you to come in on their side of the case?

A. Well the local representative of the D&RGW in Portland asked us to—in a sense it was put to us in this way—this asked us if we couldn't support the D&RGW, if we would take a neutral position in the case, and not

take the side of the Union Pacific, and of course we said that such wasn't our desire or conclusions after we had given careful study to it, because we feel, as I testified, that we have no use for the Ogden gateway or the Denver gateway, and we wouldn't use it if it were established.

Q. Did you hear from anyone else in connection with possible intervention on the side of the D&RGW? Did you [fol. 1404] receive any other communications or anything else?

A. Well, there is a group in Portland, a Shippers Industrial Traffic Club in Portland, composed of about 50 members, known as the Portland Industrial Traffic Club, they were approached by the D&RG, to take the position in the case. But they declined to do so. I am also a member of that organization.

Q. I don't think you understand what I meant. Did you receive any communication with anyone connected with the D&RG soliciting your support in this case?

A. Yes, I received a letter from Mr. Hogue, the vice president of the D&RG, and a copy of the complaint.

Q. Do you have that with you?

A. Yes, I have. It is a letter from Mr. Hogue, dated August 10, 1949, and a copy of the complaint, and a map, and explanatory matter in connection with the filing of the complaint.

Q. May I have those? (Handed to Mr. Hobbs.)

Did the local representative of the D&RGW at Portland, did he supply you with any literature in connection with the dates?

Mr. Quirk: Is this relevant to the case?

Mr. Hobbs: If you will just wait a minute.

Exam. Mullen: Go ahead.

The Witness: Yes, the representative of the D&RGW at Portland gave me a copy of the prepared statement by Mr. Bradford which I have here outlin-g the argument supposedly and position of the D&RGW in support of their case.

[fol. 1405] By Mr. Hobbs:

Q. Do you have that?

A. I have that here.

Q. And did he leave any other literature with you?

A. Twenty questions on the Ogden gateway.

Q. Did he say what the purpose of this was when the local representative called on you, the purpose of leaving this literature and this statement of Mr. Bradford's with you, did he say what the reason was?

A. The purpose was to influence our decision to either support the D&RGW in the case, or take a neutral position and not support either side.

Q. Do you know when you received this literature and a statement from the local representative?

Mr. Quirk: I object to this, on the ground it is irrelevant and immaterial. The Denver and Rio Grande doesn't deny it tried to persuade various people, and so did the Union Pacific. Why go back behind that? That is something Mr. Collins tried to bring up at the Salt Lake hearing.

Exam. Mullen. What was the purpose, Mr. Hobbs?

Mr. Hobbs: The purpose that was expressed both at Salt Lake City and here yesterday in connection were much the same matter, Mr. Examiner, is that by this literature that was distributed by the D&RG at or about the time the complaint was filed, we contend was an attempt on the DRG&W to arouse public interest in the case of which none existed prior thereto. We think that is an important [fol. 1406] thing.

Exam. Muller: Is there any dispute as to that fact that the D&RGW endeavored to interest the shippers in this territory in this complaint?

Is that a disputed fact?

Mr. Quirk: It is not.

Mr. Hobbs: Has it been established yet that is the fact? That is what we are attempting to do.

Mr. Quirk: We just conceded that.

Exam. Mullen: The other side conceded that.

Mr. Quirk: It has been established. You have not been here, Mr. Hobbs.

Mr. Hobbs: Oh, yes, I have.

Exam. Mullen: Just a moment. Let's stick to what we have here.

Mr. Quirk: Let me make this statement. It has been

established here also, in some instances when we did persuade——

Exam. Mullen: Mr. Quirk, we are interested solely now in a single question. Cannot the parties agree that the D&RGW did solicit shippers in this territory to support its complaint, can that be agreed upon by the parties here?

Mr. Quirk: And that the Union Pacific——

Exam. Mullen: Wait a minute, that is another question. Just stick to one at the present time.

Mr. Collins: May we have read what you said, Mr. Examiner?

[fol. 1407] Exam. Mullen: Read what I said.

(Statement read.)

Exam. Mullen: I'm asking for a stipulation on that.

Mr. Collins: Yes. I could agree—mind you, I say I could agree to such stipulation as far as it goes. You say in this territory. But we would not have the benefit of the scope and expanse of the territory through which the D&RG exerted these efforts, and we do not have the character of effort that they made in order to stir up the public interest which we say did not exist until they began this campaign, so I don't feel that we could agree to so limited and non-committal a stipulation, Mr. Examiner.

Mr. Quirk: Mr. Examiner, we at least weren't influencial enough to require the Union Pacific to subpoena these witnesses, that otherwise would have been here without their influence.

Exam. Mullen: The parties ought to get together to stipulate those facts. I see no reason for going into a long discussion as to the exact methods, pamphlets, and literature, and so on. I don't see what that will accomplish.

Mr. Quirk: I have already agreed we have tried to get public support, Mr. Examiner. What more can the complainant do?

Mr. Hobbs: Would Mr. Quirk have any objection to put in as an exhibit——

Mr. Quirk: Yes, I do.

[fol. 1408] Exam. Mullen: Just a minute, please. Do you want to put that in as an exhibit?

Mr. Hobbs: That is right, an exhibit, the pamphlet of 20 questions, the statement that was left by this gentleman

by the local representative of the D&RG, Mr. Hogue's letter, and the matter that is referred to in there.

Exam. Mullen: That is offered, then, as a representative type of solicitation you are speaking of?

Mr. Hobbs: Yes, sir.

Exam. Mullen: Will that serve your purpose?

Mr. Hobbs: Immediately it certainly will.

Exam. Mullen: Do you contemplate putting any more in?

Mr. Hobbs: I do not.

Exam. Mullen: All right. Mr. Quirk doesn't object to that.

Mr. Quirk: Wait a minute. I have not seen the letter.

Exam. Mullen: I beg your pardon.

(Letter shown to Mr. Quirk.)

Mr. Hobbs: I'm sorry, Mr. Examiner, so far as I am concerned, we don't have copies enough of any of this literature to hand out.

Exam. Mullen: That won't be necessary. The parties are all aware of what it is.

Mr. Hobbs: You mean, then, if we have this marked as an exhibit.

Exam. Mullen: We will receive it as an exhibit.

[fol. 1409] Mr. Hobbs: And I need file but the one copy.

Exam. Mullen: That is right.

Mr. Hobbs: In order then that there may be no question about it, will you assign an exhibit number at this time?

Exam. Mullen: Are you going to offer it now?

Mr. Hobbs: Yes, I will.

Exam. Mullen: Exhibit 30.

Mr. Hobbs: Exhibit 30 then, Mr. Examiner, will consist of a letter from Mr. F. C. Hogue, vice president of traffic of the Denver and Rio Grande, dated August 10, 1949; a copy of which bears the title of the Rio Grande seeks opening of closed door away. A copy of a statement apparently executed by Mr. R. K. Bradford, vice president of the D&RG, and the pamphlet called "Twenty Questions." There will be no need of putting in the complaint.

Exam. Mullen: All right.

Mr. Hobbs: I offer them in evidence at this time.

Exam. Mullen: They will be received in evidence.

(Defendant's Exhibit No. 30, Witness Clay, marked and received in evidence.)

Exam. Mullen: Any further questions, Mr. Hobbs?

Mr. Hobbs: No.

Cross-examination.

By Mr. Quirk:

Q. Mr. Clay, is the Union Pacific a member of the Portland Chamber of Commerce?

[fol. 1410] A. It is my understanding they are.

Q. Do all the other railroads that serve Portland belong to the Portland Chamber of Commerce?

A. My understanding, the four major lines are members, yes, sir.

Q. Am I correct in assuming the members of your group are only interested in railroads that are in Oregon?

A. No, sir. When you say my group, I assume you mean the Portland Freight Traffic Association.

Q. Yes, that is your group, isn't it?

A. Yes, the members of my group are all shippers, all industrial concerns, and we are interested as we have stated in the betterment of transportation services of every kind affecting our community.

Q. You said you were not interested in the Ogden gateway at all, didn't you?

A. That is right.

Q. Don't some of your shippers ship to local points on the Denver and Rio Grande in Colorado?

A. Yes, sir, they have through rates in connection with the Ogden gateway, to local points on the D&RGW. I confined my statement to transcontinental traffic, Mr. Quirk.

Q. Well, then, they ship from points on the Denver and Rio Grande in Colorado, too, through Ogden, don't they?

A. That is correct.

Q. Don't you know that a large part of the business of the [fol. 1411] Union Pacific is what is called "overhead traffic"?

A. No, sir, I don't know what you mean by that statement.

Q. Bridge traffic, traffic which originates beyond its line and goes beyond its line.

A. Not as far as the Pacific Northwest is concerned. That is the end of the line.

Q. Are you a traffic man?

A. Well, I have been engaged in the work for about thirty years.

Q. Haven't you ever heard the term "bridge traffic" as applied to railroads?

A. Yes, I have heard the term, but it is——

Q. Well, it means then, doesn't it, traffic that originates beyond the Union Pacific, and going to destinations in the east beyond Omaha, we will assume, that is what I mean by "bridge traffic".

A. All right, I will take your statement.

Q. Didn't you know the Union Pacific depends to a very large extent on bridge traffic, for a large part of its total revenue?

Exam. Mullen: The question is do you know?

The Witness: I don't know that myself, Mr. Quirk, no.

By Mr. Quirk:

Q. In other words, you are familiar with this, and you are very much concerned what is going to happen to the railroad, but you don't know that?

A. I only know in a general way that the Union Pacific draws large amounts of traffic from points east of the Missouri River, and how much, or to what extent I don't [fol. 1412] know.

Q. Let me put it this way. I take it your shippers and receivers who belong to your association are interested in maintaining an adequate railroad from all points in the United States, aren't they?

A. No, we are only interested in the railroads that serve the Pacific Northwest.

Q. I see.

Wouldn't your shippers want to ship from Oregon to say Pennsylvania or New York?

A. Of course, shipping that way all the time.

Q. Wouldn't they be interested then in joint rates and

routes being opened between the various railroads that are necessary to use to get between those points?

A. Most assuredly we have to reach the eastern markets. That is where we ship.

Q. You say you are only interested in the railroads serving Oregon, why do you say that?

A. Well——

Q. What would happen if some of these railroads just quit in the east? How would you get there?

A. We wouldn't get there.

Q. Do you think as a traffic man that any of these railroads can live on strictly local traffic, traffic originating and terminating on their line?

[fol. 1413] Mr. Hobbs: If you know.

The Witness: I couldn't answer that question with any knowledge that would be of any benefit to you, Mr. Quirk. I wouldn't know.

By Mr. Quirk:

Q. I am not asking you to benefit me. I thought you were a traffic man representing a great many people out there, and you have been in the business 30 years or more. I should think you, as a traffic man, would know—you expressed opinions about other things—would know something about it. You say you don't?

A. I know, naturally, that the railroads, besides the traffic they originate on their own lines, they get traffic on connecting lines, and all you say in that respect is true. To what extent a railroad could exist on traffic that it just originated and was destined to points on their own line, I don't know. I couldn't answer that.

Q. You are not enough interested in the national transportation system, where railroads are linked together, over routes generally, where the routes are generally open and available, are you, you are just interested in the Union Pacific in Oregon?

A. No, sir, we are interested in the national transportation policy, yes.

Q. Well then if a particular railroad would have difficulty in existing on local traffic alone, wouldn't you think that would be something that might interfere with the

national transportation system. I say that not only about [fol. 1414] the Denver and Rio Grande, but any railroad.

A. Well, if the answer to your question would mean the Union Pacific was to be deprived of their traffic to bolster this other line you are speaking of, I would say no.

Q. That isn't my point. You brought up this question of your great concern for the railroads. I didn't bring it up. You brought it up here.

A. Yes——

Mr. Quirk: All right, that is enough. Thank you.

(Witness excused.)

Mr. Overcash: I call Mr. Gentleman.

GERALD GENTLEMAN was sworn and testified as follows:

Mr. Quirk: I want to just interrupt a minute, Mr. Examiner. Now we have agreed to certain things. I have not heard anything from Mr. Collins yet. They have not given us any of their methods or what they did in connection with persuading people. Would you be interested in having that?

Exam. Mullen: Well, not at this point. Let's take that up at the session tomorrow, at the morning session. Perhaps you and Mr. Collins will get together in the meanwhile and agree to some stipulation as to that.

Mr. Collins: I may inform Mr. Quirk, Mr. Examiner, that Mr. Burns stated yesterday that we did call on people through the territory, from Salt Lake City and north, [fol. 1415] and explained our side of this controversy to them.

Mr. Quirk: That satisfies me.

Direct examination.

By Mr. Overcash:

Q. Mr. Gentleman, have you prepared a statement covering your testimony?

A. I have.

Q. You may proceed with your statement.

A. My name is Gerald Gentleman. I am General Manager of the Platte Valley Public Power and Irrigation District, North Platte, Nebraska. I have resided in North Platte for 25 years. I have been associated with the Platte Valley District from its inception 16 years ago.

Prior to that time I was Manager of the O'Connor Department Store, North Platte. I am a director of the Mutual Building & Loan Association, North Platte, and a member of the North Platte Chamber of Commerce and have served that organization on two occasions as President.

During the time I managed the O'Connor Department Store I became keenly aware of the fact that our business was dependent to a great extent on Union Pacific payrolls. A reduction in employment by Union Pacific was reflected immediately in our sales.

During the time I was associated with O'Connor Department Store approximately one-third of our sales were provided by Union Pacific employees and their families. A [fol. 1416] recent check by present store management indicates about the same proportion today.

North Platte has enjoyed a steady growth. Recently because of the large investment made by Union Pacific in a new retarder yard and freight transfer depot, this growth has been accelerated. It is apparent in the expansion of home building, the opening of new residential sections, and the expansion of the business district.

In our business we are aware of it by reason of an increase in power consumption. North Platte's power consumption has been stimulated by Union Pacific's expanded activities and at present Union Pacific accounts for sixteen per cent of the power consumed in City of North Platte.

I believe it proper to call attention to North Platte's war experiences. We were disturbed because we were not successful in getting a war installation for North Platte. Our fears were never realized because of Union Pacific's prominent place in transporting troops, equipment and munitions for the prosecution of the war.

This rail system had anticipated the load it would have to meet and war- ready with a double track road bed in excellent condition and the equipment to do the job. Every-

one living along this railroad knows how well it discharged its war responsibilities. The operations of the Union Pacific during the war provided activity in North Platte far [fol. 1417] surpassing any war installation we had anticipated having located in our city.

The Platte Valley Public Power and Irrigation District, North Platte, and Loup River Public Power District, Columbus, own the Nebraska Public Power System.

Exam. Mullen: Just a minute, Mr. Witness. Is this a public utility?

The Witness: It is a public corporation.

Exam. Mullen: Is it owned by the state?

The Witness: It is owned by the people of our district.

Exam. Mullen: Well is it——

The Witness: It is organized under the laws of the State of Nebraska.

Exam. Mullen: Is it publicly owned?

The Witness: It is publicly owned.

Mr. Quirk: You mean it is owned by the citizens of Nebraska.

The Witness: That is right.

Mr. Quirk: It is not politically owned, it is owned by public individuals.

The Witness: It is owned by the—it is termed in the laws as a public corporation.

Exam. Mullen: I see.

Mr. Overcash: Mr. Examiner, it is a public corporation created under our state laws to carry on this activity.

Exam. Mullen: Where does the ownership apply, who [fol. 1418] owns it, in other words?

Mr. Overcash: The citizens of the state, I suppose.

Exam. Mullen: As Individuals, not as individuals you mean?

Mr. Overcash: Not as individuals.

Exam. Mullen: All right, I just wanted to get it clear.

The Witness: The Nebraska Public Power System operates a high voltage transmission system serving that part of Nebraska east of North Platte. This district is in the middle of a large expansion of its generating plants and transmission system.

We have invested 16 million dollars in facilities since the war and are in the process of adding another 20 mil-

lion dollars to our investment. The facilities of the District have been built and are planned to serve the needs of its territory, including the railroads that serve the territory. Any changes affecting the traffic or business of the territory will be reflected in our business and a reduction of demand for power would create serious financial difficulties for this district. The Union Pacific serves and follows the Platte Valley and its welfare is of prime importance to all of us.

In conclusion I would like to make one other observation. I am and for some time have been a small stockholder of the Union Pacific. I have had an opportunity to study its operating and financial reports. It enjoys a large volume of traffic. It is efficiently operated. Its financial [fol. 1419] structure is one of best.

I wish to add here, considerable of the income of the Union Pacific is from investments and operations other than as a carrier.

Its plant and equipment have been built up to care for the traffic it has developed and now enjoys. Its welfare is of first importance not only to the territory it serves but to the entire nation. Our country as a whole needs the vital protection which a strong and healthy Union Pacific provides in time of national emergency and the maintenance of such strength can only come from continuance of a volume of traffic that utilizes its splendid facilities.

By Mr. Overcash:

Q. Do you have anything further?
A. No, sir.

Mr. Overcash: You may cross-examine.

Cross-examination

By Mr. Quirk:

Q. Mr. Gentleman, have you been led to believe by anything you have heard or been told that the Union Pacific is contemplating the abandonment of its railroad in Nebraska?
A. No, sir.

Mr. Quirk: That is all.

(Witness excused.)

Mr. Melia: Mr. Detweiler.

CLAUDE H. DETWEILER was sworn and testified as follows:

[fol. 1420] Direct examination.

By Mr. Melia:

Q. Mr. Detweiler, have you reduced your testimony to written form?

A. I have.

Q. Will you proceed to read it?

A. Yes, sir.

My name is Claude H. Detweiler and I reside at Twin Falls, Idaho. I am President and General Manager of Detweiler Brothers, Inc. and also President and General Manager of Magic Valley Processing Company. Detweiler Brothers is engaged in the plumbing, heating and electrical contracting business. It also handles electrical appliances. It started business in 1921.

Magic Valley Processing Company has manufactured potato starch since 1941.

The traffic of Detweiler Brothers consists of electric household appliances and a general line of plumbing and heating equipment. Most of these items are manufactured at various points in the east and southeast. Inbound carload shipments of the Detweiler firm totaled about 60 cars in 1949. There were no outbound shipments.

As to Magic Valley Processing Company, also located at Twin Falls, its carload traffic in 1949 consisted principally of 96 cars of outbound starch and 78 cars of inbound potatoes. The starch shipments moved principally to lower [fol. 1421] New England, the east and southeast.

On all of our eastbound shipments, we have used Union Pacific service to the Missouri River junction points such as Omaha and Kansas City, and I can say without hesitation that it has served us well.

Bearing in mind that we must depend entirely upon the Union Pacific for rail transportation, my purpose in appearing here is to emphasize the point that having a good railroad, we want to support it. The Union Pacific has always been attentive to our needs. For instance, I have in mind that in the spring of 1948, we began to realize that our competition from Europe and Maine was gradually forcing us out of our eastern and southeastern starch markets because of an average 25 cents per hundred freight differential from Maine manufacturing points and the low tariff and low water rate from Holland. In the summer of 1948, the starch manufacturers of Idaho requested me to represent them in approaching the Union Pacific officials to see if some relief could be obtained. We found them receptive and interested, because I think they realized that this was a mutual problem. If we were forced to close our factories, the UP would naturally lose the starch haul.

The UP successfully sponsored a proposal for a rate reduction through the Western Trunk Line Association and the reduced rates became effective February 1, 1949. At that time, all the starch plants' warehouses in Idaho were [fol. 1422] filled due to inability to make sales, but within a matter of 60 days, all warehouse stocks were liquidated. Certainly the Union Pacific could not afford to take the lead in getting this rate reduction for us and other Idaho shippers faced with eastern competition if it is required to give up traffic which it has originated after a relatively short haul, as the Rio Grande intends.

Let me express this one additional thought in connection with the starch matter: With the present condition of the potato market, the starch factories in Idaho are consuming enormous quantities of potatoes which would otherwise add to the surplus already on the Government's hands.

Exam. Mullen: Just a moment. That next paragraph is argumentative and should come out.

The Witness: The inbound and outbound carload traffic of our two companies originates and terminates at many scattered points in the east and southeast, and in all the years we have been in business, I can say that we have found that the various through routes and rates that have been available to us via the UP and its connections have

been entirely sufficient for us to come from and go to all the markets.

It is for these reasons, therefore, that the firms which I represent here do not favor opening of the Ogden gateway.

Mr. Melia: You may cross-examine.

[fol. 1423] Cross-examination.

By Mr. Quirk:

Q. Are there any groups of shippers or receivers of freight in Idaho that would be benefitted by the use of the Ogden gateway and the Rio Grande in respect to transit or other situations? You wouldn't as an individual be opposed to getting what they need?

A. I can only speak for myself, but I would be opposed to it, but for reasons not expressed here today, but which I would like to express to the Examiner.

Mr. Melia: Go ahead.

The Witness: I have been viewing with concern for the past yeaf to year and a half various reports coming out of Washington by column writers regarding meetings being held, and serious discussions entered into by the Department of Defense and other high government officials regarding the status of the railroads in America from a national standpoint and from a national defense standpoint. It was shocking to me as a layman to read——

Mr. Quirk: Mr. Examiner, I think this is not only not responsive to my question, but it has nothing to do with this particular question.

The Witness: It does.

Exam. Mullen: It strikes me that way. Why don't you ask a specific question?

Mr. Quirk: He answered my question.

Exam. Mullen: I thought you had another one.

[fol. 1424] Mr. Quirk: No, I have none.

Exam. Mullen: You go ahead with your questions.

Mr. Quirk: I have no questions, Mr. Examiner.

Exam. Mullen: You mean you are through.

Mr. Quirk: Yes, I am through.

Exam. Mullen: What is your question?

Mr. Quirk: He didn't ask any, he urged him.

Exam. Mullen: Read the answer, please.

(Answer read.)

Exam. Mullen: What is the purpose of that statement, Mr. Detweiler?

The Witness: Mr. Examiner, the purpose is, apparently our railroads——

Exam. Mullen: What do you want to prove? What is the fact you want us to recognize?

The Witness: That our government officials are considering subsidizing, letting the railroads go bankrupt, and nationalizing the railroads today.

Exam. Mullen: What has that got to do with the issue we have here?

The Witness: If you take away from an admittedly strong railroad, and tear them down, you are not going to help our national situation.

Exam. Mullen: True. That is argument now. We want to know facts.

[fol. 1425] The Witness: I said it appears to me as a citizen and taxpayer.

Exam. Mullen: All right. That is argument. We don't want argument, Mr. Detweiler, we want facts here. You are stating your opinion; is that right?

The Witness: That is right.

Exam. Mullen: We don't want the opinion.

The Witness: Very well.

Mr. Quirk: I have no question.

Mr. Melia: Thank you, Mr. Detweiler.

(Witness excused.)

Mr. Melia: Mr. Weitz.

George A. Weitz was sworn and testified as follows:

Direct examination.

By Mr. Melia:

Q. Mr. Weitz, you have prepared some testimony in written form?

A. Yes, sir.

Q. Will you proceed to read it?
A. I will.

My name is George A. Weitz. I live at Caldwell, Idaho, and am President of George A. Weitz Company with its headquarters at that point. Our operations consist of growing potatoes, onions, lettuce, sweet corn, seed and other farm crops. Our principal shipping points are Caldwell, Shelp and Notus, Idaho. Caldwell and Notus are lo- [fol. 1426] cated on the main line of the Union Pacific just west of Nampa, Idaho, and Shelp is located on the Wilder Branch. I have been in this business for about 26 years.

During 1948, our shipments of the various commodities mentioned above aggregated 553 cars and in 1949, 597 cars. In addition, we also sell f.o.b. cars to cash track buyers who make shipments in their own name.

The vegetables which we grow are sold in a limited way in Wyoming, a still larger volume in Denver, with the principal markets being in the States of Nebraska, Kansas, Oklahoma, Texas and Louisiana, and points east thereof. Because of the perishable nature of these commodities we use the short and direct route of the Union Pacific so as to minimize transit time.

I might say at this point that it has at no time been necessary for us to use the Rio Grande from Ogden, Utah, for shipping our products to markets located beyond the Rio Grande. Neither do we ship to points intermediate between Ogden and Denver-Pueblo on that line for the reason that the products which we grow and ship are also grown at various points in Colorado located on the D&RGW. For instance, potatoes are grown in the Monte Vista District, onions in the Arkansas Valley, and lettuce and green peas in the Alamosa District.

With the variety of routes open to us via the Union Pacific and its connections, we have at no time found any [fol. 1427] difficulty in reaching eastern and southwestern markets with our products and I can say definitely that the Union Pacific throughout the years has done a good job of railroading on our shipments.

When you grow potatoes you not only produce the No. 1's but also the No. 2's which, while entirely edible, do

not command as high a price in the market because of shape or other defects which the buyer recognizes. Our No. 2 potatoes largely find a market at Kansas City, Missouri, and at points in Kansas, Oklahoma, Texas, Louisiana, and points west thereof. I cannot recollect that we have ever had any difficulty in the diversion of our shipments in case of rejection from one market to another within the territory just described which largely takes our No. 2 potatoes, because we can go into the southwest on the basis of through rates.

Our No. 1 potatoes for the most part go to Chicago and St. Louis and markets farther east, also to the larger cities in Texas. However, anything that I sell in Texas is routed via Kansas City and that practice would not be changed by opening any gateway west of Kansas City.

As to our onions, our large onions are marketed almost entirely at St. Louis, Chicago and east, whereas the smaller onions, known as "mediums," are sold in the territory from Denver east to the Missouri River, and in Texas, Louisiana and Oklahoma. In the marketing of medium onions, as in the case of potatoes, we have had no trouble [fol. 1428] with rejected cars because we have markets in Texas, Oklahoma and Louisiana where we can go on through rates via existing routes.

It is for these reasons that our company has never been interested in the route of the Rio Grande, and I cannot see that we will have any need for it in the future. The Union Pacific is our railroad and we depend upon it, and it has been fair to us. Whether or not the Rio Grande wins this case we will still have only one railroad in southern Idaho.

I am appearing here to say that anything that hurts the Union Pacific will eventually hurt our company. The Union Pacific played a prominent part in developing the State of Idaho. It pays heavy taxes—something the Rio Grande would not have to do.

Another fear that I have is for the rather large amount of money I have invested in packing houses and equipment.

Exam. Mullen: Just a minute, please, let me read this.

Mr. Quirk: We have no objection to that.

Mr. Melia: I don't see how you could.

Exam. Mullen: All right, there is no objection to it, read it in the record.

The Witness: It would only be natural, considering the competitive situation in the growing of vegetables between Colorado and Idaho, that firms in Colorado would look longingly to the large volume of tonnage in Idaho available for processing in transit. In my opinion with the [fol. 1429] opening of the Ogden gateway, they would eventually reach into Idaho for a goodly portion of their supplies for processing and repacking in transit. This, of course, would be subject to the Rio Grande setting up regulations which would permit the processing and repackaging in transit.

This, of course, would be subject to the Rio Grande setting up regulations which would permit the processing and repackaging of Idaho products or products of other western states at a point such as Grand Junction. Frankly, if such arrangements were made, and no doubt the Colorado processors would have no difficulty having the Rio Grande establish such privileges, then my investment in Idaho would be seriously jeopardized.

In my opinion, the proposition of the Rio Grande Railroad, if put into effect, will eventually impoverish the Union Pacific Railroad, retard the growth and development of the State of Idaho——

Mr. Quirk: We object to that.

Exam. Mullen: That will go on, that finishes the statement.

The Witnes: —and it could ultimately put me and others out of business for the reasons I have just explained.

I earnestly urge that the Interstate Commerce Commission not open the Ogden gateway as the D&RGW asks.

[fol. 1430] By Mr. Melia:

Q. Mr. Weitz, to what extent are you able to control the routing on your produce?

A. To what extent?

Q. Yes.

A. Well, we control the shipments for sale in transit or at terminal markets, but the buyer in most cases has the privilege or the right to demand or tell us to route a certain way that suits his desires.

Q. To suit his convenience or desires.

A. That is right. We have to follow his instructions. He is the buyer, and we are the seller, and that is the practice we have to follow.

Q. Would that be true on a substantial number of cars?

A. Yes.

Q. Would you sell a car of anything, potatoes or onions, at such a point as Wichita, Kansas, without having a firm sale?

A. No.

Q. If you had a rejected car at a point like Denver, what would you do with it?

A. I would go to a terminal market. I would go to Kansas City. That is the point where I would go with the produce I handle. That has been my practice in the past.

Exam. Mullen: That wasn't the question, as I remember it.

By Mr. Melia:

Q. The question was, if you had a rejected car at Denver, what would you do with it—and he said he would go to [fol. 1431] Kansas City; is that right?

A. Yes.

Exam. Mullen: You mean after it was rejected at Denver; is that the point?

Mr. Melia: Yes, sir.

Exam. Mullen: Is that what you mean, Mr. Witness?

The Witness: I would try to sell the car at Denver, if I couldn't accomplish that, I would go to the next terminal point from Denver. I wouldn't go to any other point for sale.

By Mr. Melia:

Q. You mean such as a point at Wichita?

A. That is right.

Mr. Melia: You may cross-examine.

Mr. Quirk: No questions.

Mr. Melia: No questions, that is all.

(Witness excused.)

Mr. Melia: Mr. Bradshaw.

D. B. Bradshaw was sworn and testified as follows:

Direct examination.

By Mr. Melia:

Q. Mr. Bradshaw, will you proceed to read the statement you have prepared.

A. My name is D. B. Bradshaw and my home is at Wendell, Idaho. I am a partner with my father and my brother in the R. D. Bradshaw and Sons Company, honey producer-packer whose processing plant is located at Wendell. Our firm is a pioneer in the producing and processing of [fol. 1432] honey in Idaho, having commenced business at Payette, Idaho in 1905. That year my father, R. D. Bradshaw, imported his first carload of honey bees into the state. From this small beginning at Payette, he moved to Wendell in the Twin Falls territory in 1921 where operations were expanded.

At the present time, honey comes into our plant by truck and rail from producers located in Idaho, Wyoming, Montana and eastern Oregon. Rail shipments are received on a processing in transit basis, and the finished packaged product is shipped out to larger consuming centers in the Pacific Northwest, Middle West and Atlantic Coast points.

For the year 1949, our outbound shipments came to 90 cars, about two-thirds of which moved to the eastern points mentioned above. Our inbound rail shipments in the same year totaled 44 cars.

While honey cannot be considered in the category of a perishable product, it is true we must sell in highly competitive markets, and in order to compensate for our long distance from eastern markets, we must have fast and dependable rail service.

In the 45 years that we have been in business in Idaho, we have found that the variety of routes and the service provided by the Union Pacific has been entirely adequate for the purpose of enabling us to sell and distribute our [fol. 1433] products in all markets.

We must rely upon the Union Pacific to handle shipments in and out of our Wendell plant. This is so, of course, because the Union Pacific is the only railroad in southern Idaho. It has given us excellent service and it has also been extremely cooperative in setting up processing in transit privileges on honey which means a low inbound cost on bulk honey into our plant. Because of this cooperation and assistance, our company feels it is morally obligated to help the Union Pacific with their problems, and that includes giving this carrier all the business we can.

I feel that the Union Pacific has done a fine job of assisting our company and the entire honey industry as a whole in the inter-mountain region. I think the people living within this area, in their own interest, should see that its revenues are not channeled to competing lines who have no real interest in Idaho. Unless the Union Pacific can be assured of the maximum haul and revenue on traffic such as ours, then it is my fear that in the future, it will not be able to assist us in our transportation problems as it has in the past.

The Union Pacific paid to our County of Gooding in 1948, $101,417.19 in taxes. This amount represented 20.89 per cent of all the taxes received by the county for the same period. Without this Union Pacific revenue, it is not difficult to realize the additional tax burden that would be placed on the other taxpayers within the county. I spent [fol. 1434] two years on the local school board and I know the value of the Union Pacific tax money in keeping the schools going. If Union Pacific revenues are jeopardized, the tax money received by Gooding County is imperiled.

Exam. Mullen: Just a moment, that is argument.

Mr. Quirk: Yes.

The Witness: I believe I will be pointing out that leads——

Exam. Mullen: I understand. That ought to be stricken

out, the whole paragraph is all argument. Do you have anything further you wish to add, Mr. Bradshaw?

Mr. Melia: You may cross-examine.

Cross-examination.

By Mr. Quirk:

Q. Did you prepare this statement yourself?

A. Yes, I did.

Q. It looks very much like the other one.

Mr. Melia: Is that a question, Mr. Quirk?

Exam. Mullen: The witness has stated he prepared it himself.

Cross-examination.

By Mr. Gibson:

Q. Mr. Bradshaw, referring to Page 2 of your statement, at the bottom of the page, the $101,417 in taxes, are those all property taxes?

A. That is the total tax money received by Gooding County. That is the total taxes received by Gooding [fol. 1435] County from the Union Pacific.

Q. Those are property taxes, are they not, on real estate?

A. Yes, that is the total taxes received by the county.

Redirect examination.

By Mr. Melia:

Q. Mr. Bradshaw, you developed that figure yourself, did you not?

A. Yes, I went to Gooding and checked with the County Treasurer over there.

Mr. Melia: Thank you, Mr. Bradshaw.

(Witness excused.)

Exam. Mullen: Does that complete the witnesses for today?

Mr. Melia: That is all we have, Mr. Examiner.

Exam. Mullen: We will adjourn until 9:30 tomorrow morning.

(Whereupon at 5:05 p. m. the hearing adjourned to reconvene at 9:30 a. m. on Friday, April 7, 1950.)

[fols. 1436-1437] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL., Defendants.

Transcsript of Testimony, Boise, Idaho,—Friday, April 7, 1950

Met, pursuant to adjournment, at 9:30 o'clock a. m. before:

Frank E. Mullen, Examiner.

ADDITIONAL APPEARANCES:

Henry A. Cockrum, Office of the Solicitor, U. S. Department of Agriculture, Washington, D. C., appearing for the Secretary of Agriculture, Intervener in support of Complainant.

[fol. 1438] Proceedings

Exam. Mullen: We are ready to proceed, gentlemen.

Mr. Collins: Mr. Examiner, the other day, at the presentation of Mr. Edens' testimony, Mr. Quirk requested that we supply the same figures for July, 1945, as stated by Mr. Edens.

Mr. Quirk: The year is what we asked for.

Mr. Collins: July, 1949, is what we have in the record, at page 18, showing the number of trains for the month,

and daily, and the number of switch shifts used in handling at the Ogden terminal.

I would like to read this into the record. These are the figures you requested:

During July, 1945, a total of 2966 freight trains, or an average of 96 trains daily, were handled through the Ogden terminal facilities. This handling required 70 switch shifts, with engines and crews, daily.

Mr. Collins: We will have to have one other item to add to it, Mr. Examiner.

Exam. Mullen: All right.

Mr. Quirk: Off the record.

Exam. Mullen: Off the record a minute.

(Discussion off the record.)

Exam. Mullen: On the record.

That will be supplied later?

[fol. 1439] Mr. Collins: Yes, as soon as the man can go down and get it.

Exam. Mullen: All right.

Mr. Booth.

Mr. Booth: I am appearing for the Montana Railroad Commission.

I have two witnesses. First I want to call Mr. Willard Thompson.

In connection with Mr. Thompson's statement, Mr. Examiner, we have an exhibit, if I may have a number assigned to it.

Exam. Mullen: That will be Exhibit 31.

(Interveners' Exhibit No. 31, Witness Thompson, marked for identification.)

Exam. Mullen: Will you be sworn, Mr. Thompson?

WILLARD S. THOMPSON was sworn and testified as follows:

Direct examination.

By Mr. Booth:

Q. Mr. Thompson, have you prepared a written statement showing the evidence that you desire to offer in this case?

A. I have.

Q. Will you proceed with your statement, Mr. Thompson?

A. Yes, sir.

My name is Willard S. Thompson. I reside at Butte, Montana, and am at present, and for approximately 20 years have been, manager of the Chamber of Commerce at [fol. 1440] Butte, Montana. I am appearing here in behalf of and at the request of the Montar Railroad and Public Service Commission, an intervener in this case.

It is my understanding that the D&RGW is seeking in this case to have the gateway through Ogden open to it so that it will be in a position to solicit and move traffic originating in the States of Idaho, Washington, Oregon and Montana on the lines of the Union Pacific and destined for points east of Denver or traffic moving from east of Denver to destination points on the Union Pacific in the states named at the same rates now charged over the Union Pacific.

Mr. Quirk: I object to that. Rates are involved, Mr. Examiner. That is just what is involved: competitive joint through rates.

Mr. Booth: Mr. Examiner, there is no rate—there is no question of a reduction of rates involved in this case.

Exam. Mullen: The statement is that he understands there is no question of rates involved. What does he mean by that? Certainly a through joint rate would be lower than the present rate.

Mr. Booth: Lower than the termination rate, yes.

Exam. Mullen: This witness doesn't understand it, then. He says, "no question of rates involved."

By Mr. Booth:

Q. Mr. Thompson, what did you mean when you said [fol. 1441] there were no rates involved?

A. Well, my understanding is that this is a case involving the desire of the D&RGW to open the gateway in our area. I didn't know this had anything to do with the rates.

Q. By your statement "it had nothing to do with the rates" you mean that the present low rates would not be further reduced or changed? Is that your opinion?

A. Yes.

Mr. Quirk: Is that your understanding of the complaint?

The Witness: That is my understanding.

By Mr. Booth:

Q. You may proceed, Mr. Thompson.

A. I understand further——

Mr. Quirk: I object to that.

Exam. Mullen: The witness is on the stand, and on cross-examination you can bring out the facts.

The Witness: I understand further that there is no question of rates involved in this petition and no direct monetary benefit will accrue to the shipper, regardless of the outcome of this case.

Mr. Quirk: I object to that statement on the ground that it is irrelevant, incompetent and immaterial.

Exam. Mullen: It is a statement of the witness' understanding. Go ahead.

The Witness: The Union Pacific presently owns and operates its own system between Montana, Idaho, Washington and Oregon, points to Denver and east, through Ogden [fol. 1442] and by a cutoff from McCammon, Idaho, to Granger, Wyoming. The D&RGW does not own or operate any rail system north or west of Ogden, Utah, I do not understand that the D&RGW contemplates the building of a road into the territory in the states named, nor do I understand that the D&RGW will render any additional service to the shipper; and, in short, all that it proposes to do is solicit traffic in the territory referred to, for routing over its lines between Ogden and Denver, and partici-

pate in the revenues for moving such traffic. The Union Pacific would have rendered all service in regard to the loading or delivery of the shipment and transportation north or west of Ogden.

The map of the Union Pacific system shows that traffic from the northwest on its system, and particularly from Montana points to Denver, Colorado, or east, can move over the cutoff from McCammon, Idaho, to Granger, Wyoming, and over the cutoff at Borie, Wyoming.

I understand that this route is nearly 100 miles shorter than any route through Ogden over the D&RGW. I further understand that traffic would have to be transferred to the D&RGW through the Ogden terminal. Traffic between points in the area referred to, and Denver, would be considerably delayed by reason of the longer mileage and transfer at Ogden.

It is my view, and as a representative of the Butte Chamber of Commerce I here state, that there can be no [fol. 1443] advantage to the shippers in the State of Montana in the routing via the D&RGW. There are many disadvantages.

In the first place, the Union Pacific is one of the largest taxpayers in the state; the D&RGW pays no taxes, and, if successful here, would not pay any, with the possible exception of taxes on an office for its solicitors.

The Union Pacific has a considerable payroll in Montana. The D&RGW has no payroll in the state.

The Union Pacific serves the citizens of Montana, whereas the D&RGW does not propose to render any service to the citizens of Montana.

As between the two, the State of Montana, through its duly authorized agency, the Board of Railroad Commissioners, and the various chambers of commerce, particularly the Butte Chamber of Commerce, representing citizens and business men served by the Union Pacific, is necessarily interested in and should support the Union Pacific, which serves the community and pays taxes for the support of the state, rather than the D&RGW, which addes nothing to the welfare of the state or its business.

Mr. Quirk: This is just plain argument, Mr. Examiner.

Exam. Mullen: That is true. But this witness is repre-

senting the Butte Chamber of Commerce. We will let him finish his testimony.

[fol. 1444] The Butte Chamber of Commerce, of which I am the manager, adopted a resolution on the 2nd day of November, 1949, in support of the Union Pacific Railroad Company in this case. This resolution, Exhibit No. 31, is offered in evidence.

As a witness for the Board of Railroad Commissioners, and as manager of the Butte Chamber of Commerce, I oppose the application of the D&RGW in this case for the reason that if traffic were diverted from the Union Pacific to the D&RGW we might reasonably anticipate that loss of revenue might result in reduced service, or that increased rates would be requested, to the detriment of the shippers of this state.

The Union Pacific should not be placed in a position, at the shipper's option, of having to move traffic to Ogden, turn it over to another road and divide the revenue when it can move the traffic on its own system, at a lesser total mileage, for the entire distance.

The Union Pacific is the road Montana shippers will continue to look to for service. We propose to keep the Union Pacific in a strong position, so that it may continue to render reasonable and satisfactory service to that part of Montana which it serves.

Mr. Booth: At this time I desire to offer Exhibit 31, which is attached to the prepared statement.

Exam. Mullen: Any objection?

Mr. Quirk: Yes. I object to it as incompetent, irrelevant [fol. 1445] and immaterial.

Exam. Mullen: It will be received solely for the purpose of showing that such a resolution was adopted.

It is received as Exhibit No. 31.

(Interveners' Exhibit No. 31, Witness Thompson, received in evidence.)

Cross-examination.

By Mr. Quirk:

Q. How long have you been with the Butte Chamber of Commerce, Mr. Thompson?

A. About 21 years.

Q. Do you handle traffic matters for the Chamber?

A. Incidentally, yes; we interest ourselves in traffic matters.

Q. But your principal duties relate to other matters?

A. Yes, sir.

Q. You are not very familiar with rates, are you?

A. No, sir.

Q. Now, you stated here that the Union Pacific should not be placed in a position, at the shippers' option, of having to move traffic to Ogden and turn it over to another railroad.

Does your Chamber believe that the right to route, which is now contained in the interstate Commerce Act, should be cancelled?

A. That the right to route should be cancelled?

Q. The right to route is given in that statute—the shipper's right to select routes. You don't believe in that?

[fol. 1446] A. I think the shipper should select his own route.

Q. But you say here that the Union Pacific should be immune from that, apparently. Is that your view?

A. Well, no; I didn't go that far. I don't say that.

Q. Well, look at that last paragraph: "The Union Pacific should not be placed in a position, at the shippers' option, of having to move the traffic to Ogden."

In other words, that is just another way of saying that the Union Pacific ought to be set apart and ought not to be placed in the position where it will permit the shipper to select the route if he wants to.

A. Well, under the present conditions the shipper doesn't do that, of course.

Q. Yes; he has the right to do it now, and many shipments are moved that way; and they have paid as much as $800 in excess of the going rate when they did it. This record shows a good number of shippers shipping through Ogden. You didn't know that?

A. No.

Q. You are really not too familiar with this case, are you?

A. I am not familiar with the rate business.

Q. Did you prepare this statement yourself?

A. Yes, sir.

Q. Well, now, where did you get the idea that the question of rates is not involved?

[fol. 1447] A. Because I understood it to be a case of a petition to open the gateway.

Q. Well, you don't understand it very well.

If the gateway is opened, the Union Pacific is on record here as conceding that; but what is not available are the competitive rates. If anybody shipped through the Ogden gateway now—and the record shows this—he pays a combination rate which is very substantially higher than the joint through rates.

A. I understand that.

Q. So what this case seeks to obtain is competitive joint rates via a route that already exists.

You don't understand that?

A. I understand that the option is up to the shipper, yes.

Q. Now, does the Union Pacific belong to the Butte Chamber of Commerce?

A. Yes, sir.

Q. And all the other railroads?

A. Yes.

Q. What railroads are there?

A. Northern Pacific, Great Northern, Milwaukee.

Q. Now in the third paragraph, Mr. Thompson, you state what you do not understand, and in the fourth paragraph you state what you understand.

Now, where and how did you come by these understandings that you state here? Did the Union Pacific inform [fol. 1448] you concerning them?

A. About this case?

Q. Well, just look at——

A. Yes, I got my information from the Union Pacific.

Q. And the Union Pacific representative asked you to take the position you are taking, I suppose?

A. That is right.

Q. Now, you mentioned that the Union Pacific was a taxpayer in Montana and the Denver and Rio Grande Western was not.

As manager of the Chamber of Commerce, you are no doubt interested in the right of the shippers that belong

to that Chamber to use through routes to and from Montana, to and from places that the Union Pacific does not operate, does not pay taxes; is that correct?

A. Surely.

Q. In other words, you wouldn't want the railroads that serve Montana to cancel out the existing joint rates, via the Pennsylvania and Eastern lines, by reason of the fact that those lines don't pay taxes in Montana, would you?

A. No.

Q. Have you the impression that if there was any diversion of traffic here the Union Pacific might pay less taxes?

A. I think there is that possibility.

Q. Well, don't you know that the taxes they do pay [fol. 1449] there are ad valorem taxes?

A. Perhaps not taxes, but that the position of the Union Pacific would not be as strong as it is now. I will put it that way.

Q. How many shippers, as such, belong to your Chamber?

A. I would say practically all of them.

Q. Could you give me a rough idea of how many in numbers?

A. No, I couldn't, without referring——

Q. Are there 20?

A. Oh, yes.

Q. Now, you say you also speak for the Montana Railroad and Public Service Commission.

Did you know that the original intervention which this Commission filed in this case was in favor of the complainant?

Mr. Booth: I object to the statement made. The petition of intervention which Mr. Quirk is referring to was never filed. The second petition, which is filed, does refer to the fact that it was withdrawn before filing. It is an incorrect statement.

Mr. Quirk: The petition, though, was sent down to Washington; isn't that true?

Mr. Booth: That is correct.

Exam. Mullen: Is it in the docket?

Mr. Booth: No, sir; I don't believe it is.

Exam. Mullen: Does the Commission have an order per-
[fol. 1450] mitting intervention?

Mr. Booth: No, sir. I have a wire from the secretary that it was withdrawn before filing.

Exam. Mullen: Then they have no such petition in this record, Mr. Quirk.

Mr. Quirk: There was a petition tendered, and served on us, and it favored the complaint. Now, whether it was actually filed or not, I don't think that matters for the purpose of my question.

You will find it in the correspondence section of the docket, I'm sure.

By Mr. Quirk:

Q. The point is: Do you know, Mr. Thompson, that later, when the Montana Commission filed another petition, they favored the Union Pacific?

A. I don't know.

Q. You said you are here to speak for them. You really don't know much about it, do you?

Mr. Booth: Mr. Examiner, this witness was put on by the Commission. He is not here speaking for the actions of the Commission in any manner.

Exam. Mullen: He is the witness for the Board of Railroad Commissioners, and he can be cross-examined on the basis of his direct evidence.

Mr. Booth: As to anything he knows, yes.

Exam. Mullen: He can state whether he knows it or not.
[fol. 1451] Mr. Quirk: I will call attention, Mr. Examiner, to the fact that this witness, according to his testimony, is more than just a witness. He says: "I am appearing here in behalf of and at the request of the Montana Railroad and Public Service Commission."

Witnesses really shouldn't be allowed to appear as such, but if he is appearing he certainly ought to know something about this.

Exam. Mullen: You can proceed with your examination.

Mr. Quirk: I have finished. He apparently doesn't know.

Exam. Mullen: Anything on redirect?

Redirect examination.

By Mr. Booth:

Q. Mr. Thompson, according to your understanding of this case, if the Denver & Rio Grande Western is successful there would be no reduction in the present rate from Butte to Denver; is that correct?

A. There is no anticipated reduction in the rate?

Q. Yes.

A. As far as I know.

Mr. Quirk: Do you really know about that at all?

The Witness: Do I know?

Mr. Quirk: Do you know of your own knowledge whether that would be so or not?

The Witness: I do not know whether that would be so or not.

Mr. Booth: That is all.

[fol. 1452] Recross-examination.

By Mr. Quirk:

Q. You have not examined any exhibits in this case, especially Mr. Hogue's Exhibit No. 1?

A. No, sir.

Mr. Quirk: That is all.

Exam. Mullen: That is all. Thank you, sir.

(Witness excused.)

Mr. Booth: I will call Mr. Burke.

John J. Burke was sworn and testified as follows:

Direct examination.

By Mr. Booth:

Q. Mr. Burke, will you please state your full name?

A. John J. Burke.

Q. Mr. Burke, have you prepared a statement showing the evidence you desire to offer in this case?

A. I have, sir.

Q. You may proceed with your statement.

A. My name is John J. Burke. I am appearing here at the request of and in behalf of the Montana Railroad Commission. I reside at 1062 West Platinum Street, Butte, Silver Bow County, Montana.

I was born in Butte and have resided there continuously, except for the time spent in travel for business or for pleasure. In company with three other men, my father left New York City, went down the Eastern seaboard and [fol. 1453] walked across the Isthmus of Panama, went to San Francisco and from there to Nevada, and came to Butte in the 1880's. He was a prospector miner and died in Butte in 1896.

I attended the elementary schools in Butte and two and one-half years in Butte High School. At the age of 13 I started to work at a temporary job.

Mr. Quirk: Is this relevant, Mr. Examiner?

Exam. Mullen: I was just wondering. What is all this for?

Mr. Booth, what is this for?

Mr. Booth: Purely for the purpose of showing his long residence and acquaintanceship with the problem of Montana, your Honor.

Exam. Mullen: Is that for the purpose of qualifying the witness?

Mr. Booth: Yes.

Exam. Mullen: All right. Go ahead.

The Witness: I left school in January, 1907, to accept steady employment, and until 1916 had a varied office experience, and then became manager of a business. I continued in that capacity until I left for Army service and, after my return in 1919, I entered the banking business and have been engaged therein since that time, for a period of about 31 years. During that time I have been interested in various lines of business in many capacities, and am now president of the the Metals Bank & Trust Company, [fol. 1454] the largest state-chartered banking institution in the State of Montana, with resources of over thirty millions of dollars.

In that position I have had contact with various lines of

business and the financial operations of many individuals, partnerships and corporations. For a great number of years I have been, and am now, chairman of the tax committee of the Butte Chamber of Commerce and, as such, I am familiar with assessed and taxable valuations, tax levies and the budgets of our city, county and school district. In addition, I am a substantial taxpayer of the community.

It is my information that the Denver and Rio Grande Western Railway Company has filed a petition with the Interstate Commerce Commission, known as Docket No. 30297, to open the so-called Ogden gateway, so that it will be in a position to solicit, for movement via Ogden and the Rio Grande, traffic in the states of Montana, Idaho, Washington and Oregon now moving over lines of the Union Pacific Railroad Company and destined for Denver and points east of Denver, or for traffic moving from points east of Denver to destination points on the Union Pacific Railroad at the same rates now charged over the Union Pacific system.

I also understand that there is not a question of rates involved in this petition and that no monetary benefit would accrue to the shipper, regardless of the outcome of [fol. 1455] this particular hearing.

Further, this petition has originated entirely with the D&RGW, and it is one that resolves itself to an issue between that railway and the Union Pacific Railroad Company.

The Union Pacific Railroad Company owns and operates its own system between points in Montana, Oregon, Washington and Idaho to Denver and east through Ogden and also over the so-called Granger Cutoff from McCammon, Idaho.

The distance from any point in Montana through the Granger Cutoff into Denver is, I am told, approximately 100 miles shorter than by way of Salt Lake over D&RGW, so it appears that no saving in mileage or time would be effected for the shipper.

The Union Pacific has a very substantial capital investment, the money coming from many thousands of stockholders and bondholders, whose investments should be protected. In four counties in Montana it operates approximately 150 miles of trackage and the necessary depots, sta-

tions, etc., and any reduction in income would affect, or could affect, this investment.

The D&RGW does not own or operate any rail system north or west of Ogden, Utah. It has no tangible investment in Montana, but it appears that it proposes to use the facilities of the company which has pioneered and developed the territory. Neither the state of Montana nor any political sub-division thereof, nor any shipper would [fol. 1456] gain any benefit by favorable action on this petition.

For the year 1948, the Union Pacific Railroad Company paid the sum of $116,687.78 in taxes in our state, of which nearly $23,000.00 was paid to Silver Bow County, where I reside. Of the amount paid, 52 per cent is for the benefit of schools in the four counties through which the line operates.

For the year 1949, the amount of tax paid is at least as high and, in all probability, much higher. As a result, the schools of these four counties receive a considerable portion of benefit from the Union Pacific tax payment.

The petitioner does not pay any taxes in Montana, and if this petition were granted no taxes would be paid, as the D&RGW could use traffic solicitors only and would not have to make any capital investment in the state, but would have the use of the facilities of the Union Pacific. As a result, no tax benefit would accrue to the state of Montana.

In addition, the Union Pacific Railroad Company payroll, to its employees in the State of Montana during the year 1948, amounted to $875,685.00, so the total amount of money expended by Union Pacific in the State of Montana for taxes and wages amounted to nearly $1 million for that year.

Shipments originating in any of the four states can move either directly east through Ogden or through the Granger Cutoff from McCammon, Idaho, in through trains without the necessity of breaking up or reassembling the cars at [fol. 1457] any point along the line. This, of course, is a decided advantage to shippers and makes for better operating schedules, all of which benefit shippers.

Should traffic be routed through Ogden into Salt Lake and from there over the line of the D&RGW, it would be necessary to move or switch cars containing these ship-

ments at Ogden or Salt Lake to the D&RGW, which, no doubt, would result in a loss of time and efficiency.

As a result, the state of Montana and the counties through which this traffic would move would gain no additional revenue or advantage whatsoever, and the shippers might suffer from delay, in particular.

Exam. Mullen: Just a moment.

That next paragraph, it appears to me, is argumentative. It will be stricken out.

The Witness: As a citizen and taxpayer of the state of Montana, I desire to go on record as opposing the application of the D&RGW in this particular case for the various reasons set forth above and, principally, because no direct or collateral benefits would accrue to the state of Montana or its shippers.

By Mr Booth:

Q. Mr. Burke, what, if any, effect would the possible loss of revenue on the Union Pacific have as to their status in Montana?

[fol. 1458] Mr. Quirk: What is the question? I didn't hear it.

Exam. Mullen: Read the question, please?

(Question read.)

Exam. Mullen: Doesn't that depend on the amount of loss? What loss of revenue do you have in mind, Mr. Booth?

Mr. Quirk: I object to the question because obviously the witness is not competent to answer the question.

Exam. Mullen: What amount of revenue did you have in mind?

Mr. Booth: Whatever loss there may be from this case.

Exam. Mullen: Regardless of the amount, large or small?

Mr. Booth: Well, of course the effect may be different, but the effect will still be there.

Exam. Mullen: Can you answer that question, Mr. Witness?

The Witness: I would say, Mr. Booth, that I think the Union Pacific does pay Montana corporation license taxes in the state of Montana, and that naturally reduces the

amount of tax paid to the state of Montana by the loss of revenue from that.

Exam. Mullen: Your sole objection in this case, then, is based upon your thought that there will be a considerable loss in taxes paid to the state, and the municipal units in Montana, by the Union Pacific? Is that your only objection?

The Witness: Yes, it could result in that loss.

Exam. Mullen: Is that your only objection?

[fol. 1459] The Witness: Yes, sir.

By Mr. Booth:

Q. Mr. Burke, you say that is your only objection. Could that also affect the service?

A. It could, yes.

Mr. Booth: That is all.

Cross-examination.

By Mr. Quirk:

Q. Mr. Burke, you are talking about a subject that reminds me of a man that was partly blind who was looking through a dark shutter for a black cat that wasn't there. You don't know what amount of revenue you have in mind at all, do you? You have no fixed sum in mind, do you?

A. I have never heard it expressed.

Q. I see.

Now, does the Union Pacific have an account in the bank—the Metals Bank & Trust Company of which you are president?

A. No, sir.

Q. Are you a stockholder or a bondholder in the Union Pacific?

A. No, sir.

Q. Does your bank own any of the Union Pacific stock?

A. No, sir.

Q. Did you prepare this statement yourself?

A. Yes, sir; I dictated it myself.

Q. Did you see Mr. Thompson's statement at the time you prepared it?

A. At the time I prepared it?

[fol. 1460] Q. Yes. If you will read it, it is almost alike.

A. I saw Mr. Thompson's statement after I was told roughly what the essence of the statement was.

Q. You have no personal knowledge of most of the things you cover in here, so far as the Union Pacific is concerned, have you?

A. Personal knowledge as far as taxes are concerned, in particular.

Q. That is the only thing you have personal knowledge of, isn't *it*?

A. That is true. I have heard some rate discussion, etc.

Q. I suppose the Union Pacific gave you the information about the payroll?

A. I requested that; yes, sir.

Mr. Quirk: That is all.

Exam. Mullen: That is all, Mr. Burke. Thank you.

(Witness excused.)

Mr. Rouse: I will call Mr. Coughlin.

WILLIAM P. COUGHLIN was sworn and testified as follows:

Direct examination.

Q. Mr. Coughlin, *H*ave you prepared the testimony you wish to give in this hearing in written form?

A. I have.

Q. Will you proceed to read it?

[fol. 1461] A. My name is William P. Coughlin. I am appearing in behalf of the Anaconda Copper Minging Company and the Montana Power Company. I reside at Butte, Montana. I am assistant general traffic manager of the Anaconda Copper Mining Company and assistant traffic manager of the Montana Power Company.

There is no legal or corporate connection between the Anaconda Company and the Montana Power Company.

I started employment in the traffic department of Anaconda in May, 1912, and have been continuously employed in that department since. I took over Montana Power

Company traffic matters shortly after that date, and have handled their traffic continuously since that date.

I have read and studied the complaint or petition of the D&RGW Railway, known as Docket 30397, and believe I understand it.

There is no indication, in the petition, that the through rates presently applicable between points, Denver and East on the one hand, and Ogden and North and West, on the other hand, will in any way be changed from their present level.

Therefore, if the petition is granted, there will be no money or financial benefit to the shippers or receivers, North and West of Ogden. The distance via the D&RGW between Colorado gateway and Ogden, the proposed Western gateway, is approximately 100 miles greater than the distance via the Union Pacific, over which the present rates apply, and there is no interchange between carriers via [fol. 1462] the present route. This added distance, together with some delay in interchanging the cars at both terminals, is such that no better service, or even equal service, can be furnished over the proposed route. Thus the shipper, receiver, the cities and districts, north of Ogden, can coresee no benefit, financial or otherwise, by granting of the petition.

On the other hand, there might be some, and will most likely be, disadvantages, added costs and reduced service.

Let us assume that traffic to and from points north of Ogden is going to cost the people in this region as much under the proposed rates as under the present rate.

By Mr. Rouse:

Q. Mr. Coughlin, in reading that you said "rates" instead of "routes." Did you intend to change your written statement in that respect?

When you read your statement you said, "as much under the proposed rates as under the present rates."

I don't think you intended to change your written statement, did you?

A. No, I did not.

Q. That should be as written in the text?

A. Yes.

If this money is divided between the two carriers, instead of the one as at present, then the gross and net of the present carrier will be reduced by just so much as accrues to added or new carrier. This will place the entire [fol. 1463] rate structure in danger, and we can look for increases in rates; not only those affected by this proposal, but also all rates applicable into the territory affected.

It is not unreasonable to hope that railroad costs might be reduced or that volume of traffic will increase, either or both of which might make for a general decrease in the present level of the rates. This possibility becomes more remote if the total revenue is divided between two carriers.

We wish to make it clear that our objection is not inspired by any antagonism to, or any preference of, either party. Our objection is to the principle involved. There are probably hundreds of parallel, or nearly parallel situations.

If this petition should be granted I think we can look for a flood of similar cases, further dissipating the transportation charges that we might pay. This could result in short hauling the three transcontinental lines, operating from the East through Montana, and further dissipate their revenues, including the freight charges paid by Montana shippers and receivers.

All this will have a tendency to hasten the day that these carriers will have to seek increased rates or delay the day that they might grant a reduction in the present level of rates. This reduction in earnings may be such as to curtail the present efficient service that the Montana carriers are affording the people in Montana, not to say anything [fol. 1464] about reduced employment and tax payments in the state.

If this petition is granted I believe we can look for a petition from every paralleling short line or shoo fly for participation in through routes and rates.

Therefore, we wish to go on record as opposing, for the reasons outlined above, the petition herein under consideration.

Now I have another statement to make.

In my 38 years in Butte I have sat in many rate meetings and conferences. I have been a constant member of

the traffic committee of the Butte Chamber of Commerce. I believe that through these associations and otherwise I have been familiar with every complaint of shippers or receivers in Montana. I have never heard any desire expressed that the through rates and through routes be established by the D&RGW.

Mr. Rouse: That is all.

Exam. Mullen: Cross-examine.

Cross-examination.

By Mr. Quirk:

Q. Mr. Coughlin, in the last sentence of the fourth paragraph of the first page of your prepared statement you say, "Thus the shipper, receiver, the cities and districts, north of Ogden, can foresee no benefit, financial or otherwise, by a granting of the petition."

Did you know there are probably 50 or 60 witnesses in this case, some of them representing a Grange of some 12,000 members, that testified at Salt Lake that they were [fols. 1465-66] in favor of this route, and they are north of Ogden?

A. I wouldn't doubt that; yes. I don't know that, no.

Q. Well, but you can't speak for all these people anyway, can you? You didn't mean to speak for them when you used that statement?

A. No. I am speaking for the Montana Power Company and Anaconda Company.

Q. I wonder why you said none of these shippers you speak for—and you don't know their problems—"can foresee no benefit"? That is a pretty expansive statement, isn't it?

A. It is pretty generally correct, I would say.

Q. That is, you would say your statement, as it stands, is correct?

A. Yes.

Q. Well, now, over on page 2, Mr. Coughlin, you say, "Our objection is to the principle involved."

A. Yes.

Q. Do you mean, by that, that the Anaconda Copper Mining Company is against the idea that the Interstate

Commerce Commission shall not exercise the power that it has in a case where that exercise of that power is justified to require joint rates?

A. No, I don't mean to say that.

Q. What do you mean to say?

A. I mean to say that we are giving you our version of it.

[fol. 1467] Q. Well, you, as a traffic man, and your company are not against the policy of the railroads in the country of establishing joint rates and through routes and interchange facilities, are you?

A. No.

Q. You don't have any idea, do you, Mr. Coughlin, as to the possible loss of revenue should the complainant here be sustained?

A. No.

Q. You say there won't be any reduction in the rates from Montana to Denver. Is that what you mean?

A. Yes. There would be no reduction in rates.

Q. Don't you know that if a shipment moved from Montana to Ogden and on the Rio Grande to Denver that it would pay a substantially higher rate, on any of the commodities that you deal with than if it moved via the Union Pacific to Denver?

A. That is very true. But nobody would pay the combination of locals. When we talk about rates we are talking about the minimum rate existing—the through rate existing.

Q. Well, now, if the complainant succeeds here, however, and joint rates on a competitive basis were established through Ogden and the Rio Grande, there would be a reduction in the rates, would there not?

A. They would have the same rate that is presently in effect now by the short and the through route. I will put it that way.

Q. Then there would be a reduction?

[fol. 1468] A. I would say no, because when we speak of rates we talk about the minimum rates.

Q. Well, of course it is so obvious—I don't want to argue about it, but if the competitive rate was established through Ogden via the Rio Grande, and it was lower than the existing rates, there would be a reduction via that route, wouldn't there?

A. Yes, there would be a reduction via that route.

Q. Don't you know, as a traffic man, Mr. Coughlin, that the situation with respect to the Rio Grande, a railroad that size, is almost unique in this country, to be bottled up the way it is?

A. Well, I don't - that it is unique. I might say this: It is unique in the fact that they can very well go into this case and ask for through rates without endangering their maximum haul because they have no connections between their eastern terminal and their western terminals.

Q. Now, you have plants at various points throughout the United States, don't you—your or your affiliated companies?

A. Yes.

Q. Don-t you find, generally, that joint rates and through routes on a competitive basis prevail on all points and via most railroads.

A. I would say yes—most of the railroads.

Q. Do you think it is all right for the shipper to have [fol. 1469] the choice of selecting routes?

A. The tariff route, yes. I think the shipper has a right to route his freight any route he wants, yes, if he wants to pay the rate.

Q. Now, if this record establishes that many shippers have special situations and other reasons for needing a route via the Rio Grande, you would not object to those shippers getting a rate that would put them on a competitive basis, would you?

A. No if they got a rate on their particular business; but I think the bad that would come out of this would offset the good to a few shippers.

Mr. Quirk: Well, all right. That is all.

Redirect examination.

By Mr. Rouse:

Q. Mr. Coughlin, just one or two questions.

Mr. Quirk asked you if you knew as to what the loss of revenue to the Union Pacific would be, and I think you said you did not.

But you do know, do you not, Mr. Coughlin, that witness Early, for the D&RGW, testified that a conservative estimate of the traffic potential available to their solicitation would be 157,000-some-odd cars?

A. I have heard that statement, but I didn't hear the testimony.

Mr. Quirk: I object to the leading of the witness.
Exam. Mullen: This witness says he has just heard that.

By Mr. Rouse:

Q. Do you know witness Early did testify there was a [fol. 1470] substantial amount of traffic available to their solicitation?

A. Yes.

Q. You know that, to the extent that traffic is diverted to the lines of the D&RGW, the Union Pacific would suffer a loss in revenue?

A. Yes.

Q. On- other question, Mr. Coughlin.

Mr. Quirk is lamenting the fact that D&RGW is a bottled up railroad. Is that of any particular importance to the people in Montana and, in parteiular, to the Anaconda Copper Company?

A. No, I don't think it is.

Q. Is the fact that they are in an unfortunate situation, as described by Mr. Quirk, of no particular concern to you?

A. No.

Mr. Rouse: That is all.
Exam. Mullen: Any recross-examination?
Mr. Quirk: Yes.

Recross-examination.

By Mr. Quirk:

Q. Don't some of your companies, including the Anaconda Company, use the Denver & Rio Grande to a substantial extent?

A. Yes, I think so.

Q. Now, you never have been in this case before, have you——

[fol. 1471] A. No.

Q. ——until today?

A. No.

Q. Apropos of what Mr. Rouse has just suggested to you, do you know that there were any number of witnesses in this case, one of them, Mr. Johnson, of the Koppers Company, who testified that he would buy lumber for his treating plant at Salida, Colorado, over the Union Pacific if he had competitive rates?

That is a big company, and many others said that. So you see, when you are guessing about the loss of revenue, there would be some additional revenue in this case, according to the testimony, that is not here. But you don't know those things, do you?

A. No, I am not familiar with that man's problem.

Q. You know as much about that as you did the question Mr. Rouse suggested to you, don't you?

A. No.

Mr. Rouse: This witness is not here to hear the testimony you are talking about, but he has been made acquainted with the testimony of Witness Early as to——

Exam. Mullen: Just a moment. We don't need to explain that. We have the witness here. Ask questions of the witness.

Mr. Quirk: I have finished.

Examiner Mullen: Any further questions?

(No response.)

[fol. 1472] Exam. Mullen: That appears to be all. Thank you.

(Witness excused.)

Mr. Rouse: I will call Mr. Finch.

H. L. Finch was sworn and testified as follows:

Direct examination.

By Mr. Rouse:

Q. Mr. Finch, have you prepared your testimony in written form?

A. Yes, I have.

Q. Are the statements therein made true and correct, to the best of your knowledge and belief?

A. They are.

Q. You may read your statement, Mr. Finch.

A. My name is H. L. Finch. I am a member of the partnership of H. L. Finch & Sons, the other partners being my three sons, William Carl, Edward and Robert Finch.

Q. Mr. Finch, could I interrupt you to ask where is your place of residence?

A. Soda Springs, Idaho.

I am a member of the Idaho Citizens Grazing Association and am at the present time, and for the past 35 years have been, the president of that organization, which is the largest organization of its kind in the state. I am also a director and a member of the Executive Committee of the Idaho Wool Growers Association.

[fol. 1473] The firm of H. L. Finch & Sons is engaged in the sheep business in the State of Idaho. Our activities embrace:

(a) The operation of a farm at Soda Springs, Idaho, which is devoted largely to the production of purebred sheep for breeding purposes. A substantial part of the male sheep for this purpose are imported from England into Canada and shipped from there either by freight or express to our farm at Soda Springs. All of the sheep produced on our farm at Soda Springs are either sold or used for breeding purposes, and purchasers of this breeding stock are located at all points in the United States.

(b) Our firm also owns approximately 3,000 acres of grazing land and rents approximately the same acreage, or a total of 6,000 acres.

(c) The firm also has Taylor grazing rights for 4,000

head of sheep and rights for about 4,500 head of sheep in the national forests.

(d) Quarters for feeding during the winter season are operated by the firm of H. L. Finch & Sons in leased quarters at Rupert, Idaho. Our sheep are quartered and fed at this location during the months of January, February and March. Feed for the winter operation is received from eastern points or purchased locally in the area.

Soda Springs, Idaho, from which our main operation is conducted, is located on that part of the Union Pacific [fol. 1474] Railroad Company between McCammon, Idaho, and Green River, Wyoming. McCammon is the point where the lines of the Union Pacific Railroad between Ogden, Utah, and Pocatello, Idaho, and between Granger, Wyoming, and Pocatello, Idaho, join.

Our firm also maintains a flock for the production of lambs for market of about 4,000 white-faced ewes which, by cross-breeding with black-faced bucks, produce annually approximately 4,500 lambs.

The lambing operation is conducted at Rupert, and at the end of the winter season the lambs and ewes are moved to the grazing territory operated by our firm which I have heretofore described. Lambs produced by our firm are marketed as prime fat lambs.

Following the marketing of the lambs the ewes are maintained on the range at or near Soda Springs until the next winter season.

We find it necessary to replace our breeding ewes used for the production of lambs for market purposes to the extent of about 10 per cent or 12 per cent each year, and, because such animals are not available in Idaho, it is necessary to purchase them from surrounding states, principally Oregon, Washington, Montana and Wyoming. The reason why it is necessary to purchase replacement ewes rather than to use the ewe lambs which are raised is because the value of Idaho lambs for mutton is high and the cost of maintaining them until they are old enough for breeding [fol. 1475] purposes is prohibitive since we can buy replacement ewes for this purpose from surrounding states more cheaply than we could use the ewe lambs we produce.

At this point I want to state that in our business we do not use transit privileges. Our in and outbound movements are independent of each other and we have never found that the payment of flat rates was in any way a hindrance to the successful operation of our business. Our fat lambs which are grazed on our grazing lands heretofore described are shipped from the station of Soda Springs and those purchased in other areas are shipped from the stations closest to the points where they are raised.

All of the sheep sold by our firm for market purposes are routed via the lines of the Union Pacific, the majority of which are consigned to Omaha or Kansas City or markets east thereof. Our firm annually ships from 20 to 125 carloads per year, depending upon the amount of sheep purchased.

I have been engaged in the sheep business in Idaho either under the present firm name or the previous firm name of Knollin and Finch for 44 years, and I believe that I have been in the sheep business in the eastern part of Idaho as long or longer than any other person in that part of the State.

During all of that period, the service provided by the Union Pacific Railroad has been entirely satisfactory and [fol. 1476] adequate for my needs, including the furnishing of cars, switching and transportation service.

I have never had occasion to use the lines of the D&RGW and I have never requested either the Union Pacific or the D&RGW for the establishment of joint rates via the Ogden gateway. The reason that I have not requested joint rates via the lines of the D&RGW is that the routes open to me via the lines of the Union Pacific are the most direct to markets for my sheep and are entirely adequate for my needs.

It is my fear that if the D&RGW should prevail in this case and secure a substantial diversion of traffic originating in the State of Idaho to the lines of the D&RGW, service on that part of the Union Pacific line east of McCammon which embraces the town of Soda Springs, where the principal part of my business is conducted, would be materially reduced, at least to the extent that trains which presently move over the more direct route of the Union

Pacific east of McCammon were diverted to the D&RGW and thus routed via the Union Pacific line from McCammon to Ogden.

It is my further belief that this diversion would result in a substantial loss in revenue to the Union Pacific, and in addition to the reduction in train service which I might reasonably expect, the Union Pacific might find it necessary to increase rates. Either reduction in train service which I presently enjoy or increase in rates would work to the [fol. 1477] disadvantage of my firm.

Expedition of service is of the utmost importance to me in my business, and any curtailment of service would be detrimental to me as the service presently afforded by the Union Pacific permits me to ship my sheep without delay, and I know that with the service presently afforded the sheep will be expeditiously transported to markets via the lines of the Union Pacific.

The Union Pacific is presently furnishing service so as to enable the lowest possible shrinkage of the lambs shipped by me and any delay in movement after loading or in transit would result in a loss to the business of our firm.

Shortly after this case was commenced, representatives of the D&RGW came to Pocatello, where they had a meeting with the executive committee of the Idaho Wool Growers Association. I was in attendance at that meeting, at which time a representative of the D&RGW made a statement to those present that the practice of feeding Idaho lambs in transit in Colorado and of later re-shipping them as fat lambs to market had been discontinued by the action of the Union Pacific in cancelling through rates with transit privileges which previously existed, and that the present basis of combination rates to and from the feeding territory made the cost of feeding in transit there prohibitive.

The fact is that right after the turn of the century, in the [fol. 1478] early 1900's, there was quite a movement of range sheep commonly known as pairs, transported from Idaho into Colorado and unloaded around the Tennessee Pass country and grazed there during the summer and then sent on to eastern markets and sold in the early fall.

During the early 1900's, however, following the estab-

lishment of the national forests, regulations were issued by the Secretary of the Interior or the Secretary of Agriculture for the purpose of protecting the national forests and making certain restrictions on their use for grazing purposes.

Among the regulations that were issued was one prohibiting the pasturing of sheep and goats on the public lands in the forest reservation. Another regulation provided for the protection of the settler and home-builder against unfair competition in the use of the range lands.

These regulations had the effect of giving preference in the use of the grazing lands in the forest reserves in Colorado to the citizens of that state, and it is my recollection that it was the regulations issued from time to time by the Secretary of the Interior or the Secretary of Agriculure for the protection of the forest reserves which changed the practice of grazing Idaho sheep in Colorado rather than the freight rates.

The Union Pacific is the largest taxpayer in the State of Idaho and maintains a large payroll in the State. It [fol. 1479] provides the transportation facilities necessary to assemble the traffic originated in this territory, performs the switching and furnishes the car supply, all with expedition. I understand that the D&RGW does not contemplate building a railroad into the State, nor does it propose to furnish any of the facilities or render any service in connection with transportation in the State of Idaho.

I am in favor of permitting the Union Pacific to secure the longest haul by its lines of the products originated in this state, and particularly those in which my firm has an interest.

I am, therefore, appearing here as a witness in favor of the Union Pacific Railroad in this case and in opposition to the application of the D&RGW, and earnestly request the Interstate Commerce Commission to deny the petition of the D&RGW in this case.

By Mr. Rouse:

Q. Mr. Finch, is there anything you wish to add to your written text?

A. I think not, Mr. Rouse. I think that covers it pretty well.

Mr. Rouse: That is all I have.

Cross-examination.

By Mr. Quirk:

Q. Mr. Finch, you know Mr. Rich, I suppose, don't you?

A. Very well.

Q. Did you know that he testified here the other day and [fol. 1480] his views are quite the opposite of yours?

A. Yes, sir.

Q. You say, at the bottom of page 3 of your statement, that you "fear that if the Rio Grande should prevail in this case and secure a substantial diversion of traffic," and so forth and so on, that the Union Pacific might be injured. That is roughly what you say.

What inspires that here? By whom was it inspired?

A. By my interest in the case.

Q. Did you think it up yourself?

A. Absolutely.

Q. There have been a lot of statements out here, in the papers of Idaho, that sound very much like that was the line that was followed—that the Union Pacific would suffer.

A. I speak my own mind on these things. I have had considerable experience over there.

Q. Now, at the bottom of page 5 of your statement, Mr. Finch, you are dealing with the question of the forest reserves, and you say that it is your recollection that it was the regulations issued from time to time by the Secretary of the Interior or the Secretary of Agriculture for the protection of the forest reserves which changed the practice of grazing Idaho sheep in Colorado rather than the freight rates."

Now, don't you know that a great deal of grazing went on in Colorado under the plan where the forest permit-ees still purchased sheep from points west of McCammon, and [fol. 1481] did so in large quantities until 1932, when the Union Pacific eliminated the competitive equal rates that then existed and imposed a penalty?

A. No, I don't know that. I don't think that is the case.

Q. This record shows that it is.

You don't know it personally?

A. Well, I was here, and operating here, and had a pretty good idea of what went on, the same as today. If there had been any large movements of sheep over the Rio Grande out of Idaho I would have known about it.

Mr. Quirk: Well, that is all.

Exam. Mullen: Any redirect examination?

Mr. Rouse: That is all, Mr. Finch.

Exam. Mullen: Thank you.

(Witness excused.)

Mr. Rouse: I will call Mr. Siddoway.

J. C. Siddoway was sworn and testified as follows:

Direct examination.

By Mr. Rouse:

Q. Mr. Siddoway, have you prepared the testimony you wish to give here in written form?

A. Yes, sir; I have.

Q. Are the statements in your written prepared statement true and correct, Mr. Siddoway?

[fol. 1482] A. Yes, sir.

Q. You may read your statement.

A. My name is J. C. Siddoway. I live at Teton City, Idaho.

I am there engaged in the agricultural and livestock business, and have been for the past 50 years. I am and have for many years been the president of the Fremont County Wool Growers Association, an association consisting of approximately 25 wool growers who produce approximately 100,000 head of lambs per year.

I am also, and for many years have been, a director of the Idaho State Wool Growers Association, which is an organization representing the wool growers in the State of Idaho. I served one term as a representative and one term as a senator in the state legislature of Idaho.

Right here I have a correction. I say "I own." I operate with my boys. I have seven sons and I operate with them. And in the next few places where it says "I", I would like to have that changed to "we."

We own approximately 25,000 acres of grazing land in Jefferson and Freimont Counties, Idaho, and we own approximately 2,000 acres of irrigated land. We feed approximately 6,000 head of sheep per year. In addition to the sheep, during the year 1949 we fed approximately 250 head of cattle.

The irrigated land is devoted for the most part to the production of potatoes, although part of the acreage is [fol. 1483] used in *in* the production of hay, grain and seed peas.

During the year 1949 we produced approximately 2,000,000 pounds of potatoes and, of that amount, we shipped, either direct or through dealers, from the stations of Newdale, Idaho, located on the East Belt Branch, and Sugar City, Idaho, located on the Yellowstone Branch of the Union Pacific Railroad, approximately 50 carloads of potatoes.

We also shipped, either in our own name or in the name of the dealers to whom they were sold, approximately 40 carloads of lambs, and sold to dealers, for shipment to eastern markets, 7 or 8 carloads of cattle.

During the period I have been engaged in the business above described I have not followed a uniform practice with respect to the shipping of our products. During certain years I have shipped them in my own name; during other years, we have sold them to local dealers who have shipped them. The practice varies from year to year, depending upon which, in our judgment, is the most advantageous to us. The products produced and shipped by us direct or through dealers are customarily consigned to commission firms in Omaha, Chicago or other eastern markets.

During the entire period of our operations in this territory, we have always used the facilities of the Union Pacific and have routed our shipments via its lines to destination, if destination was located on its lines, or to eastern connections at Council Bluffs or Kansas City, where the [fol. 1484] shipments moved to points beyond the lines of

the Union Pacific. The service afforded by the Union Pacific has always been adequate for our requirements. The Union Pacific has been reasonably prompt in furnishing an adequate supply of cars for our needs.

We have never had occasion to ask the Union Pacific or the D&RGW to publish a joint rate via the lines of the D&RGW. We have never had occasion to use the lines of the D&RGW, nor do we anticipate that we ever will require routing via its lines. With the variety of routes open via the lines of the Union Pacific and its connections, we have at no time found any difficulty in reaching markets with our products, and I can definitely state that the services and facilities operated by the Union Pacific are entirely satisfactory.

As I understand it, the D&RGW is seeking, in the application now pending before the Commission, to participate in the movement of shipments originating in the State of Idaho.

Exam. Mullen: Just a minute at this point. This is off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

By Mr. Rouse:

Q. Mr. Siddoway, in that paragraph in your prepared text there are some statements to the effect that you understand that the D&RGW does not intend to build a railroad in the state or furnish a car supply or switching serv-[fol. 1485] ice, and that statement has been made by other witnesses.

Do you concur in the testimony of the other witnesses in that respect?

A. Yes, sir; in that respect, I do.

Q. We will strike, then, from your prepared statement, Mr. Siddoway, that first complete paragraph on page 3, and you may continue to read following that paragraph.

Mr. Gibson: Is that the first paragraph on page 3?

Mr. Rouse: The first complete paragraph on page 3.

Exam. Mullen: Just a minute. The rest of it is repetitious, too: "The Union Pacific is the railroad that serves

the communities in which I operate," and so forth. That is all repetition. Why not ask him about that in a single question?

Mr. Rouse: Well, all right, Mr. Examiner.

By Mr. Rouse:

Q. Mr. Siddoway, some of the other witnesses have testified to the general economic effect on the state and the citizens of the state with respect to the Union Pacific's participation in the building of the state; what effect the curtailment of service would have on the shippers; and what effect, also, would result if the Union Pacific's revenue were decreased so that it would not be in a position to continue to pay taxes and render service to the same extent as it has in the past.

Are you willing to adopt the statements to that general effect by previous witnesses, Mr. Siddoway?

[fol. 1486] A. Yes, sir. Generally, I would be willing to do that.

Q. Well, to save copying this statement into the record, Mr. Siddoway, we will skip the rest on page 3 of your statement.

Mr. Rouse: But I would like, Mr. Examiner, if I may, to ask Mr. Siddoway one further question about taxes.

Exam. Mullen: All right. Go ahead.

By Mr. Rouse:

Q. Mr. Siddoway, as I understand it, you served as a member of the board of directors of a certain school district during a number of years that were lean years, when the revenues in the state were not sufficient to keep the schools in operation without the contribution of a substantial amount of taxes from the Union Pacific; is that correct?

A. That is right.

Q. Do you want to add anything further to that statement about what regard you have for the Union Pacific's tax payments as they have affected your schools?

A. I would like to say here, if I may, that if it hadn't been for the amount of the Union Pacific taxes that they paid in the lean years that you spoke of, in the early 30's,

vouldn't have been able to maintain some of the dis-
s over in our part of the state, especially in Clark
nty and Teton County, where I live.
believe, as near as I have been able to find out, the
n Pacific paid more than half of the taxes in some
1487] of those counties in the years of the early 30's.
hadn't been for the amount they paid, the schools
d have been closed down—if it hadn't been for the
unt the Union Pacific paid.

By Mr. Rouse:

Now, Mr. Siddoway, if there should be diverted to
D&RGW a substantial amount of traffic in the territory
re you operate, and if it were necessary, as a result
at, for the Union Pacific to render less service, would
be of disadvantage to you in your operations?
Yes, sir.
In other words, you require the prompt service that
are presently getting; is that correct?
That is just the way I feel about it.
If the revenues of the Union Pacific were depleted
uch a point where it would be necessary to ask for
ncrease in freight rates, would that be to the disad-
age of your business?
Yes, sir. It would be more expense.
r. Rouse: No-, Mr. Examiner, if I may, I would like
ave Mr. Siddoway read the second complete para-
h on page 4 of his statement.
xam. Mullen: The last two?
r. Rouse: The last two paragraphs.

By Mr. Rouse:

You may proceed, Mr. Siddoway. Read those last
paragraphs.

r. Gibson: Are you going to eliminate the first para-
1488] graph on page 4?
r. Rouse: At the suggestion of the Examiner we have
inated the first paragraph on page 4.
xam. Mullen: He understands the rest of it.
he last two paragraphs of page 4.

By Mr. Rouse:

Q. You may proceed, Mr. Siddoway.

A. I have been in the State of Idaho long enough to know that the building of the main and branch lines of the Union Pacific Railroad made possible the development of this state, and I am therefore now opposed to permitting the D&RGW to participate in the revenues which the Union Pacific receives on the products shipped out of this state via its lines, which were made possible only be the expenditure of vast sums of money by the Union Pacific in building its railroad facilities in the state.

I am, therefore, appearing in this hearing as a witness for the Union Pacific and in opposition to the petition of the D&RGW, which I feel should not be granted by the Interstate Commerce Commission.

Q. Mr. Siddoway, is there anything further you would like to add to your statement?

A. I haven't anything further prepared; but I have in mind that I live out there in a territory which is maintained by a branch line, and if we look at this business right, and if this revenue is partly taken away from the Union Pacific and given to the D&RGW, it will naturally [fol. 1489] throw their things a little out of order, and I think these branch lines may be taken from us.

Therefore, I would like to say that I would oppose taking this revenue from the Union Pacific, which I think it takes to operate any business—a certain amount of good revenue. If it is divided among the two railroads, why, they necessarily will have to cut down expenses and maybe discontinue these branch lines, which would be very detrimental to my business.

Q. In other words, Mr. Siddoway, you appreciate that the revenue that the Union Pacific receives——

Exam. Mullen: Please don't lead the witness.

Mr. Rouse: I didn't hear you, Mr. Examiner.

Exam. Mullen: I said, please don't lead the witness. You can rephrase the question, though.

Mr. Rouse: Yes.

By Mr. Rouse:

Q. The abandonment of branch lines would be of particular disadvantage to you because you are located on a branch line; is that right?

A. That is right. These branch lines were made when roads were poor and it was very hard to get around; and they have been of great benefit to us, and I would like to maintain them.

I don't believe they could be if the revenue, or part of the revenue, were taken from the Union Pacific. I don't think they could maintain all these small branches in operation.

[fol. 1490] Q. Your thought is that the revenue from that operation is not sufficient to justify the operation of the service.

A. That is correct.

Exam. Mullen: You are still leading the witness.

By Mr. Rouse:

Q. You are opposed to the abandonment of the branch lines; is that correct?

A. That is right.

Exam. Mullen: He said that just now.

Mr. Rouse: That is all, Mr. Examiner.

Exam. Mullen: All right. Any cross-examination?

Cross-examination.

By Mr. Gibson:

Q. Mr. Siddoway, did you prepare this statement or was it prepared for you?

A. I prepared it myself. It was written by a stenographer, but I dictated it.

Q. I see.

Several witnesses have testified in this case previously, Mr. Siddoway, to the effect that having markets available in all possible parts of the country is an advantage to a producer of livestock.

As I understand your statement, you disagree with those people?

A. Not exactly; no, sir.

Q. You think it is an advantage to have markets available to you?

[fol. 1491] A. I think it is; yes.

Q. Do you sell speëp on the Ogden market?

A. I have done so.

Q. Now, referring to the taxes that were paid in the counties you mentioned—school taxes, primarily—were those taxes paid on the property of the Union Pacific Railroad—that is, as a school levy? You said you were familiar with taxes.

A. It was paid on the property; yes, sir. As I understand it, the Union Pacific pays about 10 per cent of the property tax in the state of Idaho.

Q. I see.

A. And a lot more than that in some counties. They have paid at least half in Clark County, and have done so in the past year.

Q. You say those taxes were paid in the 30's, when you had some lean years?

A. Yes, sir.

Q. What amount of taxes did they pay in the county with which you are familiar at that time?

A. I don't have the exact amount.

Q. Was there any difference in the amount of taxes paid then and the amount of taxes paid now?

A. Well, no, there wouldn't be any difference in proportion. But the farmers were unable to pay a lot of the taxes at that time. They didn't get any revenue from their crops in the early 30's, as you remember.

[fol. 1492] Q. Pardon me. I am referring to the amount of taxes paid by the Union Pacific Railroad in your county.

At that time did they pay approximately the same amount of taxes they pay at this time?

A. I think, according to their valuation, they paid probably more than they do at this time—according to what they have. But the farmers were unable to pay the taxes in those years.

Q. Well, the increases in taxes paid by the Union Pacific

would be dependent upon their increased valuation, would it not, in your county?

A. Yes, sir.

Q. Was there a decrease in the business of the Union Pacific in the 1930's? Didn't they have lean years, too, at that time?

A. I don't know as to their business.

Q. Well, you are familiar with their traffic moving through this county of which you are speaking?

A. Well, if they didn't have the products to ship, there naturally would be a smaller business.

Q. And at the present time their business has increased? Wouldn't that be a general statement?

A. That could be made as a general statement. If there was more stuff produced in the county there would be more stuff to haul out.

Q. Do you think there is any connection between the taxes they pay and the business moving through your county?

[fol. 1493] A. I didn't get that.

Q. Is there any connection between the volume of taxes paid by the Union Pacific and the volume of traffic they have moving through your county? They pay their taxes on the real estate and the buildings?

A. They pay their taxes on the operations. That is, on what they own in the territory.

Q. If these rates were established through Ogden, Mr. Siddoway, would you use them—the joint rates we are discussing here?

A. Well, I am not able to answer that. I have always tried to operate where I thought it would better my conditions. And from what I know, I don't think it would better my conditions.

Q. If the rates were established and more markets were available to you, you might use these rates; isn't that true?

A. If there were more places to sell, I don't think I would. I have been perfectly satisfied, as far as I have had any dealings.

And, further, I would like to say that I am well satisfied with what is going on. I am not of the opinion that

I would like to stop some thriving operation in order to get a new one—try to get a new one—whether I knew they could do anything or not, rather than having the one that is here already.

Q. Other citizens in Idaho have testified, with respect to these rates, who are similarly situated to you in the [fol. 1494] livestock business, that if they are established they would be of advantage to them.

Now, would you be opposed to those people having the advantage of those rates if it would help them?

A. No, sir. I am not opposed to anything that would help anyone.

Q. Referring to the branch line through your territory, you say that you are interested in that property's continued use.

Do you own trucks in your operation, Mr. Siddoway?

A. Yes, sir.

Q. Do you use them to haul lambs to market?

A. No, sir.

Q. You ship all your lambs by rail?

A. I ship them by rail.

Q. Have the highways in your county improved since the 1930's, for instance?

A. Yes, sir.

Q. You use them more extensively than you did then, at the present time?

A. I might not say I use them more extensively, but I do it much easier.

Mr. Gibson: I think that is all.

Exam. Mullen: Any redirect?

Mr. Rouse: That is all. Thank you.

Exam. Mullen: Witness excused.

(Witness excused.)

[fol. 1495] Exam. Mullen: We will recess for 10 minutes.

(Short recess taken.)

Exam. Mullen: Come to order, gentlemen.

Mr. Melia: I will call Mr. Yoder.

LEWIS YODER was sworn and testified as follows:

Direct examination.

By Mr. Melia:

Q. The testimony which you will give here has been reduced to writing, Mr. Yoder?

A. It has.

Q. Will you proceed to read it?

A. My name is Lewis Yoder and my home is at Nampa, Idaho, a point on the main line of the Union Pacific just west of Boise, where I operate a packing plant for processing potatoes, onions, lettuce and green peas. Also, I operate a packing plant at Marsing, Idaho, and buy produce fro shipment from such points as Emmett, Wilder and other stations throughout the Nampa territory.

Our shippers will average about 650 cars a year, which are sold to a large extent at points east of Denver, principally Kansas City and east, and some in the southwest. I have been in this business at Nampa since 1914.

Having been a shipper over the Union Pacific for about 35 years, during which time I have been in rather close touch with the railroad situation, including rate matters, here in in Idaho, my reasons for opposing the complaint [fol. 1496] of the Rio Grande asking for opening of the Ogden gateway are as follows:

The service which the Union Pacific gives on our movement of loaded cars has always been very good. Most of the perishable movement is in solid block, usually made up at Nampa for the products of this district, and these solid trains can be depended upon to make the Missouri River points on the third day. If any of the cars in these blocks are routed via the Rio Grande, then it would be necessary to put trains through the Pocatello hump yard, involving one dealy, and again through the interchange to the Rio Grande at Ogden, involving a second delay. Both operations, of course, would require considerable switching, thereby increasing the possibility of damage to the lading.

Our refrigerator car service on the Union Pacific in Idaho is good. On account of having the P. F. E. shops at Nampa, we always have nice cars, clean and in good condi-

tion. Opening of the Ogden gateway would mean the scattering of PFE cars over the Rio Grande route and because of its longer distance for both the loaded movement and the return empty movement, resulting in extra transit time in both directions, it would interfere with and reduce the supply of refrigerator cars available for loading, and this is particularly important during the height of the shipping season. We feel that these P. F. E. cars belong to U. P. shippers, but if they get into the hands of the Rio Grande [fol. 1497] empty, then they might well be taken for loading by shippers on that line and never get back to Idaho.

Years ago, the Union Pacific inaugurated rates on Idaho ptotatoes, vegetables and onions for the purpose of encouraging the growth and development of these industries so that they could compete in distant eastern markets with similar products grown much closer to those markets. The Union Pacific was vitally interested in seeing this volume grow, and it has grown steadily since 1914. It was to the interest of the Union Pacific to give us the lowest per ton mile rates possible in order to encourage the growing of perishables here, but if this tonnage is going to be split up and divided with the Rio Grande at Ogden, then the Union Pacific will have less incentive to work for the continued growth of this area. Railroads, like individuals, work best when working for themselves.

The Rio Grande originates a considerable volume of potatoes, onions and lettuce, all of which is sold in competition with similar products grown in Idaho, viz., onions and potatoes from the Western Slope, potatoes from the San Luis Valley, and lettuce in the summer from Canyon City and the Slope Mountain areas.

Exam. Mullen: That next paragraph should come out. It is purely argumentative. Please eliminate that.

[fol. 1498] The Witness: To require the Union Pacific to inject the Rio Grande into the eastbound haul would add absolutely nothing to the supply of transportation service available in Idaho. I know from experience that the route is not a practicable one, simply for the reason that to points where most of my shipments move, the Rio Grande is quite circuitous and the transit time would of necessity be longer. Our products are highly perishable and we

would use the shortest and fastest route even though the same rates applied over the Rio Grande. Here I might say that if I am involuntarily required to ship over the Rio Grande because of eastern solicitation among my purchasers, then my concern is that, even though the contents of the car were in first class condition at the origin point, if upon arrival over the Rio Grande they were found to be in poor shape, then the purchaser would, I am sure, ask me to take part of the loss, and perhaps it would be good business for me to do it. I prefer that eastern buyers continue to instruct routing over the Union Pacific because I think it gives better service than other lines.

Opening of the Ogden gateway via the Rio Grande would not create any new markets for Idaho products. I might also say that in the past I have had no trouble in making diversions and reconsignments in cases where cars are rejected for any reason.

Mr. Quirk: I think that is argumentative.

[fol. 1499] Exam. Mullen: Let it stay in.

Mr. Quirk: All right.

The Witness: If this gateway is opened, some shippers might demand constant special favors from the Union Pacific as a price of billing cars direct over the Union Pacific. This would be unfair to reasonable, fair-minded shippers who expect nothing from a carrier but fair rates and good railroad service, without special concessions.

By Mr. Melia:

Q. Would you like to elaborate on that last statement, Mr. Yoder? Just what did you have in mind when you wrote that?

A. Well, there are many shippers who like a special advantage over other shippers. In times of a car shortage they want the most cars and the quickest yard service, and in case of a claim they are not fully able to substantiate they like to enforce the collection of it, if it is possible, through short haul.

Q. Do you know from experience that that practice has been indulged in?

A. I know, especially from the records that we have had in eastern terminals, that many receivers use that.

Q. Mr. Yoder, over on page 2 of your statement, paragraph C, you mention the subject of rates—what the Union Pacific has done in the matter of establishing rates to encourage the growing and marketing of fruits and vegetables here. Could you be more specific? How does your rate [fol. 1500] situation in Idaho compare with Colorado, for instance?

A. Our rate per ton mile on practically all of our products is less than the Colorado rate per ton mile. This was started, really, at the beginning of my work in the potato and onion industry, as well as in the beginning of the industry in 1914.

The Union Pacific, in their desire to expand our production, and our market, finally established a rate of 12 cents over Colorado for Idaho Falls territory, and 2 or 3 cents—first 2 and later 3—for the Nampa-Caldwell district.

Q. What is the distance, Idaho Falls over Greely, Colorado, approximately?

It is 500 miles, isn't it?

A. Idaho Falls is around 600 miles.

Q. Over Greely?

A. Over Greely. And then Greely to Fort Worth is 853.

Q. You say the Union Pacific established a rate of 12 cents, Idaho Falls over Greely?

A. They did. However, by the percentage increases that differential has gradually been increased.

Q. Do you feel that the Union Pacific has treated you—I will deal with you individually—fairly in the matter of rates on potatoes and onions?

A. In the matter of potatoes and onions, lettuce, and especially fruits, compared to any other district, and the [fol. 1501] number of miles from market, we have been treated very fairly.

Mr. Melia: Thank you. You may cross-examine.

Cross-examination.

By Mr. Quirk:

Q. Mr. Yoder, what special favors have you demanded of the Union Pacific?

A. I don't think I ever demanded any that I was not entitled to.

Q. You say here that if this gateway is opened some shippers might demand constant special favors from the Union Pacific.

A. That is absolutely correct.

Q. Then you are against competition, I take it?

A. I am not against competition. I am against unfair competition.

Q. Why would shippers demand special favors, if the gateway was opened, that they wouldn't demand now?

A. Some shippers, there isn't any question; but we have shippers who buy from the East. Perhaps some who are residents of this section. If they could divert 10 to 20 to 30 cars weekly over another line, immediately they would begin to work with the Rio Grande and the Union Pacific. If you want the larger percentage of this haul, you perhaps had better give consideration to these claims for loss and damage.

Q. Do you think the shippers in the East are not as nice as they are out here?

A. I think the shippers average about the same as other [fol. 1502] humanity in all sections.

Mr. Quirk: That is all. Wait a minute——

By Mr. Quirk:

Q. Mr. Yoder, referring to page 3 of your statement, the paragraph that you have numbered F, you say that you have had experience with this route that is in question here. Have you used the Union Pacific to Ogden and the Rio Grande from Ogden in shipping your products?

A. I haven't stated there that I have had experience shipping over the Rio Grande. I stated that I have had experience in out-of-line hauls, and we have learned to confine our shipments through as few terminals as possible and as few connections. In shipping to New York we usually bill U. P., Wabash and Erie or Pennsylvania to avoid the large terminals.

Q. That isn't the way I read your statement.

You say, "I know from experience that the route is not a practicable one."

A. That is correct. It would take a car out of its shortest haul and best roadbed, and it would be impracticable.

Q. I see.

If the rates were established, you wouldn't use this route at all, would you?

A. I can't see why I would. There are no markets there that I could sell to because there are competitors.

Q. On page 4 you refer to damage to shipments and the fact that you might have to share in paying that loss. Would you also file a claim against the railroad companies [fol. 1503] involved for the loss?

A. I probably would. If these blocks had to be stopped at Pocatello in order to take out the diverted cars, there would be a terminal there that would use that, and they would be switching them through that hump yard, and then again through this Ogden delivery, and we undoubtedly would have more damage than if it goes straight through; and if there were losses I would have to file a claim.

Q. That isn't the question I asked you. I asked you if you would file a claim with the railroad. You said you would.

A. Yes, I would file a claim if there was loss and damage in the shipment.

Mr. Gibson: I see. Thank you.

Exam. Mullen: That appears to be all. Thank you.

(Witness excused.)

B. M. Tibbetts, Sr. was sworn and testified as follows:

Direct examination.

By Mr. Rouse:

Q. Mr. Tibbetts,——

Exam. Mullen: Just a moment, please. An additional appearance is to be entered.

Mr. Coc-rum, Henry A. Cockrum, attorney, Office of the Solicitor, U. S. Department of Agriculture, Washington, D. C., appearing on behalf of the Secretary of Agriculture [fol. 1504] of the United States.

Exam. Mullen: Do you intend to produce any witnesses?

Mr. Cockrum: We will have a witness, Mr. Mullen.

Exam. Mulen: You will have, you say?

Mr. Cockrum: We will have one witness.

Exam. Mullen: All right.

Mr. Collins: Mr. Examiner, I wonder if Mr. Cockrum is ready now to say whether he is supporting the complainant or not?

Mr. Cockrum: Our position is that of an invervener in support of the complainant.

Exam. Mullen: All right, Mr. Rouse.

By Mr. Rouse:

Q. Mr. Tibbitts, have you reduced to writing the testimony you wish to give in this case?

A. Well, I dictated this statement.

Q. You have a written statement which you wish to read, do you not?

A. Well, I don't think so, other than comment that I might make.

Q. You may proceed to read your statement, Mr. Tibbitts.

A. My name is B. M. Tibbitts, Sr. I live at St. Anthony, Idaho.

I am engaged in business at that point under the firm name of B. M. Tibbitts & Son Company. We are the owners of four ranches in Fremont County and one in Madison County, Idaho, comprising a total area of between [fol. 1505] 500 and 600 acres. We are engaged in the production of agricultural products on the land above described and, to a large extent, in the production of potatoes.

During the past year we produced on this land approximately 2,500,000 pounds of potatoes. In addition to operation of the farms above described, we are also a packer and shipper of potatoes. We have potato warehouses located on the lines of the Union Pacific at Egin and Lorenzo, Idaho, and I ship from those stations as well as various stations on the line of the Union Pacific in the vicinity of St. Anthony.

During the year 1949 we shipped from the stations above

enumerated 909 carloads of potatoes and received at those stations 91 carloads. We also shipped from the above stations approximately 50,000 bushels of grain. All of the above-described shipments were routed via the lines of the Union Pacific and its direct connections and consigned to markets in various locations in the country, east, west and south.

We have never had occasion to ship via the lines of the D&RGW and have never requested either the Union Pacific or the D&RGW for through rates via the lines of the D&RGW for the reason that with the variety of routes open to us via the Union Pacific and its connections we have at no time found any difficulty in reaching markets with the products which we ship.

The routes of the Union Pacific are adequate and satisfactory for our needs. The Union Pacific has furnished [fol. 1506] with reasonable promptness an adequate supply of cars for our purposes.

It is important, in the shipment of potatoes, to ship via the most direct route so as to avoid delay in transit. There would be no advantage to us in routing via the D&RGW because it is a longer route and, if used, would occasion delay in arrival at ultimate destination.

Exam. Mullen: That next paragraph, it seems to me, is repetition of what other witnesses just said.

Mr. Rouse: May I ask the witness another question?

Exam. Mullen: If you make it brief. We don't want repetition.

By Mr. Rouse:

Q. Do you wish to adopt other statements other witnesses have made in this hearing regarding the adequacy of supplies and service rendered by the Union Pacific?

A. I do.

Q. And the economic effect of the Union Pacific in this state?

A. Postively.

Q. You may skip the next paragraph in your prepared statement, Mr. Tobitts, and start at the bottom of the page.

A. At the hearing with respect to this case held in Salt

Lake City during the month of December, 1949, certain parties testified in behalf of the D&RGW, one saying that his firm was a member of the Idaho Potato and Onion Shippers Association and that he was a vice president of that Association; and the said that he represented the St. [fol. 1507] Anthony Chamber of Commerce, and on December 16, 1949, I sent a telegram to Mr. E. B. Collins, counsel for the Union Pacific in this case commenting on this testimony. The telegram which I sent to Mr. Collins reads as follows——

Mr. Quirk: I object to this method of dealing with this subject. These witnesses testified. Their testimony is of record. They were cross-examined. What is this witness intending to do?

Exam. Mullen: I don't think you need to read that telegram; but you can state from your own knowledge the same facts without reading the telegram.

What is it you want to prove?

The Witness: Certain individuals at that hearing represented themselves as representing the different organizations in Idaho, and they were speaking for those organizations; and, upon reading these press reports, I took it upon myself to send this telegram of protest to Mr. Collins because, as a member of these particular organizations to which I refer, I was not contacted or polled, and I knew they were not representing me or my firm.

Mr. Quirk: That is your point, is it—that they were not representing you?

The Witness: Yes, sir.

Mr. Quirk: I think you made that clear.

[fol. 1508] The Witness: They were not representing the organizations because I wasn't polled as a member of the organizations.

Exam. Mullen: Your point is that they were not representing you; is that it?

The Witness: They were not speaking for the organizations, because I later contacted these different organizations and found out that they were not speaking for the organizations.

Mr. Quirk: I object to that as incompetent because these

men were on the witness stand and they were cross-examined.

Mr. Collins attempted to show that they acted through the organization boards, or whatever way they functioned in the organization, and it is not unusual for one or two, in a large group, that do not agree with the others.

The Witness: I think you will find in the record—Mr. Bass I referred to—did not act as a representative of the association but merely as a representative of——

Exam. Mullen: How do you know that, sir?

The Witness: Because I contacted the manager and the vice president.

Exam. Mullen: That is hearsay. What do you know of your own knowledge?

The Witness: He put out a letter to the effect that they didn't.

Exam. Mullen: What do you know of your own personal knowledge?

[fol. 1509] The Witness: All I have is the fact that the president of the organization sent a circular letter to the members saying that Mr. Bass was not speaking for the organization; that he was merely representing his own firm and was not speaking——

Exam. Mullen: Just a minute. That is hearsay. What do you know, of your own personal knowledge, of whether he did or did not represent them? You stated he didn't represent your firm.

The Witness: He didn't represent this organization, the Idaho Potato and Onion Shippers Association.

Exam. Mullen: All right. We will let it go at that.

The Witness: I am again affirming that statements made in my telegram. I am not, as heretofore stated, in favor of the D&RGW in this case. The opening of the Ogden gateway would be of no benefit to me and it could be of serious disadvantage if sufficient business were taken from the Union Pacific so that it would be necessary for it to reduce its service or increase its rates.

I am, therefore, unalterably opposed to the application of the D&RGW in this case and I am appearing here as a witness in support of the defendants, and particularly the Union Pacific.

Mr. Rouse: That is all the direct, Mr. Quirk.
Exam. Mullen: Cross-examine.
Mr. Quirk: No questions.
[Vol. 1510] Mr. Rouse: Thank you, Mr. Tibbitts.
Exam. Mullen: Witness excused.

(Witness excused.)

Mr. Rouse: Mr. Clement.

Ross Clement was sworn and testified as follows:

Direct examination:

Mr. Quirk: Mr. Examiner,——
Exam. Mullen: Let's have a little quiet, please.
Mr. Quirk.——
Mr. Quirk: I would like to make a suggestion.
The witnesses that we have heard this morning are repeating and saying about the same thing. I am willing, for the complainant, to agree, if it is agreeable with counsel for the other side, that they dispense with putting these various witnesses on who have the same story and, if they were put on, the names could be given, if they were put on the witness stand, and that they could be sworn to in groups that they would testify to the same general effect as the witnesses which would be picked out by Mr. Collins.
That is just a suggestion.
Mr. Collins: Mr. Examiner, we have even given some thought to making that proposal ourselves. There is some difficulty about it. For one thing, many of these shippers, who have the privilege and the right to come on the stand [Vol. 1511] and do their own stating, I wouldn't undertake to try to control in that respect if they want to get on the stand.
Another difficulty is that, while perhaps their stories are of the same general tenor, there are some technical features to the operations or shipping interests in one or another witness that prevents anything like an exact duplication.
What I mean is that one thing may be true with respect

to grain and another with respect to lumber, and things of that sort.

Now, we want to get that sort of representative picture before the Commission, and I don't see how it would be practical to adopt Mr. Quirk's suggestion. But we will be glad to think it over and look at our witnesses' statements that we understand they are going to make and perhaps confer with the witnesses with a view to seeing if we can adopt his suggestion.

Exam. Mullen: I have a further suggestion along that line.

If there is no objection, those statements could be received as verified statements when the witnesses are sworn. The witness could be here and could be sworn, and their statements could be received as verified statements after Mr. Quirk has had an opportunity to read them and interpose any objections he desires to make. In that way the statements will get into the record as a verified statement. It would not, of course, be copied into the transcript. You [fol. 1512] might consider that a possibility also.

Mr. Collins: Well, I wish to make this remark, not for the purpose of being retaliatory, but I call to the Examiner's attention that Mr. Quirk took no short cuts in the presentation of the Rio Grande's part of this case. In fact, he refused to accept any special procedure which would have enabled us to shortcut the trial in the making of the record in this case.

I think it is a little unfair for him to have one procedure and for us to have another and different procedure, Mr. Examiner, much as I would have liked, in the beginning, to cooperate to the end of brevity with the Commission, which I tried to do.

Exam. Mullen: Of course verified statements become a part of the record.

Mr. Collins: There seems to be a feeling among some of the witnesses that they should appear and present their testimony, but we will take your suggestion under consideration, Mr. Examiner.

Exam Mullen: All right.

Mr. Quirk: Could I make this one observation?

As you recall, most of the witnesses which we will char-

acterize, for want of a better name, as public witnesses were on our side. There were one or two that weren't.

I call attention also to the fact that we finished part of the [fol. 1513] day here, and Salt Lake in 4 days and a half. We are in the fifth day now, and we didn't take so much time.

Exam. Mullen: All those facts will have to be considered in determining what procedure we will follow from now on.

Mr. Collins: Yes, we will try.

Exam. Mullen: All right.

By Mr. Rouse:

Q. Mr. Clement, do you have a prepared statement of your testimony?

A. Yes.

Q. You may proceed to read it.

A. My name is Ross Clement. I am one of the partners of Clement Brothers, a co-partnership consisting of myself and my brother Gale Clement.

Clement Brothers are engaged in growing, processing and shipping potatoes. Clement Brothers have a warehouse, processing plant and potato cellar located on Union Pacific trackage at Lewisville, Idaho. The potato cellar at Lewisville has a capacity of 100 carloads of potatoes.

In addition to our processing plant and warehouse at Lewisville, we operate, under lease, 180 acres of land in the vicinity of Lewisville on which there is located a potato cellar having a capacity of 50 carloads of potatoes. The land under lease, which is operated by Clement Brothers, is used for agricultural purposes on which we produce hay, grain and potatoes, although the majority of the agricul- [fol. 1514] tural crops produced are potatoes.

During the year 1949 Clement Brothers produced on this leased land approximately 2,000,000 pounds of potatoes. In addition to the potatoes produced on the land which Clement Brothers operate, we purchased potatoes from growers in the territory.

During the year 1949 Clement Brothers processed and shipped—including the 2,000,000 pounds of potatoes grown on our farm—approximately 250 carloads of potatoes, and, generally, we handle between 175 and 250 carloads per year,

although we have, in a given year, shipped as many as 300 carloads.

During the growing season we employ two men in addition to ourselves. During the harvesting season we employ from 10 to 40 men and during the processing and shipping season we employ approximately 20 men.

Our potatoes are shipped from our plant at Lewisville, Idaho, and for the most part consigned to Kansas City and Chicago markets, the preponderance of the shipments being consigned to Kansas City. Occasionally, part of our shipments are sold to track buyers at Lewisville. There is no uniformity in our practice. Some of our potatoes are sold to track buyers and some consigned to produce dealers in the Kansas City and Chicago markets, depending upon which is the most advantageous arrangement to Clement Brothers.

All of the shipments handled out of our plant are shipped [fol. 1515] via the Union Pacific. We have never had occasion, in order to reach suitable markets, to ship via the lines of the D&RGW nor have we ever requested that line or the Union Pacific to establish a joint rate via the lines of the D&RGW, nor do we anticipate that we will ever have occasion to ship via that line because markets via the lines of the Union Pacific and its connections are ample for our purposes.

The service rendered by the Union Pacific, both in the matter of furnishing cars, switching and transit, has been entirely satisfactory for our purposes.

It is our understanding that the D&RGW in this case seeks to have the Ogden gateway opened so that by solicitation it may secure routing on some of the products from the State of Idaho, including the products produced and shipped by us.

Exam. Mullen: Just a minute. The balance of that is repetition of what has already been said.

Mr. Rouse: May the record show that this witness will adopt the statements that the other witnesses have made to the effect that the Union Pacific renders adequate service, that it maintains a substantial payroll in the state, and that it pays substantial taxes?

By Mr. Rouse:

Q. Would you adopt the statements of the other witnesses in that respect, Mr. Clement?

A. Yes, I would.

Q. You may skip your prepared statement, Mr. Clement, [fol. 1516] from where the Examiner interrupted you down to the beginning of the last complete paragraph of page 3.

Q. It is our belief that if the gateway were opened and the D&RGW should, by solicitation, secure routing on any substantial amount of business, the earnings of the Union Pacific would be reduced and we might reasonably anticipate one of two things—either it would be necessary for the Union Pacific to increase its rates or reduce its service, either or both of which would decidedly be to our disadvantage.

Further, we understand that the route of the D&RGW to the points where our potatoes are marketed is substantially longer than the route via the Union Pacific. Expedition in transit is definitely an advantage to us in our business, and we would, therefore, necessarily use the most direct route to avoid delay in transit.

In conclusion, Clement Brothers is definitely opposed to the opening of the gateway as petitioned by the D&RGW in this case, because there would be no resulting benefit to us; but there would, as heretofore stated, be many disadvantages. We are, therefore, appearing here as a witness for the Union Pacific in this case in opposition to the petition of the D&RGW.

By Mr. Rouse:

Q. Mr. Clement, in the last paragraph that you have read, you have referred to the disadvantages heretofore stated. Those disadvantages that you intended to state in [fol. 1517] your written text you adopted from the testimony of the other witnesses; is that correct?

A. Yes.

Mr. Rouse: That is all I have, Mr. Quirk.

Cross-examination.

By Mr. Quirk:

Q. Mr. Clement, referring to your conclusion, is it just a coincidence that the language of your conclusion is almost identical with the language of practically all the witnesses we have heard this morning?

A. That might be a coincidence, but this is my own. These are my own words. My brother and I prepared it—both of us. This is definitely my feeling on this matter.

Mr. Quirk: All right. Thank you.

Exam. Mullen: That is all. Thank you, Mr. Clement.

(Witness excused.)

Mr. Collins: Mr. Examiner, I want to put Mr. Edens on the stand for a couple of minutes to furnish some information Mr. Quirk asked for the other day.

R. E. Edens was recalled and testified further as follows:

Redirect examination.

By Mr. Collins:

Q. Mr. Edens, the other day Mr. Quirk requested that we supply some information in addition to some shown at about the middle of page 18 of your written prepared statement. Do you have with you the information he requested?

[fol. 1518] A. Yes, sir.

Q. Will you go ahead and submit it?

A. The war year 1945 was the all-time peak year for volume traffic handled through the facilities of the OUR&D Company in that year. 2,847,277 cars were handled through these facilities.

July was the peak month of the peak year 1945 for traffic handled. During that month a total of 284,711 cars were handled in 2,966 trains, an average of 96 trains daily and a daily average of 70 switch shifts with crews and engines used.

Of the total 2,966 trains handled in the month of July, 894 were solid trains, which moved through the Ogden terminal without switching, and this fact made it possible for us to get the total volume of traffic through the Ogden terminal. Even then, and with the addition of the East Yard, with its 10 tracks holding 135 cars each, we experienced severe congestion and delays, with inbound trains being held out of the yard from all directions.

Mr. Collins: That is all.

Mr. Gibson: What kind of trains were the 894?

Mr. Collins: Solid—required no switching the yard.

Mr. Gibson: They didn't go through the yard, then?

Exam. Mullen: Mr. Edens is the witness.

Mr. Gibson: I'm sorry. I was asking for information. I [fol. 1519] was not cross examining.

Mr. Collins: They were handled through the facilities.

Exam. Mullen: Now, just a moment. Who is the witness here, Mr. Collins or Mr. Edens?. Why don't you ask Mr. Edens that? He seems to be the best informed man on that.

Mr. Gibson: Yes, sir.

By Mr. Collins:

Q. Explain that. Were the 894 solid trains handled through the Ogden terminal facilities, Mr. Edens?

A. Yes.

Q. They were; but they were not broken up, classified, or reassembled, were they?

A. No, sir.

Mr. Collins: Does that explain it?

Mr. Gibson: Yes.

Exam. Mullen: As I understand it, these trains moved around the yard to the by-pass tracks that were mentioned before.

The Witness: Yes, sir.

Exam. Mullen: They did not move through the yards.

The Witness: That is, the major portion of them. Some of them moved through the yard proper.

Exam. Mullen: But the major portion moved over these by-pass tracks?

The Witness: That is true.

Exam. Mullen: All right.

[fol. 1520] By Mr. Collins:

Q. If you had solid trains, westbound, from the Union Pacific, going to the Southern Pacific, would they by-pass the yard?

A. No, sir.

Q. They would go right through the middle of it, I suppose?

A. Yes.

Mr. Collins: All right. That is all.

Exam. Mullen: Cross examine.

Mr. Quirk: No questions.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

Exam. Mullen: Have you another witness?

Mr. Melia: Mr. Naylor.

ROBERT M. NAYLOR was sworn and testified as follows:

Direct examination.

By Mr. Melia:

Q. Mr. Naylor, have you reduced your testimony to writing?

A. I have.

Q. Will you proceed to read it, please.

A. I will.

This is a statement in writing of Robert M. Naylor, of Emmett, Idaho.

My name is Robert M. Naylor. My residence and place of business is Emmett, Idaho. I am president of the Highland [fol. 1521] Livestock and Land Company, incorporated in the State of Idaho in 1907, which is in the business of breeding, fattening and marketing sheep, incident to which we also carry on extensive farming operations. My experience in the sheep business dates back over a period of 30 years.

Our company operates extensively in western Idaho.

Our lambing operations start in January and we market our lambs five months from date of birth. For the past several years, our primary market for lambs has shifted from eastern markets to Ogden, Utah. For instance, there was a time when our shipments moved direct to Chicago; then, later, our market was Omaha; then, in the late 20's and early 30's, it was Denver; and since then and now the initial movement has been to Ogden, where the packers are active buyers. Highland prime lambs are sold on the Ogden market to the packers who have plants at points reached by the Union Pacific and its eastern connections.

We have shipped about 50 cars annually, or about a million pounds of prime lambs. All of our lambs are now sold in Ogden, because of the shift in our primary market, and the Union Pacific is giving us the benefit of an out-of-line haul to Ogden and back to the main line at Granger without additional charge.

Owing to the fact that the bulk of producers in southwestern Idaho are raisers of prime lambs, instead of feeders and breeding stock, it is necessary for Highland to go [fol. 1522] out of the state for ewe lamb keepers or breeding stock.

Prior to 1940, Highland raised its own replacement ewes in its own outfit, but as we are producing a choice milk fed lamb in demand by the packers, it is too costly for us to produce our replacements even as much as we want to.

Since 1945, the Highland outfit has acquired yearling ewes for replacements from sheepmen in the neighborhood of Billings, Montana. These yearling ewes originate either on the Milwaukee or Northern Pacific and are transferred to the Union Pacific at Butte, from which point they are given special runs to our unloading points in southwestern Idaho.

Our inbound movements of ewes and outbound movements of lambs are at flat rates, no transit being available or involved since the two moves are in opposite directions. This has not proved burdensome from a competitive standpoint to our operations.

Because the lambing season varies in Idaho, two weeks early or late, the initial date of shipment varies from year to year. The records will show that Highland, as early as May of each year, orders cars from the Union Pacific's

Nampa office for the entire season's run, which begins in July.

Throughout the 17 years that I have been with the Highland Company my experience has been that the Union Pacific has handled our lambs to Ogden and other eastern markets in such a capable manner that Highland has never filed a claim against the railroad for a case [fol. 1523] of loss or damage due to bad handling or otherwise; and I might also say that during my previous connection as fieldman for the First National Bank of Idaho, Boise, Idaho, from 1926 to 1932, operating similar business for them, I did not have occasion to seek or claim damages from the Union Pacific.

In summarizing my testimony, there are a few points that I want to particularly emphasize.

First, the production of sheep in southwestern Idaho is predominantely finished animals, fattened and ready for market. The number of feeder stock available for sale as such is so few that they are of no consequence.

Second, we have not found that the payment of combination rates—that is, feeder rates into and fat rates out of the breeding and feeding points—prevents us from competing with sheep producers elsewhere.

Third, without the protection of its long haul, I do not see how the Union Pacific can continue to give the kind of attention and preferred service to livestock which we have been getting in the past and which is so basically essential to the success of our operations.

Any breakdown or curtailment of that service by reason of reduced revenues and forced economies or any increase in transportation costs would be a serious threat to our business.

That is where the Rio Grande's proposal pinches our [fol. 1524] business, and that is why I am appearing here to state a few facts in opposition to the complaint of that railroad.

Mr. Melia: You may cross examine, Mr. Quirk.

Cross-examination.

By Mr. Quirk:

Q. Mr. Naylor, will you turn to the first carryover paragraph on page 2?

A. Yes.

Q. You say, "Since 1945 the Highland outfit has acquired yearling ewes for replacements from sheepmen in the neighborhood of Billings, Montana," and that "These yearling ewes originate either on the Milwaukee or Northern Pacific and are transferred to the Union Pacific at Butte, from which point they are given special runs to our unloading points in southwestern Idaho."

Do those lambs or ewes move on a joing single-factor rate from the neighborhood of Billings to points in southwestern Idaho?

A. I think they are the same as I have stated in my testimony, Mr. Quirk. "Our inbound movements of ewes and outbound movements of lambs are at flat rates,"—if you will continue to read—"no transit being available or involved since the two moves are in opposite directions."

Q. In other words, you don't pay a combination of rates on ewes to Montana, do you? Is that right?

A. Mr. Quirk, I am not a railroad man, nor am I too [fol. 1525] much posted on rates. When I go to Montana to buy replacement sheep for my outfit I am just like when I go down the street to buy a $100 suit of clothes. I am not too interested whether I am in a 25-cent taxi or a 10-cent bus.

Q. Frankly, I am seeking information. I am really not cross examining you.

A. I wish to say why I am not so involved as to that rate feature. When I go to Montana and, through selection and choice—the same as buying that suit of clothes—get the quality and kind of particular breeding stock I need in my business, I have no thought in mind, when I go and get what I want, about the question that you may ask.

Mr. Quirk: That is all.

Mr. Melia: That is all. Thank you, Mr. Naylor.

Exam. Mullen: Thank you, Mr. Naylor.

(Witness excused.)

Exam. Mullen: We will adjourn now for lunch and resume at 1:30.

(Whereupon, at 12:15 p.m., the hearing in the above matter was recessed until 1:30 p.m. the same day.)

[fol. 1526] Afternoon Session, 1:30 p. m.

Exam. Mullen: We are ready to proceed, gentlemen.

A. J. STILLING was recalled and testified further as follows:

Cross-examination:

Exam. Mullen: A little quiet, please.

Mr. Collins: Mr. Examiner, Mr. Stilling is on the stand for cross examination which, I understand, opposing counsel is ready for.

Exam. Mullen: All right, Mr. Quirk.

Mr. Quirk: Mr. Gibson is going to ask him some questions.

By Mr. Gibson:

Q. Mr. Stilling, will you please refer to page 6 of your written statement?

In that page you refer to a potential of 171,909 carloads. Then further down, Mr. Stilling, you refer to 50,000 carloads of that total originated or terminated at Oregon or Washington, as I understand you, outside of the area that would be considered within this complaint.

Now, is it your understanding that that situation—that the 50,000 should be subtracted from the 171,000?

A. No, Mr. Gibson. The 50,000 carloads originated in the territory around the Pacific coast terminal, that is, around the Portland-Seattle area and on the Southern Pacific south of Portland. It represents carloads that actu-[fol. 1527] ally are involved in this proceeding but originated in an area where the Rio Grande now has joint rates on a competitive basis with all other lines.

Q. Those 50,000 loads, though, are not included in your figure of 171,000?

A. Yes, they are.

Q. They are included?

A. Yes, sir.

Q. Then do I understand you to mean that your potential—I mean actual, not potential——

A. That is right. It was actual movement in the year 1949, Mr. Gibson.

Q. Then it is your statement that from the 171,909 carloads actually moved you should subtract 50,000 from that that are already available for routing over the Rio Grande by a joint through rate?

A. That is right. Approximately 121,909 carloads originated in Idaho, Montana, and in that area of Oregon and Washington lying east of the Pacific coast terminals.

Q. Now, Mr. Stilling, I would like to refer you to a hypothetical movement from Cheyenne to McCammon, first moving via Cheyenne to Ogden, which I understand is approximately 483 miles, my Union Pacific routing, then from Ogden to Springville, Utah, which is approximately 98 miles, for the purpose of partial unloading, then from Springville back to Ogden, Utah, and from Ogden to [fol. 1528] McCammon, which makes a total mileage of approximately 790, considering the two backhauls.

The mileage from Cheyenne to McCammon over your short route is approximately 529 miles, according to our information, the difference between the two being 261 miles.

Is it true that the through rate would apply to the routing I have suggested—Ogden, back to Springville and back to Ogden and on through to McCammon?

A. I think that is correct. We have provided an out-of-line haul privilege there down to Springville. I believe it goes down that far, for partial unloading.

Q. Then I have one more question:

If you will please refer to page 83 of your statement, you refer to shipper testimony concerning eastbound rates on grain and grain products and you say that two witnesses appeared representing the Kansas Milling Company.

Isn't it true that one of those witnesses also appeared for approximately 14 other mills in Kansas? You heard the testimony in Salt Lake City when Mr. Kohlwes appeared there?

A. Yes, I did. You are speaking of the witness Kohlwes?

Q. Yes.

A. I believe he did represent some others. I don't recall the exact number.

Mr. Gibson: That is all.

Mr. Quirk: No questions.

[fol. 1529] Examiner Mullen: Anything on redirect?

Mr. Collins: No.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

Exam. Mullen: Do you have another witness?

Mr. Melia: Mr. Parsons.

LYNN R. PARSONS was sworn and testified as follows:

Direct examination.

By Mr. Melia:

Q. Mr. Parsons, have you reduced your testimony to writing?

A. Yes, sir.

Q. Will you proceed to read it?

A. Thank you.

My name is Lynn R. Parsons. I live at Weiser, Idaho, where I am in the business of packing and shipping potatoes and onions.

During the 1949 season, I operated on my own account. Before that and after being released from the armed services, I operated the Parsons Fruit Company's Weiser warehouse on a joint account basis with my brother, Edward E. Parsons.

For the 1949 season my shipments exceeded 200 cars. Almost all of my shipments of potatoes consisted of No. 1's, which were sold f.o.b. Weiser and billed mainly to Kansas City. A few went to Chicago. I sold quite a few No. 1's to [fol. 1530] cash track buyers who billed the cars to Kansas City. During 1948 I shipped very few No. 2 potatoes.

As to onions, all of these, both the large and the small sizes, were billed to Kansas City and Chicago. During the

time I was associated with my brother in the potato and onion business, and during the brief period that I have been on my own account I have not had any trouble reaching all the markets over the existing routes.

The Union Pacific, of course, is the only railroad for many miles around Weiser. As long as I must ask and depend upon the U. P. for cars, switching and everything that goes into getting my shipments started to market, I can see no need for putting the Rio Grande into the rail route.

In other words, the U. P. provides all the service I need at Weiser and my principal interest is in seeing that it is in a position to continue to give me fast and dependable rail service. To split up the haul and the revenue between the Union Pacific and the Rio Grande, which has no particular interest in my transportation problem, will only leave the Union Pacific less money with which to carry on its operations and this is where the Rio Grande's proposal will eventually hurt me.

While I would not route against the U. P. myself, all of my shipments are sold f.o.b. Weiser and are subject to purchaser's routing. With the opening of the Ogden route, the [fol. 1531] Rio Grande and the eastern railroads would be free to go among the purchaser-consignees and ask them to short haul the U. P., and no doubt in many cases they would do so without realizing how much I have to depend upon the Union Pacific at Weiser in the way of railroad service.

Even though I ship f.o.b. Weiser, I am interested in getting my perishables to market as fast as possible. I know that the Rio Grande route is quite a bit longer than the Union Pacific and if cars go over the Rio Grande, even though they are routed that way by the buyer, the chances are that he will ask me to divide up any loss if the cars reach him in poor condition, and I will have to do it to keep his business.

Another point that I want to mention is the matter of school taxes because I have had some experience with this problem in Washington County, Idaho, as a member of one of the school boards. The U. P. happens to be a heavy taxpayer in that county.

The Rio Grande, on the other hand, would pay no taxes for the support of the state and our schools, but the Union Pacific will have to go on paying taxes even though it loses the long haul on our business.

Mr. Melia: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. The Union Pacific taxes that you refer to are ad valorem taxes, aren't they?

[fol. 1532] A. Yes.

Mr. Quirk: That is all.

Mr. Melia: Thank you.

(Witness excused.)

Mr. Melia: Mr. Peckham, will you take the stand, please?

H. G. Peckham was sworn and testified as follows:

Direct-examination.

By Mr. Melia:

Q. Mr. Peckham, the statement which you hold in your hand was prepared by yourself, personally, was it not?

A. That is right.

Q. And, of course, it was mimeographed by the Union Pacific Railroad?

A. Yes, sir.

Q. But you wrote it personally; is that true?

A. Yes, sir.

Q. Will you proceed to read it, Mr. Peckham?

A. My name is H. G. Peckham. My home, for the past 37 years, has been on my ranch near Wilder, Idaho.

My business is general crop production and livestock feeding. I grow sugar beets, commercial onions, and head lettuce. I have produced twenty-seven crops of potatoes. I fed somewhat more than fifty thousand lambs in one eleven-year period.

ly rail shipments of freight that I have produced have from one hundred to two hundred cars per year. From
l. 1533] these shipments I have paid the U.P. Railroad mpany an average of $1,000 a month freight for the t 32 years. I have classified as a grower-shipper but m essentially a grower.

When I first went to Wilder in 1912, there were seven ldings and the railroad track there. It was the terminus branch line extending miles west from Caldwell, Idaho. ere was a box car for a depot and a portable loading te for the loading of livestock. The side track con-ed of one short spur.

From that date until now we have been engaged at Wilder the development of a modern rural community, and the P. Railroad Company has been cooperative. The com-ny has developed their facilities here so that they are te adequate. Their service is good. We have daily, cept Sunday, train service. When business demands, s service is increased to take care of our requirements. e car supply normally is good. Interruptions by war or ikes account for most of our low spots in car supplies. r railroad rates are the same as main line points on -of-state shipments. The dispatch with which the car shipments are handled is good.

In developing a new state like Idaho, the question of ving for all the necessary improvements is a big ques-n. The U. P. Railroad Company plays a big part in s matter. In 1948 they paid taxes in Idaho amount-to $2,490,261.41. In our County of Canyon they d, in 1948, $141,175.24, or nearly 10 per cent of our l. 1534] total tax load in Canyon County.

The railroad employs a large number of workmen in the te of Idaho. This item is most important in our nomy. Full employment of wage earners, adequate ilities with which to serve Idaho in all communities and moving of freight with dispatch are important.

To open the Ogden gateway would not facilitate the mat-of freight shipment. On the contrary, it might retard movement of our produce because it is more miles over other line than the U. P. to Texas, Oklahoma and the er Southern and Eastern markets. If a single car be erted off of the U. P. at Ogden, it will reduce the

revenue of the U. P. somewhat. If two cars are diverted, it will reduce the revenue more. All revenue that is added to the connecting lines at Ogden will be subtracted from the U. P. It will take away from the citizens of Idaho and will return nothing. It is on this premise that I base my conclusions. Therefore, I am opposed to the proposal, viz., the opening of the so-called "Ogden gateway."

Mr. Melia: You may cross examine.
Mr. Quirk: I have no questions.
Exam. Mullen: Any cross examination?
Mr. Gibson: No questions.
Mr. Quirk: No.
Mr. Melia: Thank you, sir.
[fol. 1535] Exam. Mullen: All right. You are excused. Thank you, sir.

(Witness excused.)

Mr. Melia: Mr. Marshall.

C. J. MARSHALL was sworn and testified as follows:

Direct-examination.

By Mr. Melia:

Q. Mr. Marshall, will you proceed to read your prepared statement?

A. My name is C. J. Marshall, and I am president of the C. J. Marshall Produce Company, which has its main plant at Jerome, with shipping warehouses at Wendell, Shoshone, Dietrich, Twin Falls and Richfield, Idaho. The principal products shipped by our company consist of potatoes, onions and potato starch; also, we operate a warehouse for processing and shipping dried beans and peas at Jerome.

I have been in the produce business in Jerome and vicinity for 13 years. All of our plants are served exclusively by the Union Pacific Railroad. For the past few years our shipments by rail have averaged 533 cars.

Our business of processing and selling the above named products, particularly potatoes, has certain peculiar problems which I would like to explain.

For instance, Idaho is considered as producing the outstanding type of potatoes of any state in the United States. This is proven by the fact that the market price for Idaho [fol. 1536] potatoes, on the whole, exceeds prices for potatoes produced in other areas.

In the packing of our potatoes grown in the Twin Falls area, which is one of the two principal winter producing areas for Idaho potatoes, we pack both U. S. No. 1's and No. 2's. These are packed to grade as specified by the U. S. Department of Agriculture. The market for our No. 1 potatoes, generally speaking, is that portion of the United States east of the Missouri River, with a limited portion going to points in Kansas, Nebraska, Oklahoma, Texas, and Louisiana in the way of mixed carloads—that is, No. 1's mixed with No. 2's. The bulk of the car, however, is No. 2 potatoes.

It may be possible that terminal market buyers who specialize in straight carloads of both No. 1 and No. 2 potatoes, as well as mixed cars, have sales outlets at points in Kansas, Nebraska, Oklahoma and Texas for No. 1's, but these markets are not available to us for volume shipments. Because of this we have adopted the practice of shipping straight cars of No. 1 potatoes to those states only on firm sales through our agent at Kansas City who diverts cars from that point as sold. Otherwise we confine our sales of No. 1's to points east of the Missouri River.

In the case of our No. 2 potatoes, they are sold largely in states such as Kansas, Oklahoma and Texas, and also at middle western markets such as Omaha and Kansas City. [fol. 1537] This method of marketing potatoes has been in effect for many years and, to the best of my knowledge, is quite generally practiced by most shipping firms in Idaho.

As to our onion markets, this is a new venture for us, and I do not feel that I am competent to explain the markets or need for rail routes and distribution of this crop as we have only had a limited experience.

I can say, however, that, after 13 years' experience in marketing and distributing potatoes and the limited experience that I have had in handling onions, the present routes and service which have been available to our company have been adequate and sufficient.

Opening of the Ogden gateway would be of no benefit whatever to our company in the sale of perishable products in Colorado at points on the D&RGW between Ogden and Pueblo-Denver because we have never had a market in that territory for the reason that the same general type of products that we handle are grown along the D&RGW in Colorado.

As I have heretofore explained, all of the plants from which we ship in Idaho are served exclusively by the Union Pacific. We depend entirely upon the Union Pacific for cars, for assembling our shipments and for getting them going to market.

The Rio Grande means nothing to us because even though the Ogden gateway is opened up we will have to con-
[fol. 1538] tinue to rely upon the Union Pacific for all kinds of service and not the Rio Grande.

During the 13 years our company has been in the produce business, I can say that the service rendered to us by the Union Pacific has been entirely satisfactory. The Union Pacific has always stood ready to help us. Anything that works against the Union Pacific will, in the end, hurt us.

If the Union Pacific is going to be required to give up its traffic, some of which is ours, to the Rio Grande Railroad, then necessarily its revenues are going to be greatly reduced. My fear is, then, that either I am eventually going to pay higher transportation costs or the Union Pacific must cut its costs, which only means that it will have to reduce the quantity and quality of service now given to us and other shippers in Idaho and elsewhere.

The Union Pacific is a fine railroad, and I want to keep it that way so that it can continue to render good transportation service in the areas which it serves.

About a year ago the Union Pacific sponsored and successfully concluded a proposal to reduce our rate on potato starch to Chicago to the point where we could compete with eastern manufacturers who theretofore had an advantage in that market.

Without the protection of its long haul to the Missouri River I do not think the Union Pacific could afford to make rates on a reduced level necessary to enable us to compete
[fol. 1539] in the east with more advantageously located eastern manufacturers.

In view of what I have said, I cannot possibly see how the opening of the Ogden gateway can be of any benefit to my company.

It is a fact, though, that, inasmuch as my company does not control the routing on all of its shipments, the Rio Grande and its connections, which are in competition with the Union Pacific and its eastern connections, will, by reason of active solicitation in eastern markets, be able to take a large volume of traffic from the Union Pacific and hurt it financially and otherwise.

I firmly believe that the proposal of the Rio Grande Railroad here, instead of being a help to us, would in the end hurt us in many ways.

Mr. Melia: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. Those are just your feelings?
A. That is my opinion.
Q. Yes. All right.
A. My opinion.

Mr. Quirk: That is all.
Mr. Melia: Thank you, Mr. Marshall.
Exam. Mullen: There is just one question I wanted to ask you in connection with the last statement. Do you sell all [fol. 1540] your products f.o.b. shipping point?
The Witness: No.
Exam. Mullen: What proportion?
The Witness: I would say about 90 per cent.
Exam. Mullen: Sold which way?
The Witness: F.O.B.
Exam. Mullen: You don't control the routing on those?
The Witness: Of the 10 per cent you would.
Exam. Mullen: Beg pardon?
The Witness: I can control the routing on maybe 10 per cent.
Exam. Mullen: Only the 10 per cent?
The Witness: Yes, sir.
Exam. Mullen: All right. Thank you.
Mr. Gibson: I have on- question.

Cross-examination.

By Mr. Gibson:

Q. Mr. Marshall, referring to page 3 of your statement, about in the middle of that paragraph you say, "If the Union Pacific is going to be required to give up its traffic——"

What is your basis for that statement? How do you know they are going to have to give up their traffic?

A. If the Ogden gateway was opened, what else are they opening it up for him to get part of their traffic? For what reason are they doing it, if they don't intend to get the traffic?

Exam. Mullen: Who is asking the question?

[fol. 1541] The Witness: In other words, if I want a warehouse built in Jerome, or certain facilities, I could short haul them, if they didn't come through, couldn't I, in certain ways?

By Mr. Gibson:

Q. Yes, you are the shipper.

A. I beg your pardon?

Q. Yes, you could.

A. I didn't quite understand your question.

Q. Will you please answer my question?

On what do you base your statement that the Union Pacific is going to be required to give up its traffic? And if you don't know any reason, just say so.

A. Where is that, again, please?

Q. On page 3, the middle of the last paragraph.

Mr. Melia: Isn't that explained in the last paragraph of your statement, Mr. Marshall?

Mr. Gibson: I would appreciate it if he would answer my question.

The Witness: I said "if the Union Pacific is going to." I didn't say it was. I said if the Union Pacific was going to.

By Mr. Gibson:

Q. Yes. But you imply that the rates established will result in their giving up traffic. Why? That is what I want to know.

Exam. Mullen: Perhaps the witness means that if the buyers chose to use the D&RGW, then the U. P. would have [fol. 1542] to give up that much of the traffic. Is that what you mean, Mr. Witness?

The Witness: I didn't say it was. I said "if" they were.

Exam. Mullen: I think it is well understood, then.

By Mr. Gibson:

Q. You mean the customers may want this route?

A. Yes. I said "if." That is the reason I was trying to find it.

Mr. Gibson: Thank you.

Redirect examination.

By Mr. Melia:

Q. Did I understand you to say, Mr. Melia, that 90 per cent of your shipments—potato shipments, particularly—are subject to the consignees' routing instructions?

A. Yes, that's right. Absolutely.

Mr. Melia: Thank you.

The Witness: I don't think I said exactly. I said "if." Is that all?

Exam. Mullen: That is all. Thank you.

(Witness excused.)

GEORGE L. CROOKHAM, JR. was sworn and testified as follows:

Direct examination.

By Mr. Melia:

Q. Mr. Crookham, the statement you have there was prepared by you, was it not?

A. Yes, sir.

Q. But it was mimeographed by the Union Pacific force; [fol. 1543] is that correct?

A. Yes, sir.

Q. Will you proceed to read it, please?

A. My name is George L. Crookham, Jr., and I reside at Caldwell, Idaho, a point on the main line of the Union Pacific just west of Nampa. The Crookham Company, of which I am president, is engaged in the business of growing and marketing hybrid corn seed and other vegetable seeds. I have been in this business for the past 21 years.

Our company is a substantial user of rail service as is shown that our carload shipments in 1949 aggregated 117 cars, of which 102 were forwarded and 15 received. These figures represent only the cars which were billed in our name. To these should be added shipments which were loaded by our company for account of firms making purchases for shipment for their account.

The bulk of our shipments move to the Missouri River and east and south. In the past we have used the Union Pacific exclusively as far as the Missouri River and thence its connections.

Seed is a crop with one turnover a year. Early delivery after the completion of harvest is important. Our customers require their seeds in good time so the carlots may be broken down into small packets and prepared for spring distribution.

During the recent national emergency, our company was [fol. 1544] one of the principal producers of seeds for lend lease purposes. Seeds were considered of such importance that they rated space on the same priority as munitions.

During this period of stress, we were accorded very satisfactory service and treatment by the Union Pacific. In fact, this has always been true.

In the period from 1945 to 1947, I served the City of Caldwell in the capacity of mayor. One of our problems at that time was to develop an industrial area so as to expand employment and payrolls in the Caldwell area. Through the help, counsel and cooperation of the Union Pacific we were able to plan and open up a 23-acre industrial site which, today, serves some 18 accounts with an aggregate of 100,000 square feet of floor space.

During the same period, the matter of finances for running a fast-moving city and for local improvements was particularly pressing. We were emerging from a wartime economy to a peacetime betterment.

In studying the tax structure, we became familiar with the municipal tax load borne by the Union Pacific and on one particular bond issue which involved the construction of a by-pass highway through the city, we were even afforded every cooperation by Union Pacific officials.

Also, at that time, it became necessary to decide upon the location of an underpass within the city. Underpasses, as [fol. 1545] you know, are all right as long as they go by the other man's property, and here again we found the Union Pacific ready and willing to help. It was up to the city administration to determine the site, but it was not until the Union Pacific suggested a compression of the tracks at 10th Avenue that a workable plan was developed. The cost of this compression was to be assumed by the Union Pacific.

Because of the method in which our company produces and contracts the sale of seed, practically 100 per cent of our shipments are subject to consignees' routing instructions. The freight charges on our shipments will run in the neighborhood of $100,000 a year, and, in the past, the Union Pacific has been assured the long haul on our carlot business.

If our customers can be prevailed upon by the Rio Grande and other competitors of the Union Pacific to short haul the Union Pacific through Ogden, then, of course, the Union Pacific's share of the revenue will be greatly reduced.

The customers could be influenced to divert their shipments from the Union Pacific because they will have no immediate knowledge or interest in our transportation problems in Idaho, not knowing that this community depends greatly upon the financial welfare of the Union Pacific and entirely upon it for rail transportation needs.

While Caldwell and Nampa, 9 miles apart, are separate municipalities, they really function more or less as one [fol. 1546] community. The shops of the Pacific Fruit Express at Nampa, and the large railroad payroll are very important factors in the economy of that area.

The Union Pacific and its affiliated company, the Pacific Fruit Express Company, employs about 1400 men in the Caldwell and Nampa area. Of course, anything that is done to impair the earnings of the Union Pacific might well result in a curtailment of employment and transportation service. This naturally would affect the economy of this area generally and affect our company because we are entirely dependent upon the Union Pacific for rail service at Caldwell.

Mr. Melia: You may cross examine, Mr. Quirk.

Cross-examination.

By Mr. Gibson:

Q. Mr. Crookham, referring to your statement at the bottom of page 2, and the fact that your shipments are subject to consignees' routing instructions, is my impression correct, from your statement, that you don't think the consignee should have any right to route his shipment?

A. If he pays the freight he has every right to route his shipment.

Q. You think he does have that right to make that choice?

A. He does have that right.

Q. These taxes that you mentioned on page 2, as to your municipal tax load, those are ad valorem, are they not?

A. That is right.

[fol. 1547] Mr. Gibson: That's all.

Mr. Melia: Thank you, Mr. Crookham.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

Mr. Melia: Mr. J. R. Simplot.

J. R. SIMPLOT was sworn and testified as follows:

Direct examination.

By Mr. Melia:

Q. You may proceed with your prepared statement, Mr. Simplot.

A. My name is J. R. Simplot and I live at Boise, Idaho.

As a resident of the State of Idaho, I would like to make a short statement of the reasons why I am strongly opposed to the opening of the so-called Ogden gateway.

I began using the Union Pacific service in Idaho about 20 years ago in a comparatively small way. However, in the past 8 years I have handled approximately 10,000 carloads per year of products consisting of potatoes, onions, vegetables, canned and frozen products, fertilizer, lumber, livestock and ore.

My shipments originate and terminate regularly at several points on the main line of the Union Pacific in Southern Idaho and Eastern Oregon and also at points on the following branch lines of the Union Pacific in the same territory: [fol. 1548] East Belt Branch, Gay Branch, Aberdeen Branch, Twin Falls Branch, North Side Branch, Ketchum Branch, Homedale Branch, Burns Branch, Declo Branch, Brogan Branch and the McCall Branch.

Thus it will be seen that I am entirely dependent on the Union Pacific for rail service, and particularly branch line service. Hence, it is vital to my several lines of business that these branches be kept in operation. Obviously, the Union Pacific cannot afford to do this unless the traffic and revenues on these branches justify it.

Also, these commodities move to and from practically every state and important city and town in the country, and in no instance, in my experience as a shipper, would it have been of any advantage or serve any purpose or

bettered my position in these various businesses to have had the Ogden gateway opened.

Most of our products, especially agricultural products, must go to distant markets and compete with similar items grown or manufactured closer to those markets, and if it were not for the willingness of the Union Pacific to establish suitable rates, the shippers of Idaho, like myself, simply could not continue in business.

The officers of the Union Pacific have worked long and hard to develop new industry and new activities in this territory, and I think they should continue to be rewarded with the maximum haul and revenue on the business which [fol. 1549] they have developed.

Several of the commodities which I now ship are entirely new to this area and did not previously move at all from or to the State of Idaho. Some of these are fertilizer, barium, onion salt and flakes, dried potatoes, fresh frozen potatoes and sulphuric acid for the manufacture of fertilizer. My shipments of these commodities aggregate quite a substantial figure. In establishing these new lines of business from time to time throughout the years I found the Union Pacific extremely helpful.

From my experience in several lines of business in this territory, I can say that if anyone comes up with a sound venture, the Union Pacific stands ready to cooperate with rates in constructing and establishing rail facilities on the customary basis to serve such industries.

The Union Pacific is the largest industry within our state and, through its large payroll, purchases and taxes, it has contributed much toward the welfare and economy of our state, and people with foresight and vision invested their money to build the main line and branch lines to every producing section of our valley, plus Sun Valley, the finest winter resort in America, in order to develop our greater part of southern Idaho.

The investor and the people are now enjoying, without a doubt, the finest railroad and railroad service of any section [fol. 1550] of this country, and we, the people who have helped build this fine railroad, should do everything in our power to help keep them financially sound so they can help us develop for the future.

I can see, by the opening of the Ogden gateway, a drain on Union Pacific's revenue which could only lead to poor service and higher rates for the future, plus a longer out-of-line haul for the shipper.

Again I want to say that I can see absolutely no advantage in interrupting our splendid relations and penalizing our fine railroad by opening this Ogden gateway.

Mr. Melia: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. Have you ever read that statement before?
A. Just over there while I was sitting down.
Q. I didn't hear you.
A. Yes, sir.
Q. How long ago?
A. Just a little while.
Q. You just like the Union Pacific, don't you?
A. Right.
Q. Do you own any stock in the Union Pacific?
A. I own a little stock.
Q. What would you call "a little"?
A. Not very much.

[fol. 1551] Q. Now, you said the Union Pacific had co-operated in rates and in constructing and establishing rail facilities on the customary basis to serve the industries.

What is the "customary basis"?

A. The customary basis—you generally have to pay for them. At least I have had to pay for all I got.

Q. Have you had any tracks built within the last two years?

A. Yes, sir.

Q. Where were they built?

A. I have had some additions at Caldwell and Pocatello, and also at the Gay Branch.

Mr. Melia: How long is that Gay spur? That might be interesting to the Examiner.

The Witness: Twenty-one miles.

By Mr. Quirk:

Q. You mean the Union Pacific built 21 miles of track for you?

A. Yes, sir.

Q. I can see why you are for them.

Mr. Quirk: Thank you. That is all.

Redirect examination.

By Mr. Melia:

Q. Who paid for that track?

A. I did.

Mr. Quirk: That is all.

Mr. Melia: Thank you, Mr. Simplot.

Examiner Mullen: Witness excused.

(Witness excused.)

[fol. 1552] Mr. Melia: Mr. Compton.

M. A. Compton was sworn and testified as follows:

Direct examination.

By Mr. Melia:

Q. Will you proceed to read your statement, Mr. Compton?

A. M. A. Compton is my name, and I reside at Boise, Idaho. By business connections and activities are as follows:

Owner of Compton Fuel Company; president of the Compton Transfer & Storage Company; and president of Olson Manufactureing Company.

As to the Compton Fuel Company, practically all of the coal which it handles comes from mines on the Denver & Rio Grande Western and the Utah Railway in the so-called Castle Gate district in northwest Utah.

Compton Transfer & Storage Company does a general storage and warehousing business, and among its cus-

tomers, which approximate 200, are many national concerns which use our facilities at Boise for the distribution of their products throughout the Boise trading area, which extends, roughly, from Rupert, Idaho, on the east, to La-Grande, Oregon, on the west.

During 1949 we handled a total of 1,058 cars of inbound business for storage and distribution at our Boise house, of which about 80 per cent originated at points east of the [fol. 1553] Missouri River. The remainder originated in the Northwest and California. All of the cars which originated east of the Missouri River were handled by Union Pacific from those junction points. Also, during that same year the Compton Fuel Company received 255 cars of coal from Utah mines.

While I cannot say that under normal conditions time is of the essence in handling our coal shipments, I do want to emphasize that with respect to the so-called break bulk cars which are consigned to us for distribution, as was explained above, time in transit is a very important factor. It is a matter of common knowledge, I think, that the competitive advantage of break bulk merchandise service resides in the fact that the companies providing this service aim and promise to move the cars with the utmost expedition.

It is true that the Boise trade area is rather sparsely settled, and, as a consequence, retailers and wholesalers in this area must *guage* their inventories to the limited demand. This makes it necessary that wholesalers carrying stocks of merchandise in our warehouse for distribution receive the best possible rail service so that merchandise is available at all times for retail outlets, and, at the same time, wholesalers are relieved from carrying an unnecessarily large inventory for their Boise trade territory. Rapid and dependable transportation service, as given by the Union Pacific, in my opinion, has been most helpful in putting Boise in the position of being the [fol. 1554] important jobbing center that it is today.

I am appearing in this proceeding for two reasons:

First, to call to the attention of the Interstate Commerce Commission the fact that it was the Union Pacific Railroad—and none other, because it is the only railroad

serving southern Idaho—that has been largely responsible for the industrial development of this portion of the state. I use the term "industrial", because I know that those representing the agricultural and livestock industries will speak for themselves. It has been my experience, and I have lived in southern Idaho all my life, that the Union Pacific has always been alive to the interests of southern Idaho and has been extremely sympathetic as to its needs.

Second, in the three lines of business in which I am engaged we rely entirely upon the service of the Union Pacific, which, from my long experience, is equal to or better than the service rendered any place in the country. I realize full well that if the Rio Grande Railroad is successful in its efforts here—namely, its desire to take away from the Union Pacific its long haul on traffic that is now handled for me and other shippers—then, in the long run, I and other shippers will have to pay higher freight charges on whatever traffic remains to the Union Pacific; or, if that alternative is not adopted, then it will of necessity be required to curtail its service in this territory.

[fol. 1555] Exam. Mullen: Just a minute. That is argumentative.

The Witness: Sir?

Exam. Mullen: That is argument. I don't think that is proper testimony.

Mr. Melia: It is a fact, Mr. Examiner. Merely through solicitation, and without the presence of any physical plant here, the Rio Grande can divert business from us.

Exam. Mullen: That is argument, exactly as you have stated it. I don't think it should be in this statement as testimony. That paragraph should be excluded.

The Witness: If the Rio Grande can solicit and divert a sizeable volume of business away from the Union Pacific—and apparently they intend to do so—then it seems to me that the Union Pacific is going to have a lot of surplus and unused railroad facilities which it provided in the past upon the expectation that it would retain its traffic for the long haul; and then, if the Rio Grande has to spend money for additional facilities necessary to handle the business which it takes away from the Union Pacific, to me that is just a plain waste of money.

The shippers of Idaho must have fast, frequent and dependable rail service and adequate physical rail facilities; that is, service and facilities such as only a financially strong railroad can afford to give and provide, and so long as we have only one railroad in the southern part of the state, then [fol. 1566] in our own interests we must see that the traffic and revenues of that railroad are not diverted to competing railroads that cannot possibly render a service to the people and shippers of this state.

It is for these reasons that I want to voice my opposition to the opening of the Ogden gateway.

Mr. Melia: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. As I understand it, Mr. Compton, you think the Union Pacific is entitled to its long haul?

A. I do, sir.

Q. Have you ever protested the fact that at Denver the Union Pacific will split up the traffic with the Burlington and the Rock Island and other railroads going to places like Omaha and Kansas City, where it serves?

A. I understand that under certain conditions of traffic there is an extreme—I know nothing of the mechanical operation of the traffic department.

Q. You know nothing about the mechanical operation of this situation we are involved in here, do you?

A. No. But all I know is that the service I am obtaining from the Union Pacific is satisfactory.

[fol. 1557] Q. Well, you stress the point there is something wrong about anybody, a carrier or other, that would attempt to persuade the Interstate Commerce Commission to require the Union Pacific to participate with another carrier because by doing so it would give up its long haul. So you do think then, that there are circumstances under which you would think it was proper for the Union Pacific to divide traffic with other railroads and give up its long haul?

A. No, I don't think I do. I feel this way: the Union Pacific has made a large capital investment in our state. My grandfather——

Mr. Quirk: Mr. Examiner, that is not responsive.

Exam. Mullen: That is not responsive to the question. Do you understand the question, Mr. Compton?

The Witness: It seems to me——

Exam. Mullen: Just a minute. Let's get it in question and answer form. Please read the question.

Mr. Quirk will repeat the question.

By Mr. Quirk:

Q. Do you concede, in view of what I have already described to you, that there are conditions under which it would be all right in your mind for the Union Pacific to divide traffic with other railroad connections even though it involved giving up its long haul?

A. No, I don't concede that point.

Q. You don't? Well, then, you never have protested to [fol. 1558] the Union Pacific, have you, where they have done that?

A. I know of no case where they have.

Q. Well, they do it at Denver.

Exam. Mullen: The witness doesn't know, he says.

Mr. Melia: There is nothing in the record to that effect, Mr. Quirk, and you know well yourself.

Exam. Mullen: Just a minute, please, there is an Examiner here to whom you can address your questions.

Mr. Melia: I beg your pardon?

Exam. Mullen: This witness has stated he doesn't know. I don't see any sense in pursuing it further.

Mr. Melia: I don't either, Mr. Examiner.

Mr. Quirk: I am through. He doesn't know, so it doesn't matter.

Exam. Mullen: You spoke of handling 1058 cars of inbound business?

The Witness: Yes, sir.

Exam. Mullen: Into your storage warehouse?

The Witness: Yes, sir.

Exam. Mullen: How is that warehouse stock distributed from your warehouse?

The Witness: Well, percentagewise I wouldn't be able to give you the figures, but the major portion of it goes out to local consignees.

Exam. Mullen: By what means of transportation?

[fol. 1559] The Witness: Many of them pick it up at our warehouse with their own trucks. Some we deliver with our own local trucks. Some goes by every truckline in this area.

Exam. Mullen: Does any go out by rail?

The Witness: A very small proportion of it goes out by rail.

Exam. Mullen: I see, all right.

Redirect examination.

By Mr. Melia:

Q. What would be the normal distribution area from your Boise house, Mr. Compton?

A. From Burley and Rupert, on the east, to LaGrande on the West,—Baker and LaGrande.

Q. How far is that?

A. An area of about 200 miles radius from Boise.

Mr. Melia: Thank you.

The Witness: Is that all, sir?

Exam. Mullen: That is all.

The Witness: Thank you.

(Witness excused.)

Exam. Mullen: We will have a ten-minute recess.

(Short recess taken.)

Exam. Mullen: We are ready to proceed, gentlemen. All right, Mr. Cockrum.

Mr. Cockrum: May I present Mr. Pease.

Exam. Mullen: Mr. Pease, please take the stand.

[fol. 1560] J. L. Pease was sworn and testified as follows:

Direct examination.

By Mr. Cockrum:

Q. Mr. Pease, will you please state to the Examiner your name, address and transportation experience?

A. My name is J. L. Pease. My address is Washington, D. C. I'm a transportation specialist in, and Assistant Chief of the Transportation Rates and Services Division, Transportation and Warehousing Branch, Production and Marketing Administration, United States Department of Agriculture. I have been with that division since 1940. Prior to that time I was Traffic Manager for a large vegetable producing and shipping firm with headquarters at Los Angeles, California, and with growing and shipping operations in Arizona, New Mexico, California, Oregon, Washington, Idaho, and Colorado. I held that position for about 15 years, and during the last five years of that time I also acted as Assistant Sales Manager. Prior to that time I had approximately ten years' experience with railroads and private refrigerator car company.

Q. Mr. Pease, what is the interest of the Secretary of Agriculture in the present proceedings?

A. The Secretary of Agriculture, whom I represent here, has an interest in this proceeding because of two statutes. One, Section 201 of the Agriculture Adjustment Act of 1938, and two, various sections of the Agricultural Marketing Act of 1946. These statutes as set forth in [fol. 1561] our petition for leave to intervene in this proceeding require the Secretary to interest himself in this proceedings affecting the rates, rules and regulations of transportation agencies when agriculture is involved, and to develop or assist in developing plans for efficient facilities, for the proper transportation, distribution, and handling of agricultural products.

Q. Do you have an exhibit to present, Mr. Pease?

A. Yes. At the Salt Lake City hearing Dr. Nelson testified in some detail as to the industrial growth and possibilities of the Northwestern states, Idaho, Montana, Oregon, Washington, and Utah. Similar information as to the

growth and size of the agricultural production was not furnished. Therefore, for the information of the Commission I have prepared an exhibit, Number——

Mr. Cockrum: May this exhibit be numbered?

Exam. Mullen: Thirty-two.

(Intervenor's Exhibit No. 32, Witness Pease, marked for identification.)

The Witness: Thirty-two, consisting of 48 pages, and listing by years and by states the annual production of the 45 agricultural commodities of which records are made by the Bureau of Agricultural Economics of the United States Department of Agriculture; and the total production of all species of lumber as reported by the United States Forest [fol. 1562] Service which is also contained within the Department. As far as possible these statistics go back to 1920. However, in the case of some commodities reports were not started until later years.

By Mr. Cockrum:

Q. What is the purpose of this exhibit No. 32, Mr. Pease?

A. The purpose in showing these statistics is to indicate the large volume of production and the need for as nearly unrestricted channels of distribution as possible. The continued inability to use an important gateway such as Ogden at joint competitive rates between two such railroads as the Union Pacific and the Rio Grande is not in our opinion, in the interest of the general agricultural public. All areas of consumption are needed now for the disposal of the production and all means of reaching those areas are important.

Q. Is it then the position of the Department of Agriculture, Mr. Pease, that the opening of the Ogden Gateway will promote the ends of which you have just spoken?

A. We believe it will; to some extent. At least it will not retard it.

Q. The extent to which you believe that it will promote the distribution of agricultural commodities, you believe that is of importance, do you, to the agricultural Northwest?

A. Yes, I believe it is of quite some importance, perhaps

not of as much importance as has been stressed in this hearing at certain times, but it will be at least of some im-
[fol. 1563] portance to agriculture.

Mr. Cockrum: I believe that is all, Mr. Examiner, unless some of the others on the Complainant's side have questions.

Direct examination (Cont'd).

By Mr. Quirk:

Q. Mr. Pease, I understood you to say that you were Traffic Manager for some fruit and vegetable company in Los Angeles, at one time?

A. Vegetables, yes, sir.

Q. Vegetables. What was the name of that company?

A. Sawdey and Hunt, Incorporated.

Q. Was it a fairly large company?

A. We shipped from 9,000 to 12,000 carloads of vegetables a year, mainly lettuce, carrots, some cabbage.

Q. From what territory?

A. The entire western states, as I mentioned, from New Mexico all the way around to and including Idaho and Colorado.

Q. Now how long were you with that company?

A. About 15 years.

Q. While you were with that company, did you ever have occasion as a shipper or buyer to use the Ogden route, Ogden to Salt Lake and the Rio Grande going northwest?

A. There were some occasions when we could have used it, but we were unable to because of the combination rate.

Q. Did you ever make an effort to persuade the Union Pacific to establish a joint rate via the Rio Grande and
[fol. 1564] through the Ogden, Salt Lake routes?

A. Yes, sir, I did. This was longer ago than I like to admit, but it was either in late 1927 or early 1928 that we had a small lettuce deal in Idaho. I asked the local representative of the D&RG at Los Angeles who at that time, I believe, was Mr. J. D. Stack, about opening the Ogden Gateway, and he indicated his railroad would be highly in favor of it.

Mr. Collins: What year was that?

The Witness: It was either the latter part of 1927, or early in 1928, Mr. Collins. I am a little hazy, but the files were left with the company. I was advised by him to take it up with the Union Pacific, of course. I did take it up with the local assistant traffic manager. He suggested I take it up with the then vice president in charge of traffic of the Union Pacific, Mr. Frank G. Robinson. I wrote Mr. Robinson, laid my case before him, received a very polite but firm "no." Then my principals and myself discussed the possibilities of filing a formal complaint, but decided that the expense would not justify it.

Mr. Quirk: That is all.

Mr. Collins: Mr. Examiner, I move this statement with respect to this firm—was that the one you took it up for, with Mr. Robinson?

The Witness: Yes, sir.

Cross-examination.

By Mr. Collins:

Q. What was the name of the firm again?

A. Sawdey and Hunt, Incorporated.

[fol. 1564-A] Q. The year was 1927.

A. 1927 or 1928.

Mr. Collins: I move that be stricken on the ground it is too remote to have any relationship to this situation.

Exam. Mullen: It is quite remote; but we will let it stand in the record.

By Mr. Collins:

Q. Did you say you took it up with the then vice president, Mr. F. G. Robinson?

A. Yes, sir.

Q. Mr. Pease, will you tell me if this exhibit purports to show anything other than an increase, if there be an increase, in the production of the commodities named on the different pages from the years 1920 through to 1949?

A. That is all, Mr. Collins.

Q. Now with respect to the Northwestern states, are you aware of the fact that the population of those states has

increased very greatly since about the beginning of the World War II period and since that time?

A. Yes, sir.

Q. Can you state whether or not the increase in the production of the commodities listed in your exhibit has kept in pace with the increase in the population percentagewise?

Mr. Cockrum: Just a moment, Mr. Examiner, I don't know if the witness is qualified to answer that question.

Mr. Collins: He can say yes or no.

[fol. 1565] Mr. Cockrum: He is comparing an increase in population to an increase in production. Now we don't know what the increase in population was.

Exam. Mullen: Who are "we?"

Mr. Cockrum: I submit, Mr. Examiner, that the witness doesn't know precisely what the increase in population was.

Exam. Mullen: All he was asked to respond to was whether he knew or not.

Mr. Collins: Mr. Examiner, he might know more than his lawyer does.

Exam. Mullen: Just a moment, I have a question for the witness here. What is the answer, Mr. Witness? Do you know that?

The Witness: Not sufficiently in detail to answer, I don't think, Mr. Mullen.

By Mr. Collins:

Q. You don't know, then, but what the population might have increased sufficiently to absorb or more than absorb the increase in production up there, do you?

A. No, I don't know that it has. I doubt it.

Q. I see you have sheep, lambs, and wool. Has there been an increase, let us say, within the last five years, in the production of lambs in that northwest country?

A. No, sir, I believe there has been a decrease.

Q. So at this time there are fewer lambs in that country than there were around 1944, 1945, and along in there?

[fol. 1566] A. I think that is right, yes, sir.

Q. Do you recall what the peak year of sheep population in the country was?

A. No, sir.

Q. Do you recall what the Department of Agriculture is now releasing in its different publications from the, I guess it is Production and Marketing, things like livestock and meat and wool, do they have a separate one for that?

A. Yes.

Q. Do you recall what the total reduction in sheep population, lambs, and so forth, the Department now says has taken place in recent years, annually?

A. I don't recall exactly, Mr. Collins, but I know it is quite a sharp reduction.

Q. It has been a sharp reduction?

A. It has been a sharp reduction, yes, sir, particularly in sheep, lambs, and wool.

Q. Do you have any personal knowledge presently or as of the last three or four years of any actual need on the part of any shipper of any of these agricultural commodities to or from the northwestern states by way of the Rio Grande Railroad?

A. Yes, Mr. Collins. This is purely hearsay, though.

Q. Well, we haven't been allowing that—I say the Examiner has not been allowing it. I am willing for you to state if it he will permit some hearsay.

[fol. 1567] Exam. Mullen: Well, we will let the witness answer it.

The Witness: For the past five years everytime I have come in contact with members of I'll say the Idaho Potato and Onion Association, either here in Idaho or in Chicago or other places, almost the first remark that they have made is "When are we going to get the Ogden Gateway open?"

By Mr. Collins:

Q. Will you give us the names of any of these people?

A. Well, the gentleman I refer to in the main is Mr. M. O. Stradford, Executive Secretary of that association.

Q. The Department of Agriculture as such has not investigated the situation?

A. Except as I may perhaps have investigated it myself.

Q. How would you go about making an investigation

under those circumstances? What kind of an investigation would you make?

A. It would probably have to be on a question and answer basis.

Q. As a matter of fact, didn't the Department of Agriculture circularize considerable part of the population out in Idaho practically inviting them to invite the Department of Agriculture in on the D&RG's side of this case?

A. No, sir, not that I know of.

Q. Didn't you see letters that Mr. Boling or someone of your people there in the Department wrote to people calling their attention to the filing of the complaint in this case?

A. Mr. Boling is my immediate superior, Mr. Collins, and [fol. 1568] I don't recall he ever wrote any such letters. He may have, of course.

Q. Maybe I mis-tated it. Do you know whether or not he wrote any letters out to people in this part of the country where you are now, concerning the filing of the complain- in this case, and referring to the issues in the complaint?

Mr. Cockrum: Mr. Examiner, I would like to object to this line of questioning on the grounds that it is irrelevant and immaterial. The witness has stated the reason for the Department's coming into the case during the course of his direct examination.

Exam. Mullen: He can be cross examined on that statement. Go ahead, Mr. Collins.

By Mr. Collins:

Q. I have seen such letters, Mr. Pease. Whether I properly characterized them or not, I am asking you now, whether you have any personal knowledge of them?

A. I will put it this way, Mr. Collins: after the complaint was filed I had received a copy of it. I personally wrote to Mr. Stradford of the Idaho Association, and Mr. Davis of the Oregon Association. I believe Mr. Taylor, of the Northwest Horticultural Council, telling them the complaint had been filed, suggesting they might perhaps want to sho- some interest in it. There were also numerous other letters written in acknowledgement of letters received from

other parties. I don't recall inviting anyone to get in the case.

Q. Inviting anyone into the case?

[fol. 1569] A. Yes.

Q. Did the Department of Agriculture suggest to these correspondents of the Department to request that the Department of Agriculture get into the case?

A. No, sir, not that I know of.

Q. Do you recall how long this was after—how long this was after the complaint was filed before these letters were written by the Department?

A. I can tell you from my file when I wrote. August 25.

Q. And the complaint was filed——

A. August 1, I believe.

Q. August 1? Had the Department of Agriculture given any consideration, itself, to making an effort to get the Ogden Gateway opened prior to the filing of the complain- in this case?

A. Yes, sir. In response to the request from the gentlemen I have mentioned we had thought some about it.

Q. Did you suggest to those gentlemen—were they shippers?

A. Yes, sir.

Q. Did you suggest to them they had rights under the Interstate Act to file their own complaints?

A. Yes, sir.

Q. And they did not?

A. No, sir.

Q. Now you spoke of, as I understood you, perhaps I didn't correctly understand you, rates from California [fol. 1570] east. Is it your understanding that fruits and vegetables cannot be shipped at through rates from California to the east by through routes including the Denver and Rio Grande Railroad?

A. No, sir, Mr. Collins, I didn't mention California rates. I mentioned we had an operation in California.

Q. Had a what?

A. Had an operation in California, but I didn't say anything about California rates.

Q. In what you said there, you were referring then back to this period when you were in the—27 years ago when you were in California?

A. That is right.

Q. I see. Now, is this a fair statement of the—or a fair understanding of your statement, or of the Department of Agriculture's position in this case, that the Department of Agriculture on what might be called general principles is opposed to any routing restrictions on any agricultural commodities?

A. That is a pretty broad statement, Mr. Collins. But I think it is about right, yes, sir.

Q. Has the Department of Agriculture taken any position with respect to the so-called through routes bills that have been introduced, and I presume are still pending in Congress, in the Senate, and in the House?

Mr. Cockrum: May we have that clarified, Mr. Examiner?

Exam. Mullen: Do you want the question read?

[fol. 1571] By Mr. Collins:

Q. Do you know that there are two or three bills pending in Congress which if enacted, one of which would eliminate the restrictions against the Commission's authority to compel through routes and joint rates as set forth in paragraph 4 of Section 15 of the Act. Do you know whether there are such bills in Congress?

A. Yes, sir, I believe there is at least one, perhaps two, perhaps more.

Q. Yes, the other one is somewhat less drastic.

A. That is right.

Q. Has the Department taken any position, or does it intend to take any position, if you know, with respect to those bills?

A. It has taken no position up to the present time. It is my understanding there will be a position taken at a proper time, perhaps at the time of hearing.

Q. And I take it from what you are saying the Department would support the bill——

Mr. Cockrum: Mr. Examiner, I am going to object.

Exam. Mullen: I sustain that objection.

Mr. Collins: I said if he knows.

Mr. Cockrum: I object.

Exam. Mullen: I sustain the objection.

By Mr. Collins:

Q. Has the Department of Agriculture, insofar as you may know, ever supported a situation in a case of this nature which would retain routing restrictions?

[fol. 1572] A. So far as I know, Mr. Collins, we have never been in a case of this nature before.

Q. You don't know of any case in which the Department of Agriculture has advo-ated retention of routing restrictions then, do you?

A. No, sir.

Mr. Collins: That is all.

Redirect examination.

By Mr. Cockrum:

Mr. Pease, Mr. Collins interrogated you with respect to the decreased production in sheep since the late war. Does your exhibit indicate increased production in other commodities?

A. Yes, sir.

Q. Just to illustrate, does it, on page 33, indicate an increased production of cattle and calves since 1940?

A. Yes, sir, by nearly 400,000,000 pounds.

Q. Mr. Collins asked you a question or two with respect to whether or not there had come to your attention any indications of a need for this particular through route, including these through joint rates. You indicated to him that information respecting that type of evidence had come to your knowledge, I believe. Did this information come to your attention through the course or in the cours*t* of your duties in your present position?

A. Yes, sir.

Q. Did you and your superiors reach the decision to [fol. 1573] intervene in this proceeding on behalf of the complainant?

A. We didn't intervene on behalf of the complainant, we intervened as our interests might appear.

Q. To intervene in this proceeding, and at this hearing to take a position in support of complainant on the ground that in your combined judgment——

Mr. Collins: I object to that.

By Mr. Cockrum:

Q. The best interests of agriculture would be served thereby.

Mr. Collins: I object to that question, Mr. Examiner. It is wholly leading.

Exam. Mullen: It is leading. What is the purpose of the question?

Mr. Cockrum: May I rephrase the question, Mr. Examiner?

Mr. Collins: I suggest he could just inquire why they decided to switch from the neutral position to the complainant's position.

Exam. Mullen: That is not the purpose of his question. Do you want to rephrase your question and withdraw the old one?

By Mr. Cockrum:

Q. Mr. Pease, why does the Department of Agriculture now take the position in support of the complainant in this proceeding?

A. Because after due consideration of all the people on our staff who are interested in such matters we thought it was for the best interests of the agricultural community [fol. 1574] of the Northwest as a whole.

Mr. Cockrum: That is all.

Recross-examination.

By Mr. Collins:

Q. You came to that conclusion, Mr. Pease, you and your staff, without having heard all of the witnesses, and you have not heard them all yet?

A. That is correct.

Q. Then does it matter to the Department of Agriculture what individual shippers have to say about what they desire with respect to these things?

A. To a certain extent, yes. But in a Government bureau like the Department of Agriculture if is our mandate, as we see it, to take the side of any proposition which does the most good for the most people.

Q. And in coming to the conclusion——

A. Instead of people, could I please say producers?

Q. I didn't catch the last.

A. Instead of people, I would like to change that to producers.

Q. Yes. And in coming to the conclusion to switch from what I understood to be a neutral position, insofar as the petition for intervention disclosed, to a definite position for the complainant, did you take into consideration, you and your staff, any other circumstance than what you thought might be good for the majority of the producers in their business?

A. No, sir.

[fol. 1575] Q. You gave no consideration to their transportation needs, or the possible effect if the complainant succeeds in this case, upon the producers' transportation services, did you?

A. Well, we did discuss that, Mr. Collins, to some extent. The concensus was that the small percentage of tonnage which the Union Pacific would lose, if the Ogden Gateway was opened, would not in any substantial way harm the Union Pacific.

Q. Did you speculate or arrive at, in your minds, what that percentage of loss would be?

A. No, sir, not percentage-wise. We didn't work on the 157 car per year basis. It was my opinion that if the Rio Grande got 1,000 cars a year out of this, they would be doing pretty well.

Q. We hope you are right, of course. You actually, then, based—I mean we hope you are right they wouldn't get any more than that—but you actually based your conclusions on the general principle of removal of routing restrictions largely, wasn't that right?

A. That is correct, yes, sir.

Q. And we might say, if this is too drastic for you, you can narrow it down—wide open distribution anywhere at rates equal to the lowest rates that might be had between any two points for the distribution of agricultural products?

A. That is a pretty long question, Mr. Collins. Could I have it read, please?

[fol. 1576] (Question read.)

Mr. Collins: No wonder you find it confusing, I do, too.

By Mr. Collins:

Q. The basis of the Department of Agriculture's decisions to announce a position here in favor of the complainant was that it would be better for the producers to have unrestricted routing privileges in the first place, was it not?

A. Yes, sir.

Q. Did you give any consideration to the rate situation there, from the standpoint of the level of rates that might result from the elimination of routing restrictions?

A. Yes, sir, we did.

Q. Now would you in your position in the Department of Agriculture advocate the elimination of routing restrictions where to do so would not reduce rates over a particular route?

A. Eliminate the routing restrictions, but not reduce rates?

Q. Yes.

A. I think so, yes, sir.

Q. Is your purpose in being here, or is your interest in being here, only for the elimination of the routing restriction via the Ogden-Gateway, and not the rate reduction by that routing?

A. I don't understand that there is any restriction against the Ogden Gateway. No.

Q. You don't understand there is any?

A. They have through routes through the Ogden Gateway. There is no restriction.

[fol. 1577] Q. They can route that way?

A. They can route that way now, I understand.

Q. By way of the D&RGW?

A. Yes, sir.

Q. Was that the understanding of your group when you considered it?

A. No, sir, I guess we are a little tangled up here.

The route is open, but not at through competitive rates, that is the issue.

Q. Yes.

A. Naturally if the route is to remain open for business we feel there should be joint competitive rates. If it involves a reduction, yes.

Q. So that really in the final analysis, it is a rate reduction the Department is interested in getting for the producers, isn't that the fact?

A. If they choose to ship through the Ogden Gateway, via the D&RGW, yes.

Mr. Collins: That is all.

Exam. Mullen: Any further questions?

Mr. Cockrum: No further questions, Mr. Examiner.

Exam. Mullen: All right.

Mr. Cockrum: Mr. Examiner, may I ask Exhibit 32 be received in evidence?

Exam. Mullen: Any objection? It will be received.

[fol. 1578] (Intervenor's Exhibit No 32, Witness Pease, received in evidence.)

(Witness excused.)

Edward Oakes was sworn and testified as follows:

Exam. Mullen: All right, gentlemen, we are ready to proceed.

Direct examination.

By Mr. Melia:

Q. Will you proceed to read your statement, Mr. Oakes?

A. My name is Edward Oakes and my home is Ontario, Oregon. I am a partner of Duncan Brothers & Oakes which owns and operates about 30,000 acres of land in Malheur County which is given over to ranching and cattle grazing. I have been in the cattle business since 1919.

In addition, I am President of the Valley Wholesale & Warehouse Company which operates two warehouses at Ontario. The principal business of these warehouses is the storage of freight for distribution through Southwestern Idaho and Eastern Oregon.

We also store large quantities of hops for growers in [illegible] and Malheur Counties, Oregon. The principal

market for these hops is at the various eastern brewing centers, such as St. Louis, St. Paul, Milwaukee and the eastern seaboard. Other articles which are stored and distributed out of our Ontario warehouses originate at numerous eastern points.

[fol. 1579] At these two warehouses we also mix and blend various types of fertilizer material for sale through eighteen dealers located at various points in Malheur County, Oregon, and Western Idaho. The ingredients of our fertilizers come from such points as Trail, B. C.; Anaconda, Montana; Freeport, Texas; Geneva, Utah, and various points in California.

The cattle ranches belonging to Duncan Brothers & Oakes are operated on the basis of spring and summer grazing. Our method of stocking these ranches is as follows: Stocker cattle are bought and shipped from points in the States of Nebraska, South Dakota, Montana, Wyoming, Colorado and the Missouri River markets. During the grazing season, we feed from 1,600 to 3,000 head. When our herds of stockers exceed 1,600, it is necessary to lease additional grazing land. Stocker cattle for our ranches are bought on the basis of f.o.b. sales point. After grazing is completed, which is from September 15 to October 31, these cattle are sold either to local buyers or shipped to California for further fattening. In all cases, they are reshipped as feeder cattle, and both the inbound movement to our ranches and the outbound movement therefrom are at flat feeder rates.

In our cattle feeding operations, purchases are of necessity made many months before contracts to resell can be negotiated. Obviously then we do not know at the time of making such purchases where these cattle will finally move for further feeding and slaughter. It is our main [fol. 1580] purpose, of course, at all times to secure animals of the type and quality that can make substantial gains in weight while on our ranges. Application of through rates or transit privileges is not a controlling factor in the selection of these animals and do not determine the points where we obtain them. I say this because 25 cents or even 50 cents would not stymie us in purchasing cattle when the matter of quality is involved because if we can get the

type of cattle desired for our ranges the weight that can be added by feeding this type of cattle will greatly exceed the extra freight charges. The movement of cattle into this territory for feeding is regulated by the amount of feed available. In some years, this feed is available more than other years because of a number of conditions. For instance, this present year we have a very large acreage of sugar beets contracted for amounting to something over 60,000 acres in our valley and this will bring an unusually large number of cattle here this fall to eat up this cheap feed. Also, we have very good prospects this year for range cattle feeding due to the fact that we have had good winter snows and a wet spring.

Due primarily to a substantial increase in population in recent years in Oregon (about 53%) and increased meat consumption, we are finding it increasingly difficult to purchase local feeder cattle. Those that are available can be bought in only small lots, even as few as one or two head [fol. 1581] at a time, at local auction yards. This is not satisfactory in our operations because of the rather high cost of making purchases in small numbers and assembling cattle at numerous points for shipment to our ranges.

In buying and moving cattle, transit time is an important factor for the reason that the shorter the time of movement, the less will be the expense for feed and the loss of shrinkage. A day's run by rail means about a 4% shrinkage after the first 24 hours. Inasmuch as the route of the Union Pacific from the Missouri River is much shorter than the Rio Grande and its connections, you can see that I would not route cattle over the latter route.

My interest in this proceeding is because I know from my long residence in Oregon that the Union Pacific Railroad has been an important factor in the development of this country. It is a substantial taxpayer in Malheur County, Oregon, and by reason of this fact, it has contributed heavily to the support of our schools and local government. Anything that would affect the revenues of the Union Pacific, as the opening of the Ogden Gateway would, because it would simply mean that the revenue on the haul would be split between the Union Pacific and the Rio Grande, would I am sure eventually hurt me because

I must depend on the Union Pacific for service. So far as our operations are concerned, I cannot think of a single advantage that would be brought about by putting the Rio [fol. 1582] Grande Railroad into the rail haul. They could not possibly add to our service or convenience or be of any help from a rate standpoint. On the contrary, the Rio Grande's proposal will result in the wasteful use of railroad transportation and facilities and the eventual sapping of the revenue of the Union Pacific. In my opinion it is inconceivable that on the whole any good can come from such a scheme.

Mr. Melia: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. The concern which you seem to show about this situation apparently is based on the notion that if the complainant succeeds here the Union Pacific will lose considerable revenue and your services may be affected, that is right, isn't it?

A. That is right.

Q. Now I have before me four years of the Union Pacific Railroad revenue count. In 1945, the total revenue from transportation was $491,877,000—I won't read the smaller figures—$491,877,000. In 1946, their total revenue was $361,395,000. That is a difference of $130,000,000. Did you find any slowing up of the service, or any poorer service as a result of that falling off in their revenue?

A. Not noticeably.

Q. Well, even according to the most fantastic claims made by anybody in this case, there wouldn't be any greater loss than $40,000,000, so they managed to live through [fol. 1583] without you even noticing it, apparently, falling off of gross revennes, 1946 under 1945 of 130 million. You didn't even notice that, did you?

A. No.

Q. What makes you think then even if they lose the 40 million, as a result of this case, their services would be affected?

A. Well, I would say that the service would be affected

through the increase in population in the Northwest territories, and the Northwest countries, through any decrease in revenue.

Q. But you didn't seem to notice any shock, because the Union Pacific had 130 million dollars less revenue in 1946 than they had in 1945, did you?

A. Not personally, no I didn't.

Q. You weren't even conscious of it, were you?

A. Not very much.

Q. You still carry on this fear?

A. Oh, not too much.

Q. Hasn't it been more or less inspired? I mean you received a liberal education in the last few months, haven't you, about what could happen?

A. No, I don't think so.

Q. You don't think you were educated?

A. No, I was not.

Mr. Quirk: All right. That is all.

Redirect examination.

By Mr. Melia:

Q. Mr. Oakes, do the expenses of operating at least two [fol. 1584] types of business, do they fluctuate up and down in some direct proportion to what your revenue might be? Do you reduce expenses when your revenues fall off in your business?

A. Absolutely.

Q. In other words, you can't spend more than you take?

A. That is right.

Q. If business is good, you have more employees, you spend more money?

A. That is right.

Q. When revenues fall off, you curtail expenses, do you not?

A. That is right.

Mr. Melia: That is all.

Recross-examination.

By Mr. Quirk:

Q. You said a while ago you didn't notice this shock between the difference in the gross revenue of the Union Pacific in 1945 and 1946 of 130 million dollars, didn't you?

A. That is right.

Mr. Quirk: All right.

The Witness: But then——

Exam. Mullen: Is that all?

Mr. Melia: That is all I have. Thank you.

Exam. Mullen: Thank you, Mr. Oakes.

(Witness excused.)

Exam. Mullen: Do you have any more witnesses?

[fol. 1585] Mr. Melia: That is all we have, Mr. Examiner, for today.

Exam. Mullen: We will take a recess for 20 minutes.

(Short recess taken.)

Exam. Mullen: The hearing will be in order. We are ready to proceed.

Mr. Quirk: Mr. Examiner, during the 20-minute recess we have considered the points that we had marked down to quiz Mr. Hanson about, and we have concluded not to cross examine him at all, but we will meet what we think is wrong with his statement by rebuttal.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

The hearing will go over to Monday, 9:30 a.m.

(Whereupon, at 4:15 o'clock p.m., the hearing was recessed until 9:30 o'clock a.m., Monday, April 10, 1950.)

[fols. 1586-1587a] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., Defendants

Transcript of Testimony—Boise, Idaho, Monday, April 10, 1950

Met, pursuant to adjournment, at 9:30 o'clock a.m.

Before Frank E. Mullen, Examiner

[fol. 1588] Proceedings

Exam. Mullen: All right, gentlemen, we are ready to proceed. Are you ready, Mr. Collins?

HARRY W. MORRISON was sworn and testified as follows:

Exam. Mullen: We have a number of witnesses here who have prepared statements. Copies of these have been furnished to you, I think, Mr. Quirk, or this particular one?

Mr. Quirk: Yes, I have this.

Exam. Mullen: I suggest, then, you read that over. Mr. Morrison has been sworn, if you desire to cross examine on it. Then this might be received as a verified statement without having the testimony actually copied into the record.

Mr. Melia: Mr. Examiner, I would prefer, with respect to this particular testimony, that it be read into the record. It is short, and I would prefer it.

Exam. Mullen: All right.

Mr. Melia: Mr. Morrison, will you proceed to read your statement, please?

The Witness: Gentlemen, my name is Harry W. Mor-

rison. I am President of Morrison-Knudsen Company, Inc., a firm of contractors and engineers. We organized our business in 1912, here in Boise, Idaho. For the past several years, we have been completing in excess of $100,000,000 of construction a year in the United States and foreign countries. We maintain branch offices [fol. 1589] in the United States and other countries, but our executive headquarters and main shops are located in Boise, Idaho, where, for the years 1948 and 1949, we have averaged 600 carloads of incoming and outgoing freight per year on the Union Pacific lines.

I have been eager to offer my testimony in this hearing because throughout the 44 years I have lived in Idaho, I have witnessed at first hand the remarkable development which has taken place in this state and have noted the indispensable contribution which the Union Pacific Railroad Company has made to that development.

Out of a relatively few widely scattered and unconnected small railroad lines serving limited and isolated areas of our state, the Union Pacific has created an extensive and unified railroad system which has given to the people of Idaho the highest standard of railroad service in the world. This was not a mere consolidation operation. I estimate that in my own time, the Union Pacific has invested more than $125,000,000 of cash in the State of Idaho in the construction of branch lines and other improvements in order to better serve Idaho's needs. Since 1905, which was my first year in Idaho, the Twin Falls, Northside, Declo, Oakley, Homedale, Burns, Brogan and McCall branch lines have been constructed. Thanks to the forward-looking management of the Union Pacific Railroad, Idaho now has quick and economical access to markets for all of her [fol. 1590] products. It is important to note that it was the Union Pacific, not a connecting railroad, which constructed these additional facilities.

As a citizen of Idaho interested in seeing the progress and development of our state continue, I wish to register a strong objection to the proposal that the Union Pacific now be relegated to the role of messenger boy for connecting railroad lines.

Mr. Quirk: This is argument, and very objectionable argument.

Exam. Mullen: That is argument, and I notice the rest of it is argument. We cannot include that in the record.

Mr. Melia: What do you mean by the rest of it, Mr. Examiner?

Exam. Mullen: The balance of the statement. I have read it through.

You may question the witness if you desire, but this statement is argument and nothing else as I read it.

Direct examination.

By Mr. Melia:

Q. Mr. Morrison, have you and do you do work for the Union Pacific Railroad?

A. Yes, sir, we do a very substantial amount of business and construction work for the Union Pacific.

Q. Do you perform work for other railroads?

A. Yes, sir, many of the principal railroads of the United States.

[fol. 1591] Q. Could you identify a few of the western lines?

A. The Northern Pacific, the Great Northern, the Milwaukee, the Burlington, the Denver and Rio Grande Western, the Southern Pacific, the Santa Fe, the Rock Island, to name a few, that is most of them, I believe.

Q. Have you done work for the Rio Grande in recent years?

A. Not recently.

Mr. Melia: That is all I have. You may cross examine.

Cross examination.

By Mr. Quirk:

Q. Your company, Mr. Morrison, has a current contract with the Union Pacific with respect to the annual ballast requirements of the Union Pacific?

A. Yes, but may I qualify to say that we do not hold a contract for all of the ballast requirements of the Union

Pacific. We have a contract to provide part of the ballast requirements for the Union Pacific.

Q. Did you have a construction contract with respect to the New Aspen Tunnel?

A. Yes, sir.

Q. Has your company had other contracts with respect to large projects in which the Union Pacific is interested?

A. The word large is relative. We have done for many years a great deal of the betterment work, which has been a part of the Union Pacific's progress.

Q. Name some of the projects that you have taken part [fol. 1592] in that you describe as relatively large?

A. There have been some major line changes in Wyoming in recent years, contracts perhaps ranging from $500,000, perhaps as much as $700,000, which our company has handled.

Q. As I understand your position and your testimony, it is that if any of the trackage now moving east of Granger on the Union Pacific is diverted through Ogden, whether it be large or small, you think that might in some way affect the Union Pacific's ability to serve the people out here?

A. Mr. Quirk, I go a great deal farther in my thinking than that, sir.

Q. Can't you answer that?

A. Yes, I can answer it. I can explain my answer, too, if I were permitted to do so.

Exam. Mullen: Answer the question, and then explain your answer.

The Witness: The answer would be yes. My reasons for my opinion is the fact that Idaho is a state that must, if it is to progress and continue to grow, have large acreages of land developed through irrigation. To develop that land requires great concerted efforts, sir, on the part of the people of Idaho and the corporations primarily serving our state.

By Mr. Quirk:

Q. All right. But you think a diversion of traffic through the Ogden gateway would somewhat affect that, no matter whether it was small or large?

[fol. 1593] A. I think every dollar of revenue that is side

tracked from the Union Pacific reduces their willingness, desire, and ability to serve our people.

Q. Are you familiar with the fluctuation in the gross revenues of the Union Pacific in recent years?

A. Very slightly.

Q. Would you be surprised to know that in 1946 the gross revenues of the Union Pacific was $130,000,000 less than it was in 1945?

A. I know they have a rather wide fluctuation. I know we had terrific storms in Wyoming, a winter or so ago.

Q. That has nothing to do with my question.

A. That cut down the volume of business on the Union Pacific.

Q. Now, did you notice any effect on the service of the Union Pacific in 1946, as against 1945, because of that reduction; loss of $130,000,000 in gross revenues?

A. No, I couldn't say that I did.

Q. Well, in 1948, on the other hand, the gross revenues of the Union Pacific was roughly $30,000,000 more than in 1947. In other words, you are apparently not familiar with the fact there is more fluctuation from year to year in the revenues of this railroad than could possibly be involved in this case.

Mr. Melia: I object to that question. That is not a question, that is a statement, Mr. Quirk.

Mr. Quirk: He has been making speeches.

[fol. 1594] Exam. Mullen: You may make whatever assumptions you desire, Mr. Quirk, and then base your question on it.

Mr. Quirk: It is not too important.

By Mr. Quirk:

Q. You spoke of the development of this country. Are you familiar with the fact that between 1906 and 1931 the Oregon Shortline paid to the Union Pacific dividends aggregating $252,246,875?

Mr. Mulliner: I object to the question, because it is improper cross-examination.

Exam Mullen: There has not been any question yet. What is the question?

Mr. Quirk: What did I say?

(Question read.)

Exam. Mullen: That was a question. Do you know that, Mr. Witness?

The Witness: No, sir.

By Mr. Quirk:

Q. Well, if that is true, and we expect to show that it is, this country has been rather good to the Union Pacific, too, hasn't it?

Mr. Mulliner: I object to the question.

Exam. Mullen: The witness may answer it. He has expressed his opinion.

The Witness: The Union Pacific, sir, came first; when I speak of the Union Pacific, I speak of the Union Pacific and its allied lines. I was in Idaho in 1904 and 1905 when the [fol. 1595] Minidoka, Twin Falls branch was started, and I have seen them follow, one after the other, usually during the development of the country.

By Mr. Quirk:

Q. Don't you know, in the development of the history, all shown in the United States Senate Pacific Railway Investigation, the Union Pacific came up this way to seek a terminal?

A. I suppose it did, the same as Mr. Gould did the D. & R. G. to get over to the West Coast.

Mr. Quirk: That is all.

Redirect examination.

By Mr. Melia:

Q. Do you know whether or not the work you have performed for the Union Pacific or any other railroad, for that matter, throughout the many past years, has fluctuated in some degree with respect to the prosperity of those lines?

A. Very definitely, sir.

Q. You do more work for the Union Pacific when their

gross and net revenues are greater than when they are less?

A. Correct. They do more improvement. They restrict and rather manage their improvement programs in proportion to their budget and income, as I understand it.

Q. If the Union Pacific revenue should be impaired by this proposal, do you think it might affect your company in some way?

A. I do. It has, regularly, with the railroads of the West.

Mr. Mulliner: Thank you.

[fol. 1596] Recross-examination.

By Mr. Quirk:

Q. Don't you know, Mr. Morrison, since 1945, despite this great reduction in the gross revenues of the Union Pacific, they have spent more rather than less money than they normally do?

A. Yes, I think that is right.

Q. All right.

A. I think it is because of a forward-looking program they have, trying to serve better the people of Idaho.

Mr. Quirk: I agree with you on that. I won't quarrel at all.

Mr. Melia: Thank you.

(Witness excused.)

George B. Carpenter was sworn and testified as follows:

Direct examination:

By Mr. Melia:

Q. Will you proceed to read your statement, Mr. Carpenter?

A. My name is George B. Carpenter. My headquarters is Ontario, Oregon. My business is the buying and selling of cattle which I have been doing for the past 40 years. My operations extend throughout the western states in-

cluding Mexico and Canada. My yearly shipments will be between 20,000 and 30,000 head.

I represent Moffat & Company, whose headquarters are at San Francisco, California, in purchasing their cattle [fol. 1597] throughout the territories mentioned. This firm happens to be the largest cattle feeding concern in the West. They operate finishing feed yards at Manteca, Stockton, Fresno, Chowchilla, and Bakersfield, California, and at Lovelock and Fallon, Nevada. They also pasture cattle throughout the San Joaquin Valley in California, at Elko, Nevada, in the McCall area in Idaho and in eastern Oregon.

I buy many cattle in the States of Nebraska, Iowa, South Dakota, North Dakota, Montana, Colorado, Texas, Nevada and California. Some of these are bought for account of Moffat & Company and move direct to their California and Nevada feeding yards. Others are bought for Moffat in the states mentioned and shipped to the ranges mentioned above where they are placed on summer feed, and after that feeding is completed in the Fall, they are shipped to Moffat's finishing yards in Nevada and California.

In addition to buying cattle for Moffat, I make many deals for my own account in the states described, and these are moved to feed yards at Ontario, Oregon, and Payette, Idaho.

In buying feeder cattle, both for Moffat and for myself, my purpose is to select the kind and quality of cattle that can take on substantial added weight. Of course, price is a factor. It is for this reason that I have bought cattle all over the western part of the country, including Mexico and Canada. In many cases when these feeder animals are [fol. 1598] bought I do not know definitely where they will eventually move for slaughter. Consequently in many cases, transit billing is worthless. A concrete illustration of this is that during 1949, Moffat shipped around 1,600 head of cattle from Los Banos, California, to Norwood, Idaho, a local point on the McCall branch of the Union Pacific. These cattle were fed during the summer and late fall and returned to California over the same rail route for further feeding as they originally moved. It is not an unusual thing for me in my overall operations to

return cattle after feeding operation is completed over the same line of railroad as was used for the inbound movement. In this situation, of course, we pay flat rates, either feeder or fat.

We have always found, because of the perishable nature of livestock, that it is essential in order to minimize shrinkage that we use the shortest and fastest route in making shipments from Nebraska, and other western states to California, Idaho and eastern Oregon, and have consistently used the Union Pacific or the Union Pacific and Southern Pacific. I know from personal experience that the route of the Rio Grande between Denver and Ogden or Salt Lake is quite a bit longer than the Union Pacific, and for this reason, I cannot afford to use the Rio Grande route even if the same rates applied because the most important factor in the purchasing and shipping of cattle is the shrinkage loss. Any excess shrinkage due to delay in [fol. 1599] transit could well mean more than the total freight charges.

The Rio Grande just does not fit into our picture. While I have indicated I cannot afford to use the Rio Grande Railroad in shipping cattle, I am interested in the outcome of this proceeding simply because I have for many years routed cattle via the Union Pacific. Here I might say that I have used the route of the Rio Grande, and it just has not worked out. Being dependent on the Union Pacific to a very great extent, I am interested in seeing that its long haul and revenues are preserved.

Q. Mr. Carpenter, I understand you buy cattle in Montana among other places?

A. That is right.

Q. Where would they be shipped to for feeding?

A. Oh, we ship those cattle, we would either ship those cattle into eastern Oregon, or we go into California with them.

Q. Now if you ship them into Eastern Oregon, would some of them leter move to California?

A. That is right.

Q. In that event, they would return east over the Union Pacific over the Wells cut-off?

A. In a lot of cases, we ship cattle like say into the Brogan

area. That is the end of the branch line out of Vale, Oregon, on the Shortline, and then we take, after those cattle are grassed out, we route those cattle back over the same lines [fol. 1600] and just pay the feeder rate on into California.

Q. In other words, you have no transit billing?

A. No, there is none at all.

Q. Is it unusual for you to, after feeding and grassing the cattle, to ship them back over the same route as the inbound movement?

A. We do that right along.

Q. Of course, that is done at flat rates?

A. That is right.

Mr. Melia: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. Have you had any trouble using the Union Pacific after 1945 when the revenues went down 130 million dollars?

A. Well, I don't know anything about that. We use the Union Pacific because it kind of fits into where we move our stock.

Q. You wouldn't use the Denver and Rio Grande even if the rates we seek here are established, would you?

A. No, we wouldn't.

Mr. Quirk: All right. Thank you.

Mr. Melia: Thank you, Mr. Carpenter.

(Witness excused.)

Mr. Rouse: I call Mr. M. B. Smith.

M. B. Smith was sworn and testified as follows:

Mr. Rouse: Mr. Examiner, it is agreeable to me to have [fol. 1601] this statement put in as a verified statement and not read, but there is an exhibit referred to in this prepared statement. Perhaps since it would go in as an

exhibit, the accompanying exhibit might be made a part of the verified statement.

Exam. Mullen: Does the statement explain the exhibit?

Mr. Rouse: The statement explains the exhibit.

Exam. Mullen: Just let it go in the record; then, it is short.

Mr. Rouse: The only thing then, the verified statement will have a blank.

Exam. Mullen: You can read that in the record, there is only a page and a half.

Direct examination.

By Mr. Rouse:

Q. Mr. Smith, you may proceed to read the statement.

A. My name is M. B. Smith. I reside at Pocatello, Idaho, mailing address Route 2 North. I am engaged in farming at that location and I am also weed supervisor for Bannock County, Idaho. I am a member of Portneuf Grange 229, an organization composed of approximately 150 producers of agricultural commodities in Bannock County, Idaho, and am a member also of Lakeview Pomona Grange 34, having a membership of approximately 100 producers of agricultural commodities.

During the latter part of November, 1949, Portneuf Grange 229, of which I was at the time chairman of the [fol. 1602] executive committee, had before it for consideration the petition of the Denver & Rio Grande Western Railroad Company before the Interstate Commerce Commission seeking authority to open the Ogden Gateway, which would permit solicitation of business originating on the lines of the Union Pacific Railroad in the States of Oregon, Washington, Montana and Idaho, and to the extent such solicitation resulted in routing via the lines of the D&RGW, to divert such traffic to its lines via the Ogden Gateway. After full discussion of the subject the executive committee of Portneuf Grange 229 adopted a resolution, which has been identified as Exhibit 33,—

Exam. Mullen: Exhibit 33.

The Witness: —in which that grange expressed its opposition to the petition of the D&RGW.

It will be observed from the resolution, Exhibit 33, that not only did Portneuf Grange 229 oppose the petition of the D&RGW, but it also requested the Public Utilities Commission of the State of Idaho to intervene in the case in behalf of the Union Pacific Railroad Company, and it directed that a copy of the resolution be furnished to the Public Utilities Commission of the State of Idaho and to the other parties referred to in the resolution, including the Governor of the State.

Following the adoption of the resolution, Exhibit 33, by Portneuf Grange 229, this resolution was referred to and [fol. 1603] given consideration by Lakeview Pomona Grange 34, a superior grange to Portneuf Grange 229, and at a meeting of the full membership of Lakeview Pomona Grange 34, on motion duly made and seconded, it was resolved that the action of Portneuf Grange 229 be approved by Lakeview Pomona Grange 34. I was at the time of the action of Lakeview Pomona Grange 34, the master of that grange.

By Mr. Rouse:

Q. Mr. Smith, were you also the master of this first grange you have mentioned here, the Lakeview Pomona Grange 34, were you master of that grange at the time it adopted its resolution?

A. No, sir, I was just chairman of the executive committee.

Q. You were chairman of the executive committee at the time that resolution was passed, that is the resolution which we have identified as Exhibit 33?

A. Yes.

Mr. Rouse: That is all.

Cross-examination.

By Mr. Quirk:

Q. Mr. Smith, did you know that the State Grange voted to favor this complaint; you knew that, didn't you?

A. Yes, sir.

Mr. Quirk: That is all.

Exam. Mullen: That is all. Exhibit 33 will be received.

(Defendant's Exhibit No. 33, Witness Smith, received in evidence.)

[fol. 1604] Exam. Mullen: Thank you, Mr. Smith.

(Witness excused.)

VAUGHAN STEWART was sworn and testified as follows:

Mr. Rouse: Mr. Examiner, I am agreed this be attached as a verified statement.

Exam. Mullen: Is there any objection—after you read it, Mr. Quirk, of course.

Mr. Quirk: Beginning at the bottom of page 3, and running on to the end of this verified statement is argument, and is therefore objectionable on that ground, as well as being very repetitious. We have heard this story over and over again.

Exam. Mullen: The argument matter, of course, will be annulled.

Mr. Quirk: I have no questions.

Exam. Mullen: This statement, then, will be received as Verified Statement No. 1.

That is all, Mr. Stewart.

(Witness excused.)

Mr. Rouse: Calling Mr. Zimmerli.

H. H. ZIMMERLI was sworn and testified as follows:

Mr. Rouse: Mr. Examiner, we are agreeable likewise to have the statement of Mr. Zimmerli placed in the record as a verified statement.

[fol. 1605] Mr. Quirk: With the understanding the argument contained in this proposed verified statement will be ignored. We have no questions.

Mr. Rouse: That is a matter the Examiner ruled on last week. You made a ruling on that last week, Mr. Examiner.

Exam. Mullen: Oh, yes, any argumentative matter in these statements will be disregarded.

Mr. Quirk: I am objecting to any argumentative statements on the record.

Exam. Mullen: It is so understood. This will be received as Verified Statement No. 2.

Mr. Rouse: That is all, Mr. Zimmerli, thank you.

(Witness excused.)

Mr. Rouse: Mr. Carlson?

Albert Carlson was sworn and testified as follows:

Mr. Rouse: We are agreeable, Mr. Examiner, this statement likewise be placed in the record as a verified statement.

Cross-examination.

By Mr. Quirk:

Q. Did the Union Pacific render good service to your company the last year?

A. Yes, sir.

Q. They did?

A. Yes, sir.

Q. Did they render good service to your company in 1948?

[fol. 1606] A. I would say so, yes.

Q. Was the service just as good in 1949?

A. I would say so.

Q. Did you know the Union Pacific had $38,000,000 less gross revenue in 1949 than they had in 1948?

A. No, sir, I did not.

Q. You weren't even shocked by that at all, were you?

A. No, I would not be.

Mr. Quirk: That is all.

Exam. Mullen: This will be received then, as Verified Statement No. 3.

(Verified Statements Nos. 1, 2, and 3, received in the record.)

Mr. Rouse: That is all.

(Witnessed excused.)

CLYDE HESS was sworn and testified as follows:

Mr. Rouse: This statement may be similarly treated, Mr. Examiner, and placed in the record as a verified statement.

Cross-examination.

By Mr. Quirk:

Q. Have you gotten the impression that if the Rio Grande gets the joint rates through Ogden, that somehow or other the Union Pacific will suffer, its services will be less satisfactory?

A. Would you state that again, please?

Mr. Quirk: Read it.

[fol. 1607] (Question read.)

The Witness: Well, I would say, as far as I am concerned in this deal, we depend on the U. P. for all our service. I'm interested in being served, and I think it would, if it was opened, I think the Union Pacific would lose a lot of business.

Q. You mean that this route, if it was opened, the shippers would use it to a very large extent and thereby hurt the Union Pacific?

A. I wouldn't say they would.

Q. Would you?

A. No, I would continue with the Union Pacific.

Q. Were your services as good in 1949 as it was in 1948?

A. Yes, sir.

Q. Do you know the Union Pacific had $38,000,000 less gross revenue in 1949 than it had in 1948?

A. Yes, sir.

Q. How was your service in 1946?

A. Our service has been very good, ever since we have been in business, with the U. P.

Q. It was better in 1946 than it was in 1945, wasn't it?

A. I didn't notice any particular difference.

Q. In 1946 the Union Pacific had $130,000,000 less gross revenue than in 1945, but it didn't affect your service?

A. It didn't seem to affect our service.

Mr. Quirk: That is all.

[fol. 1608] Exam. Mullen: That is all. Thank you, sir.

(Witness excused.)

Exam. Mullen: That statement will be received as Verified Statement No. 4.

(Verified Statement No. 4 received in the record.)

Mr. Rouse: Mr. Thompson.

F. G. THOMPSON was sworn and testified as follows:

Mr. Rouse: Mr. Examiner, this statement may be treated similarly to the others.

Exam. Mullen: This is Verified Statement No. 5.

Cross-examination.

By Mr. Quirk:

Q. Would your position be different, Mr. Thompson, if the Rio Grande was attempting to build a railroad into Idaho?

A. Sir?

Mr. Quirk: Read it, Mr. Reporter.

(Question read.)

The Witness: Well, I don't know. It would depend on the circumstances.

By Mr. Quirk:

Q. Why did you say then you say you understand the Denver Rio Grande Western does not contemplate building a railroad in this state. It pays no taxes. Now you made the statement, and I merely asked you if it had filed an [fol. 1609] application for authority to build a railroad into the state, and pay taxes in the state, I suppose you would be in favor of that?

A. Well, has it?

Q. It has not, no.

A. If it does, I will reserve my opinion, then, sir.
Q. You don't distribute beer in Colorado, do you?
A. No, sir.
Q. Don't the people down there drink beer?
A. I think they do, you bet.
Mr. Quirk: All right.
Exam. Mullen: Received as Verified Statement No. 5.

(Verified Statement No. 5 received in the record.)

(Witness excused.)

Mr. Rouse: Mr. Hyer.

MERLE G. HYER was sworn and testified as follows:

Mr. Rouse: Mr. Examiner, I would like Mr. Hyer to read this statement into the record.

Exam. Mullen: All right, Mr. Hyer, proceed.

The Witness: My name is Merle G. Hyer and my residence is at Lewiston, Utah. I am there engaged in farming, cattle feeding and shipping of livestock and grain. During the year 1948, I shipped approximately 32 carloads of livestock and during the year 1949, 30 carloads of live- [fol. 1610] stock from Lewiston, Utah, and I am a receiver of approximately 6 carloads of livestock per year at Cornish. The livestock received is shipped from points in Idaho and Wyoming and the livestock forwarded is, for the most part, shipped to points in California, either Los Angeles or San Francisco, with an occasional car to Omaha, Nebraska. All shipments made or received by me at Lewiston are routed via the lines of the Union Pacific Railroad.

The Union Pacific has rendered satisfactory service to me and provided an adequate car supply. The routes of the Union Pacific are satisfactory and sufficient for my requirements. I have never routed any shipments via the lines of the D&RGW and have never felt the need for nor asked either the D&RGW or the Union Pacific for the establishment of through routes via the D&RGW, such as the D&RGW is seeking in this case. I do not anticipate any need for such through routes and am satisfied that I would derive no benefits therefrom.

I understand that in this case the D&RGW seeks to have diverted to its lines traffic originating on the lines of the Union Pacific in the States of Oregon, Washington, Montana, Idaho and Utah, that it does not intend to render any service in connection with the movement of such traffic into Ogden, nor is it in a position to render such service.

I am at present a member of the Board of County Commissioners of Cache County, Utah, and as such have an acquaintance with the tax problem in my county. The [fol. 1611] Union Pacific during the year 1948 paid $79,042.50 taxes in Cache County, Utah. The D&RGW paid no taxes.

Exam. Mullen: Just a moment, that next paragraph is argumentative. That will come out.

Mr. Quirk: All right.

The Witness: It is my understanding that the D&RGW would hope to divert traffic such as that shipped from the station of Lewiston via its lines through Ogden. There would necessarily be delay in the movement through the Ogden terminal and the time consumed would delay the time of arrival of the stock at destination.

Exam. Mullen: The next paragraph is argumentative. That should come out.

Mr. Collins: You mean he can't state his position in the case, Mr. Examiner?

Exam. Mullen: He can state his position.

The Witness: I mentioned previously I am a member of the Board of County Commissioners of Cache County, Utah. The Board is unalterably opposed to the petition of the D&RGW in this case and I have been officially authorized to represent it in this statement in support of defendants, and particularly of the Union Pacific. As a shipper and individual citizen, I also oppose granting of the petition of the D&RGW.

Mr. Quirk: Are you finished?

Mr. Rouse: Yes.

[fol. 1612] Cross-examination.

By Mr. Quirk:

Q. If the joint rates which the complainant seeks here were established, I take it you wouldn't use the Ogden Gateway anyway, would you, in connection with the Rio Grande?

A. No, sir.

Q. Well, you have the impression, have you, that you have to use it if we should succeed in this case?

A. No, sir.

Q. There are other Utah citizens that have been here and testified that they needed this route. Are you opposed to them getting it if they need it?

A. No, sir.

Q. This tax that you speak of is an ad valorum tax, isn't it?

A. Yes, sir.

Q. Property taxes do not fluctuate with the revenues of the railroad, do they?

A. I wouldn't know about that.

Mr. Quirk: All right.

Exam. Mullen: Anything further?

Mr. Rouse: No.

Exam. Mullen: That is all. Thank you, Mr. Hyer.

(Witness excused.)

Mr. Olsen.

MARION OLSEN was sworn and testified as follows:

[fol. 1613] Mr. Rouse: It is agreeable with me, Mr. Examiner, that this statement be placed in the record as a verified statement. There is reproduced in the statement a resolution that is described in the statement, but if it is placed in the record as a verified statement I think the resolution will be a part of it. I had intended it to be an exhibit.

Exam. Mullen: It will go along with the verified statement if you wish.

Mr. Rouse: Yes.

Exam. Mullen: That will be Verified Statement No. 6.

(Verified Statement No. 6 received in the record.)

Cross-examination.

By Mr. Quirk:

Q. On page 4 of your verified statement, you say that you had one experience in the area up there at the time the Utah Idaho Central Railroad was abandoned. Have you gotten the impression that the Union Pacific is about to abandon its line in Utah?

A. No, sir.

Q. Why did you refer to the abandonment of the Utah Idaho Central, then?

A. Because of the fact that if the other railroad, namely the U.P., was taken out of there, it would be a crippling blow such as it was when the Utah Idaho Railroad went out, we would be at a great loss there with no rail service. [fol. 1614] Q. You think there is a danger of the Union Pacific abandoning this line, if there is any diversion of traffic whatsoever to Ogden via the Rio Grande?

A. Not under the conditions now, no.

Mr. Quirk: That is all.

Redirect examination.

By Mr. Rouse:

Q. Mr. Olsen, have you been approached recently by representatives of the D&RG in an effort to dissuade you from coming here to testify for the Union Pacific?

A. Yes, sir.

Q. How many times?

A. Twice.

Q. That is within the last month?

A. Yes, sir.

Mr. Rouse: That is all.

Recross-examination.

By Mr. Quirk:

Q. How many times were you approached by the Union Pacific in being persuaded to support them?

A. Once.

Mr. Quirk: We're one up on you.

(Laughter)

The Witness: I was persuaded the first time.

Exam. Mullen: That is all.

(Witness excused.)

Exam. Mullen: This will be received as Verified State-[fol. 1615] ment *Statement* No. 6.

(Verified Statement No. 6 received in the record.)

Guy Gray was sworn and testified as follows:

Mr. Rouse: Mr. Examiner, it is agreeable to me this statement likewise be placed in the record as a verified statement.

Mr. Quirk: No questions.

Exam. Mullen: It will be received as Verified Statement No. 7.

(Verified Statement No. 7 received in the record.)

Mr. Rouse: Thank you, Mr. Gray.

(Witness excused.)

Mr. Hobbs: Mr. Examiner, we have three or four additional witnesses, and they went out to get their statements. If you would declare a recess we will have the statements.

Exam. Mullen: All right, we will take a ten-minute recess.

(Short recess taken.)

Exam. Mullen: We are ready to proceed, gentlemen.

Mr. Hobbs: I call Mr. Roedel.

L. J. Roedel was sworn and testified as follows:

Mr. Hobbs: We are agreeable, Mr. Examiner, that Mr. Roedel's statement be received as a verified statement and [fol. 1616] not read into the record.

Exam. Mullen: Any questions?

Mr. Quirk: Yes.

Cross-examination.

By Mr. Quirk:

Q. Mr. Roedel, at the Salt Lake hearing in this proceeding a Mr. Johnson, Manager for the Coppers Company, with a creosote treating plant at Salida, Colorado, testified that they moved lumber off the Union Pacific for treatment at Salida, and then moved it east. Would your company be interested in that kind of customer?

A. He wouldn't be buying any more lumber from us.

Q. Are you familiar with the Coppers Company's needs?

A. Yes, I think I am, to a certain extent.

Q. You know who the Coppers Company is?

A. Yes.

Mr. Quirk: That is all.

Exam. Mullen: This will be received, then, as Verified Statement No. 8.

(Verified Statement No. 8 received in the record.)

(Witness excused.)

Mr. Hobbs: I call Mr. Lanzer.

Fred E. Lanzer was sworn and testified as follows:

Mr. Hobbs: Mr. Examiner, we are willing to have the [fol. 1617] statement of this witness received as a verified statement also.

Exam. Mullen: All right.

Cross-examination.

By Mr. Quirk:

Q. Mr. Lanzer, is the lumber you ship east from producer points used by your company subject to reconsignment and other transit privileges?

A. We ship the lumber from our enterprise mill out of LaGrande on a transit basis.

Q. Well, is it stopped in transit for any kind of treatment or reconsignment or resale at all?

A. For remanufacture, definitely not.

Q. You say on page 2 of your verified statement that if the rates sought by the Rio Grande here should be established the Union Pacific would sustain revenue losses that would necessarily have to be offset by restricting the service. Has your service rendered by the Union Pacific been satisfactory in the last four years?

A. Yes, it has.

Q. In other words, you found it to be satisfactory one year about as well as the other years?

A. Yes.

Q. Did you know that in 1946 the Union Pacific had gross revenues of 130 million dollars less than the year before?

A. I know it from your statement.

Q. They didn't restrict the service on account of the loss [fol. 1618] of the 130 million dollars loss, apparently?

A. Not to my knowledge.

Mr. Quirk: All right.

Exam. Mullen: This will be received as verified statement No. 9.

(Verified Statement No. 9 received in the record.)

(Witness excused.)

Mr. Hobbs: I call Mr. Kiddle, please.

FRED E. KIDDLE was sworn and testified as follows:

Mr. Hobbs: We are willing, Mr. Examiner, that the testimony of this witness be received as a verified statement.

Cross-examination.

By Mr. Quirk:

Q. Mr. Kiddle, on page 2 of your verified statement you say that any reduction in revenue to the Union Pacific might result in restrictions or curtailment of services rendered to you in various ways. Have you been led to believe by the Union Pacific representatives that this case would lead to restrictions in your service?

A. No, not by any officials of the Union Pacific. It is just my general thinking that if there would be any substantial reduction in earnings that ultimately it would catch up where there might be this restriction.

Q. You think that if the loss of revenue might be no more [fol. 1619] than say four million, or $4,000,000, that that would result in restricting your service?

A. I have never attempted to analyze it on that basis.

Q. What basis did you have in mind?

A. I would just think——

Q. Let me finish. What basis did you have in mind to base your fears on?

A. Our operations are on a branch line. From my observation and reading in the newspaper when curtailment and impairment of service does come, it is usually the branch lines that are affected first.

Q. Is there any curtailment in your service in any respect in 1949, as compared with 1948?

A. Not noticeably, anything of a major character, no.

Q. Did you know that the Union Pacific had 38 million dollars less gross revenue in 1949 than it had in 1948?

A. No, I didn't have those figures.

Mr. Quirk: All right. That is all.

Mr. Hobbs: Thank you, Mr. Kiddle.

Exam. Mullen: It will be received as Verified Statement No. 10.

(Verified Statement No. 10 received in the record.)

(Witness excused.)

Mr. Collins: Mr. Examiner, by the adoption of this verified statement method in getting the witness' testimony in the record has speeded up things so we don't have anymore witnesses now, and won't until 3 o'clock, when we will have seven.

[fol. 1620]

Exam. Mullen: Didn't you notify them all to be here? Didn't you notify them all to be here today?

Mr. Rouse: We notified all except those who had previous commitments, Mr. Examiner. We did have about a dozen witnesses who couldn't be here Monday. We notified all the rest of them, and there are about seven who didn't make it early this morning, but will be here today.

Exam. Mullen: How about tomorrow?

Mr. Rouse: Tomorrow we have about 15, and on Wednesday I think about ten more, and that is the list.

Exam. Mullen: Could you get some of those in this afternoon that are supposed to come tomorrow?

Mr. Rouse: I'm fearful we cannot, Mr. Examiner. We have tried to separate this as much as we can, but some of the witnesses we hoped to have here this morning just couldn't make it because of other commitments. That is true as of tomorrow. There are a few witnesses who *are* commitments on Tuesday, and can't be here until Wednesday.

Exam. Mullen: It seems to me we are losing a lot of time here.

Mr. Collins: Well, we have to treat that loss by adopting an accelerated method, Mr. Examiner. We made these plans

[fol. 1621]

previously to have these witnesses, and they made the plans dependent on coming here at a time we planned for them before. Mr. Hobbs had these witnesses from the Northwest area up there around Portland, in order to try to inconvenience them as little as possible, we have tried to plan them out for the two or three days.

Exam. Mullen: When will the witnesses be available this afternoon?

Mr. Rouse: We expect about seven, Mr. Examiner.

Exam. Mullen: What time?

Mr. Collins: About three o'clock.

Mr. Hobbs: Before then.

Mr. Rouse: They will not all be here then.

Mr. Hobbs: We have one witness, Mr. Examiner, from Spokane, who will be in here as I understand it, on the noon train, and who must get out of here again on the train that leaves at 3:50. I don't know when the balance of the local witnesses, if they are local, will be here.

Exam. Mullen: Then we will recess until 2 o'clock.

Do you have anything, Mr. Quirk?

Mr. Quirk: No, we haven't right now. This is quite unexpected.

Exam. Mullen: All right, we will recess until 2 o'clock.

(Whereupon, at 11:11 o'clock a.m., the hearing was recessed until 2 o'clock p.m., the same day.)

[fol. 1622] Afternoon Session, 2 P. M.

Exam. Mullen: We are ready to proceed, gentlemen.

Mr. Collins: Mr. Examiner, pursuant to the discussion that Mr. Quirk and I had with you orally before lunch, we turned over to Mr. Quirk copies of the prepared statements of the other witnesses that we expected to have present, testimony for the defendants at this hearing. Now, as I understand the situation, what I am proposing is that—and as I understood Mr. Quirk's being agreeable to his waiving the requirement that the witnesses be brought to the hearing and put under oath, and that the prepared statements may be permitted in evidence with the same force and effect in the form of verified statements and not copied, with the same force and effect as if the witnesses had been brought here and put under oath. Is that correct, Mr. Quirk? I find we have some that are not available at the moment, but will be a little later on. These are not all, in other words, but we will have them a little later on.

Mr. Rouse: Mr. Collins, we have them all here, but Mr. Quirk didn't get them before lunch. Mr. Burchell and I had them.

Mr. Collins: We can offer what we have then, and give him a chance to look at the others.

Mr. Quirk: Mr. Collins has stated correctly the under-

standing we have about what we are about to do in legal [fol. 1623] words, which constitutes a stipulation.

Mr. Collins: That is correct.

Mr. Quirk: He agreed to this reservation, too, since the witnesses will not be present, it will be understood that I object now to anything in these verified statements which is in the nature of an argument or that are obviously irrelevant, without taking up each one and making objection; and I also wish the understanding that many of these witnesses, if they were here, I would ask on cross examination the same general type of questions where it was appropriate as I have asked of the other witnesses.

Mr. Collins: Yes. And if the witnesses were here they would give answers substantially along the lines as those you have elicited from the witnesses already cross examined.

Mr. Quirk: That is all right.

Mr. Collins: That is agreeable to me. I think, Mr. Examiner, the best we can do is for me to read the name and address of these witnesses, as stated at the top of their prepared statement, one by one, and let you give it a number, unless you have some better way to suggest.

Exam. Mullen: Well, except you could prepare a list and furnish it to the reporter, and he can copy that list in.

Mr. Collins: Then you would give each name a number.

Exam. Mullen: That is right.

Mr. Collins: We can do that. We haven't got it done.

Mr. Rouse: We haven't a list, Mr. Examiner.

[fol. 1624] Mr. Collins: We have a partial list.

I'm afraid, Mr. Examiner, the only way we can be sure that everybody knows what number is assigned to each statement would be to read them.

Exam. Mullen: Suppose you do that right now.

Mr. Collins: I don't believe we have ours in the same order Mr. Quirk has.

Exam. Mullen: He will find it, you go ahead.

Mr. Collins: I will call them as I have them here, and he can hunt for them, I suppose.

Mr. Examiner, in connection with some of these statements there are attached resolutions of the sort that you have seen. I take it they will go along with the verified

statement, as a part of the verified statement, is that correct?

Exam. Mullen: As a part of the verified statement, that is correct.

Mr. Collins: The first I will read is E. S. Harper, Idaho Falls, Idaho.

Exam. Mullen: That will be Statement No. 11. We will go on from there.

(Verified Statement No. 11 received in the record.)

Mr. Collins: The next is Frank A. Mason, Dedham, Massachusetts.

Exam. Mullen: That will be No. 12.

[fol. 1625] (Verified Statement No. 12 received in the record.)

Mr. Collins: The next is J. C. Stauffer, Willard, Utah.

Exam. Mullen: It has a resolution attached.

Mr. Collins: Yes.

Exam. Mullen: That will be Verified Statement No. 13.

(Verified Statement No. 13 received in the record.)

Exam. Mullen: All right.

Mr. Collins: Next, Mr. Robert D. Gallafent, Pocatello, Idaho.

Exam. Mullen: Fourteen.

(Verified Statement No. 14 received in the record.)

Mr. Collins: E. E. Pugh, Springston, Idaho.

Exam. Mullen: No. 15.

(Verified Statement No. 15 received in the record.)

Mr. Collins: Clyde Bunting, Boise, Idaho.

Exam. Mullen: No. 16.

(Verified Statement No. 16 received in the record.)

Mr. Collins: Jay Malvin, Boise, Idaho.

Exam. Mullen: No. 17.

(Verified Statement No. 17 received in the record.)

[fol. 1626] Mr. Collins: Fred A. Phillips, Baker, Oregon.

Exam. Mullen: No. 18.

(Verified Statement No. 18 received in the record.)

Mr. Collins: Edward E. Parsons, Payette, Idaho.
Exam. Mullen: No. 19.

(Verified Statement No. 19 received in the record.)

Mr. Collins: Do you have that, Mr. Quirk?
Mr. Quirk: Yes.
Mr. Collins: Marcus A. Pomeroy, Hansen, Idaho.
Exam. Mullen: No. 20.

(Verified Statement No. 20 received in the record.)

Mr. Collins: That is Hansen, Idaho, Mr. Quirk.
Frank H. Adams, Twin Falls, Idaho.
Exam. Mullen: No. 21.

(Verified Statement No. 21 received in the record.)

Mr. Collins: Frank Stubbs, Yakima, Washington.
Exam. Mullen: No. 22.

(Verified Statement No. 22 received in the record.)

Mr. Collins: Frank W. Shields, Yakima, Washington.
Exam. Mullen: No. 23.
[fol. 1627] Mr. Collins: That has a resolution, also.
Exam. Mullen: Just a minute. All right. The resolution goes with that statement.
Mr. Collins: Yes, that will be a part of 23.
Exam. Mullen: That is right.

(Verified Statement No. 23 received in the record.)

Mr. Collins: Reese Lamb, Freewater, Oregon.
Exam. Mullen: No. 24.

(Verified Statement No. 24 received in the record.)

Mr. Collins: George P. Stadelman, the Dalles, Oregon.
Exam. Mullen: No. 25.
Mr. Collins: That has a resolution, also.

(Verified Statement No. 25 received in the record.)

Mr. Collins: Frank E. Freshwater, Yakima, Washington.
Exam. Mullen: No. 26.

(Verified Statement No. 26 received in the record.)

Mr. Collins: E. S. Prentice, Yakima, Washington.
Exam. Mullen: No. 27.

(Verified Statement No. 27 received in the record.)

[fol. 1628] Mr. Collins: Charles C. Gossett, Nampa, Idaho.
Exam. Mullen: No. 28.

(Verified Statement No. 28 received in the record.)

Mr. Collins: Russell O. Vognild, Tacoma, Washington.
Exam. Mullen: No. 29.

(Verified Statement No. 29 received in the record.)

Mr. Collins: Lowden Jones, Walla Walla, Washington.
Exam. Mullen: No. 30.

(Verified Statement No. 30 received in the record.)

Mr. Collins: Harold A. Cohn, Heppner, Oregon.
Exam. Mullen: No. 31.

(Verified Statement No. 31 received in the record.)

Mr. Collins: William H. Steiwer, Fossil, Oregon.
Exam. Mullen: No. 32.

(Verified Statement No. 32 received in the record.)

Mr. Collins: Marion Weatherford, Arlington, Oregon.
Exam. Mullen: No. 33.
Mr. Collins: Also a resolution to go with his testimony as a part of verified statement No. 33—two resolutions, instead of the one, to be included in Verified Statement No. 33.

[fol. 1629] (Verified Statement No. 33 received in the record.)

Mr. Collins: W. B. Savage, Kimberly, Idaho.
Exam. Mullen: No. 34.

(Verified Statement No. 34 received in the record.)

Mr. Collins: Leroy W. Hayes, Caldwell, Idaho.
Exam. Mullen: No. 35.

(Verified Statement No. 35 received in the record.)

Mr. Collins: Charles Baker, Walla Walla, Washington.
Exam. Mullen: No. 36.

(Verified Statement No. 36 received in the record.)

Mr. Collins: Stanley D. Jenkins, Pilot Rock, Oregon.
Exam. Mullen: No. 37.

(Verified Statement No. 37 received in the record.)

Mr. Collins: Denny H. Hogue, Twin Falls, Idaho.
Exam. Mullen: No. 38.

(Verified Statement No. 38 received in the record.)

Mr. Collins: The next one is Dan J. Cavanaugh, Twin Falls, Idaho.
Exam. Mullen: No. 39.

[fol. 1630] (Verified Statement No. 39 received in the record.)

Mr. Collins: Donald Wallace, Tacoma, Washington.
Exam. Mullen: No. 40.

(Verified Statement No. 40 received in the record.)

Mr. Collins: K. H. Klopp, Spokane, Washington.
Exam. Mullen: No. 41.

(Verified Statement No. 41 received in the record.)

Mr. Collins: Verne R. Woods, Ault, Colorado.
Exam. Mullen: No. 42.

(Verified Statement No. 42 received in the record.)

Mr. Collins: E. J. Maynard, Denver, Colorado.
Exam. Mullen: No. 43.

(Verified Statement No. 43 received in the record.)

Mr. Collins: H. W. Farr, Greeley, Colorado.
That also has a resolution attached to go with it.
Exam. Mullen: Statement of H. W. Farr, with extracts of minutes of meeting of Board of Directors of Weld County Lamb Feeders' Association, is received as Verified Statement No. 44.

(Verified Statement No. 44 received in the record.)

[fol. 1631] Mr. Collins: Harold Smillie, Eaton, Colorado.
Exam. Mullen: No. 45.

(Verified Statement No. 45 received in the record.)

Mr. Collins: Walter J. Gooding, Salt Lake City, Utah.
Exam. Mullen: No. 46.

(Verified Statement No. 46 received in the record.)

Mr. Collins: Paul Blood, Morrill, Nebraska.
Exam. Mullen: No. 47.

(Verified Statement No. 47 received in the record.)

Mr. Collins: W. E. Anderson, Topeka, Kansas.
Exam. Mullen: No. 48

(Verified Statement No. 48 received in the record.)

Mr. Collins: Leeland U. Grieve, Savery, Wyoming.
Exam. Mullen: No. 49.

(Verified Statement No. 49 received in the record.)

Mr. Collins: L. G. Harding, Chugwater, Wyoming.
Exam. Mullen: No. 50.

(Verified Statement No. 50 received in the record.)

Mr. Collins: Ralph R. Crow, Saratoga, Wyoming.
[fol. 1632] Exam. Mullen: 51.

(Verified Statement No. 51 received in the record.)

Mr. Collins: Wayne I. Snyder, Morrill, Nebraska.
Exam. Mullen: 52.

(Verified Statement No. 52 received in the record.)

Mr. Collins: N. H. Troelstrup, Julesburg, Colorado.
Exam. Mullen: 53.

(Verified Statement No. 53 received in the record.)

Mr. Collins: Emmett A. Torney, Kellogg, Idaho.
Exam. Mullen: The statement of Emmett A. Torney is Statement No. 54.

(Verified Statement No. 54 received in the record.)

Mr. Collins: Sam W. Ditty, Dillon, Montana.
Exam. Mullen: No. 55.

(Verified Statement No. 55 received in the record.)

Mr. Collins: Leo J. Falk, Boise, Idaho.
Exam. Mullen: No. 56.

(Verified Statement No. 56 received in the record.)

Mr. Collins: That is all I have at the moment, that Mr. [fol. 1633] Quirk has seen, I guess.

Exam. Mullen: Are you ready to proceed? Do you have a statement, Mr. Quirk?

Mr. Quirk: No.

Exam. Mullen: These statements are received under the stipulation.

Mr. Collins: These constitute all that I now understand we have to submit here with the exception of the intervention, petition on behalf of the defendants for a Mr. Staff, also a prepared statement that he wanted to present, but I understand he won't arrive in Boise until the 3:50 train or some such train. It won't take him but a moment in the morning.

Exam. Mullen: All right.

Mr. Quirk: Your ruling, I take it, Mr. Examiner, refers to verified statements numbered 11 to 56, inclusive?

Exam. Mullen: That is correct. Does that complete the Defendant's presentation at this hearing?

Mr. Collins: Yes, it does, with the exception of this one man in the morning who will be on our side.

Exam. Mullen: Yes, so I understand.

Mr. Collins: You mean here at Boise?

Exam. Mullen: At Boise.

Mr. Collins: I think there will be some statements of some witnesses at Cheyenne, I'm not sure yet.

Mr. Gibson: According to the request of Mr. Collins, we [fol. 1634] have had duplicated the entire correspondence between Mr. Kirk and Mr. Hogue, and we have this ready to introduce in the record at this time, Mr. Examiner.

Exam. Mullen: All right.

Mr. Gibson: I might call your attention to the fact that there are two corrections on the last page in pen, and one

on the next to the last page that were discovered after the copies were duplicated.

Mr. Collins: But they are made on all the copies?

Mr. Gibson: Yes, they are made on all copies.

Exam. Mullen: That is offered as an exhibit?

Mr. Gibson: Yes.

Exam. Mullen: It will be marked as Exhibit 34.

(Complainant's Exhibit No. 34, Counsel Gibson, marked for identification.)

Exam. Mullen: Any objection to the receipt of this in evidence?

Mr. Collins: No.

Exam. Mullen: It will be received in evidence.

(Complainant's Exhibit No. 34, Counsel Gibson, received in evidence.)

Exam. Mullen: Does the complainant have anything further to present at this time?

Mr. Quirk: We haven't anything ready at this moment. We will be ready in the morning.

[fol. 1635] Exam. Mullen: We have nothing further this afternoon then, have we?

Mr. Collins: No, we only have this one witness I mentioned for the intervenor.

Exam. Mullen: We will adjourn until 9:30 tomorrow morning.

(Whereupon, at 2:40 o'clock p.m., the hearing was adjourned until 9:30 o'clock a.m., April 11, 1950.)

[fols. 1636-1637] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL, Defendants

Transcript of Testimony—Boise, Idaho, Tuesday, April 11, 1950

Met, pursuant to adjournment, at 9:30 o'clock a.m.

Before:

Frank E. Mullen, Examiner.

[fol. 1638] Proceedings

Exam. Mullen: We are ready to proceed, gentlemen. Has your witness come, Mr. Collins?

Mr. Collins: Yes.

Exam. Mullen: Will you be sworn, sir?

ROBERT H. STARR was sworn and testified as follows:

Direct examination.

By Mr. Collins:

Q. Mr. Starr, you have a petition to intervene in your own behalf in this case, do you not?

Exam. Mullen: Mr. Starr, I understand you have filed a petition for leave to intervene in this case.

The Witness: I have.

Exam. Mullen: That petition has been distributed. Is there any objection to it?

Mr. Quirk: We have none.

Exam. Mullen: The petition is received, and intervention is allowed.

Mr. Starr, you have been sworn and you have a statement you desire to make?

The Witness: A statement, yes.

Exam. Mullen: You may read it, then.

The Witness: My name is Robert H. Starr. I live one and one-half miles northwest of Cedaredge, Colorado. Cedaredge is in Delta County, approximately 17 miles northeast [fol. 1639] of Delta, Colorado.

I have been growing fruits, such as apples, peaches, pears, apricots and plums for the past 40 years on the Surface Creek Mesa. In the recent past, I have disposed of some of my orchard holdings, but at this time I still have around 150——

Mr. Quirk: Is it 150 or 200?

The Witness: That is a mistake. It should be changed. I wish that should be changed to 150.

—150 acres, devoted exclusively to the growing of the various fruits just mentioned.

I have for several years held the position of Colorado representative for the National Apple Institute, a national organization, and have represented the apple growers in Colorado in that capacity. I am not appearing here for the National Apple Institute, but only as an individual grower.

Delta County orchards alone produce an average of 50,000,000 pounds of apples, 16,000,000 pounds of peaches, 3,000,000 pounds of apricots, and 700,000 pounds of plums annually.

In addition to the fruit produced in Delta County, I know from my own experience that other counties, principally Mesa and Montrose Counties, are large producers of the same fruit.

My desire to be heard in this case arises from the desire to protect my own and other fruit growing interests in Delta [fol. 1640] County and the adjoining producing counties.

In the area of which I speak, approximately 30 per cent of the apples grown are grade "C" apples. Grade "A" and "B" apples are generally marketed through fresh fruit dealers. Our principal market for Grade "C" apples, which we must sell at a considerably lower price, is to frozen or canned fruit processors, who likewise process large quantities of peaches, plums and apricots.

I can safely say that in a normal crop year there is a surplus of grade "C" apples, as well as a certain amount of peaches and apricots, that we have difficulty in marketing through normal channels because they ripen too rapidly to be shipped. Our only outlet for these fruits is to a canner or freezer who has a plant reasonably adjacent to the growing territory.

It is my understanding that if the Ogden Gateway is opened, local processors will then be in position to purchase fruit in northern Idaho and Utah, which fruit generally sells for less than we can produce it in the Western Slope Territory, and our outlets for this large percentage of our total production will be cut off. Under certain marketing conditions, depending upon the demand for our fruits, we must sell our grade "C" apples and overripe fruits to show a profit for the season because of the narrow margin on which we operate. This narrow margin arises because of our high growing and picking costs and our comparatively shorter growing season.

[fol. 1641] If we lose our market for our grade "C" apples and over-ripe fruits, it may result in our operations being conducted at a loss and eventual curtailment of our growing activities.

If Western Slope processors are able to secure the less expensive Utah and Idaho fruits for processing in transit, we will have no alternative except to meet the prices paid for Utah and Idaho fruits or let our fruit rot on the ground, and with our higher producing and picking costs the latter would probably result.

Last year my entire crop of apricots went unmarketed and spoiled on the trees while Utah apricots were shipped in and processed locally.

It is my sincere opinion that in the Western Slope territory there is ample production of these grade "C" apples and overripe peaches and apricots to satisfy the requirements of local processors of frozen and canned fruits.

For these reasons I am opposed to the opening of the Ogden Gateway.

By Mr. Collins:

Q. What do you consider your market for these grade "C" apples, Mr. Starr? Just where are they sold?

A. Well, in a proposition of that kind, you sell them wherever you can sell them, if you can sell them.

Q. I get the impression from your testimony you have to sell them?

[fol. 1642] A. Well, the fresh fruit markets don't want that third grade apple. They want two grades, and so the upshot is that you can sell them to processors when they are peeled; the lack of color don't count.

Q. Well, is it to your interest to sell them to processors as near by your orchards where you raise them?

A. It would help us.

Q. Is that the only protection you are seeking by intervening in this case? You say at the top of page 2 of your statement that you desire to protect your own and other fruit growing interests in Delta County?

A. I am apprehensive as to the shipment of these "C" grade fruits and other fruits in used containers, on account of the danger from insects coming in, in the way of lice, mites, spiders, lygus bugs, San Jose scale, and mosaic, and the different things.

Q. Do you know of your own knowledge that there are these insects and diseases in any of the fruit that might be shipped from Idaho?

A. I do.

Q. Or Utah?

A. I do. They have an infestation of San Jose scale in the Payette Valley.

Q. In what?

A. In the Payette Valley.

[fol. 1643] Q. Now, is it that that you fear do you have that in your valley?

A. No, we don't. We have never had peach mosaic or San Jose scale, or Oriental fruit moth. Now, those are the three things that we are most afraid of, but we have been protected by our mountains and deserts. Fortunately to date we don't know that we have any of those things.

Q. These germs or insects, pests, might come into your

area there in these containers that the apples from outside your state would be shipped into the state?

A. That is true. The containers are shipped out by that local processing plant and they are put out in the orchards in Utah, Idaho, probably would be, put directly in the orchards, and the various insects in the way of lice and so forth would nest in them and be shipped to Delta, in these used containers.

Q. Where is the local processor you have in mind, if any?

A. In Delta.

Q. What is his name?

A. I think they go under the name of the Skyland Fruit Corporation.

Q. Is there anything else you want to say, Mr. Starr?

A. No, not especially. We regard this proposition of shipping Idaho apples into Delta County as you might say is a "carrying coal to Newcastle" operation. Nobody needs them, and if the local processors want to pay any kind of a decent price, they can get all the [fol. 1644] apples they want there.

Q. How near to the Rio Grande Railroad are you located?

A. About 12 miles.

Q. You can't move anything in or out by railroad without using their services, can you?

A. That is right.

Q. Do you have anything further? I don't have any more questions.

A. No, I guess not.

Cross-examination.

By Mr. Quirk:

Q. Mr. Starr, as I understand your position, you think you would be better off if you didn't have any competition from the northern Utah and Idaho fruits, is that right?

A. Yes.

Mr. Quirk: That is all.

Exam. Mullen: That is all, Mr. Starr. Thank you.

(Witness excused.)

Mr. Collins: Mr. Examiner, I want to recall Mr. Hanson very briefly.

Exam. Mullen: Mr. Hanson.

A. D. Hanson was recalled and testified further as follows:

Redirect examination.

By Mr. Collins:

Q. Mr. Hanson, do you have the operating revenues and [fol. 1645] the freight train miles of the Union Pacific for the years 1945, 1946, 1947, 1948 and 1949?

A. Yes, sir.

Q. Will you state what those are for the record, please?

A. The total operating revenues, for the year 19[illegible] $419,877,872; 1946, $361,395,534, a reduction of $130,482,338, or 26.5 per cent under 1945.

Freight train miles, 1945, 36,831,311; in 1946, 30,449,051, a reduction of 6,382,260, or 17.3 per cent.

Operating revenues, 1947, $410,053,705, a reduction of $81,824,167, or 16.6 per cent under 1945.

Freight train miles, 1947, 31,955,561, a reduction of 4,875,750, or 13.2 per cent under 1945.

Operating revenues, 1948, $437,583,132, a reduction of $54,294,740 dollars, or 11 per cent under 1945.

Freight train miles, 27,822,880, a reduction of 9,008,431, or 24.5 per cent under 1945.

Operating revenues, 1949, $398,823,082, a reduction of $93,054,790, or 18.9 per cent under 1945.

Freight train miles, 1949, 26,158,252, a reduction of 10,673,059, or 29 per cent under 1945.

Q. Now, Mr. Hanson, when you have a seasonal reduction in tonnage, how do you deal with it from the standpoint of freight train service? That is, do you have to take off schedules when you have what you know to be a seasonal re- [fol. 1646] duction, having in mind that you might soon have a rise in your volume traffic?

A. To some extent, although if it is of an expected short

duration, regularly assigned local or branch line service is not affected.

Q. And if you have what you anticipate to be a reduction which you do not regard as seasonal, but as a permanent reduction, then what?

A. Then every action possible is taken to meet the reduction in gross revenues on a comparable basis, which is, of course, difficult to reduce expenses generally in close comparison to reduction in freight revenue due to certain overhead and depreciation charges which must be charged out regardless.

Q. That is, you reached, as I understand you, or is it correct, you reach a short of irreducible minimum finally in your efforts to reduce operating expenses?

A. That is correct.

Q. But there is room, is there, above that irreducible minimum in what you have as full service in order to economize?

A. Yes, sir.

Q. I didn't notice very closely, do your figures show any fairly constant ratio as between operating revenues and freight train miles?

A. Yes, sir. The reduction in freight train miles, which reflects freight train service over the railroad as a whole, [fol. 1647] shows a reduction, percentagewise, close to the reduction in operating income. A greater reduction is shown in freight train miles during the years 1948 and 1949 for the reason of the dieselization program, modernization, and more efficient train operation, as compared to the year 1945.

Q. Do you want to make any further comment about the situation there?

A. Other than to say that the figures will bear out a reduction in train service, although it is true in some territories, and particularly in the Idaho territory, the branch line train service, as well as main line train service serving that territory has not been reduced comparable to service on other parts of the railroad.

Q. Do you have an explanation to make for that?

A. None other than what is in my original testimony to the effect that the Union Pacific has and is providing

service in Idaho and the other so-called non-competitive territory for the reason that we appreciate we are the only railroad serving the territory and there is no other railroad transportation.

Mr. Collins: That is all I have.

Recross-examination.

By Mr. Quirk:

Q. Mr. Hanson, what you are saying is this, isn't it: Wouldn't you say the Union Pacific runs a very efficient railroad and makes the adjustment necessary to meet con-
[fol. 1648] ditions as they arise?

A. That is correct.

Q. Do you regard a reduction of $130,000,000 in gross revenues, 1946 under 1945, as seasonal?

A. No sir.

Q. You don't regard any of these fluctuations that you have referred to, comparing 1945 with subsequent years down to and including 1949, as seasonal, do you?

A. No sir. And a comparable reduction was made in transportation expenses.

Q. A reduction in your gross revenues of, say, three or four or five million dollars would be hardly noticeable, would it, in your general operations?

A. It certainly would.

Q. How would it be noticeable in a company as large as yours?

A. For the reason as has been explained by other witnesses, the operating income has not been sufficient to pay our fixed charges and dividends.

Q. Well, that is your answer, is it?

A. Yes sir.

Q. You would still continue to give fairly good service with only a loss of only four or five million dollars, wouldn't you, a year?

A. To the extent of making a comparable reduction in expenses.

Q. Did you discontinue good service in 1946 with the
[fol. 1649] great loss you had in that year, compared with 1945?

A. I wouldn't say we discontinued good service. I will say that we had less service, less freight train service on the railroad than we did in 1945.

Q. The truth of the matter is, you gave much better service to the shippers generally, and to the public, in 1946, than you did in 1945?

A. That is true, because of the war conditions existing in 1945.

Q. Well then, there are factors other than mere change in the gross revenue that affect what you can do?

A. With respect to service?

Q. Yes.

A. There are a lot of things that are involved in service.

Q. Now, if you had a decrease of four million dollars in a given year, that would be less than one per cent of the situation in 1945, wouldn't it?

A. Yes.

Mr. Quirk: That is all.

Further redirect examination.

By Mr. Collins:

Q. Mr. Hanson, if you had a foreseeable loss of ten or twenty million dollars in revenue, through the Idaho and Northwest Territory, would that bestir you to methods of economizing, or would it affect the amount of service, the frequency of it?

[fol. 1650] A. Very definitely.

Q. Would it mean a curtailment——

Mr. Quirk: Mr. Examiner, I object to Mr. Collins putting words in the witness' mouth. I think a witness of this kind ought to be allowed to answer these questions without being led into the answer.

Exam. Mullen: It is leading.

Mr. Collins: Apparently there is a monopoly on leading the witnesses.

Mr. Quirk: The difference is, I am objecting.

By Mr. Collins:

Q. Will you comment on that, Mr. Hanson?

A. I believe it is quite fully covered in my original testimony.

Mr. Collins: All right, that is all.

(Witness excused.)

Mr. Collins: Mr. Examiner, that is all the testimony we will put in at this hearing for the defendant.

Exam. Mullen: Mr. Quirk.

Mr. Quirk: The day before yesterday, you said there would be no more officers or representatives of the Union Pacific put on as witnesses after the Cheyenne hearing.

Mr. Collins: That is right, as far as we know, and I hope I am right in my appraisal of the situation. I did, though, indicate that there will be shipper witnesses there. Maybe we will have two or four, but there will be no recall, as far as I know, of any officer of the Union Pacific or any [fol. 1651] of the witnesses that have testified for it.

Mr. Quirk: All right. I call Mr. Hogue.

F. C. Hogue resumed the witness stand and testified further as follows:

Redirect examination.

By Mr. Quirk:

Q. Mr. Hogue, as vice president of the Denver and Rio Grande Western, is it part of your duties to keep yourself informed about the movement of traffic between all points currently, in the past, and potential traffic that might be available to being routed via the Denver and Rio Grande?

A. It is.

Q. And have you made studies of this question from time to time?

A. I have.

Q. Did you hear the testimony of Mr. Lynch, Mr. Burns, Mr. Hanson, of the Union Pacific, which is based on the assumption that all of the available traffic that might move

out of the Denver and Rio Grande, should the joint rate sought be established via Ogden?

A. I did.

Q. Are you prepared to testify in rebuttal to those assumptions, and the testimony given by these gentlemen in this respect?

A. I am.

Mr. Collins: Mr. Examiner, before he proceeds, I have [fol. 1652] glanced over these two pages here, and I object to the testimony, because it is obvious from the language in the statements that Mr. Hogue is on the stand here apparently to construe or misconstrue or hope that he can change the estimate that Mr. Earley put into the record.

Now, if Mr. Earley wants to change his own testimony that might be one thing, but it certainly is not the proper procedure for Mr. Earley to sit in the room and have Mr. Hogue interpret Mr. Earley's estimate. We will let the record in that respect stand the way it is.

Mr. Quirk: Mr. Examiner, Mr. Hogue's testimony has nothing to do with what Mr. Earley testified to as the potential traffic. Mr. Hogue is merely testifying to the fact as to what his experience has been with respect to getting the potential traffic, and the share the railroad situated as the Rio Grande is might expect to get.

Exam. Mullen: It seems to me the witness is qualified to make that kind of a statement, Mr. Collins, as I understand it. Mr. Earley's testimony is distinctly an estimated potential. Mr. Hogue, as I understand, is going to testify how much he expects to get of that potential. I don't see any real objection to it.

Go ahead, Mr. Hogue.

The Witness: At the prior hearing in this proceeding at Salt Lake City, beginning December 12, 1949, Witness [fol. 1653] Earley submitted Exhibit No. 3, Section L of which deals with an Estimated Annual Traffic Potential for the Denver and Rio Grande Western Railroad Company in the event of the establishment of competitive joint through rates in connection with the Union Pacific via Ogden, Utah. This estimated potential of 157,762 carloads was based on the total carload traffic originating and terminating on the Union Pacific in the States of Idaho,

Montana, Oregon and Washington for the years 1944 to 1948, inclusive.

In concluding his testimony, Mr. Earley stated on page 174 of the transcript:

"I also wish to point out, with additional emphasis, that this estimate of the traffic possibilities for the Rio Grande route does not attempt to show the number of cars which we think will actually move through Ogden via the route of the Rio Grande in connection with the Union Pacific in the event of the establishment of competitive through rates via that junction."

Notwithstanding the fact that this testimony made it clear that the estimate, which was termed "potential," in nowise represented any attempt to measure the amount of traffic which the Rio Grande might secure through achieving its objective in this proceeding——

Mr. Collins: I object to this, Mr. Examiner. If there was ever any pure argument, this is it. He is interpreting a record which has already been made.

[fol. 1654] Exam. Mullen: As I understand it, his testimony is in rebuttal. I think it is permissible. Go ahead, Mr. Hogue.

The Witness: —numerous witnesses for the Union Pacific have elected to use the described potential as being the minimum amount of traffic which the Rio Grande expected to secure.

Mr. Collins: I move that be stricken. He is arguing about a record that has already been made.

Exam. Mullen: As I understand it, this is merely a preliminary statement. Go ahead.

The Witness: Our estimate of the traffic potential was prepared because we believed that, in the light of the issues in this proceeding, it was our duty to put before the Commission such information as was available to us regarding the volume of traffic that has moved between the territories involved.

The developments in this case now indicate the advisability of informing the Commission in an affirmative manner of my considered opinion as to the proportion of the potential traffic the Rio Grande can reasonably expect to

obtain in the event of the establishment of joint competitive through rates via Ogden. My opinion, which follows, is based on past experience and a special study of the matter.

While there is no way to determine precisely what the effect of our solicitation may be, we do know that the Rio Grande's present participation in Transcontinental traffic [fol. 1655] is only about 10 per cent of that potential despite the fact that certain of our connections aid and cooperate with us in obtaining such traffic. Therefore, there is no basis whatsoever for the assumption by officers of the Union Pacific and other witnesses who testified for that company that we could or would obtain all of the estimated potential.

Mr. Collins: I move that be stricken, Mr. Examiner, because it is purely as argumentative as you could ever imagine.

Exam. Mullen: The witness is stating the basis for his opinion. I think it is permissible. Go ahead.

Mr. Collins: He is saying there is no basis for the assumption of the Union Pacific officers, of this potential, when all they did was take the record made by Mr. Earley at its face value, and there is no need for Mr. Hogue to argue about what the record means as made by Mr. Earley. That is his lawyer's business, I understood.

Exam. Mullen: I believe it is very clear in the record as to the basis used by witnesses for the Union Pacific. That is very clear in the record. Go ahead.

Mr. Quirk: Mr. Examiner, could I make this one observation because of the interruption?

Exam. Mullen: Yes.

Mr. Quirk: If Mr. Collins will take the trouble to look at the testimony of Mr. Lynch, Mr. Hanson, and Mr. Burns on this subject, he will find it is all argument and all conclusion, [fol. 1656] and fantastic ones at that.

Mr. Collins: I think counsel's statement is also an argument and a lot of conclusions.

Exam. Mullen: Well, let's go on ahead and get some facts in the record.

The Witness: On the contrary, there is no probability that the Rio Grande will obtain more than 10 per cent of the estimated potential of Witness Earley in the event joint competitive through rates are established via Ogden,

and in my opinion that amount would be less than 10 per cent. Moreover, instead of assistance from the Union Pacific, such as we have from certain connections on other transcontinental traffic, we would, of course, meet with vigorous Union Pacific resistance to Rio Grande routing via Ogden.

Under these circumstances, it is my opinion that the Union Pacific's estimated gross revenue loss of $49,800,743.85, as used by Witness Burns on page 15 of his statement, is excessive by at least 90 per cent. In other words, his estimate is too high by at least 45 million dollars.

Mr. Quirk: You may cross examine.

Recross-examination.

By Mr. Collins:

Q. How did you arrive at the ten per cent, Mr. Hogue?

A. In several ways. As I testified to in this rebuttal statement, that represents approximately ten per cent of [fol. 1657] our participation in other transcontinental traffic, and we have no reason to think we would do better via Ogden, and we think we would not do as well.

Q. How many carriers are in competition with the Rio Grande in the solicitation of transcontinental traffic?

A. Well, you and I might count them up. We will say the Santa Fe.

Q. All right.

A. And the Southern Pacific.

Q. Yes.

A. The Union Pacific.

Q. Yes.

A. Great Northern, Northern Pacific, Milwaukee—that would be six besides ourselves, and supporters of some of those lines.

Q. Yes. If you succeeded in this case, what railroad competition would you have with respect to the traffic which you seek?

A. Union Pacific is number one, according to the testimony in this case; probably the Wabash and the North Western and Missouri River connections that testified for you would presumably support you.

Q. Have you considered what portion of the traffic that you seek, or is involved in what Mr. Earley said, designated as available to the Rio Grande solicitation? Have you considered what portion of that available potential is originated and terminated on the Union Pacific Railroad?

[fol. 1658] A. The 157,000-plus cars that Witness Earley testified to is an average for the five-year period indicated in Section L of his testimony, originated or terminated in the four northwestern states, and as also stated in his testimony.

Q. I am not sure that he shows the percentage of it which originated on or was terminated by the Union Pacific Railroad as such, did he, do you know?

A. It is my distinct recollection the 157,000-plus cars was only traffic that originated or terminated on the Union Pacific in these four northwestern states, because he had no way of measuring the amount of traffic where the Union Pacific was a bridge carrier.

Q. You wouldn't have the number of cars competing with you in the solicitation for this available potential, would you?

A. The number that would cooperate with us?

Q. You wouldn't have the number of carriers competing against you that you have in the competition for transcontinental traffic generally, is that correct?

A. Perhaps, not quite as many, but I would say more vigorous.

Q. You said Union Pacific would be number one?

A. That is correct.

Q. But with this six or seven large carriers competing with you in the solicitation of transcontinental traffic, you would still get approximately ten per cent of the available potential there; is that correct?

[fol. 1659] A. As to transcontinental traffic?

Q. Yes.

A. We presently get around ten per cent, yes sir.

Mr. Collins: That is all, thank you.

Further redirect examination.

By Mr. Quirk:

Q. Mr. Hogue, you have joint rates from California points in connection with the Southern Pacific and the Union Pacific, do you not, and also the Western Pacific?

A. That is correct.

Q. Can you state what your experience has been with traffic to and from California points served by the Union Pacific?

Mr. Collins: I object to that, Mr. Examiner. The witness didn't talk about those things in his direct testimony. It is outside of it entirely.

Exam. Mullen: That has reference to the ten per cent you now obtain on transcontinental traffic, that question?

Mr. Quirk: Mr. Examiner, the witness surely can testify as to his experience with the Union Pacific where he does have joint rates, and that is what I asked him to do.

Exam. Mullen: That has reference to the traffic he already obtains; that is, transcontinental traffic, is that right?

The Witness: That is right.

Exam. Mullen: That may be done.

The Witness: Will you repeat the question?

[fol. 1660] (Question read.)

The Witness: My experience has been that it is more difficult for the Rio Grande Railroad to obtain Southern California competitive traffic than to obtain that to or from any other territory. Therefore, the ten per cent approximate average of what we do obtain, of all transcontinental traffic would be reduced considerably if we only considered Southern California.

In my opinion, we obtain less than five per cent of Southern California's competitive traffic, either eastbound or westbound, because of the competition involved and our direct service route to Los Angeles via Salt Lake City and the Union Pacific.

We naturally encounter vigorous resistance from the Union Pacific to routing our lines to Salt Lake, and Union Pacific to Los Angeles. Naturally, they prefer the long

haul from the Missouri River, and make any effort to secure any future business, that what we might obtain by our line.

Does that answer the question?

Mr. Quirk: Yes sir. I have no further questions.

Mr. Collins: I have nothing further.

Exam. Mullen: That is all.

(Witness excused.)

Mr. Quirk: I call Mr. Earley.

THOMAS K. EARLEY was recalled and testified further as follows:

Further direct examination.

[fol. 1661] By Mr. Quirk:

Q. Mr. Earley, you are Thomas K. Earley and you testified in this proceeding at Salt Lake City?

A. Yes sir.

Q. Have you prepared an exhibit of rate comparisons, Mr. Earley?

A. Yes.

Mr. Quirk: Could we mark that for identification, Mr. Examiner?

Exam. Mullen: Exhibit 35.

(Complainant's Exhibit No. 35, Witness Earley, marked for identification.)

Mr. Collins: Is it the exhibit of five pages?

The Witness: That is right.

Mr. Quirk: It is the statement showing comparison of car mile and tone mile earnings on various commodities.

Exam. Mullen: That will be marked Exhibit 35.

By Mr. Quirk:

Q. Mr. Earley, will you make such comment with respect to that exhibit as you think necessary?

A. The statement is largely self-explanatory. It is a

comparison of the car mile and ton mile earnings on various commodities from or to representative points in transcontinental territory via routes over which through competitive rates are presently applicable via the Rio Grande with car mile and ton mile earnings on the same commodities, from and to representative points west of Ogden, Utah on the Union Pacific.

These commodities selected for comparison, and the [fol. 1662] points of origin and destination are largely those that were used in my previous testimony in connection with the sought rates via Ogden and the Union Pacific.

For comparison purposes, other destinations or points of origin in transcontinental territory about equi-distant, from or to the eastern points of origin or destination, as are the points we used to illustrate the sought rates via Ogden were used.

I think the exhibit largely is self-explanatory, and it is fully authenticated as to tariff authority and distances used.

Exam. Mullen: Mr. Earley, what particular testimony is it offered to rebut?

The Witness: Witness Stilling, in his prepared testimony and exhibit, has attempted to show, as he describes it, the low level of transcontinental rates, and has attempted to show that these rates being what he terms "subnormal" are too low to share with another line, in other words. The revenue accruing to his line under existing transcontinental rates, according to Mr. Stilling, is at such a level that his line should not be required to join in through rates via Ogden with our line, thereby dilute the revenue of the Union Pacific by such participation.

By Mr. Quirk:

Q. What does this exhibit show in that respect, Mr. Earley?

A. This exhibit shows that presently via routes which [fol. 1663] are comparable, other transcontinental lines, including the Rio Grande, participate in these same rates, and this exhibit shows the revenue yield per car mile and ton mile to those routes.

Exam. Mullen: The D&RGW participates in all the routes shown?

The Witness: It participates in all of the routes shown in the second line in each entry.

Exam. Mullen: All right.

By Mr. Quirk:

Q. You have no further comment on that exhibit, I take it?

A. No sir.

Q. All right. Now, have you prepared an exhibit which has been distributed, which has the heading "Revenue ton miles produced by all railroads," in the State of Colorado—wait a minute—and other states, compared with the taxes paid?

A. Yes.

Mr. Quirk: Off the record.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

Mr. Quirk: The exhibit number will be 36?

Exam. Mullen: Exhibit 36.

Mr. Quirk: We will have to number the pages, gentlemen, so we can identify them.

[fol. 1664] Exam. Mullen: Number them off the record, beginning with Colorado.

(Complainant's Exhibit No. 36, Witness Earley, marked for identification.)

By Mr. Quirk:

Q. Will you make an explanation of this exhibit as you deem necessary, Mr. Earley?

A. Much has been said in the testimony so far introduced in this case about taxes and the effect of railroad revenues upon taxes, particularly upon the taxes paid in the various states. We have prepared and have shown in Exhibit No. 36 for nine of the western states which are directly or more or less indirectly concerned with this proceeding the revenue ton miles produced by all of the railroads in these states, and the total taxes paid to the various states by all of the railroads for certain calendar years.

Those years are 1939, 1940, 1941, and 1946, 1947, and 1948. The war years were omitted because the distortion in ton miles during those years was, of course, abnormal, and should not be used for a comparative purpose such as this. It will be noted that of the nine states dealt with in this exhibit, taking the year 1948 as compared with 1947, that all of the states except Utah received an increase in the taxes paid by the railroads within those states.

On the other hand, all of the states, except Colorado — within all of the states except Colorado, the railroads ex- [fol. 1665] perienced a decrease in the number of revenue ton miles produced.

The purpose of this exhibit is to show graphically that there is no definite pattern or relationship between the payment of taxes by the railroads and the revenues received by those railroads. The revenue does not vary exactly as does the tax payments.

Exam. Mullen: Just a moment. You say revenue. Your figures are based on revenue ton miles, the volume of traffic.

The Witness: Volume of traffic would have been a happier choice there, yes.

By Mr. Quirk:

Q. Have you finished with that exhibit?

A. I have.

Q. Now, you heard the testimony of Mr. Stilling in this proceeding, I take it?

A. Yes sir.

Q. Have you some rebuttal testimony to certain testimony made by him?

A. Yes, I have prepared such testimony.

Q. Will you proceed to rebut the statements made by Mr. Stilling, in your own way?

A. Mr. Stilling, at pages 79 to 83 of his prepared statement, discusses the testimony of Mr. Reed (Tr. p. 174 to 188) and Snooks (Tr. p. 258 to 271) about rates on fruit for freezing in transit at Delta, Colorado.

[fol. 1666] On pages 79 and 80, Mr. Stilling points out that the transit privilege named in Rio Grande ICC No. 792, authorizing the freezing in transit arrangement at Delta under which Reed's plant operates, will not apply on ship-

ments originating in Idaho, Oregon, Washington, or California, and suggests that "Apparently the Rio Grande can satisfy that particular witness (Reed) by broadening the scope of its transit tariff."

The answer is not that simple. Obviously there would be nothing accomplished by including Idaho as an origin state since we do not have joint through rates from Idaho today. Mr. Reed explained why he could not use California fruit in his operation. (Tr. p. 186 and 187.)

Mr. Collins: Now, Mr. Examiner—pardon me, Mr. Earley—this very type stuff has been ruled by the Examiner time and again as argumentative and not admissible when it was in the testimony of the Union Pacific witnesses. He is commenting on other witnesses, and construing and contrasting and what not, just as counsel will when the time comes.

Mr. Quirk: Mr. Examiner, Mr. Stilling was on the witness stand, drawing conclusions that rates were depressed. Mr. Lynch devoted a large part of his time commenting on Mr. Bradford's testimony. So did Mr. Hanson; so did Mr. Edens. It is a most extraordinary thing for Mr. Collins of all people to raise this question.

Exam. Mullen: We need not argue that. As I understand [fol. 1667] it, the direct statement of Mr. Stilling, which the witness is now quoting, and this witness is merely stating why the requirements of that particular shipper could not be satisfied in the way Mr. Stilling testified to.

Mr. Collins: If he is going to rebut it, he ought to rebut it with facts.

Exam. Mullen: As I understand it, this witness is the assistant freight traffic manager. He certainly can testify about the condition.

Mr. Collins: If he uses facts instead of argument, that is all right.

Exam. Mullen: Well, there is a little argument mixed up with it, but we will let it go.

The Witness: Since Witness Reed testified that he would not use California fruit at Delta, obviously, no purpose would be served by amending the transit tariff to apply on California traffic. Since Reed testified that he wants through competitive rates available via his plant at Delta

from Northern Utah and Idaho only, the question of amending the transit tariff to include Oregon and Washington origin territory is academic.

Exam. Mullen: Is that limited solely to the requirements of Reed?

The Witness: That is all I am talking about.

Exam. Mullen: Then it is academic only as to shipper?

The Witness: That is right. We have no requests from [fol. 1668] any other operator, since there is no other operator but Reed in the business.

Exam. Mullen: All right.

The Witness: We are willing to change our transit tariff to include all origin territory from which joint through competitive rates apply upon request.

On pages 80 and 81 of his prepared statement, Mr. Stilling quotes figures of the Department of Agriculture about the quantities of fruit produced in certain localities in Colorado and Utah, and observes that "If Skyland Fruit Company is having difficulty in operating its plant to capacity, it would appear to be for some reason other than adequate supplies of fruit."

In view of Mr. Reed's two statements on pages 183 and 186 that his "inability to get sufficient quantities" and "the total available to a processing plant isn't enough to satisfy our demand," it would seem that Mr. Stilling's argument does not supply the answers. Reed has to go beyond the sources Mr. Stilling quotes; the sources he wants to reach are Northern Utah and Idaho.

Mr. Collins: Excuse me, Mr. Earley.

Exam. Mullen: That is argumentative.

Mr. Quirk: He is answering an argument. All this testimony of Mr. Stilling, Mr. Lynch, Mr. Hanson—Mr. Stilling we are dealing with not—I move it be stricken if this is to be [fol. 1669] stricken. He is answering an argument.

Exam. Mullen: We don't want all argument. If this witness has some facts to support it, I think he should state those facts.

Mr. Quirk: Well, Mr. Examiner, Mr. Stilling gratuitously suggested how this problem could be cured.

Exam. Mullen: Yes, he has answered that.

Mr. Quirk: He has not completely answered the question yet.

Exam. Mullen: But the rest is argumentative; anyhow that argument part will be disregarded. Go ahead, Mr. Earley.

The Witness: Mr. Stilling's testimony on pages 81 to 83 about the level of the rates on fresh fruit from Brigham, Utah, Logan, Utah and the Boise-Payette District in Idaho to Chicago, indicates that he has missed the point of the Reed-Snook testimony.

The outbound commodity from the transit station (Delta) is frozen fruit—not fresh fruit. Therefore, the through rate on frozen fruit from Utah and Idaho origin points to destination must be applied on the transited commodity.

I have prepared and submit Exhibit No. 37 to show this situation——

Exam. Mullen: That will be Exhibit No. 37.

(Complainant's Exhibit No. 37, Witness Earley, marked for identification.)

[fol. 1670] Mr. Quirk: That is headed "Frozen Fruits, carloads."

The Witness: —and direct attention to the rates on frozen fruits shown on Lines 13 to 16, inclusive, which apply to Chicago. The rates shown on Lines 15 and 16 are from Seattle and likewise the rates from Boise and Payette.

It will be noted that the rates on the higher minimum weight from Ogden and from Brigham to Chicago are the same, while the rate on the lowest minimum weight (40,000 pounds) is only two cents per cwt. lower from Ogden than from Brigham.

It is easy to understand from this situation why Mr. Snooks testified that, when fruit was shipped to the Delta plant for freezing, the Delta processor instructed that the fruit be trucked to Ogden and loaded on the Rio Grande since the transit rate would be applicable from that point. In the event the price was unfavorable, the grower would not be able to stand the cost of the trucking and the fruit would be left on the trees or on the ground.

By Mr. Gibbons:

Q. Mr. Earley, referring to your Exhibit No. 35, in response to a question from the Examiner, you stated that the routes in which the Rio Grande participates are the routes shown in the second line in each case. Is that correct, or was it the first line?

A. I want to correct that. The first entry is the route which presently applies via the Rio Grande.

By Mr. Quirk:

Q. You have no further comments, have you?

[fol. 1671] A. No sir.

Mr. Quirk: You may cross examine.

Mr. Collins: No questions.

Mr. Quirk: I offer Exhibits 35, 36 and 37 in evidence.

Exam. Mullen: Any objection? If not, they will be received in evidence.

(Complainant's Exhibits 35, 36 and 37, Witness Earley, received in evidence.)

Mr. Quirk: May we have a recess?

Exam. Mullen: Yes, we will take a ten-minute recess.

(Recess taken.)

Exam. Mullen: We are ready to proceed, gentlemen. Call your witness.

Mr. Quirk: Call Mr. Hadden.

J. M. Hadden was sworn and testified as follows:

Exam. Mullen: Mr. Hadden, have you been a witness before?

The Witness: No.

Exam. Mullen: State your name for the reporter.

The Witness: My name is *S. J.* Hadden.

Direct examination.

By Mr. Quirk:

Q. And your business address?

A. 1531 Stant Street, Denver, Colorado.

Q. With what company are you connected?

A. I am chief clerk to the president, Denver and Rio Grande Western Railroad Company.

[fol. 1672] Q. How long have you been with the Denver and Rio Grande Railroad?

A. Since December 3, 1919.

Q. Will you state some of your other experiences in corporate affairs?

A. I have been for a number of years secretary of the subsidiary companies of the Rio Grande Railroad. That includes Rio Grande Motorway, Inc., Larson Transportation, Rio Grande Land Company.

I am also connected with a number of corporations which are not subsidiaries of the Rio Grande Railroad, as president and director for a number of years of a water company; secretary and director of a loan company; as president and director of a printing and publishing company. I have also had other connections which do not exist at the present time.

Q. Can you state in a brief manner the nature of your duties with the Denver and Rio Grande Western Railroad?

A. My present position, I have general supervision of the clerical work in the president's office, although I spend a great deal of my time on special assignments, research work of various kinds.

Q. Were you with the property that is now the Denver and Rio Grande during the reorganization proceedings in the courts?

A. Yes. In my present position, except that I was chief clerk to the trustees during the reorganization period.

Q. Have you prepared an income statement for the Union [fol. 1673] Pacific during the years 1945 to and including 1948?

A. I have a condensed comparative income account for the Union Pacific Railroad Company for the years 1945, 1946, 1947 and 1948, which was prepared from the annual reports of that company to its stockholders.

Mr. Quirk: May we mark that for identification, Mr. Examiner?

Exam. Mullen: That will be marked as Exhibit 38.

(Complainant's Exhibits No. 38, Witness Hadden, marked for identification.)

By Mr. Quirk:

Q. That exhibit is self-explanatory and doesn't require any comment from you.

Now, have you also prepared a similar exhibit dealing with the income account of the Denver and Rio Grande Western Railroad covering the same years, 1945 to 1948, inclusive?

A. I have such a comparative statement.

Mr. Quirk: Shall we mark that as Exhibit 39?

Exam. Mullen: 39.

(Complainant's Exhibit No. 39, Witness Hadden, marked for identification.)

By Mr. Quirk:

Q. Have you prepared another exhibit which is headed, "Dividends declared by Union Pacific Railroad Company, during the years 1939 to 1948, inclusive," consisting of two sheets?

A. I have such a statement, which is in two parts. The first page is headed "Dividends declared," and the second [fol. 1674] page being headed "Dividends Paid."

We concluded it was best to put it in this form because of the fact, in some years at least, the dividends declared in the year are payable after the first of the year.

Mr. Quirk: Shall we mark that as Exhibit 40?

Exam. Mullen: Exhibit 40.

(Complainant's Exhibit No. 40, Witness Hadden, marked for identification.)

By Mr. Quirk:

Q. Have you any comment to make on Exhibit 40, Mr. Hadden?

A. I might call attention to the fact that the dividends are shown in dollars per share of stock, and there was a stock split effective July 1, 1948, where the number of shares of both common and preferred stock were doubled with no increase in the total par value of the stock; that is, the par value of stocks per share were cut in half. So that by reference to the first page, "Dividends Declared,"

you will note that the ten dollars declared in 1947 compares with really double the amount shown for 1948, being $6.00 on a $50.00 par, or $12.00 on $100 par, compared with $10.00 declared in the year 1947.

Q. Now, have you examined authorities and records available to you in order to determine the aggregate amount of dividends which the Oregon Short Line Railroad Company has paid to stockholders, Union Pacific being the principal one, during a certain period?

[fol. 1675] A. Yes sir.

Q. And what period is that?

A. I took from the records available, which were the Commission's valuation——

Q. Wait a minute, I have not asked you about the record. What period does it cover?

A. It covers the period 1906 through 1931.

Q. What sources have you relied upon—first, what is the aggregate amount of the dividends paid by the Oregon Short Line to the Union Pacific during that period?

A. The aggregate dividends paid by the Oregon Short Line during the period 1906 through 1931, as I was able to ascertain them, were $252,246,875, which was 444.68 per cent of the capital stock outstanding.

Q. You are familiar with the statement or testimony appearing on page 3 of the prepared statement of P. J. Lynch, vice president of the Union Pacific Railroad, in which he states that the valuation report 44, of the Interstate Commerce Commission, discloses the Union Pacific put more than 14 million dollars in the original construction and equipment of the Oregon Short Line Railway Company.

A. I heard that testimony, yes sir.

Q. Now, your reference to the payment of dividends of the Oregon Short Line Railway Company relates more or less to that statement Mr. Lynch made, does it not?

[fol. 1676] A. Well, it relates to the capital stock of the Oregon Short Line outstanding.

Q. What I mean is, Mr. Lynch stated what the original investment was, and you are merely testifying to what the Union Pacific received from the Oregon Short Line during the period 1906 to 1931, inclusive?

A. That is correct, yes sir.

Q. Mr. Hadden, will you explain briefly the sources relied upon by you in determining the dividend of $252,000,000 plus that you have referred to?

A. The Commission's valuation reports, Volume 44, some of the annual reports of the Union Pacific Railroad Company, Poor's and Moody's manuals.

Mr. Quirk: You may cross examine.

Mr. Collins: Mr. Examiner, just for purposes of the record—well, what I was about to say, I guess, is a little premature. I will wait until counsel offers these exhibits.

Cross-examination.

By Mr. Collins:

Q. Mr. Hadden, has the D&RG Railroad paid any dividents in recent years?

A. Yes sir.

Q. For how many years?

A. Since the effective date of the reorganization.

Q. That was what time?

A. And a short period before. The payments were made [fol. 1677] since reorganization, but they also covered a short period before the reorganization was actually consummated.

Q. Do you recall the exact date of the reorganization?

A. The reorganization was effective as of April 10, 1947.

Q. Can you state offhand what dividends the railroad has paid since that time annually?

A. We paid half of a dividend on the preferred stock.

Q. How much was that?

A. The preferred stock is five dollars per share, for the two years prior to the effective date of the reorganization, and the preferred dividends have been paid in full since. The common dividends have been paid at the rate of two dollars per share since the date of reorganization.

Q. Do you have a preferred stock on which you pay?

A. We pay five dollars per share.

Q. Oh, five dollars. Well, you paid these dividends at the rate you mentioned, in 1949, did you?

A. Yes sir.

Q. As well as the previous years you referred to?
A. Yes sir.

Mr. Collins: That is all.

Redirect examination.

By Mr. Quirk:

Q. Mr. Hadden, inasmuch as the gross revenue for the Union Pacific for 1949 has been put in the record by Mr. Hanson, do you have the gross revenue of the Denver and Rio Grande for the year 1949 now?
[fol. 1678] A. I have a copy of the 1949 annual report to stockholders from which I can give it.
Q. Just give the gross revenue at this time.
A. The gross revenue for 1949 was $65,689,065.54.

Exam. Mullen: What figure does that correspond to on Exhibit No. 39 for the year 1948?
The Witness: That would correspond to the figure of $68,501,024.48.
Exam. Mullen: That is gross railway operating revenues, then?
The Witness: That is correct, yes sir.
Mr. Quirk: I offer Exhibits 38, 39 and 40 in evidence.
Exam. Mullen: Any objection?
Mr. Collins: Yes, Mr. Examiner, although the Union Pacific has attempted to furnish for the record some considerable data that is financial in nature, our doing so does not affect my legal view that matter of this sort is irrelevant in this case, so I object to the admission of the Exhibits 38, 39 and 40, on the grounds of irrelevancy, and I will state for the record my particular reasons in doing so is I don't want the record to be left so I can't have full freedom in arguing the print in brief and in oral argument that in view of the fact that it has the sentence, I believe it is of paragraph 4, of Section 15, of the Interstate Commerce Act, in my judgment prohibits the Commission from giving consideration to the financial condition of a railroad [fol. 1679] in the through rates case, and it expressly says no such through *rates* and rates shall be compelled to give financial aid to a carrier participating in the through routes and rates.

Mr. Quirk: Mr. Examiner, it is a matter of indifference to me whether Exhibit 38 is ruled out or not. I thought in a case of this character that the Commission would want to know something about the financial conditions, since the physical operating conditions have been described.

Exhibit 38 is not offered in respect to any claim of financial need. On the contrary, this complainant does not make any claim of financial needs. Moreover, the facts in this case show the route is opened, and that traffic moves through it, and the task for the Commission is to prescribe just, reasonable and undiscriminatory rates.

Now, as to the other, I have had the impression listening to the evidence in this case that the Union Pacific would be properly rude if this joint rate case was entered. They have certainly made their own financial conditions relevant by the kind of testimony they put in, and by the position they have taken. They have talked about what they have done for this country out here.

Mr. Lynch referred to the original investment in the Oregon Short Line, and they have made that relevant. We have not made it relevant, and under our complaint it need not have been put in.

[fol. 1680] Mr. Collins: Mr. Examiner, Mr. Quirk is in no position as I said the other day to deny the position of the president of the railroad, and by meeting the situation they presented I am not taking the position that financial data or the financial condition of railroads is relevant.

Mr. Quirk: Mr. Examiner——

Exam. Mullen: The Examiner will receive the exhibits. They are admitted in evidence.

(Complainant's Exhibits 38, 39 and 40, Witness Hadden, received in evidence.)

Mr. Quirk: Can I comment on that last remark?

Exam. Mullen: No, I don't think it will be necessary.

(Witness excused.)

Mr. Quirk: Mr. Bradford.

R. K. BRADFORD resumed the witness stand and testified further as follows:

Redirect examination.

By Mr. Quirk:

Q. Mr. Bradford, you testified in this proceeding at Salt Lake City?

A. Yes sir.

Q. Did you hear the testimony of Mr. Lynch, Mr. Hanson, and Mr. Edens with respect to certain operating conditions?

A. I did.

Q. Are you prepared to testify in rebuttal to certain of the testimony by each of those gentlemen?

[fol. 1681] A. I am.

Q. Will you proceed to do so?

A. On page 9 of his prepared statement, Mr. Edens said: "Union Pacific's southbound traffic from Idaho, Montana, Oregon and Washington for delivery to D&RGW at Ogden is received in trains from Pocatello normally in the Union Pacific Yard. Since there is no direct track connection between the lines of the Union Pacific and the D&RGW at Ogden, it is necessary that cars interchanged to the D&RGW at Ogden be delivered by the OUR&D Co."

Still later Mr. Edens explained there is no direct track connection between any of the railroads involved at Ogden, except through the Ogden Union Railroad and Depot Co. There is a connection and now an interchange of certain traffic between the Union Pacific and Rio Grande through the use of the facilities of the Depot Co., jointly owned by Southern Pacific and Union Pacific. The only question left, therefore, is whether or not the Depot Co. can handle an increase in this interchange of business between the two companies.

On Page 18 of his prepared statement, Mr. Edens said that in July 1949 he handled 2359 trains of 76 daily through the Depot facilities at Ogden, and that during the entire year of 1949, he handled 1,955,219 cars through the present Depot Co. facilities. In his testimony on April 7th he stated that in July, 1945, which he designated as the peak year,

[fol. 1682] there were handled through Ogden Depot Co. terminals 284,711 cars in 2966 trains, or an average of 96 trains per day and that he handled during the entire year of 1945, 2,847,277 cars.

On Page 18 of his prepared statement, Mr. Lynch said:

"The yard facilities at Ogden present an insurmountable problem."

In his verbal testimony, Mr. Edens stated that the Depot Co. facilities at Ogden were now saturated and could handle no additional business.

The best answer to this question is the fact that during 1945 Mr. Edens testified that during the peak month an average of 20 more trains per day were handled through the yard than during the peak month of 1949.

Mr. Collins: Mr. Examiner, I object to any further reading of these two paragraphs. They are purely argumentative.

Exam. Mullen: The present paragraph is argumentative; I think that can come out, but the witness can state his opinion based on the figures he has read. That paragraph at the top of page 2 should come out as argumentative.

Mr. Quirk: He can state as a fact there were so many more cars handled in 1945 than there were in 1949.

Exam. Mullen: Certainly.

Mr. Collins: The record shows that already.

Exam. Mullen: All right. The next statement, as I understand it, is this witness' opinion based on those figures. He can state his opinion.

[fol. 1683] Mr. Quirk: Wait a minute, we haven't got the figures yet.

By Mr. Quirk:

Q. Will you state the fact, Mr. Bradford, what Mr. Edens' testimony shows with respect to the year 1945 and the year 1949?

A. His testimony showed that he handled 20 more trains per day during the peak month in 1945 than he did during the peak month in 1949, and that for the entire year of 1945 he handled through the Depot Company facilities at

Ogden 892,058 more cars than were handled through the facilities in 1949.

Q. Now proceed with the next paragraph.

A. Based upon Mr. Edens' testimony and my knowledge of this situation at Ogden, it is my opinion that all of the business heretofore testified to as being susceptible to Rio Grande solicitation and routing could be handled through the present Depot Co. yards at Ogden. It may be that some of the methods heretofore used by the Depot Co. should undergo a change, but since the Superintendent of the Depot Co., Mr. Edens, has testified that in 1945 he handled 892,058 cars more through the facilities he has than he did in 1949, the facilities are not now being used to the saturation point.

Exam. Mullen: What do you mean by that statement, "all of the business heretofore testified to as being susceptible to Rio Grande solicitation and routing"? What figure did you have in mind there?

The Witness: I had in mind the figure as has been con- [fol. 1684] stantly used in this case, 157,000-odd loads, and approximately 50,000 empties.

Exam. Mullen: All right.

The Witness: On Page 19 of his written statement, Mr. Edens states the maximum number of cars received by the Rio Grande from the Depot Company during February, 1949, was 369. He later stated this figure covered the movement in one direction only. On many days during the period 1942 up to February, 1949, Rio Grande handled more than 500 cars per day in and out of Ogden Yards.

Mr. Collins: Just a moment, Mr. Examiner. I wonder if you really mean that, Mr. Bradford. Your interests don't go into the Ogden yard, do they? Do you mean you delivered that many in your freight yard there and took that many out of your freight yard?

The Witness: I mean that we delivered and received from the Ogden Union Depot Company, at Ogden, on many days during the period 1942 to 1949, more than 500 cars per day.

Mr. Collins: But I get the inference here, maybe you made deliveries in the Ogden yard. It is a fact that you only deliver on your tracks there at Ogden and pull from your tracks, isn't it?

The Witness: That is correct.

Mr. Collins: All right.

The Witness: And to that extent, on many days we de- [fol. 1685] livered on our tracks and pulled from the other tracks more than five hundred cars.

Mr. Collins: All right.

The Witness: All of which were handled by the Depot Company.

On page 11 of Mr. Edens' prepared statement, speaking of trains arriving in September, 1949 from SP, he stated such trains for UP "were held in the Ice House Yard four hours and thirty-eight minutes per train and D&RGW perishable traffic from these trains averaged six hours and nine minutes from time of arrival until delivery to the D&RGW was accomplished."

October 7, 1936, in a telegram from Mr. W. B. Kirkland, then Superintendent of Transportation of Southern Pacific (co-owners of Ogden Terminal) to me, then Superintendent of Transportation of the D&RGW, he stated in reference to California and Oregon traffic, the delivery time would be four hours. This traffic is due to arrive via Southern Pacific at 4:40 PM Pacific Time (5:40 PM Mountain Time) and due to us at 9:40 PM Mountain Time. Since the average time quoted by Mr. Edens is two hours and nine minutes more than the owner, Southern Pacific, agreed would be consistent, there must be some inefficient methods in use.

Despite the handicap of slow service through the Ogden terminal, D&RGW service and solicitation has resulted in the interchange of business between the Southern Pacific and the Rio Grande at Ogden reaching very substantial [fol. 1686] proportions. We are confident that proper blocking at Pocatello, practical as testified to by Mr. Hanson, with some change in the present methods of handling at Ogden, would result in much improvement in the handling through that point.

On Page 20 of his written statement, Mr. Edens uses a cost figure of $4.63 per car on all cars handled by the Depot Co. in the freight terminal. On Page 22 of the same statement, he outlines the method he thinks he would use for the handling of the interchange of traffic between Union

Pacific and Rio Grande, which handling he thinks would require the movement of each car at least twice, and then quotes the cost of interchanging being $9.26 per car. He then uses a potential figure of 207,762 cars, which is arrived at by taking the so-called potential loads and adding 50,000 empties, multiplies hat figure of 207,762 by $9.26 and reached the following conclusion, and I quote:

"In a new and additional expense to the Union Pacific annually of $1,919,820, which the Union Pacific would have to bear in addition to the amount of expense it already bears in connection with operation of the Ogden terminal."

He said that all of this additional expense would accrue to Union Pacific because the D&RGW would bear no part whatever of this additional burden placed upon the Union Pacific, and further said this would be free interchange service to D&RGW on this traffic.

If the figure used by Mr. Edens of $4.63 per car correctly [fol. 1687] represents the cost of handling a car through the Depot Co. terminals, then it includes as cost the handling of stock cars, interchange of cars to and from Southern Pacific, interchange of cars to and from the Rio Grande, Union Pacific and Southern Pacific, the handling of all cars through the Ice Dock Yard, the Union Pacific, Southern Pacific and East Yard.

At present there is a substantial movement of cars to and from Idaho and the Northwest through the Ogden yard via Union Pacific. Idaho grain now moves into and out of the terminal; Idaho and Northwest livestock now moves into and out of the Ogden terminal.

There is a substantial movement of cars westbound via Union Pacific to Salt Lake for partial unloading or for storage or fabrication in transit, and these cars now move in and out of the Depot terminal enroute to Idaho. The use of the number of the cars susceptible to Rio Grande routing as the number of cars which would move through Ogden terminal without giving due consideration to the fact that many of the cars which might move via Rio Grande are now moving through Depot terminal facilities via Union Pacific will not give a correct answer to this question.

To get such a figure of additional costs, the net change should be considered. Additional cars moving through a yard should decrease the average cost per car as yard forces, clerical, switching, supervision will not fluctuate [fol. 1688] from day to day to the extent that cars will, and the total cost of the yard will be spread over a larger number of cars.

The figure of $1,919,820, used by Mr. Edens' method of figuring to represent additional cost to Union Pacific for the movement of the potential traffic through the Depot Co., is wrong to the extent that car moves are now being made. If this cost is material to the case, then the reduction in cost to the Union Pacific at yards east of Granger should also be considered as a credit. These costs are shown in Mr. Hanson's Exhibit 15, on pages 9, 10, 11, 12 and 13, where he lists loss of employment to Union Pacific employes.

On Page 23, Mr. Edens repeats his statement that the D&RGW already enjoys the benefit of free interchange to and from the Union Pacific and Southern Pacific on a considerable volume of traffic, indicating that he fails to understand that it is the duty of the inbound carrier to make delivery of business to the outbound carrier.

The point of interchange is agreed upon and when the inbound carrier delivers business to that point the expense of such delivery is its; on the outbound move, the outbound carrier goes to the point of interchange and moves the traffic—and at no expense to the delivering carrier. At Ogden the Depot Co. is the agent for the Southern Pacific and Union Pacific and it is the duty of the agent of Union Pacific to make delivery of its traffic to the agreed point of interchange.

[fol. 1689] Mr. Collins: Now, Mr. Examiner, it seems to me that is nothing but argument. We know the legal responsibilities of these carriers.

Mr. Quirk: Mr. Examiner, before you rule, Mr. Hanson dealt with these questions in just that manner.

The Witness: Mr. Edens.

Mr. Quirk: Mr. Edens. For example, here is a sample of it——

Exam. Mullen: I don't think it is necessary to refer to that, Mr. Quirk.

Mr. Quirk: Well, the only point is, where technical men deal with these technical situations, there is about as much argument in Mr. Edens' and Mr. Hanson's testimony as you will generally find. I don't object to much of it, because I realized when you are dealing with this type of question there is a certain amount of argument in the nature of reasoning which is necessary for the Commission or others to understand it.

Exam. Mullen: As I understand it, this testimony is to show what the duty is of the Rio Grande Railroad with respect to this interchange. Is that the purpose?

Mr. Quirk: Yes.

Exam. Mullen: That may be stated. The objection is overruled. Go ahead. As I understand it, he is merely stating the particular portions of the testimony to which his rebuttal is directed.

Mr. Collins: Well, I don't see it in any light except the [fol. 1690] discussion and actual argument about facts that are already in the record, without supplying additional facts.

Mr. Quirk: What do you think this is, may I ask?

Exam. Mullen: We don't need to talk about that, Mr. Quirk. We can read it. Go ahead, Mr. Witness.

The Witness: The Rio Grande has no duty in connection with these loads until they are on the interchange. In the opposite direction, the Rio Grande delivers all business to the designated interchange and at no expense to Ogden Depot Co. or Union Pacific.

As a further clarification, the Union Pacific operates its north yard at Salt Lake and delivers to Rio Grande in its Roper Yard and at no expense to the Rio Grande up to the time of delivery; Rio Grande operates its Roper Yard and at its own expense delivers business to Union Pacific's North Yard. Neither road has up to now accused the other of getting any free interchange.

Mr. Edens, Page 20 of his testimony, states: "Even if it were possible to expand the facilities of the OUR&D Company and the D&RGW to accommodate any substantial increase of traffic to be interchanged between them, such ex-

pansion would not solve but only aggravate the present awkward, cumbersome facilities, because of the crossing necessary by reason of the yards lying at right angle, and by reason of the location of certain Rio Grande facilities."

While this crossing presents a problem, it is far from [fol. 1691] insurmountable. In November, 1942, we made an offer to move certain business to and from Southern Pacific via our line.

Exam. Mullen: Just a minute. What does that statement mean?

The Witness: It means that in November, 1942, when the question of capacity of the Ogden Yard was raised, the Rio Grande Railroad at that time made an offer, or a suggestion, that it would handle certain business now moving—at that time moving through Ogden Depot Yard by its own line between Ogden and Salt Lake, in order to relieve one of the conditions then complained of, and the purpose of that is to show you that the progress that was made from that time on in trying to solve some of the problems that have faced us at Ogden for some time.

Exam. Mullen: That interchange would be made at some point other than the Ogden yard, is that it?

The Witness: On this particular business, the interchange was to be made at Ogden, but because of the layout of the facilities at that point it was suggested that considerable improvement could be made in the movement, if the Rio Grande would consent to handle that business over its line between Salt Lake and Ogden.

Exam. Mullen: Yes, all right.

The Witness: It refers particularly, Mr. Examiner, to troop trains that the Rio Grande was interchanging—that was being interchanged at Ogden.

[fol. 1692] Mr. Collins: Mr. Examiner, it has no relevancy here, because the traffic that the D&RG wants in this case is to be interchanged in a north and south—I mean it is north and south traffic, and is interchanged with the Union Pacific, not the Southern Pacific.

Exam. Mullen: I understand that. I wanted an explanation of this statement. That is the reason I asked the question. Go ahead.

The Witness: In January, 1943, there was a meeting with

SP and UP vice presidents at Ogden, in connection with the problem, at which time it was agreed by both to recommend a plan to remove this crossing. This plan, briefly, provided some consolidation of facilities, and a new entrance via a new track in the vicinity of the crossing.

Additional trackage was also provided about the same time in the way of new leads; additional trackage was also provided in the East Yard. D&RGW granted an easement to the Depot Company for certain track changes they desired to make and some of these changes were made. An additional crossing was installed June 6, 1943.

Certain ground was necessary to permit increasing the ice dock yard facilities and difficulty was encountered. Rio Grande suggested everything but the ice house changes be progressed so that the benefits of the other improvements might be obtained. The proposed balloon track would have enabled Rio Grande to pull their trains into and [fol. 1693] out of Ice Dock Yard, thus relieving the leads of the shuttling of switch engines back and forth over the crossing, and this would have improved the yard performance.

Exam. Mullen: Just a moment. I suggest the next sentence be stricken.

Mr. Quirk: Which one is that?

Exam. Mullen: That is argumentative.

Mr. Quirk: Mr. Examiner——

Exam. Mullen: We can go on from there.

Mr. Quirk: I want you to notice what Mr. Lynch said back here, "the yard facilities at Ogden present an insurmountable problem."

Exam. Mullen: I understand that. This testimony is in answer to that. I am speaking of this particular sentence.

Mr. Quirk: I am making the point Mr. Lynch reached the conclusion, and this witness can answer it only in the manner he is attempting to do it.

Exam. Mullen: I am not ruling out any part of his testimony. I am merely suggesting the next sentence come out, as argumentative.

The Witness: The matter was again discussed with both Union Pacific and Southern Pacific in 1945, but without success. January 30, 1945, Mr. F. C. Paulsen, General Man-

ager, Union Pacific, wrote me, in connection with these [fol. 1694] changes, and stated in part: "The necessary land to complete the trackage arrangement at Ogden can only be secured at a very high cost." .

In July, 1945, we advised both UP and SP we felt D&RGW was in position to deliver the land they desired and at a price they had previously offered. In late 1946, it was definitely indicated to us the proposed plan had ceased to be of interest to the UP or SP. If the business that might move via this route should prove more than the present facilities can handle, which is improbable, then it is apparent that the necessary improvements can be made in the present yard plan.

In regard to the testimony of Mr. Hanson, may we again state that at no time have we in any way questioned the capacity of the Union Pacific Railroad physically to handle the business it now handles, nor have we at any time in this case brought up for discussion the relative efficiency of the Union Pacific—Rio Grande.

However, he makes certain assumptions we feel can be cleared up once and for all: He states, on page 21: "During the February, 1949, blockade on the Union Pacific Railroad, it would not have been possible for the Rio Grande to handle any empty refrigerator cars from Denver to Ogden for movement into Idaho, unless it had handled empty refrigerator cars instead of loads, because Rio Grande was unable to handle all of the westbound loaded traffic we had to offer them at Denver."

[fol. 1695] This was a blizzard period and we agree with Mr. Lynch that it should not be used as a criterion. Mr. Hanson disregards the fact that we might have been handling many empty cars for our own account, to protect our own obligations, and that if we had been obligated to Idaho, and the Northwest, we could have, and would have seen to it that they got their proportion of the cars handled.

We had no such obligation, we have been excluded from such business, except in emergency conditions, and we are not inclined to take from our own customers to help emergency demands of Union Pacific. During this period of storms, our westbound empty movement count on an average was more than a thousand daily.

On Page 30-31 of his written testimony, Mr. Hanson sets out his understanding of the position of the D&RGW under its ART contract. Since his written testimony was prepared, Rio Grande has filed its Exhibit 41, which he stated changed his views considerably, therefore, we need not offer any rebuttal testimony on this point.

On Page 34-35, he states in connection with refrigerator movements, that D&RGW was short 8099 cars under its equalization agreement with P.F.E., the inference being that it was shirking its part of the arrangement. The figures are correct; the inference entirely wrong.

The facts are as follows: as of January 1, 1948, Rio [fol. 1696] Grande had delivered to western connections 733 more refrigerator cars than it had received—this balance in our favor continued until May 1st, when we started to fall behind. We cannot handle refrigerator cars west until they are given to us by our connections, and they are not given us until the P.F.E. Company lines them up.

We have refused no cars—on the contrary, we have been writing and wiring Mr. Klaproth, Assistant General Manager, PFE Company, calling his attention to the fact that the balance was getting entirely out of line, and urging him to route more cars westbound empty over our line.

As late as January, 1950, this gentleman stated he could not give us any cars now for movement; in March, he stated it appeared he could move fifty SFRD cars daily over our line if we would accept. We advised him we would, and he stated they would start shortly. Until April 5, none has been received.

The out of balance equalization is very distasteful to us—we have been running light trains westbound and could have moved many cars at a minimum of expense—we have not been able to get them. The failure of the PFE Company to give us cars which are due us has caused us much concern and will add to our expense later. The Rio Grande has not shirked its responsibility in this regard.

On pages 37-38 of his prepared statement, Mr. Hanson, [fol. 1697] quotes a message from Mr. Hale, Superintendent Transportation of the Rio Grande, thanking him for some timely assistance in furnishing refrigerator cars to protect

peaches, and then points to this as an indication of the way the Union Pacific contributes to the handling of the car supply on Rio Grande.

He states: "The delivery of these PFE refrigerator cars to the Rio Grande was made without any strings attached thereto and without any request on the part of the Union Pacific to use these cars for return loading routing via Union Pacific."

During this past peach season, Rio Grande brought 2595 carloads of peaches into Denver, and of this number, delivered 1120 cars to Union Pacific. The UP delivered during the period about 306 empty cars. Under similar conditions we have delivered ART cars to Southern Pacific and Union Pacific, both PFE contract lines. This fact indiates nothing except that ART Co.—Rio Grande—and PFE Company—UP—can and do help each other when cars are available.

On page 38, Mr. Hanson states: "During a period of refrigerator car shortage on the Rio Grande in January, 1949 * * *". Our records show there was no shortage of refrigerator cars on the Rio Grande in January, 1949.

On page 39 of his prepared statement, in speaking of the ice situation, Mr. Hanson states in part: "I call attention to the fact during the peach loading season on the Rio Grande for a number of years past, perishable traffic routed [fol. 1698] from the Rio Grande at Denver to the Union Pacific Railroad has been delivered without reicing due to Rio Grande's inability to handle without excessive delay."

There is an icing tariff covering the icing of perishable traffic; such traffic is iced under numerous rules, regulations, and requirements. When the Dotsero Cutoff was opened, June 15, 1934, arrangements were made by me with the Union Pacific, Burlington, Rock Island, to accept cars of perishable from Rio Grande uniced, for through movement, because the cars had been iced twelve to fifteen hours before at Grand Junction, and because this handling would expedite the business.

Business to Burlington was delivered at Fox Junction Yard before the cars got to Denver yard. This was done to expedite movement east. Rock Island trains then departed from our Seventh Street Yard, and rather than

delay the cars, it was decided they could safely move to Goodland, Kansas, and be iced incidental to the yard move through there.

Union Pacific elected to handle in their Pullman yard in order that they might keep up with Burlington and Rock Island competition. Much of the business was local business, on which we are in position to set the schedule, so that it was beneficial to all for us to get the business into Denver as early as possible, divide the icing between three points, and keep cars rolling, rather than take it in trains to our Burnham Yard, bring it back and reice in our Denver Yard.

[fol. 1699] The new Denver yard is adequately equipped with a splendid icing facility, and connecting lines have already been notified we will be in position to, and will, take over reicing at our North Yard. Whether some will elect to continue to receive before reicing, we cannot now say. It is entirely possible this might be done with benefit to all. Union Pacific has always cooperated in this handling and not until Mr. Hanson testified have they indicated any distaste for this movement.

On page 43, Mr. Hanson states that the Rio Grande refused to handle ore in C&NW ore cars to CF&I, and that to him indicates we were not as interested in taking care of the needs of the CF&I steel plant as was Union Pacific in taking care of industries located on its lines. These cars were declined because they were not suitable for the service for which they were offered.

This offer was made February 15, 1948, and since the cars were not returned to owners until between March 17 and 28, 1948, it is apparent Union Pacific had other services on its line in which the cars could be kept busy, thus releasing other cars which were more suitable for handling in our trains.

On page 44 of his written statement, Mr. Hanson states, in relation to box cars ordered by Rio Grande from Union Pacific at Denver, and offered by Union Pacific at Salt Lake, the disinclination of our Mr. Hale to haul empties 700 miles, was "a further indication of the Rio Grande [fol. 1700] being unwilling to incur empty car mileage to take care of industries exclusively served by that line."

These cars were for return loading to Union Pacific destinations. The same condition exists to an extent at the Sunnyside mine mentioned by Mr. Hanson on page 47. A large part of that tonnage out of the Sunnyside Mine is destined to the Kaiser Company in Fontana, California, via Provo and Union Pacific. A large percentage of all the coal loaded in Carbon County by Rio Grande, goes to destinations on Union Pacific.

On November 10, 1949, Union Pacific was helpful in furnishing a part of the empties required to protect its return loading, and for this help we were grateful and expressed thanks. The cars furnished were not necessarily Union Pacific—they might well have been D&RGW cars returning from a previous load.

Our Transportation Department is constantly behind Union Pacific, urging them to return such cars promptly so we will not have to close our mines. As an example, and a recent one, we delivered Union Pacific 794 more open top cars March 1st to 26th than we received. March 8th to 13th, we delivered Union Pacific at western junctions 992 open top cars and received back but 210 empties, so for this one week we lost 782 cars; this was at rate of 142 cars daily.

In answer to a telegram begging for these cars to be expedited in their return, Union Pacific advised by wire as follows:

"Will deliver fifty empty coal cars Salt Lake today, [fol. 1701] about same tomorrow. Our people will expedite return of cars recently received under load, but many going to distant points and time required for movement to destination, unloading and return empty."

During the next four days Union Pacific returned to us 158 Rio Grande coal cars and 68 foreign coal cars.

During the height of the fall coal movement in 1949, the coal car situation was difficult, and the situation was as follows: On November 1st, there were 370 more Rio Grande open tops on UP than vice versa; on December 1st, there were 469 more Rio Grande coal cars on UP than UP coal cars on Rio Grande, on January 1st, there were 124 more Rio Grande on UP than UP on Rio Grande.

Unlike our situation, on PFE cars, Union Pacific does not have to await the pleasure of any third person such as PFE Company to keep this equalization in balance, and their failure to keep it balanced often results in loss of time at our mines.

On page 48, in connection with a request from Mr. Hale for flat cars to protect SP rail from Minnequa to Ogden, Mr. Hanson states: "although the Union Pacific Railroad would not in any way participate in the haul of the loaded traffic, and, based on past experience together with some facts presented in this testimony, the Rio Grande would expect the loaded eastbound haul if these cars were utilized for lumber loading when released."

[fol. 1702] Exam. Mullen: Just a minute. Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

Mr. Collins: I object to that as being purely argumentative, Mr. Examiner.

Exam. Mullen: I will call attention to it. I think the facts which he wishes to bring out there can be stated affirmatively.

The Witness: Let's try this: Southern Pacific rail does move by Denver and Union Pacific. When empties are loaded on Southern Pacific rails, that line, in their handling in the lumber territory, will not earmark them for any line. They consider this was the endeavor to equalize movements throughout the year.

On page 48, he lays great stress on an inquiry from Mr. Hale as to waiving per diem on his coal cars. There was a strike on—the cars were not needed by us. It seemed wasteful to run the cars home, then have the strike settled and run them back—that would have cost both railroads money. Certain of our connections agreed with our suggestion and to save the wasteful transportation of switching cars out, sending them home only to later have them returned, waived per diem. Mr. Hanson did not think enough of our suggestion to waive per diem, so his cars were switched out and sent home. The handling was in my opinion wasteful.

[fol. 1703] A somewhat similar unusual condition brought about the wire N-382 quoted in his written statement on

page 48. There was again a strike on; we were instructed to reduce coal burning locomotive mileage. We asked him if he would take the cars released at Denver to save us locomotive mileage, thinking such a move might also save him coal burning mileage.

When he stated he could not use them at Denver, we moved them back to him at Provo. Many cars are thus shorthauled in empty movement. Rather than such a move causing undue criticism, such moves should result in praise, because of saving transportation waste.

Car Service Division 199 shows that during 1948 the Rio Grande handled 42.8 per cent of the westbound loads to SP—WP, but we handled 45.2 per cent of the eastbound empties, while during the same period Union Pacific handled 57.2 per cent westbound loads and but 54.8 per cent of eastbound empties.

During 1949, we handled 44.2 per cent of the westbound loads and 53 per cent of the eastbound empties, while the Union Pacific moved 55.8 per cent of the westbound loads and but 47 per cent of the eastbound empties. This report is not compiled by Rio Grande or Union Pacific, but is compiled by car service division of A.A.R., Washington.

We have not been handling a greater percentage of the empties than we should by reason of choice—we have and will continue to complain about the out of line routing of [fol. 1704] empties via our line when the percentage exceeds our actual loads westbound, but will not decline to handle cars—we will not shirk, nor will we knowingly delay loading by refusing pointedly to take more than our share of the empties.

On Page 45 of his prepared statement, Mr. Hanson quotes a letter from the Farmers Grain Cooperative at Ogden in regard to Rio Grande furnishing equipment, and I quote: "for any movement eastbound which we could route over their lines." He then makes the further comment: "The Union Pacific did not advice the Rio Grande's Colorado peach growers in August, 1948, that we would furnish the refrigerator cars to move their crop only if the traffic was routed over our line from Denver."

The inference is clear—the fact far from clearly stated. The Union Pacific did not "furnish the refrigerator cars

to move their crop"—only a comparatively small number of cars were hauled empty by Union Pacific. In return, they secured about one third of the peach movement.

Mr. Hanson perhaps does not understand that so far as the Farmers Grain Cooperative at Ogden is concerned, competitive rates do not apply via Rio Grande on any wheat hauled into that elevator by rail from Union Pacific points.

Because of that situation, the Farmers Grain Cooperative has been short of cars in the past and because of this, they have actually trucked wheat to our loading tracks at Ogden to load in cars we have furnished. Only recently a [fol. 1705] switch charge of approximately $15.00 per car was published and now on so-called free wheat—that is, wheat not tied up inbound over Union Pacific, Cooperative can, with this penalty of about fifteen dollars a car, make use of the cars we are able to furnish them.

Undoubtedly, Mr. Young, of the Farmers Grain Cooperative, had this penalty situation in mind when writing Mr. Stoddard—admittedly we would be happy to furnish cars for our routing and it is our hope that we will be enabled to meet the requirements of Mr. Young for this outbound routing.

Starting on Page 51, and continuing for many pages, Mr. Hanson gives his version of the situation during the famous blizzard of 1949. As he states, Rio Grande cannot use oil-burning locomotives. I cannot, however, find any basis for his statement that at least some of our coaling stations were frozen so that we could not use their coal-burning locomotives. We certainly were using every one of our coal-burning locomotives and we also were using Western Pacific coal-burning locomotives——

Exam. Mullen: Just a moment, then. Your statement is none of your coal loading stations were frozen, is that what you mean?

The Witness: That is correct.

Exam. Mullen: All right.

The Witness: —and by his own records we were using Union Pacific coal-burning locomotives.

When the blizzard finally was admitted to have mastered [fol. 1706] the Union Pacific line through Wyoming, and

the detour started, the Rio Grande also faced unusual weather. The actual movement was the second time we had been alerted by Union Pacific to come to their aid. They previously had alerted us in January, then on February 7th.

We had crews called and trains in the depot at Denver ready to move via our line but their request for detour was cancelled. About forty-eight hours later we were asked to help on this situation and this we did. The passenger trains were handled on a detour basis, Union Pacific crews and power, our pilots—they retained all the revenue, which was quite large because they had consolidated trains and the cars were heavily loaded, and in accordance with the detour agreements.

Exam. Mullen: How was your road compensated for that service?

The Witness: Under the detour agreement, between the railroads, at so much per mile, plus certain expenses for crews and labor, and certain supplies that we furnished.

Exam. Mullen: So much per mile of line used?

The Witness: So much per mile of line used.

Exam. Mullen: All right.

The Witness: After the passenger trains were started, the question of freight was raised. We explained to Union Pacific that because of their difficulty hundreds of cars from eastern and western connections which ordinarily would have moved via Union Pacific were already being routed our line, that we still had some capacity and would move [fol. 1707] what we could of theirs, but that our first responsibility was to our own customers and to business routed via our line by the shippers.

We also stated we would need power, and because of the storm situation, the shortage of men and the fact that we had no spare parts for their steam locomotives, we asked for diesel power. In addition to the passenger locomotives furnished on their detoured trains, we were advised they thought they could deliver eight, four-unit freight diesel locomotives. They actually delivered four, which were gratefully received and definitely helpful.

When it became apparent no additional freight diesels would be made available, we took steam locomotives. These

locomotives were not equipped with stack hoods so they could not be used in our tunnel district, but we transferred them to the Southern Colorado territory, and transferred our own locomotives to our Northern Colorado territory.

Two of the Union Pacific steam locomotives, their 3900 series, were delivered to us on the 13th, and two more on the 14th. We were advised by Union Pacific that the two they would be able to deliver on the 13th had been stuck in the snow for some days and they were not sure what condition we would find them in. They were not too good, but they were able to move cars. All of these steam locomotives were returned, upon Union Pacific's request, on the 19th. [fol. 1708] We also rented from Union Pacific at Salt Lake two diesel switching engines which we had for five days, February 16th to 21st. We were daily in touch with Union Pacific by telephone and wire. I frequently was in personal touch with their Salt Lake officers. We knew the Union Pacific situation was desparate. We had been called upon to handle east and west all business heretofore handled by Union Pacific through Salt Lake and Ogden and in addition were told they had some four thousand cars backed up Pocatello and north.

Their Idaho line was also completely snowed in one time for a period of about thirty-six hours, as I recall. The Southern Pacific was snowed in west of Ogden for two or three different periods of twelve to twenty-four hours, and the Western Pacific was at times snowed in. At one time during this storm all railroads, all air lines and all highways were blocked except the Rio Grande which left us the only way in and out of Salt Lake.

On Page 58 of [redacted] prepared statement, Mr. Hanson said: "We could have furnished the Rio Grande additional locomotives if they could have used oil-burning locomotives or our larger coal-burning freight locomotives." We were not prepared to use oil-burning locomotives and we have no record of any larger coal burning freight locomotives being offered by Union Pacific or refused by Rio Grande.

The Union Pacific can, of course, use freight locomotives [fol. 1709] which burn oil, and this statement would indicate that Union Pacific had oil-burning locomotives which they were not using and that they also had larger coal-burning freight locomotives which they were not using.

Union Pacific and Rio Grande had many phone talks regarding the possibility of eight four-unit freight diesels, which at one time Union Pacific officers thought they could supply.

Exam. Mullen: Just a moment. That next sentence is argumentative, and I think it should come out.

The Witness: May I rephrase it?

Exam. Mullen: Haven't you already stated the fact?

The Witness: Yes, but the situation is such a serious one, and apparently has so much bearing in this case, I would like to emphasize the fact it is not until now that any officer of the Union Pacific has indicated to us that it would have been possible had they so elected to put oil-burning locomotives in service on the Union Pacific, and larger coal-burning locomotives in service on the Union Pacific, which would have enabled them to deliver us additional diesels, which we badly needed, and urgently requested them to deliver to us.

Exam. Mullen: You mean you did not have that information at the time you speak of?

The Witness: On the contrary, we were told they had given us all the help they could possibly give us.

Exam. Mullen: All right.

[fol. 1710] On Page 77 of Mr. Hanson's prepared statement, he indicates the trains he figures would be reduced if the entire potential heretofore mentioned is reached by Rio Grande. He has failed to subtract from his loss of employment, etc., the additional service between Pocatello and Ogden which the same business would make necessary. He has also claimed full loss to Nebraska and Kansas divisions for all of this potential loss, apparently with the idea that if the business is ever sent through Ogden, Union Pacific solicitation will be ineffectual in getting any of it back at Denver. To this extent, his tabulations are adding to the erroneous conception of the effects of loss of business to Rio Grande.

On Page 8 of his Exhibit 15, Mr. Hanson states that in computing the loss of trains to Union Pacific rails and the loss of employment, both from the standpoint of positions and money, he based his calculations eastbound "on the average number of loads, namely, 64" and westbound on

"the basis of the average number of loads, namely, 40." It is apparent that the eastbound crews and trains would be controlling factor.

On Page 82 of his written statement, Mr. Hanson makes the following flat statement:

"The tons of revenue freight handled is not always the controlling factor on each and every railroad with respect to employment. For example, it required just as many locomotives and just as many employes to handle a train [fol. 1711] of 100 empty refrigerator cars as it does to handle a train of 100 loaded refrigerator cars."

If the statement on Page 82 is correct, and it is intended to prove there is no relation between tonnage and train service employes, then the computation as to trains which would be lost to Union Pacific and the Union Pacific employes should be based on 100 loaded cars per train rather than 64. Such a basis would materially reduce the claimed loss in trains, and likewise the claimed loss in employment.

Exam. Mullen: Just a moment. The next three sentences appear to me to be argumentative. I think the last part, the statement of the letter to Mr. Stoddard, could be put in, but prior to that I think it should be eliminated.

Mr. Quirk: All right.

The Witness: On February 26th, 1949, after the UP lines were opened, Mr. Stoddard wrote to Mr. McCarthy, President of the Rio Grande, in part as follows:

"I want you to know of my full appreciation of the wonderful cooperation of your railroad in detouring our trains between Denver and Salt Lake during our recent snow blockade in Wyoming. In addition to the fine spirit of helpfulness, the service rendered was excellent. We had a tough situation to combat, but favorable weather during the past week has enabled us to get pretty well cleaned up and we are operating normally."

By Mr. Quirk:

Q. Mr. Bradford, wherever you have testified or referred [fol. 1712] to the 157,000 cars that are potentially available, you have simply done so in rebuttal to Mr. Hanson or the others, Mr. Edens, have you not?

A. That is right.

Q. Now, you have been in the railroad business a long time, haven't you?

A. Yes sir.

Q. You think there is any likelihood that the Rio Grande can obtain all of the potential traffic that has been referred to here?

A. No sir.

Mr. Quirk: That is all.

Mr. Collins: No cross examination.

(Witness excused.)

Exam. Mullen: Are there any further witnesses?

Mr. Quirk: We have none.

Mr. Collins: No sir.

Exam. Mullen: Well, the Examiner now understand the direct testimony of the Union Pacific, insofar as their own officers are concerned, is complete that they will put on a few shipper witnesses at Cheyenne.

Mr. Collins: Yes.

Exam. Mullen: And I further understand at Cheyenne the labor organizations will put in their evidence, and they will also have some evidence from Wyoming and Nebraska interests.

[fol. 1713] Mr. Collins: Yes, and nine or ten chambers of commers who have been permitted to intervene. I don't know whether you noticed the interventions, but they are there.

Exam. Mullen: Yes. I understand the complainant's rebuttal evidence is complete?

Mr. Quirk: Yes. It is too broad a word. We are going to hear some more affirmative evidence by whoever puts in evidence at Cheyenne. We have been willing to offer rebuttal testimony here because the time was available and we didn't feel like standing on ceremony and waiting until the other side of the case is in.

I would assume, of course, we have the right to rebut any testimony that is put in at Cheyenne by the labor unions or whoever else may put it in. We probably won't have much, but isn't that right?

Exam. Mullen: That will be permitted.

When I said rebuttal evidence was complete, I meant insofar as the rebuttal evidence of the defendants are concerned, the railroads.

Mr. Quirk: Yes.

Exam. Mullen: All right.

Mr. Cockrum: Mr. Examiner, I was wondering before this hearing is adjourned if we might have some indication, possibly off the record, with respect to briefs.

Personally, I am not going to Cheyenne, and there [fol. 1714] probably will be others who are not going to Cheyenne.

Exam. Mullen: We will have a discussion off the record, then.

(Discussion off the record.)

Exam. Mullen. On the record.

This hearing is ended at this point, and the next hearing will be at Cheyenne on April 17th, as previously announced by notice from Washington.

(Whereupon, at 12:35 o'clock p.m., the hearing in the above-entitled matter was adjourned, to reconvene at Cheyenne, Wyoming on Monday, April 17, 1950, at 9:30 o'clock a.m.)

[fols. 1715-1716] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., Defendants

Transcript of Proceedings, Cheyenne, Wyoming, April 17, 1950

Met, pursuant to adjournment, at 9:30 o'clock a. m.
Before Frank E. Mullen, Examiner

APPEARANCES:

(As heretofore noted.)

Additional Appearances:

Alden T. Hill, Woolworth Building, Fort Collins, Colorado, General Committee of Adjustment, Brotherhood of Locomotive Engineers, D&RGW, et al.

George F. Guy, 507 Majestic Building, Cheyenne, Wyoming, appearing for City of Cheyenne, Wyoming.

Norman B. Gray, Attorney General, Capitol Building, Cheyenne, Wyoming, appearing for Public Service Commission of Wyoming.

[fol. 1717] PROCEEDINGS

Exam. Mullen: The Interstate Commerce Commission has set for further hearing at this time and place Docket No. 30297, The Denver and Rio Grande Western Railroad Company versus the Union Pacific Railroad Company, and others.

Are there any additional appearances?

Mr. Overcash: Mr. Examiner, I wish to enter the appearance of Harold A. Palmer, Chairman of the Nebraska State Railway Commission.

Mr. Green: At Salt Lake City, Mr. Examiner, I entered

an appearance for the Union Pacific labor organizations and certain chambers of commerce in the State of Wyoming.

At this time I would like to offer a supplemental petition for the Rock Springs Chamber of Commerce and certain other chambers of commerce in the State of Wyoming that were not covered in the original petition.

Exam. Mullen: That is a petition for leave to intervene?

Mr. Green: Yes.

Exam. Mullen: Is there any objection? If not, this petition will be received and the intervention is allowed.

Are there any other petitions?

Mr. Guy: Mr. George F. Guy, 507 Majestic Building, Cheyenne, Wyoming, City Attorney for the City of Cheyenne, appearing for the City of Cheyenne, a municipal corporation, and I have a petition for leave to intervene on [fol. 1718] behalf of the said city of Cheyenne, which I now request permission to file in this docket.

Exam. Mullen: Is there any objection?

(No response.)

Exam. Mullen: The petition to intervene is received and the intervention is granted.

Are there any other petitions?

Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

Are there any other appearances?

Mr. Hill: Alden T. Hill, Fort Collins, Colorado, appearing for the General Grievance Committee of the Brotherhood of Locomotive Engineers and Firemen on the D&RGW, as stated in our petition of intervention heretofore filed.

Exam. Mullen: Are there any other appearances?

Mr. Gray: Norman B. Gray, Attorney General of Wyoming, appearing on behalf of the intervenors, State Board of Equalization and Public Service Commission, State of Wyoming.

Exam. Mullen: Are there any others? That appears to be all.

Mr. Green, you may proceed.

Mr. Green: I call Mr. Caveny.

M. P. CAVENY was sworn and testified as follows:

Direct examination.

[fol. 1719] By Mr. Greene:

Q. Mr. Caveny, will you state your name and place of residence?

A. My name is M. P. Caveny; I reside at 3166 Kansas Avenue, Omaha, Nebraska.

Q. And what is your occupation, Mr. Caveny?

A. Locomotive engineer.

Q. With what company are you connected?

A. Union Pacific Railroad.

Q. How long have you been an engineer with the Union Pacific Railroad?

A. Thirty years.

Q. Do you have any connection with any labor organization of Union Pacific Railroad Company employees?

A. I am the general chairman for the Brotherhood of Locomotive Engineers; that would be the chairman of the Board of Adjustments for the Eastern District, Union Pacific Railroad.

Q. Now, can you tell me briefly what your duties as general chairman of the Brotherhood of Locomotive Engineers is?

A. The general chairman for the Locomotive Engineers represents all locomotive engineers in wages and working conditions in that territory.

Q. And are you the presiding officer as general chairman of that union?

A. Yes sir.

Q. How long have you held that position?

A. For the past five years.

[fol. 1720] Q. Is the Brotherhood of Locomotive Engineers of the Union Pacific a member of any organization of unions of the Union Pacific employees?

A. Yes. On the Union Pacific we have an association of all general chairmen who hold labor contracts with the railroad company.

Q. What is the name of that association?

A. General Chairmen's Association.

Q. How many Brotherhoods are members of the Association?

A. We have 20.

Q. Mr. Caveny, are those Brotherhoods the ones that asked for leave to intervene at Salt Lake City?

A. Yes sir.

Q. What position do you hold with that Association?

A. I am chairman of that association.

Q. Mr. Caveny, I will ask you approximately how many employees of the Union Pacific Railroad Company are represented by the Association of General Chairmen?

A. Approximately 55,000.

Q. Now, are the membership those that are actually engaged in work or are there others who have other capacities that you still represent?

A. Please clarify that, Mr. Greene.

Q. I meant for example, if an employee has been a member but is furloughed because of lack of a job.

[fol. 1721] A. Oh, yes, the general chairmen do represent that group.

Q. How about employees who have been for some reason retired?

A. Yes, they still represent them.

Q. Now, did the Association of General Chairmen during January of this year take some action toward securing the services of a representative to appear and present the employees' case in this proceeding?

A. I can't tell just the exact time, but the Association did take the necessary action to secure the services of Mr. Oliver.

Q. That is Mr. E. L. Oliver?

A. Mr. E. L. Oliver.

Q. Were there any strings attached at the time to Mr. Oliver's employment?

A. Yes, I think Mr. Oliver raised the question as to his services, and I recall that he said that he would accept employment with us, provided it was in line with the constitution of the various groups which we represented.

Q. Was there anything in connection with approval by the Railway Labor Executives Association?

A. Yes, he thought we should get that necessary release from the chief executives.

Q. Now, do you have excerpts from the minutes of the railway labor executives taking action on your group's employment of Mr. Oliver?

A. Yes sir.

[fol. 1722] Mr. Greene: Might it be given an exhibit number, Mr. Examiner?

Exam. Mullen: It will be marked Exhibit No. 41.

(Defendants' Exhibit No. 41, Witness Caveny, marked for identification.)

By Mr. Greene:

Q. If you will refer to what has been marked for identification as Exhibit No. 41, Mr. Caveny, I will ask you to state what that is.

A. This is a copy of the minutes which shows the action taken by the general chairmen of the Association.

Q. In connection with the employment of Mr. Oliver?

A. In connection with the employment of Mr. Oliver.

Q. Has Mr. Oliver been retained by your Association to make the presentation on behalf of the employees?

A. Yes sir.

Q. Does he represent all of the Brotherhood of Union Pacific employees who intervened in this proceeding at Salt Lake City?

A. Yes sir.

Mr. Greene: I offer Exhibit No. 41 for the record.

Exam. Mullen: Is there any objection?

(No response.)

Exam. Mullen: It will be received.

(Defendants' Exhibit No. 41, Witness Caveny, received in evidence.)

Mr. Greene: That is all I have of Mr. Caveny.

[fol. 1723] Exam. Mullen: Any cross examination?

Cross-examination.

By Mr. Quirk:

Q. As I understand it, your position in this case has been influenced and controlled by what the Union Pacific has told

you as to the diversion of the traffic in the event the complainant should prevail here?

A. No sir.

Q. What have you based your fears on?

A. On the information we had subject to the request that was made by the D&RGW Railway Company.

Q. Is that all you based it on?

A. And the evidence that was submitted in their request.

Q. In other words, you were not told by the Union Pacific that if these joint rates that are sought here by the complainant should be established, they proceeded on the assumption that all of the traffic, 157,000 carloads would move through Ogden?

A. I rather think that our position was taken due to the request that was made that a certain amount of shipping interests would be diverted from our work, and if that is true, then our employees would suffer in that loss.

Q. Do your employees suffer with the ups and downs of traffic, from year to year?

A. Seasonal work, that is true.

Q. Well, have you been told that there was testimony in this case by a vice president of the Denver and Rio Grande [fol. 1724] that it would not hope to obtain more than about 15,000 carloads in the event the joint rates sought are established?

A. I think I heard that testimony made, Mr. Quirk.

Q. Were you in Boise?

A. Yes sir.

Mr. Quirk: That is all.

Mr. Greene: I have no further questions.

Exam. Mullen: That is all. Thank you, sir.

(Witness excused.)

Mr. Overcash: I think we can stipulate for a number of witnesses. I have submitted statements of these witnesses to counsel for the applicants, and I will make stipulation in the record covering their testimony.

It is stipulated that the statements of H. D. Wiese, North Platte, Nebraska——

Exam. Mullen: Off the record a minute.

(Discussion off the record.)

Exam. Mullen: On the record.

Mr. Overcash: May I make a stipulation?

Exam. Mullen: Go ahead.

Mr. Overcash: It is stipulated that the statements of Joe Hirschfeld, North Platte, Nebraska, H. R. Wiese, North Platte, Nebraska, W. A. Reutlinger, Grand Island, Nebraska, George Martin, Grand Island, Nebraska, may be received in the record as verified statements with the same [fol. 1725] force and effect as though the witnesses were called and sworn and testified as stated in their prepared statements. The parties waive cross examination.

Mr. Quirk: We agree to that, with the understanding and reservations we made at Boise that any argument in the statements will be ignored, and anything that is obviously irrelevant and immaterial will be objected to.

Exam. Mullen: All right, sir. They will be received with that understanding.

Mr. Hirschfeld's statement will be No. 57; the statement of Mr. Wiese will be No. 58; Reutlinger will be 59; and Martin will be No. 60.

Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

Mr. Overcash: I call Mr. Harry C. King.

HARRY C. KING was sworn and testified as follows:

Direct examination.

By Mr. Overcash:

Q. Will you state your name, address, and occupation?

A. My name is Harry C. King. My address is Room 2100, Capitol Building, Lincoln, Nebraska. I am employed by the Nebraska State Railway Commission in the capacity of rate expert.

Q. And will you briefly state your qualifications?

A. Approximately four years in the traffic department of [fol. 1726] the Burlington Railroad. Almost 19 years, or a little bit over, in the industrial employment, Dempster

Manufacturing Company at Beatrice, Nebraska, servicing the entire western half of the United States, and about 14 years as an employee of the Nebraska State Railway Commission, first as assistant rate expert and for the last seven years as the rate expert for that body.

Q. Have you prepared an exhibit for this hearing?

A. Yes sir, I have.

Mr. Overcash: Mr. Examiner, may I have the number?

Exam. Mullen: 42.

(Defendants' Exhibit No. 42, Witness King, marked for identification.)

By Mr. Overcash:

Q. Do you have a prepared statement, Mr. King?

A. No sir, I do not.

Mr. Overcash: Exhibit 42 is a map of the Union Pacific and other railroad systems, to which is attached the identification of Witness Harry C. King.

The Witness: There is a sheet on it. I might state there is a sheet on the inside of this map where you will be able to place the proper identification.

By Mr. Overcash:

Q. You may proceed.

A. Reference to this map will show the Union Pacific operates through 12 states and according to the reports furnished by the Union Pacific to the Interstate Commerce Commission and the Nebraska State Railway Commission, [fol. 1727] thei are 1355.86 road miles out of a total of 9751.91 miles in the State of Nebraska. This constitutes 13.9 per cent.

With reference to the total miles operated by the Union Pacific, there is a jump up to 17.64 per cent because of the fact the Union Pacific operates 1821.21 miles in Nebraska as against 10,324.33 throughout the entire system.

The Union Pacific passes through the State of Nebraska in a west-east direction, and serves an extremely rich farming section of the state. Products of the farms adjacent to the Union Pacific consist, of course, of grain, hay and live-

stock. I will have more to say about this farming proposition later in my testimony.

Much has been said in this record, so far as I know, with reference to the Salt Lake City hearing—I did not attend the Boise hearing—but at that point a great deal was entered into the record relative to the inability of certain shippers to obtain cars when they needed them. I want to point out for the record some facts established through the rate department of the Nebraska Commission.

First, let me preface these remarks by saying that in 1917 the Nebraska State Legislature provided by statute that the Nebraska State Railway Commission should have jurisdiction relative to the furnishing of cars for loading on the lines of the railroads in Nebraska. These legislative requirements are found in Chapter 74, Sections 515, 516, [fol. 1728] 518 and 519 of the revised statutes of Nebraska of 1943.

When that duty was conferred upon the Nebraska Commission someone of the employees had to be delegated the task of making the investigation. That task was lodged with the Rate Department of the Commission. And I may say that since 1917, or the enactment of this law, that no formal complaint has been filed with the Nebraska Commission relative to the ditsribution of cars, and this statement applies not only to the Union Pacific but to all railroads servicing Nebraska.

It is true that many reports or requests of an informal nature are received by the Nebraska Commission, and in these requests various allegations are made relative to the furnishing of cars. In some cases, there will be a complaint relative to the method of distribution at the several stations. The railroads furnish the cars to a station and under our law it is the duty of the agent to allocate those cars to the proper parties.

Then again, we receive complaints relative to the discrimination practiced between stations. In other words, somebody will be driving along the road and pass through a town and he will find a number of cars setting on the siding at a certain point. Then he comes in and calls the Nebraska Commission and tells us that a certain station is getting preference over the other places.

In Nebraska, these informal complaints are heaviest dur-
[fol. 1729] ing July and December because of the fact that is the period when the wheat harvest is moving in July, and the corn in December. However, these complaints are liable to come at any time of the year. Some of these complaints are fantastic in the extreme. I want to cite just two illustrations actually happening, and with which I am personally familiar, because I made the investigation covering these complaints.

Beatrice, 40 miles south of Lincoln, is on the Union Pacific, the Rock Island and the Burlington. It so happens that the farmers' elevator at Beatrice is located on the Union Pacific only, and this concern jobs a large amount of bran, shorts, tankage, and molasses feeds.

Pickrell, Nebraska, located on the Union——

Mr. Quirk: Mr. Examiner, I don't recall that anybody the complainant put on talked about a shortage of cars in Nebraska. There were a few witnesses that mentioned some troubles here and there in Idaho. I don't see what this is relevant to.

Mr. Overcash: Well, it is a part of the foundation of this witness on the car distribution and the problem in this case.

Exam. Mullen: What is the specific purpose of this testimony?

Mr. Overcash: Well, as I understand, the witness is going to disclose the situation that exists with reference to car distribution in Nebraska, and the effect this case would have, if any, on the problem.

Mr. Quirk: I submit, Mr. Examiner, there is no issue here [fol. 1730] raised by anybody as to car distribution in Nebraska.

Mr. Overcash: But the witness wishes to point out, Mr. Examiner, that the diversion involved in this proceeding would reduce the cars available in our state, and I think this is part of his foundation.

Exam. Mullen: Well, I think sufficient foundation has been laid for that. Don't you want to ask him now some direct questions to bring out the points?

By Mr. Overcash:

Q. Mr. King, in connection with this particular proceeding, have you made a study of what effect this proceeding would have upon the car situation?

A. Yes, I have.

Q. Proceed along that line.

A. The result of my study is to the effect that we have serious car shortages in Nebraska, and certainly any diversion of traffic away from the Union Pacific would have a detrimental effect upon the furnishing of cars for our people in the State of Nebraska.

Q. Does the D&RG's use of cars have any bearing upon the availability in our state?

A. It would in this particular instance.

Q. Just what would that effect be?

A. The effect would be to remove available cars from the particular territory so that the cars could not be used in the State of Nebraska.

[fol. 1731] Q. In connection with the car situation, have you any studies of percentage of ownership that you want to put in the record here?

A. Yes, I would like to mention that. Certain percentage of ownership, of course, is required at any time to take care of the demand for cars. Any railroad will unquestionably estimate the number of cars it requires, to take care of the business upon that particular line.

Anything less than 100 per cent of this ownership during periods of stress will certainly react unfavorably to that particular railroad. I would like to cite as an example what I am trying to say is that during the car shortage of 1949, last year, in my investigation I found that the Burlington had 63 per cent of ownership on its rails.

The Union Pacific had approximately 73 per cent of ownership. The North Western had 110 per cent of ownership, and still with the 110 per cent of ownership, the North Western was absolutely unable to take care of the car demands during this particular period of stress.

Q. Mr. King, have you given study to the economic effects with respect to efficiency of operation that is involved in this proceeding?

A. I have.

Q. Proceed with your testimony on that point.

A. Inability of the Union Pacific in this particular in-
[fol. 1732] stance to furnish cars would cause diversion of traffic to other railroads, and in some instances to other forms of transportation. This diversion of traffic to other railroads would have a detrimental effect upon the people of Nebraska because such diversion would not enable or allow the Union Pacific to furnish the cars required for Nebraska, as an example.

Mr. Quirk: Mr. Examiner, I object to this statement. It is just argument and opinion without being based on any facts that are here.

Exam. Mullen: How about that, Mr. Overcash?

Mr. Overcash: Well, this is a man who spends a lot of time on the car situation, Mr. Examiner, and he should be entitled to express his opinion as to what effect this proceeding would have on that.

Exam. Mullen: Well, it is quite general so far. What specific amount of diversion would bring about the results you say might result?

The Witness: Any amount of diversion, Your Honor, that would cut down the amount of cars the Union Pacific in this particular instance would have, would have a detrimental effect upon the entire system of the Union Pacific, and, of course, Nebraska is largely interested in the Union Pacific.

Exam. Mullen: Could you tell us about what per cent of diversion you have in mind?

The Witness: Well, that would be rather difficult to say, [fol. 1733] for the reason that it would depend entirely upon whether there was a period of stress. If there is a period of stress, any diversion of any consequence at all—five per cent or ten per cent—would have a detrimental effect.

Of course, when the demand for cars is not so heavy, then the diversion would not be so pronounced.

Exam. Mullen: Assuming that this route were opened, how would such a diversion come about?

The Witness: Diversion would come about because of cars being diverted to other roads through the Ogden gateway, and in following these car shortages I find that when

these cars get away from our Nebraska lines, it is most difficult to get them back.

Exam. Mullen: Your assumption is a good many of these cars pass through Nebraska, and go over the route of the D&RGW, to Ogden, and then to points west, is that it?

The Witness: To points west?

Exam. Mullen: Yes, I am speaking of the westbound movement.

The Witness: No, I am not particularly concerned about the westbound movement, particularly. I think your cars would go east or westbound, depending upon the flow of the traffic, and, of course, any diversion from the Union Pacific is going to cut that road's car supply down, so that it cannot take care of the people on its line.

Exam. Mullen: That would depend on the amount of [fol. 1734] diversion, wouldn't it?

The Witness: That is right. It would depend on the amount of diversion, but it is a foregone conclusion that if the Ogden gateway is opened to the D&RG, there would be a substantial diversion.

Exam. Mullen: All I wanted to know was, in your opinion, what would be a substantial diversion that would bring about the results you say would result?

The Witness: I think ten per cent.

Exam. Mullen: All right, sir.

By Mr. Overcash:

Q. Mr. King——

Mr. Quirk: Could I interrupt a minute, to keep this same thought at the same place in the record?

This diversion, some of it might be via the Chicago, Burlington and Quincy, might it not?

The Witness: That is right.

Mr. Quirk: Doesn't that railroad have an east-west line through Nebraska?

The Witness: And paralleling the Union Pacific, yes.

Mr. Quirk: How about the Rock Island?

The Witness: It serves only a small portion of the State of Nebraska.

Mr. Quirk: How about the Missouri Pacific?

The Witness: Likewise.

Mr. Quirk: The Santa Fe?

[fol. 1735] The Witness: They have one mile of road in Nebraska.

Mr. Quirk: That is all.

By Mr. Overcash:

Q. Mr. King, would the problem of efficient use of cars enter into this?

A. It certainly is.

Q. What have you to say on that subject?

A. The efficient use of cars, keeping them moving, would certainly assist very materially in alleviating any car situation that might develop.

Q. Will you refer to your exhibit and give us your analysis on that problem?

A. Referring to Exhibit No. 42, I want to talk about wasteful transportation and delays incidental to transfer.

Q. Will you indicate the identification that is shown on this exhibit?

A. Yes. If a car of apples or potatoes or any of the agricultural commodities grown in Idaho, Oregon or Washington, adjacent to the line of the Union Pacific, shipped via the Union Pacific to Kansas City, as an example, the car would move through the McKinnon and Granger cut-off to the Green River break-up yard, there it would pass on down through Wyoming and Nebraska to the Gibbon cut-off just west of Grand Island on the Union Pacific, and thence to Kansas City.

Using Union Pacific all the way, there would be no transfers, there would be no wasteful transportation, there would [fol. 1736] be no diversion of traffic which would cause an economic condition to exist in Nebraska.

If this same car were routed from the origin in Oregon, we will say Baker, Oregon, in a car of the D&RGW through the Ogden gateway, and thence the Santa Fe to Kansas City or Chicago, there would unquestionably be two transfers resulting in at least 48 hours delay.

Mr. Quirk: I object to this as incompetent and irrelevant or as incompetent.

I think the witness is qualified to state what he thinks might happen.

Mr. Quirk: I don't think he is qualified to state it would be 48 hours.

The Witness: I said there would be at least that much, sir, probably more.

Exam. Mullen: You may proceed. The objection is overruled. Go ahead, sir.

The Witness: All right.

This car would be given to the Santa Fe—it could be given to the Santa Fe at either Denver, Colorado Springs or Pueblo; it could be destined to either Kansas City or Chicago, and far beyond.

Now, if the car originating at Baker is given to the D& RGW and is routed Missouri Pacific, it would probably be given to the Missouri Pacific at Pueblo, and would be destined to Kansas City, there would be the same delay un-

[fol. 1737] questionably.

Then if it is given to the Burlington, it would, as Mr. Quirk suggested a moment ago, be received by the Burlington at Denver, pass through the southern portion of Nebraska, paralleling the Union Pacific, going through the Omaha and Council Bluffs gateway and could go on to Chicago all the way from Denver via the Burlington.

If the Union Pacific were to originate this car on Baker, which it would have to do, and would give the car to the North Western as an example, or the Milwaukee at Omaha, there would be a possible 24 hours delay in order to make that transfer.

The funnny thing about the situation is the Rock Island enters into the picture, and if this car were routed Rock Island, the D&RGW would give the car to the Rock Island at either Colorado Springs or Denver. If the car was given to the Rock Island at Colorado Springs or Denver it would move Rock Island through the Omaha gateway direct to Chicago, or if it was destined to Kansas City or St. Louis, it would move over the line of the Rock Island to Topeka, and there is a jump in there from Topeka to Kansas City, which I am going to cover with this statement, that if the car were given to the Rock Island at Denver, the Rock Island not having rails from Denver to Limon, Colorado, but a lease arrangement with the Union Pacific, the car would actually move from Denver to Limon on the Union Pacific, thence be given to the Rock Island—thence through Limon

and Belleville, Kansas, down to Topeka. From Topeka to [fol. 1738] Kansas City the Rock Island uses the rails of the Union Pacific, and consequently the car would actually move on Union Pacific rails regardless of the fact that it was routed via the Rock Island all the way through.

Exam. Mullen: Does the Rock Island lease those tracks from the Union Pacific?

The Witness: I understand they do, Your Honor. I wouldn't be too sure as to that.

Exam. Mullen: What train crews would operate over those portions of the U.P.?

The Witness: That I couldn't answer. That would be something for the Rock Island or Union Pacific officials would have to answer.

Exam. Mullen: All right.

The Witness: Now then, I think that is unquestionably wasteful transportation when there is a direct route, and this would undoubtedly cause much diversion of traffic to other roads. The reason for that is, of course, they would have their solicitors in the Northwest and the routing would not be in care of the Union Pacific.

By Mr. Overcash:

Q. Does that complete your testimony?

A. Except that I want to say this: I stated earlier in my testimony that the Union Pacific has 1355 miles of road being operated in the State of Nebraska. This goes through the rich farming country of the state and there isn't any ques- [fol. 1739] tion but that it serves a great deal more than 75 per cent of the population of the State of Nebraska.

Now, the Union Pacific is 20 miles in most instances from the Burlington, which parallels it, through the southern portion of Nebraska. I think it is fair to say that the Union Pacific would unquestionably serve at least five miles on either side of its tracks in the State of Nebraska, and that would be the equivalent of 1350 square miles of territory and at least three-fourths of the population of the State of Nebraska, and anything that causes the Union Pacific, because of diversion of traffic or kindred reasons, to be compelled to retrench, undoubtedly has a very detrimental effect upon the economy of the State of Nebraska.

Q. Is that your statement?
A. That is my statement, yes sir.

Cross-examination.

By Mr. Quirk:

Q. Mr. King, are you familiar with Section 12(b) of the Nebraska Statute under which your Commission functions?
A. No sir, I am not.
Q. You are not?
A. I am not.
Q. Don't you know it says "in the event said railway companies fail to establish through joint rates, it shall be [fol. 1740] the duty of the Railway Commission to establish such rates"?
A. We do have joint rates in the state, but we also have single line rates and other rates that are made for a purpose for a particular railroad.
Q. I got the impression from your testimony your Commission is against the joint rates.
A. Oh, no. Under our statute—I am not familiar with the one you quoted, but under Chapter 75 of the revised statutes, I do believe that there we do make joint rates, or approve them, rather, authorize them.
Q. This statute I read says when they don't exist, it is your duty to prescribe them. You are not familiar with that?
A. I am not familiar with that, sir.
Q. You are more familiar with car delays.
Anyway, isn't the position you are taking here as a witness contrary to the philosophy and terms of your own statute?
A. I don't think so, and I will tell you why.
Q. All right. You said you don't think so.

Mr. Overcash: Go ahead. Can't the witness tell why?
Exam. Mullen: No, he doesn't need to.

By Mr. Quirk:

Q. Now, your Commission seems to be more concerned with the welfare of the Union Pacific than other railroads in Nebraska, is it?

A. Definitely not.

Q. If the traffic you have been describing moves through [fol. 1741] Nebraska via the Burlington, for example, and that is a good route, the people in Nebraska and the state would benefit by that, wouldn't they?

A. The answer to that question is very obvious.

Q. Well, it would be except——

A. They would benefit because of that traffic moving over the Burlington, but at the same time there would be detracted from the benefit of the people the benefit that would accrue to the Union Pacific.

Q. Do you think all the traffic that the Union Pacific can possibly handle should go to the Union Pacific and the other railroads should suffer? Is that your position?

A. Well, I will tell you what my position is on that, of course, and that is this: I think that the Union Pacific and the Burlington and the D&RGW are, all of them, and every other railroad in the United States, entitled to all of the transportation they can get.

Q. Do you agree with the statement made by Commissioner Lane in the Missouri-Illinois Case a good many years ago, in Volume 22 of the I.C.C. reports, that the railroads of this country should so unite themselves as to establish one national transportation system?

A. I think they have done that, sir.

Q. Well, to the extent that they don't move traffic freely under equal conditions, they have not done it, have they?

[fol. 1742] A. Well, the answer to that perhaps would be no, but at the same time what is the use of short-hauling one road when it has the opportunity to transport this? The D&RGW would not like to be short-hauled.

Q. Well, now you followed this case, haven't you, this complaint, and the proceeding more or less?

A. Only through the Salt Lake hearing, sir.

Q. It is established in this case that traffic originating in the State of Washington on the Union Pacific moved to Spokane, thence by the Spokane International Railway, thence by the Canadian Pacific through Canada, thence by the SOO line to Chicago and other places.

How do you think that compares with the route, so far as efficiency is concerned, with the route the complainant seeks here?

A. I wouldn't undertake to answer that one.

Q. You state what you think is a wasteful route here. That route now exists.

A. I am not familiar with the reasons as to why it exists.

Q. Would that have anything to do with whether the route was wasteful? I am confining my questions to that point now, because you bore down on that in your testimony.

Q. What was that routing again, please?

A. Well, the Union Pacific takes the short haul, incidentally, instead of the haul that you have been talking about that is so efficient, up to Spokane, and then the traffic moves [fol. 1743] via the Spokane International Railway, and thence the Canadian Pacific, and thence Soo Line; and none of that movement, by the way, is through Nebraska.

Q. Now, I am just asking you because of your statement that you understand these things, how that route on its face compares with a movement of traffic through Ogden to the Burlington at Denver, and thence east through Nebraska?

A. Well, a route of that kind would be probably direct to Chicago from Yakima, Washington, as an example, or even from Spokane, going over the north route.

As to the reasons why that particular route was established, I am not familiar with that.

Q. Well, there would be four railroads involved in that route?

A. That is right.

Q. And only three involved in the route off the Union Pacific, Ogden, Rio Grande, Burlington to Chicago, for example?

A. That is right.

Q. I suppose you know that the Union Pacific also joins in joint rate to Kansas City and other points, St. Louis; it will move a car from Seattle to Portland, deliver it to the Southern Pacific, the Southern Pacific can move that car either through Ogden at the present time, via Denver & Rio Grande, or the Union Pacific, and also through New Mexico, the Rock Island carrier.

[fol. 1744] Mr. Overcash: Are you familiar with that?

The Witness: I have never checked that, but I suppose such a route could be made.

By Mr. Quirk:

Q. There is such a joint rate, and there is such a route. I am asking you, in view of your interest in efficiency and economy in transportation, how do you think that route compares with the one via the Rio Grande which the complainant here seeks?

A. I would say that route would be, in my opinion, out of line.

Q. Well, the Union Pacific does participate in that route?

A. That may be true, but there may be a reason for that, and I am not familiar with the reason, sir; that is what I am trying to say.

Q. Well, you are not familiar with all the reasons for this complaint, are you?

A. I think I am, in a large way.

Q. How do you happen to be so familiar? You have not attended all the hearings, have you?

A. No, but I have attended the hearing at Salt Lake, and there the foundation was laid for the complaint. I heard the D&RGW witnesses testify there. In fact, I have their testimony at home.

Mr. Quirk: That is all I have. Mr. Gibson has one question.

Cross-examination.

By Mr. Gibson:

Q. Mr. King, referring to the westbound route through Nebraska, the fact that the Burlington and the Rock Island [fol. 1745] interchange traffic with the Union Pacific at Omaha, and the fact that on transcontinental traffic through that point the Union Pacific insists upon their long haul through Nebraska, do you think that is proper in view of the fact that the Burlington and the Rock Island could haul that traffic to Denver and give it to the Union Pacific?

A. If the Union Pacific originated the car in the first place, I think that they would be within their rights to do everything they possibly could to keep that traffic on their rails as long as possible. I think they are entitled to the long haul.

Q. Let's say the Rock Island originates the car, or the Burlington originates the car in Iowa, for instance, then

it is still proper for the Union Pacific to insist upon their long haul through Nebraska?

A. That is a question of management.

Q. You are aware that they do that, aren't you?

A. I understand they do, yes, with reference to the tariff.

Q. Then referring to traffic moving eastbound from the Northwest over the U.P. through Denver, you are familiar with thef act, are you not, that the D&RG and the U.P. have a connection at Denver?

A. No, I am not, but you mean a track——

Q. They interchange traffic at Denver?

A. I assumed they did.

[fol. 1746] Q. In other words, the rates are available through that point?

A. In other words, what you are saying is that they can transfer a car there without changing the lading?

Q. That is true.

A. Yes. I assumed they had that. I was not sure of it, though.

Q. Referring to traffic moving from the Northwest over the Union Pacific to Ogden, then over the Rio Grande to Denver, and assuming that the rates here requested had been established, then the traffic could move from Denver to Omaha over the Union Pacific, could it not?

A. I think I see what you are getting at. Taking a car, for instance, originating at Baker?

Q. That is right.

A. As an example.

Q. Moving to Ogden.

A. If the Ogden gateway were opened?

Q. That is right.

A. That it could move Union Pacific to Ogden, thence D&RGW to Denver, thence Union Pacific to Omaha.

Q. That is right. In that case, there would be no harm, as you term it, to the State of Nebraska?

A. Well, I think there would be.

Q. It moves entirely through the State of Nebraska, does it not?

A. Moving a car through the State of Nebraska, in and [fol. 1747] of itself, is not the controlling feature. The thing, as I see it, the controlling factor in this proceeding, is that substantial diversion of traffic from the Union Pacific

so that it is short-hauled will unquestionably have a detrimental effect upon the revenue earned by that road, and when the revenue—our experience has been, when any railroad losses traffic, its revenue is depleted, and we have requests for rate increases.

Q. But if all of this traffic is as you say, diverted from the Union Pacific to the Burlington, for instance, through the State of Nebraska, and moves over the D&RG to Denver, and thence over the Burlington to Nebraska, there would be no effect on your state, would there?

A. I think there would be.

Q. Why?

A. For this reason: That the trains presently operated by the Burlington are capable of handling the additional tonnage. They wouldn't need to put on extra crews, but if the Union Pacific is forced to reduce its employees in the State of Nebraska, it is certainly going to have a detrimental effect upon the economy of the State.

Q. Wouldn't it be true in that case the Burlington might increase its employment?

A. That is possible, sur.

Q. I don't see any connection between your statement, then.

A. I say it is possible, but their present number of trains [fol. 1748] operated through there is probably sufficient.

Q. In other words, all of this traffic that you speak of cloud move through the State of Nebraska over the Union Pacific or other lines through a connection at Denver with the D&RGW, could it not?

A. That is right, but the Rock Island, it would move about two hundred miles is all.

Q. You are speaking, then, of the benefits being transferred from one railroad to another in the State of Nebraska?

A. No, I am saying this: The Rock Island only goes through just the lower, southeast corner of the state, but it still remains, if the traffic is diverted from the Union Pacific, and the Rock Island hauls it, or even the Missouri Pacific, down through Kansas City and up through Omaha, the fact remains the diversion of traffic there is going to cause the Union Pacific to curtail employment, and employ-

ment being curtailed it certainly will have a detrimental effect upon the economy of the state.

It will cause the Union Pacific to run less trains, and in running less trains farmer and ranch men along the line of the Union Pacific will not have the advantage they have at the present time to dispose of their products.

Q. Mr. King, you referred to the Chicago and North Western during a certain period having 110 per cent of their ownership on the line, of cars.

[fol. 1749] A. That is right.

Q. You are familiar with those statistics, are you not, their purpose?

A. Well, I don't think I know what you are getting at there.

Q. Doesn't that indicate that the North Western doesn't own enough cars to handle their business?

A. That could be. I don't know how many cars any of the railroads own.

Q. Have you ever protested that fact? Isn't it true if the North Western is short of cars, then maybe the Union Pacific with its connection at Omaha would have to make up the difference?

A. Well, in taking the matter of car shortages up with the—first, the local car distributor, then the general superintendent of transportation, then the president of the North Western, which I have done personally, and over the telephone, I have not asked them how many cars they had.

I do know, though, they had 110 per cent of ownership during 1949. That is through the peak period of wheat movement.

Q. Do you know what the percentage of ownership on the Rio Grande was during that period?

A. No, I do not.

Q. If I told you it was less than 80 per cent, would you accept that statement?

Mr. Overcash: He said he didn't know.

[fol. 1750] The Witness: I said I didn't know, but I would accept your statement, because I know the Burlington only had 63 per cent of ownership, and the Union Pacific 73 per cent of ownership during that period.

Mr. Quirk: May I ask about two more questions, Mr. Examiner?

Exam. Mullen: Yes, go ahead.

By Mr. Quirk:

Q. Mr. King, isn't it a fact that your Commission has been before the Interstate Commerce Commission in grain cases and in many other cases in which you sought and did your best to obtain joint reasonable and non-discriminatory rates over all the routes that were involved?

A. That is not a fact, so far as I personally am concerned.

Q. I don't say that. Hasn't your Commission?

A. I don't know as to that. I have something else to do beside review the old cases.

Q. But you do know about car delays?

A. I know about car delays.

Q. Don't you know the Union Pacific now maintains joint rates on practically all commodities between points on its Los Angeles line in California, and points east via the Rio Grande, and that some of that traffic moves back to the Union Pacific at Denver?

Mr. Overcash: He asked you if you knew.

The Witness: Personally, no. I heard some testimony to that effect during the Salt Lake hearing.

[fol. 1751] By Mr. Quirk:

Q. Well, you based some of your other information here on what you have read out of this record, haven't you?

A. To a certain extent.

Mr. Quirk: That is all.

By Mr. Quirk:

Q. One more question: You spoke of the interchange. Do you know there is only one hour involved in interchange between the Rio Grande and its connections at Pueblo?

A. No sir, I am not aware of that fact.

Exam. Mullen: Any redirect?

Redirect examination.

By Mr. Overcash:

Q. Mr. King, in comparing its routes through Nebraska, is the matter of significance as to whether the route is an efficient route or a wasteful route?

A. May I have that question again?

(Question read.)

The Witness: Yes, I think so, very definitely.

By Mr. Overcash:

Q. I think in your direct testimony you discussed the various routes on that basis?

A. That is right.

Q. Now, in comparing the route on the Burlington from Denver to Omaha with the through route on the Union Pacific, is it your opinion that the Burlington route would be a less efficient and a wasteful route on business coming from the Northwest?

[fol. 1752] A. If the shipment originated at Denver on the Union Pacific and the Burlington, I don't think there would be a great deal of difference in the efficiency, but if the shipment originated at Baker, Oregon, again, and was transferred at a point of interchange, it certainly would affect the efficiency.

Q. In other words, your statement about permitting all railroads to obtain the maximum amount of business would be subject to qualification that the routing and the operation would be efficient?

A. That is right.

Q. And in this case you do not think that the routing on other lines than the Union Pacific through our state on transcontinental business is upon a comparable efficiency basis.

A. They don't compare with the Union Pacific.

Q. Now, Mr. Quirk asked you about the statu-es of Nebraska. He mentioned on statute. Is it true we have a large number of statutes with reference to the regulation of routes and rates?

A. We have a stack of them about 14 inches high.

Q. Each case is judged upon the circumstances of that particular case?

A. That is right.

Mr. Overcash: That is all.

Exam. Mullen: Is that all?

Mr. Overcash: We offer in evidence Exhibit 42.

Exam. Mullen: It will be received in evidence.

[fol. 1753] (Defendants' Exhibit No. 42, Witness King, received in evidence.)

Exam. Mullen: Thank you, Mr. King.

The Witness: Thank you.

(Witness excused.)

Exam. Mulen: We will take a ten-minute recess.

(Short recess taken.)

Exam. Mullen: Come to order, please.

Have you another witness?

Mr. Overcash: I call Dr. Palmer.

Edward S. Palmer was sworn and testified as follows:

Mr. Overcash: Mr. Examiner, counsel have agreed that the direct statement of this witness may be copied into the record without being read. The exhibit of this witness will be No. 43 and we offer in evidence the prepared statement of the witness at this point, and Exhibit 43.

Exam. Mullen: Can't the whole business be put in as an exhibit?

Mr. Overcash: You mean the statement, too?

Exam. Mullen: Yes.

Mr. Overcash: It can be, if you want it that way. We offer in evidence, then, the statement and the Exhibit No. 43, and the witness is available for cross examination.

Mr. Gibson: As an exhibit, the two?

[fol. 1754] Exam. Mullen: The whole thing. This document, consisting of a statement by the witness, and accompanied by an exhibit will be received in its entirety as Exhibit No. 43.

(Defendants' Exhibit No. 43, Witness Palmer, marked for identification.)

Mr. Overcash: You may cross examine.

Cross-examination.

By Mr. Quirk:

Q. Dr. Palmer, the statements made in your direct testimony as to the adverse affect that the complaint here might have in case it is successful, is based, I take it, on information given you by the Union Pacific as to the diversion of the traffic?

A. The testimony of Witnesses Earley and Hanson, especially as elaborated by Mr. Hanson.

Q. Did you know Mr. Hanson accepted the potential estimate made by Mr. Earley as maximum—or as the minimum that would move?

A. I accepted that merely as the basis of my calculations without any regard to whether it is maximum potential or minimum.

Q. Without any regard, as far as your knowledge is concerned, as to whether it is correct, probable, or rational, is that correct?

A. That is right.

Q. Now, did you know in preparing this testimony that one of the witnesses for the Union Pacific, a Mr. Stilling, testified that of this potential traffic, there were 50,000 car-[fol. 1755] loads that moves from a coastal area, to and from which competitive rates now exist, via the Rio Grande, its eastern connections, Southern Pacific, Western Pacific, and the Great Northern?

A. My statement has no bearing upon the correctness or the incorrectness of any of these estimates, but my statement holds pro rata upon any diversion of traffic.

Q. In other words, you simply have taken what was given to you by the Union Pacific, and have used that?

A. The statement is supplied pro rata for any other diversion however smaller or larger.

Mr. Quirk: That is all.

Mr. Overcash: That is all.

Exam. Mullen: That is all. Thank you, Dr. Palmer.

(Witness excused.)

Exam. Mullen: There is no objection to the receipt of that exhibit in evidence?

Mr. Gibson: No objection.

Exam. Mullen: It will be received.

(Defendant's Exhibit No. 43, Witness Palmer, received in evidence.)

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: Are we ready to proceed?

Mr. Collins: Mr. Examiner, I have statements of four shipper witnesses in behalf of the defendants, and I would [fol. 1756] like to offer them under the same stipulation that I had with Mr. Quirk, counsel for the complainant, at the Boise hearing. That stipulation, of course, is of record.

Exam. Mullen: Yes, that is already of record.

Mr. Collins: The first statement is by B. K. Smoot.

Exam. Mullen: That will be marked Statement No. 61.

Mr. Collins: The next one is by James E. Dyer.

Exam. Mullen: That will be 62.

Mr. Collins: The next one is Emmet J. Smith.

Mr. Quirk: Off the record.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

B. K. Smoot.

Mr. Collins: Salina, Kansas. Is that sufficient, Mr. Quirk?

Mr. Quirk: He is representing the Smoot Elevator.

Mr. Collins: All right, representing the Smoot Elevator Company at Salinas, Kansas.

Mr. Quirk: And certain others.

Exam. Mullen: Yes, and others.

Mr. Collins: Yes, and certain other elevators.

Exam. Mullen: 62.

Mr. Collins: 62, Mr. Dyer of Bronxville, New York, is vice president and director of Sinclair Refining Company, and manager of the Transportation Supply and Distribution [fol. 1757] Department of that company.

Exam. Mullen: All right.

Mr. Collins: Mr. Emmet J. Smith, Chicago, Illinois——

Exam. Mullen: No. 63.

Mr. Collins: ——who is general traffic manager of Edward Hines Lumber Company and traffic manager of the Oregon and Northwestern Railroad Company.

The last one is E. G. McGovern, Minneapolis, Minnesota. He is general traffic manager for Gamble-Skogmo, Inc.

Exam. Mullen: That will be No. 64.

Mr. Quirk: The stipulation made is with the same reservation and same objections I made heretofore with respect to verified statements. That is understood.

Exam. Mullen: It is so understood.

Mr. Quirk: I call particular attention to some arguments on page 4 of the statement of Emmet J. Smith, Verified Statement No. 63. We would like to ask Mr. Smoot a few questions.

Exam. Mullen: Mr. Smoot.

B. K. Smoot was sworn and testified as follows:

Cross-examination.

By Mr. Quirk:

Q. Mr. Smoot, am I correct in understanding that the transit arrangements that exist at all the points on your Verified Statement 61, except Hutchison and Enid, do not contain the restrictions that are in the transit arrangement [fol. 1758] that exists at Wichita and certain other points in Kansas?

A. If I understand your question correct, yes. In other words, you mean the same restrictions prevail at Wichita, likewise prevail at Hutchison?

Q. And Enid?

A. And Enid, yes.

Q. But they don't prevail at all those other points you have named there?

A. That is correct.

Q. So you are in a more favorable position than the mills that have already been represented here and testified at the Salt Lake hearing around the Wichita area in that respect?

A. In that respect, yes.

Mr. Quirk: That is all.

(Witness excused.)

Exam. Mullen: That completes your statements, Mr. Collins?

Mr. Collins: Yes.

Mr. Hill: In behalf of the Brotherhoods on the D&RGW, we have one witness we would like to present out of order here in order that he may get away today.

Exam. Mullen: All right. Call him.

Mr. Hill: Mr. A. J. Chipman.

A. J. CHIPMAN was sworn and testified as follows:

Direct examination.

[fol. 1759] By Mr. Hill:

Q. State your name.

A. A. J. Chipman.

Q. Where do you live, Mr. Chipman?

A. Denver, Colorado.

Q. What is your present position?

A. General chairman of the General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen on the Denver and Rio Grande Western Railroad, and some other small lines in that territory.

Q. For how long have you been general chairman of this committee?

A. Since the 9th day of February, 1917.

Q. And prior to that time, did you work as an engineer and fireman on the D&RGW?

A. Yes sir, I did.

Q. What are the duties of the position that you occupy?

A. Making and maintaining working agreements with the carriers that we have contracts with, in engine service in that territory.

Q. Does your position also require the handling of grievances with the D&RGW?

A. Yes sir, it does.

Q. Does your position require you to be familiar with the physical plant of the D&RGW system?

A. Yes sir.

Q. And for how long have you been familiar with that system?

A. With respect to the operation of trains and engines [fol. 1760] practically ever since we went to work for the railroad company, back in 1907.

Q. In whose behalf do you appear here, Mr. Chipman?

A. The engine-service employees on the Denver and Rio Grande Western Railroad.

Q. Is there a national organization of which your brotherhood is a part?

A. Yes sir.

Q. What is it known as?

A. The Brotherhood of Locomotive Firemen and Enginemen.

Q. And of what does it consist?

A. Membership is composed of the men employed in engine service on the various railroads throughout the United States and Canada.

Q. Do you represent the Grande Lodge in this proceeding?

A. No sir.

Q. Does any intervenor in this proceeding have a right to represent the Grande Lodge here in this proceeding?

Mr. Greene: I think I am going to object to that. I think, Mr. Examiner, it might save some time; in the intervention filed by the employees of the D&RGW, they suggested that the petition filed by the Union Pacific employees might be erroneously construed as representing the Grande Lodge. I want to state at this time if any such construction could be placed on that petition, that it was unfortunately phrased, and there was no representation of any kind in this proceed-

[fol. 1761] ing that the brotherhood of Union Pacific employees represent or have the authority to represent in any way any of the Grande Lodges.

Mr. Hill: Then may it be stipulated that the intervention by those you represent are in behalf of employees on the Union Pacific system alone?

Mr. Greene: As represented by the general chairman, who signed the petition.

By Mr. Hill:

Q. Mr. Chipman, are you acquainted with the personnel on the D&RGW system, that is, those who operate the trains?

A. If you mean the engine and trainmen, yes.

Q. Are you acquainted, too, in a general way, with the Union Pacific's system of rails?

A. Very generally.

Q. Do you know where they are located?

A. Yes sir.

Q. Do you know the area they serve?

A. Yes sir.

Q. On the D&RGW Railroad, how is seniority determined for employment by those represented by you?

A. Well, upon entering the service, of course, they are, after qualifying, given a place on the seniority list in the respective class of service in which they are employed.

Q. Is there a geographic division of seniority districts on the D&RGW system?

[fol. 1762] A. Not necessarily.

Q. In other words, is there system-wide seniority, or division seniority?

A. No, it is confined to districts and divisions.

Q. Take the Salt Lake Division; are you familiar with that of the D&RGW?

A. Yes sir.

Q. Of what does it consist?

A. It consists of main line mileage between Ogden and Helper, Utah, and branches. I think there are about 400 some-odd miles of track, comprising the Salt Lake Division.

Q. And in what seniority district is that with respect to your brotherhood?

A. We call it the Salt Lake Division, subdivision No. 5.

Q. What relationship is there, Mr. Chipman, between seniority and the employment on the railroad, on your railroad?

A. Well, the man with the greater seniority, of course, his job opportunities are greater, he can hold a job longer, he has steadier employment, than the junior man.

Q. Will you explain that? Why is that true?

A. It depends on traffic. The men first entering the service, of course, are entitled by virtue of their seniority are entitled to remain in the service as long as there is any traffic to move. The junior man is laid off first, of course, when traffic declines, and there is a falling off in business. [fol. 1763] Q. Are there any rules which govern the amount of mileage that an engineman or fireman may have besides seniority?

A. Well, we have as part of the working agreement a regulation that restricts the mileage earnings of enginemen in all classes of service.

Q. And what is that mileage arrangement at the present time?

A. In freight service, a maximum of 3,500 miles per month; and in passenger service, 4,800 miles per month.

Q. How does that operate, to restrict the amount of mileage that a man may make per month?

A. When the individual has earned the equivalent of that maximum mileage, if the end of the month has not arrived, he doesn't work for the balance of that month.

Q. That would be true regardless of seniority?

A. That is correct, sir.

Q. Is there, Mr. Chipman, any relationship between the jobs of the engineers and firemen on the D&RGW system, and the amount of traffic that is handled by the system?

A. Yes. Again the engineer, generally speaking, is a promoted fireman on that particular railroad, and when traffic declines, and business falls off, he displaces a man junior to him firing the locomotive. That man, of course, displaces someone junior to him on the extra list and somebody eventually is out of a job.

Q. Is it a fact, Mr. Chipman, that enginemen and firemen

[fol. 1764] are not called unless there is some train or traffic movement to occur?

A. That is correct.

Q. Are you, Mr. Chipman, familiar in a general way with the volume of freight traffic that has been handled over the D&RGW system recently and in the past years?

A. Not to state it in terms of the actual volume of traffic, no. All we have is a general idea, of course, and we increase and decrease the number of men employed as business fluctuates.

Q. You would be familiar with it, then, as it affected employment of train crews?

A. Yes, that would be our first knowledge of it.

Q. Is there some division, operating division of the Denver and Rio Grande Western Railroad which would be representative of the railroad with respect to employment at the present time?

A. We think the Salt Lake Division, Subdivision No. 6, would be typical of the employment conditions at the present time, with respect to this particular case.

Q. What is the correct number of the Salt Lake Division?

A. Subdivision No. 6.

Q. Why do you think that the Salt Lake Division would be representative and comparative of other divisions on the Rio Grande system?

A. Because we believe it is a typical division of the Denver and Rio Grande Western Railroad with respect to this [fol. 1765] case. Part of it, of course, the district begins at Ogden and ends at Helper, Utah.

Q. Now, do you have an analysis of the employment of firemen and enginemen on the Salt Lake Division of the Denver and Rio Grande Western Railroad for a period of years?

A. Yes, we have.

Q. Will you read or state into the record the data which you have there and its source and the number of employees on the seniority list, both as to firemen and enginemen for the periods mentioned, along their range of seniority dates, and the number of firemen hired during each of those years, and the number of engineers promoted for the period from 1941 to 1949, inclusive?

Mr. Greene: May I ask, Mr. Examiner, and counsel, and the purpose of this testimony is, what issue it is proposed to meet?

Mr. Hill: The purpose is to show there is at the present time—there are at the present time men who are qualified to work on the Rio Grande system that are not able to hold jobs, and to give a picture of the relation of traffic to employment on the system.

Mr. Greene: Well, is it expected that any injury is going to result to these men irrespective of the outcome of this case?

Mr. Hill: The point is that the men represented by me believe that they have been discriminated against because of the continuance in effect of these artificial rate barriers [fol. 1766] resulted in traffic being routed over the Union Pacific which should have been for many years routed, if competitive situation permitted, over the D&RG, and also to show that the system on which these men are employed have the train personnel to handle additional traffic that have already been trained and have handled traffic over this sy-tem during the past several years.

Mr. Greene: I will pass it for the time being.

All right, sir.

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

By Mr. Hill:

Q. Will you then cover the highlights of this? Show the number, for instance, the number on the seniority list of, let's take, engineers first, from 1941 to 1949, on the Salt Lake Division.

A. Omitting the opening statement of this paragraph?

Q. Yes.

A. For the year 1941, there were 196 engineers on the Salt Lake Division, the seniority dates ranging from the third month, 1903, to the 12th month, 1939—the 19th day of the 12th month of 1939.

Q. I think for the purpose of the evidence, just give the number on the seniority list for the engineers, then the num-

ber of firemen, and the number of promotions and demotions.

A. For the year 1942, 198 engineers' names on the senior- [fol. 1767] ity list, and 392 firemen. 77 firemen were promoted.

For 1943, 263 names appear on the engineers' seniority list, 565 names appear on the firemen's seniority list; 28 men were promoted and 126 hired.

1944, 283 names appear on the engineers' seniority list, 655 on the firemen's seniority list; 10 promoted and 101 hired.

1945, 280 names appear on the engineers' seniority list, 693 on the firemen's seniority list; 18 promoted and 58 hired.

1946, 289 names appear on the engineers' seniority list, 672 on the firemen's seniority list; no promotions and 7 hired.

In 1947, 294 names appear on the engineers' seniority list, 587 on the firemen's seniority list; no promotions, nobody hired.

In 1948, 285 names appear in the engineers' seniority list, 546 on the firemen's list; no promotions, and no firemen hired.

In 1949, 279 names appear on the engineers' seniority list, 491 on the firemen's seniority list; no promotions and 13 hired.

Q. What do you understand the meaning to be of the term "bridge traffic," Mr. Chipman?

A. Our limited knowledge of it is it is through traffic by another name.

Q. And what is through traffic?

A. Traffic that moves over the entire system of railway it might be moving upon; it neither originates nor its destination is on that line.

Q. Is there a distinction or difference between local traffic [fol. 1768] originating on the D&RG and the bridge traffic with respect to the regularity or irregularity of employment of the men represented by you?

Mr. Greene: I think I am going to raise an objection to that, Mr. Examiner. The witness has not been shown qualified here to testify as to the ratio between employment, on the one hand, or traffic, on the other hand.

He said he had only a general idea of traffic conditions, and did have no actual figures apparently to back up his statement.

Exam. Mullen: Well, I think his position is such that he may testify within the range of his knowledge. Go ahead, sir.

The Witness: Local business, as we understand it, of course, has almost ceased to exist. The railroad, and consequently the employees, and the community in which it serves, depend, of course, upon the movement of through traffic.

By Mr. Hill:

Q. Well now, the question, Mr. Chipman, was related as to the characteristic of through traffic as opposed to local traffic with respect to the regularity or irregularity of employment by those represented by you?

A. Well, of course, because of a decrease in local traffic, employment naturally decreases with it, and if you were dependent upon local traffic, there wouldn't be anybody working on the railroad hardly. In fact, the number of crews would be greatly diminished, the number of employees [fol. 1769] working, and everything else.

Q. Maybe the question relates primarily to whether local traffic that does exist is seasonable in characteristic, or is it a year round activity?

A. It is not a year round traffic, no sir.

Q. How does it compare with regularity with bridge or through traffic as to being seasonal?

A. It does not compare very favorably; there is less of it, of course, than the through traffic.

Q. In your opinion, Mr. Chipman, does irregularity of employment among those represented by you have any detrimental effect on the efficiency with which they work?

A. Yes, it does.

Q. And the efficiency of the men themselves?

A. Yes, it does.

Q. How does that arise? Why is that true?

A. Well, primarily because of the irregularity of employment mentioned of at least—well, let's say seven months to

nine months a year of regular employment before they will be attracted to and remain with the job.

Q. Now, when that employment does not exist, what effect does it have on the men you represent?

A. Many of those men on the bottom of the seniority list are furloughed, or laid off. They go elsewhere seeking employment, and when need for their services again arises, [fol. 1770] they are called back. Many of them do not respond. Those who do have to be retrained to a certain extent, broken in again, in order to properly perform their duties.

Q. Does the regularity in traffic situation also result in the promotions and demotions of engineers to firemen?

A. Oh, yes sir, very materially.

Q. Do you have illustrations in the case of these engineers showing this irregularity of service, or more particularly change in occupation from engineer to fireman, so that you could state it into the record?

A. Yes sir, we do have.

Q. Who are these men, and where is their seniority?

A. There are three enginemen on the Salt Lake Division. Their names are F. W. O'Driscoll——

Exam. Mullen: Do we need all that detail in this record?

Mr. Hill: I could supply it as another exhibit to save time.

Exam. Mullen: I was wondering if you wanted that particular detail, the names of the men and so on. Why do you want that in?

Mr. Hill: I see. We probably don't need the names of the men.

Exam. Mullen: I don't think so.

By Mr. Hill:

Q. Will you then state the periods these three men served as firemen and engineers on the Salt Lake Division?

A. Omitting the names?

[fol. 1771] Q. Yes.

Exam. Mullen: Just a moment. Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

By Mr. Hill:

Q. Taking a man with seniority, as engineer, in 1942, as an engineer——

A. Yes.

Q. —how many times between that date and the present time was that man demoted to fireman?

A. Six times, the fireman in the tabulation.

Q. What does that indicate in respect to traffic, if anything?

A. It indicates a decrease in traffic, falling off in business, and, of course, less work.

Q. You mean he was demoted because of the falling off in traffic?

A. Yes sir.

Q. And taking another illustration of another engineer, with the same seniority as such, how many times was he demoted back to firing from October 5, 1942, to this date?

A. Nine times.

Q. And have you another engineer?

A. Yes.

Q. Whose seniority date was October 5, 1942, as engineer on the Salt Lake Division?

A. He was demoted seven times during that period.

Q. Does this situation of demotions and promotions, [fol. 1772] back and forth, between engineer and fireman, have any effect on the number of grievances which have to be handled by you?

A. At times, it does, yes, sir.

Q. How do those arise?

A. Well, seniority lists must be prepared semi-annually where you have large numbers of names on a seniority list. The occasion of possibility of mistakes in improperly placing men on those lists occur, that is one item. Men not having an opportunity or not availing themselves of the opportunity of examining those records, time goes by, and a man may have been improperly placed on the seniority list and doesn't know it until he is to be called back to work, and then, of course, a dispute may arise as to his proper standing on the seniority list.

Q. As of April 1, 1950, how many firemen were displaced

and out of jobs on the Salt Lake Division of the Denver and Rio Grande Western?

A. I think it is 79, if I remember correctly, at the present time.

Exam. Mullen: Do you mean of all the number of firemen you stated here, only 79 are out of work?

The Witness: At the present time. Of course, there are many of those that were dropped. If you notice that tabulation, there were over 100 at one time.

Exam. Mullen: I see.

[fol. 1773]. By Mr. Hill:

Q. That figure which you have given, as of January 1, 1949, there were 279 engineers on the seniority roster, and 491 firemen?

A. Yes.

Q. Your statement is that of that 491 firemen on the seniority list, January 1, 1950, that 79 of them were now out of work?

A. Yes sir.

Q. Would that mean, Mr. Chipman, that 79 men of the engineers were back firing?

A. Ordinarily it would.

Q. Would that be approximately true?

A. Yes.

Q. Do you feel you are qualified, Mr. Chipman, to state as to whether or not the men you represent have the qualifications as firemen and enginemen and are of sufficient number and sufficiently well trained to properly handle any additional traffic which might result from the granting of the relief sought in this case.

A. There is no doubt of that. We feel fully confident that we have the men, we have the know-how, and we have the railroad upon which to handle it.

Q. Do you have any specific illustration, or knowledge, or fact upon which you predicate that opinion? If so, please state what it is.

[fol. 1774] Exam. Mullen: I don't think that is necessary. This man is well qualified to express an opinion. He doesn't have to specify any more than that.

Mr. Hill: I will withdraw the question.

By Mr. Hill:

Q. Are you familiar with the motive equipment and the power with which the D&RG system operates at the present time?

A. Fairly well, yes sir.

Q. And its tracks?

A. Yes sir.

Q. Do you understand the issue involved in this proceeding?

A. I think I do, yes sir.

Q. What, if any, effect does the maintenance, or the failure to establish the joint competitive rates sought here, have on the men represented by you?

A. Because of the diminishing local business, and the dependence of a railroad company on its employees on the movement of through or bridge traffic, they must have it in volume, of course, in order to maintain the same number of employees, or reasonably close to that number that they are employing at the present time, and in order to continue as a going railroad they must have that volume of traffic and all additional traffic they can get reasonably under regulations, of course, and solicitation of shippers, and things relating to it.

Q. Mr. Chipman, how is the group represented by you [fol. 1775] affected by a rate or a joint rate which precludes traffic coming over your road?

Mr. Greene: Mr. Examiner, I think I am going to object to that. That goes into a question of rates, and I submit that the witness shouldn't be qualified to go into that matter, how the joint rates might affect the men.

Exam. Mullen: It seems to me he was simply trying to bring out the same facts in another way, that is all. It has reference to the volume of traffic again, doesn't it?

Mr. Greene: If that is the only purpose of it, I have no objection.

Exam. Mullen: Is that correct?

Mr. Hill: Yes, and the fact that if joint rates are in effect, or not in effect, that precludes the traffic going over this system, it directly affects the jobs that these men have, and they are discriminated against.

Exam. Mullen: By affecting the volume of traffic you mean?

Mr. Hill: Yes.

Exam. Mullen: Do you know anything about that, Mr. Witness?

The Witness: Well, I think we said it adversely affected them. Naturally it adversely affects them, because the less traffic we have, the less jobs we have. Those men being citizens of Colorado and Utah, think the situation that now exists at Ogden should long since have been dissipated, and [fol. 1776] that discriminatory feature of the thing eliminated to permit shippers to decide what railroad they wanted their traffic to be moved over from the Pacific Northwest to all points of destination.

Exam. Mullen: Under joint rates, you mean?

The Witness: Yes sir.

Exam. Mullen: Of course, you understand the route is now open under combination rates?

The Witness: Yes sir, I do.

Exam. Mullen: All right.

By Mr. Hill:

Q. Mr. Chipman, how many employees are there on the D&RGW, taking the averages of last year?

A. About 8386, I believe, the last count.

Q. Basing the average employee as having a family of three, how many are affected through employment conditions on the Rio Grande?

A. About 25,000.

Q. And on a 3½ per family basis, how many does it amount to?

A. 29,351, to be exact.

Mr. Hill: I believe that is all. You may inquire.

Mr. Quirk: Could I ask one question?

Exam. Mullen: Mr. Quirk, go ahead.

Cross-examination.

By Mr. Quirk:

Q. Mr. Chipman, I suppose the employees on the Denver and Rio Grande are like the employees on the other rail-

[fol. 1777] roads, they have to take their chances of the ups and downs of economic conditions?

A. That is true.

Q. You recognize that?

A. Yes sir.

Q. Is it your position when there is a more or less permanent restriction that prevents you from getting jobs in connection with an unknown quantity of traffic per year that you complain against that because it is a permanent restriction?

A. That is right.

Mr. Quirk: That is all.

Cross-examination.

By Mr. Greene:

Q. As I understand it, Mr. Chipman, your position in this matter is the only way you see where you can improve employment on the Rio Grande is to take traffic from the line of another railroad?

A. No sir. That isn't our position.

Q. That is what you propose to do in this case, is it not?

A. We hope that the Commission will see eye to eye with us, and remove the restrictions and dissolve the monopoly that we think exists, and permit us to compete, if you please, with our neighbor, the Union Pacific Railroad.

Q. You expect your railroad to actively solicit all of the traffic they could possibly get in the affected territories?

A. I think that would be the natural thing to expect; we [fol. 1778] sincerely hope they will, and we think they can.

Q. You read Mr. Hogue's testimony at Boise, did you not?

A. Yes.

Q. You wouldn't expect the D&RGW to stop soliciting Union Pacific traffic when they arrived at a diversion of ten per cent of the traffic potential, would you?

A. We have no fixed ideas in the matter. Again, we hope that if what we think is a monopoly is dissolved, that our traffic department should be permitted to solicit any one in that territory and let the shipper decide which way he wanted his traffic routed.

Q. You wouldn't expect the D&RG to stop soliciting when they got the 10 per cent of the traffic potential, would you?

A. Again I have no knowledge of what the ten per cent would mean, and have no knowledge of what its relationship to this case would be.

Q. Now, have you made any comparisons in the reduction of employment of employees on the Union Pacific as compared to the reduction in employment on the D&RG?

A. No, it really would be unnecessary for us to do that.

Q. You mentioned in your direct examination, I believe, that a decrease in employment tends to affect the efficiency of the working man?

A. That is right.

Q. If it were established that the decline in employment [fol. 1779] on the Union Pacific has actually been greater than on the D&RG, would you say that the Union Pacific is in a position from the efficiency of their men to stand a further diversion of traffic?

A. I wouldn't know. I do not know what their loss in employment has been. They employ a larger number of men than we do, and naturally their loss in depressed periods would be greater.

Q. If you would assume just for the purpose of your answer that such has been the case, would you say the Union Pacific is in a position to stand a further diversion of traffic?

A. I think all these railroads have had to stand loss of traffic, or diversion of traffic in periods of time. I don't know what effect it would have on the Union Pacific Railroad.

Q. If the D&RG had suffered a greater loss of employment than the Union Pacific, then you would say it would not be in as good position as the Union Pacific to stand a diversion, wouldn't you?

A. I think up to the cap-city of the railroad, which has greatly improved, to that extent, of course, they could stand a loss as well as any other neighboring railroad.

Q. Now, are you familiar with the petition that was filed on behalf of the D&RG employees? I believe you signed it, did you not?

A. Yes.

Q. Now, it is stated in that petition that it is in the public

[fol. 1780] interest to provide for the security of employment and livelihood for the employees of all common rail carriers. That is generally your position, is it not?

A. Yes, we mean all, not, of course, one or any number as against another number. We think it applies to all common carriers.

Q. Then don't you feel that the Commission in this proceeding should protect the employees of the Union Pacific against the diversion of traffic to another railroad that has not shared in that traffic for years?

A. If there was any volume of traffic to be diverted or hoped to be diverted that would make any material difference to the Union Pacific, I think they would be in the same position we are in.

Q. Now, about how much traffic would your company, the D&RG, have to secure from the Union Pacific to give the maximum employment to D&RG firemen and engineers? Do you have any idea how much that would be?

A. I don't know just what that would mean.

Q. Do you feel that the Commission should give any greater consideration to the investment that the D&RG employees have in their homes, than the employees of the Union Pacific?

A. No, but we do think they should have an equal right to participate. That is all they are seeking here as employees.

Q. Well, actually as employees, you are at this time seeking to handle traffic that the D&RG has not handled for [fol. 1781] years, isn't that right?

A. But we think they should have been permitted to handle it many, many years ago.

Q. You would naturally expect that diversion would injure the employees of the Union Pacific to the extent of the diversion, wouldn't you?

A. To the extent of the diversion, which we don't think is material in a sense.

Q. If it isn't going to be substantial or material, how is it going to affect the employees of the D&RG then?

A. To the extent that the shippers can be persuaded to ship over the Rio Grande if the monopoly is dissolved.

Q. If they don't use the route, there will be no benefit to your employees?

A. That is correct, sir.

Q. Now, you gave some figures as to the number of engineers and firemen on your seniority roster. Now, isn't it a fact that there is a duplication in those figures in that there are some firemen that also have seniority on the engineers' roster?

A. No, those lists were made up from men whose names only appear on their respective list; that is the engineers' names appear on their's and the firemen's on their's. There are two separate lists.

Q. But the figures you gave are not actual employment figures, are they?

A. No, they are not.

[fol. 1782] Q. Do you have any figures as to what the actual employment was covering this same period?

A. No sir, we don't have that.

Q. Do you have any idea how many of these men on your seniority list were actually engaged in other occupations?

A. That would depend, and it would vary, of course, from one year to the next. Possibly, looking at the figure, 1949, with 491 names of firemen, I think during a part of the year 1949 that possibly half of those men were employed in the railroad industry, and the balance in some other occupation.

Q. You mentioned that your company, that is, the employment in your company, suffers with business fluctuations.

A. Yes sir.

Q. And do you find that the fluctuations in employment conformed strictly to fluctuations in business, so that there is a direct ratio between the two?

A. Generally speaking, I think that is true.

Q. Then it is sound, I think to take tonnage figures as an indication of employment figures?

A. I think it is.

Q. There was some mention made of the motive power of the D&RG. Does it have any coal-burning locomotives, do you know?

A. Yes sir, they do.

Q. Do you know what the ratio is compared to diesel?

A. I don't know the exact ratio; I might be able to give [fol. 1783] you the numbers, but I don't have the ratio.

Q. Do you have the numbers?

A. I believe they are in the record.

The Witness: I imagine they are.

Mr. Greene: I wouldn't ask again then.

Exam. Mullen: Aren't they in the record?

Mr. Quirk: They are in the record.

By Mr. Greene:

Q. Do you recall about when the D&RG reached the peak of the traffic after the war?

A. After the war?

Q. Yes.

A. No sir, I couldn't state it to you exactly.

Q. I was wondering if you could give us some ideas of the decline in employment on the D&RG, from that peak, down to the present time.

A. I think it began almost as soon as the war was ended in the Pacific Theater. There was a gradual falling off in business then. Some of it was attributed to the fact they could not handle traffic, of course, through the Ogden gateway, as they had during the war.

Q. Well, could you tell me, percentagewise, about what the reduction in employment has been?

A. No sir.

Q. From the peak down to the present time?

A. No sir, I could not.

Q. Have you made any comparison of the decline in [fol. 1784] tonnage between the UP system and the D&RG?

A. No sir.

Q. You are aware of the difficulty of furloughed train employees in securing employment in other industries, are you not?

A. I think I am, yes sir.

Q. Isn't it a fact where a person has years of seniority with a railroad company, he usually isn't trained in any other type of work, and naturally must take a cut in wages to go into some other form of employment?

A. Not always.

Q. That usually is the case, however, if he has any length of seniority with the railroad company?

A. I think it depends on the territory of the country, where there is no other gainful employment similar or somewhat comparable to the railroad industry.

Q. You would expect, would you not, Mr. Chipman, that if this application is granted, that to the extent there is a diversion of traffic from the Union Pacific to the D&RG, that the Union Pacific employees would suffer in proportion to that diversion?

A. Generally speaking, I don't think they probably would notice any difference. That is my own judgment in the matter.

Q. Regardless of the amount of diversion, you don't think there would be any injury to the Union Pacific employees?

A. If any diversion in volume existed, or occurred, yes, sir, but I don't anticipate any change at all. There might be [fol. 1785] a greater business flow to the Union Pacific as a result of this situation than now exists, as far as I know.

Q. Would you expect any diversion or any injury to result if there was a ten per cent diversion of the traffic potential?

A. Injury?

Q. Yes.

A. Not any more than if it was diverted from some other line, some other carrier, the same thing would exist elsewhere.

Q. I want to ask you, do you find in the D&RG, that when there is a decline in traffic that the reduction in service, that is, the number of employees, affects the entire system, rather than any particular division?

A. It has a general effect on the entire system, I think.

Q. You find the company reduces employees over the entire system rather than in one particular area, don't you?

A. Generally speaking, that is what takes place.

Q. You also find do you not, as traffic declines, the tendency of your company is to lop off the more expensive and less remunerative types of service, such as expensive branch line operations?

A. I couldn't answer that the way you might want me to; no, I would have to say no. It depends on the general condi-

tions of the territory, of course, but the moment the business falls off, the railroad don't discontinue branch service.

Q. Isn't that exactly what happened in the case of your [fol. 1786] railroad. that it has lopped off the expensive branch lines, and is now confining its operations to main line operations?

A. My observation has been this, whenever we had a branch line that has not paid operating expenses, and becomes an out-of-pocket expense to the carrier, they, like any other carrier, try to eliminate that service.

Q. And that is exactly what has happened in the case of your railroad, hasn't it?

A. Not necessarily. We have had some reductions in branch line services, but that, I think, has helped the railroad possibly.

Q. Hasn't your brotherhoods uniformly opposed the abandonment of branch line operations?

A. No sir.

Q. You have never opposed branch line abandonments?

A. We have had one abandonment we opposed.

Q. Do you have any idea of what loss of employment has been on the D&RG by abandonment of branch lines?

A. Engine service employees lost nothing.

Q. I wasn't speaking of that particular abandonment, the railroad as a whole; could you tell us what the loss in employment would be?

A. I could not.

Q. Could you give any indication as to these figures on the seniority roster, how in any way the changes might have been affected by abandonments?

[fol. 1787] A. In that territory where the figures are taken, there has been no abandonment that has affected the employment of men to the extent that some men were laid off and furloughed from the service.

Q. On your railroad, does the local general chairman have the right to determine the men who are added to or taken off your seniority rosters?

A. You mean the local chairman?

Q. Yes.

A. They, in cooperation with someone, designated by the carrier, do that job.

Mr Greene: I think that is all.

Mr. Hill: That is all.

Exam. Mullen: That is all, thank you sir.

(Witness excused.)

Exam. Mullen: Have you another witness?

Mr. Hill: We have other witnesses, but we will wait until the other side has concluded its case. We just intervened here in order to accommodate this witness, as I understood it.

Exam. Mullen: Any way at all you wish to proceed is satisfactory with me. Mr. Greene, you may go ahead.

Mr. Greene: Mr. Oliver.

E. L. Oliver was sworn and testified as follows:

Direct examination.

[fol. 1788] By Mr. Greene:

Q. Would you state your name and place of residence?

A. Name is E. L. Oliver. I live in Washington, D. C. My address there is 1029 Vermont Avenue, Northwest.

Q. Your business occupation, Mr. Oliver?

A. I am a research economist.

Q. Approximately how long have you been engaged in research economy?

A. Well, for about 30 years.

Q. And have you testified in numerous proceedings before the Interstate Commerce Commission involving employment of the labor unions?

A. I have testified in several, yes.

Q. Could you state briefly your experience in economy research?

A. I am a graduate of the University of Minnesota, with about a year's graduate work. I had three different periods of service with the Federal Trade Commission, in both their economic and legal staffs.

I taught for a year at the University of Pennsylvania, in the Wharton School. While there, I began working with local labor unions, assisting them in negotiations. Subsequently, I became associated with the Labor Bureau, Inc.

In 1922, I represented the Brotherhood of Railway Clerks, in national wage hearings before the United States Railroad Labor Boards. In that same year, other national railway labor unions, before that same tribunal.

[fol. 1789] Subsequent to the passage of the Railway Labor Act, I represented various system organizations of the Brotherhood of Railway Clerks, and in 1928 became the director of the research department of the International Union.

From that time on I represented the Brotherhood and all railway labor unions on several different occasions, not only in wage and rules negotiations and arbitrations, but also in the preparation and presentation of economic and statistical material before committees of Congress, before the N.R.A. bodies, the Interstate Commerce Commission, and, of course, in the determination of policy of those railway labor organizations, specifically with respect to the——

Mr. Quirk: Mr. Examiner, we are not inclined to challenge the qualifications of this witness. It seems to me this is unnecessary.

Exam. Mullen: I think they have been sufficiently stated.

Mr. Greene: Very well.

By Mr. Greene:

Q. Mr. Oliver, you have prepared an exhibit showing the proposed traffic diversion on Union Pacific employment?

A. I have, yes sir.

Q. I wanted to ask you first, have you been retained by all of the 18 Brotherhoods of the Union Pacific's system to present their case in this proceeding?

[fol. 1790] A. I have been retained by their general chairman's association. I am not precisely certain how many organizations there are composing that association.

Mr. Greene: May I have the exhibit marked?

Exam. Mullen: It will be No. 44.

(Defendants' Exhibit No. 44, Witness Oliver, marked for identification.)

By Mr. Greene:

Q. If you will refer to Exhibit 44 for identification, I will ask if it was prepared under your supervision?

A. It was, sir.

Q. I notice on the corner of the page, "prepared by Labor Bureau of the Middle West."

Can you state your connection with that organization?

A. I am head of the organization office in Washington. It is a continuing organization of the Labor Bureau to which I referred earlier. We maintain economic research staffs in Chicago and Washington, and have other offices, notably one in Philadelphia.

Q. Then where the exhibit states "prepared by Labor Bureau of Middle West," that was actually under your direction and supervision?

A. That is right, yes.

Q. Will you proceed to explain your Exhibit No. 44?

A. This exhibit is a restatement of the probable effects on employment of the various groups of employees on the Union Pacific Railway if the potential diversion referred to [fol. 1791] earlier in the evidence in this hearing were to be accomplished. The earlier part of the exhibit, the first and second page, is a restatement in terms of the classes of employees involved directly in the proposed diversion.

This is based on testimony which has already been offered by Mr. A. D. Hanson, on page 8 of Exhibit, I believe, 15. It shows the number of employees of each class, the annual wage of the group, the average annual wage of each class of employees.

You will note by occupations the largest effect is shown on page 2 of the direct loss of employment, is in the shop forces, where the estimate is there will be 562 employees released, and in the train and engine service, where the single groups of road enginemen and trainmen are largest.

The average for the whole group, which numbers 1240, the average annual wage is $4,100, and the total wage loss, just over five million dollars. We have summarized those by major occupational groups for easier reference with respect to later data on page 3 of this exhibit.

The train and engine groups have been consolidated here. You will note there are 461 of them. It is calculated they

would be released as a direct and immediate effect if this diversion were to be accomplished. The shop forces, again the largest group, 562, or a total of 1240.

As the footnote indicates, the data used for the preparation of these tables were supplied by the Union Pacific Railroad in the form of the exhibit that was offered through Mr. [fol. 1792] Hanson. However, the employees, and I may say myself, measuring the potential diversion, so-called, against the actual traffic of the railroad, felt this estimate of the immediate and direct effect was wholly inadequate to express the total result if the diversion were to be accomplished.

I have shown on page 4 of the exhibit, one method of measuring the probable effect of such a diversion as has been discussed here. We have shown total employment on the Union Pacific Railroad in comparison with revenue ton miles, and loaded freight car miles.

Those changes for the period 1939 to 1949, inclusive, have been reduced to index numbers, with 1946 equaling 100, in the three columns at the right of the table. It is quite clear, from an examination of those figures, that employment fluctuates, both with ton miles, and with loaded freight car miles, but that the fluctuation is a little closer in terms of loaded freight car miles than revenue ton miles, as perhaps is to be expected, because the amount of load in individual cars would vary, but the employment of most groups would not fluctuate with the amount of the load.

The loaded freight car miles on the 1946 base had changed the net from 1939 to 1946 almost exactly as much as employment on the railroad.

From 1946 to 1947, although loaded freight car miles rose, [fol. 1793] employment dropped. That resulted from the post-war reorganization to some extent.

In any case, the figures here led to the belief that a calculation of the loaded freight car miles to be lost if the prospective diversion were permitted, would give a measure of the total loss of employment.

That is the experience of the employees, and my own, as well as the statistical evidence, that employment does decline with reductions in traffic. We have attempted on page 5 to measure the total employment loss to result from a traffic diversion of the size that has been discussed here.

The calculation there made is based first on the total carloads of freight handled by the Union Pacific Railroad in 1949, which were 1,500,000. If the proposed traffic diversion were to be accomplished, and 157,000 cars to be diverted from the Union Pacific, the result would be, of course, not a complete loss, because a part of those cars would continue, or a part of the mileage would continue to be run over the Union Pacific, making an allowance for the actual net loss to the Union Pacific, based on the various routes these cars might be expected to move on. We arrived at a total figure of the diversion of approximately 118,000,000 miles.

The figure just preceding that of 1,082,000,000 is based of necessity on an average car movement of 1947. That was the latest year for which the figures were available.

[fol. 1794] We have applied the average movement for 1947 to the total number of carloads of freight handled in 1949 to reach that figure of 1,082,000,000. On the basis of those two figures, the diversion anticipated, or the potential traffic diversion, to use the precise language that has been employed here, would amount to 10.9 per cent of the 1949 loaded freight car miles.

The past history on this railroad, and on railroads generally, can fully justify the belief that the employment loss would be not less than the proportionate drop in traffic. Applying that proportionate drop in traffic to the total number of Union Pacific employees in January, 1950, I have arrived at the figures shown here of 5,144, the employment loss to be anticipated if this diversion were to be accomplished.

In many ways, that figure is conservative. There is, for example, the probability that with the reduction in the total haul of traffic originating in the Northwest, the railroad would contemplate and attempt, and perhaps succeed, in eliminating a great deal of that branch line service. I base that on the branch line abandonments that have taken place in the past with which I have had general contact.

That decline in branch line service would bring about a proportionately greater drop in employment than the actual traffic reductions. There is also this factor that appears in the figures on Page 5, that had not yet been introduced as a matter of the direct employment loss.

[fol. 1795] It is this: That while the direct employment loss

relates to that part of the railroad over which the traffic is now moving, and where it is estimated traffic would not move, there would be a slight—I have no way of knowing how great—an increase in employment over that section of the railroad between McKinnon and Ogden, Utah.

However, in the figures on Page 5, full allowance is made for that compensating factor, because this is based on total loaded freight car miles over the entire railroad.

By Mr. Greene:

Q. Just for an interruption, have you read the testimony, I believe, of Mr. Bradford, commenting on the fact that Mr. Hanson's exhibit did not take into account the movement between McKinnon and Ogden?

A. Yes, I have.

Q. Is the factor that he comments upon taken into account in the figures you give on Sheet 5?

A. Yes, it is fully allowed for in the calculations shown on Page 5. I think I have made it clear, but if not, I should make it clear, this is net loss of loaded freight car miles, rather than gross.

That is to say, it deducts that part of the haul which the Union Pacific would retain to the Ogden, Utah point of diversion.

Q. Have you anything further to add as to Exhibit No. 44?

A. I don't think so. I believe that is a complete statement in respect to that.

[fol. 1796] Mr. Greene: I will now offer Exhibit No. 44 for the record.

Exam. Mullen: Any objections?

(No response.)

Exam. Mullen: It will be received in evidence.

(Defendants' Exhibit No. 44, Witness Oliver, received in evidence.)

By Mr. Greene:

Q. Have you also prepared an exhibit that compared the decline in railway employment in the western districts?

A. I have, yes sir.

Mr. Greene: May we have the exhibit masked for identification, Mr. Examiner?

Exam. Mullen: We will mark that 45.

(Defendants' Exhibit No. 45, Witness Oliver, marked for identification.)

By Mr. Greene:

Q. Will you proceed to explain Exhibit No. 45, Mr. Oliver?

A. Yes. This exhibit is designed to compare the loss in employment on the Union Pacific Railroad with other sections in the United States, particularly western areas, as a measure of the possibility of re-employment of any persons who may now be displaced from the Union Pacific Railroad; also as a measure of the relative situation of the employees on these different railroads.

On page 1 of the exhibit, which shows total railway em- [fol. 1797] ployment in the western district and regions, we have given the figures for the 11 years, 1939 to 1949, inclusive. These figures are from the Interstate Commerce Commission's report, and they are the average of mid-month counts of employees as reported by the Commission.

Of course, each of the three regions are included in the total of the Western District. The high point of employment for each of the regions, and for the western district as a whole—perhaps I should change that—for the western district, and for the regions other than the southwestern region, the high point was 1945.

Actually, employment in the southwest was about 400 greater in 1944 than in 1945. The high point in the northwest regions, in the post-war period, rose above the war peak to 153,000, comparing with the 152,000 of the last year of the war.

For the western district as a whole, and for the central western region, the high point of the entire period was 1945. From that last year of the war, the decline in employment is shown at the bottom of the table. In the northwestern region, the employment declined 5.4 per cent.

For the central western region, 18.5 per cent; for the southwest, 20 per cent; and for the western district as a whole, 15.9 per cent.

There has already been presented in the preceding exhibit figures on the decline in employment on the Union [fol. 1798] Pacific Railroad. That declined from the 1945 level, 60,414 to the 1949 level, 48,046, is 20½ per cent, so that the decline on the Union Pacific has been one per cent greater than that for the central western region.

At the same time, employment on the Denver and Rio Grande Railway has dropped from 10,113 to 8,386. That is a decline of 17.1 per cent.

By Mr. Greene:

Q. In what period?

A. From the last year of the war, 1945, to the 1949 average. So the Denver and Rio Grande has dropped 2.4 per cent less than the average in the central west, while the Union Pacific has dropped one per cent more than the average in the central west, and the Union Pacific decline has been 4.4 per cent greater than the decline of employment on the Denver and Rio Grande Western.

From 1941, employment on the Union Pacific has increased as the figures in the preceding exhibit show. The increased figures are 8.4 per cent. On the Denver and Rio Grande, the increase in employment has been 8.6 per cent since the last pre-war period, so that measured from both the last pre-war period and the last year of the war, the employment situation on the Union Pacific is decidedly worse than it is on the Denver and Rio Grande.

That this decline in employment has not been exclusively long-term, but is also measured in the seasonal changes, is reflected on page 2 of this exhibit. You take from that statement corresponding months and you will see that the em- [fol. 1799] ployment decline will vary from one to another part of the year, but that generally every month shows very substantial declines from 1947 to 1949, and from 1948 to 1949.

The last month shown, December, 1949, shows an employment decline in the central western region of 23,000, approximately, below the 1947 figures, and a drop of just under 18,000 below the December, 1948 figures. That generally holds true throughout the year, the greatest decline having been, however, in the summer months, and a somewhat smaller decline earlier in the year.

This decline in railway employment in the central western region has resulted in a large part from a decline in traffic I think it should be noted that it has happened in spite of the fact that in September of 1949, the employees were placed on a basic 40-hour week, so that the number of employees theoretically should have increased with respect to the particular volume of traffic.

Actually, that has not happened.

On Page 3 is shown in terms of traffic the underlying factor in the decline in employment. There has been a drop for each month in 1949 from the corresponding month, both in 1947 and in 1948. You will note the drop for the last months shown, that is for the month of December, 1947, 11,627,000,000; 1948, 10,410,000,000; and 1949 9,461,000,000. There has been a decline of ten per cent in traffic measured by rev- [fol. 1800] enue ton miles from December, 1948, to December, 1949.

Exam. Mullen: That dollar sign should be eliminated?

The Witness: That dollar sign should be eliminated, yes, Mr. Examiner.

Exam. Mullen: We will recess until two o'clock.

(Whereupon, at 12:30 o'clock p. m., the hearing was recessed, to reconvene at 2:00 o'clock p. m., the same day.)

[fol. 1801] Afternoon Session, 2:00 P. M.

Exam. Mullen: We are ready to proceed, gentlemen.

E. L. Oliver resumed the stand and testified further as follows:

Direct examination (cont'd):

The Witness: I think I had indicated that those figures were offered to illustrate the fact that the decline in employment in the Central Western region following on or resulting largely from a decline in traffic probably wouldn't be reversed unless there was a reversal of the very strong downward trend in total traffic.

The succeeding pages of the exhibit, page no. 4, shows the

total employment of the Union Pacific Railroad by months over a three-year period. These figures also are the mid-month count as reported to the Interstate Commerce Commission.

You will note the decline for the corresponding months for the various years, as well as the annual averages which were shown earlier. Taking the last month available—that is, January of 1950—you will see that the decline from January of 1940 has been almost 2,000, and an additional 2,000 below the 1948 figure. In 1947 there was an upward trend in progress. January of that year was the lowest month in the year. For that reason the comparison of 1947-1950 is different from the 1948 or 1949 figure. January of 1949, on the contrary, was the fourth highest of the whole year.

[fol. 1802] The downward trend in employment is quite definite with each year as well as from each year to the corresponding month of the succeeding year. That rests very largely upon the decline in traffic.

We have set forth on page 5 the monthly decline in revenue ton miles carried; and; while here, as for every year—and virtually every railroad—there are fluctuations between the seasons, for the corresponding months of each of these years there has been a very sharp drop in traffic.

There are one or two exceptions—that is to say, where the drop has not been sharp—but, for the most part, it is a definite decline; so that the unemployment on the Union Pacific Railroad rests upon or follows from this decline in traffic, and there is no prospect of any substantial reversal in the employment trend unless that traffic trend is changed.

Because certain of the connecting railroads would be obviously affected to a greater or lesser extent, we have compiled and show on page 6 of this exhibit the total employment for three of the principal connecting carriers receiving traffic from and delivering traffic to the Union Pacific Railroad. The Chicago and North Western Railway, and the Chicago, Milwaukee St. Paul and Pacific, both in the Western Region of the Interstate Commerce Commission classification, show much smaller declines in employment than the Union [fol. 1803] Pacific. Nevertheless, there has been a definite decline in each of them. There has been, in the year 1949, a

substantially lower number of employees than were in their service in 1948. The effect of a diversion of traffic would, therefore, be to increase an unemployment that has already become very considerable on those three lines.

These figures on total employment do not reflect perhaps as accurately as they should the effect of current unemployment on various railway classes.

On page 7 of this exhibit, for that reason we have shown the employment figures by employee groups as classified in the Interstate Commerce Commission reporting division form.

You will note that, while there had been a substantial decline in total employment between January, 1948, and January, 1950, there had been, on the contrary, a slight increase in the group of executives, officials and staff assistants and a relatively smaller decline in the group of professional, clerical and general employees. The decline in forces was heaviest in the transportation train and engine group from January, 1948, to January, 1950—almost a 1300 reduction in force. That is the heaviest of the proportions. The maintenance of equipment, about 900; in maintenance of way and structures, 1400. Maintenance of way and structures was, to January, 1950, heavier than the train and engine group.

[fol. 1804] Those groups, therefore, would suffer more, in the total unemployment figure, than the other groups; and, inasmuch as they are the ones most to be affected by any traffic diversion, that factor should be given some consideration.

It is not possible to trace that over a period of years without a great deal of detailed statistics, but the general fact is shown by that change from January, 1948, December of 1948 to December of 1949, and January of 1950.

That unemployment situation—when the Union Pacific showing a decline of 4300 employees over the period—is reflected in unemployment data from other sources for this same area.

The Railroad Retirement Board, of course, has the administration of the Railroad Unemployment Compensation system. There is available, through the Railroad Retirement Board, some information on the number of compensation claims on file at particular dates. They are kept

on the basis of counties rather than individual cities, for the most part, and cannot be exactly matched up with the figures for any individual railroad. But you will see, on page 8 of this exhibit, that in the county including Omaha——

By Mr. Greene:

Q. May I interrupt? I'm sorry.

A. Yes, sir.

Q. I believe that first item in Nebraska covers the city of Omaha, which, I believe, is in Douglas County.

A. I was about to say that, Mr. Greene.

[fol. 1805] Q. And I believe in the second bracket, where it says "Loraine County," that should be Laramie County, Wyoming, should it not?

A. Yes. There was a typographical error there. That is Laramie County, which includes the city of Cheyenne.

As of January 1, 1950, in these Nebraska counties lying along the Union Pacific railway there were a total of 885 unemployment compensation claims on file with the Railroad Retirement Board.

For the five counties listed in Wyoming the total is 431.

For Kansas, the number is smaller. There is only a small section of the state of Kansas covered, of the Union Pacific line down to Kansas City from the Nebraska connections; however, it is clear that there are now all along the Union Pacific line in these states substantial numbers of unemployed railway workers who are, under the operation of seniority rules, of course, first in line for re-employment on any vacancies that may exist in the railroad from which they originally came.

Q. Before you pass that page, I call your attention to the note at the bottom of the page where you state that it includes only employees with 1948 service.

Does that mean that the seniority dates back as far as 1948 in all instances?

A. Yes, it means that the employee would have had to be in service in 1948 to be entitled to unemployment compen-

[fol. 1806] sation. It may not literally mean seniority in every individual instance, but in almost every instance it would. That is to say, an employee might have quit from one railroad and gone to another in 1949. His seniority

with the new railroad wouldn't be a 1948 seniority, but he would have service that would have entitled him to unemployment compensation.

Q. Could it be there are other former employees of railroad companies who are not employed that are not included in this exhibit?

A. Oh, yes. Any employee who had exhausted his unemployment compensation in early years, or had not had service in 1948 or subsequently, would not be included here. These compensation claims are classified by the Railroad Retirement Board according to the occupation of the employees. They were secured on that basis; and, in order to illustrate the incidence, the direct effect of existing unemployment by these various classes, we have taken four of the major points along the Union Pacific to indicate the diversion at those points.

You will see train service, engine service and switch men are separately classified, but at Omaha 42 of the unemployed are in those three classes; mechanical forces, 36.

At North Platte a larger proportion, a much larger proportion of the unemployed are in the train and engine group, [fol. 1807] with 141 unemployed at North Platte as of January, 1950. There were 80 in the train and engine service groups. Similarly, in Cheyenne and Laramie a very high proportion of the persons filing unemployment compensation claims are in that group, and a correspondingly smaller proportion in the other groups.

That is because, of course, the railroad employment at Omaha is much more diversified than it is at the points along the railroad line.

However, in each of the classes affected by any diversion of traffic from the Union Pacific there is a substantial unemployment at all of the points along the line.

Q. Do you have any other comments on Exhibits No. 45?

A. I think not.

Mr. Greene: I will offer Exhibit No. 45 for the record.

Exam. Mullen: Any objection?

(No response.)

(Interveners' Exhibit No. 45, Witness Oliver, received in evidence.)

Mr. Quirk: Just a moment. I am going to object to Exhibit 45 on the ground that it broadens the issues and is irrelevant and immaterial.

Exam. Mullen: The objection will be overruled and the exhibit will be received.

By Mr. Greene:

Q. Now, have you prepared an exhibit which shows the unemployment situation in industries other than railroad [fol. 1808] in Union Pacific territory?

A. I have; yes.

Mr. Greene: May I ask that the exhibit be given a number, Mr. Examiner?

Exam. Mullen: No. 46.

(Interveners' Exhibit No. 46, Witness Oliver, marked for identification.)

By Mr. Greene:

Q. Will you proceed to explain Exhibit No. 46, Mr. Oliver?

A. Exhibit No. 46 is a statement based on information from various governmental sources, showing unemployment in industries other than the railways along the line of the Union Pacific—particularly in Nebraska and Kansas.

Mr. Quirk: May I interrupt a moment, Mr. Examiner?

Exam. Mullen: Mr. Quirk.

Mr. Quirk: I appreciate that I probably ought to defer objecting until the exhibit is offered, but it seems to me that this exhibit, on its face, just to glance through it, is carrying this question beyond reasonable bounds; and therefore I think, before the witness is permitted to talk about the exhibit for the next half hour or so, that I should be allowed to object now. And I do object now on the ground that it is incompetent, irrelevant and immaterial to the issues in this case.

Exam. Mullen: What is the purpose of introducing it, Mr. [fol. 1809] Greene?

Mr. Greene: The purpose, Mr. Examiner, is simply this: to show the difficulty which these persons would encounter

in attempting to secure employment in the territory in the area in which they are presently residing.

Exam. Mullen: Well, does it attempt to show any correlation between the unemployment on the railroad and the general employment situation in the same territory?

Mr. Greene: Yes. It would be very definitely related to the exhibit which has just been received—Exhibit No. 45—and which covers the same general territory. So there would be a direct relationship between the supply and demand for railroad employment and the supply and demand in other industries.

Exam. Mullen: Is that the purpose of introducing it?

Mr. Greene: That is the primary purpose, I believe.

Mr. Quirk: As the issues in this case have been shaped by both the evidence and the pleadings, it is quite obvious that the task the Commission will have is to fix just and reasonable and non-discriminatory rates. It has established already that the route through Ogden is opened and has been used and, therefore, that makes this evidence and all the evidence on the labor question remote to the issues as they now stand; and, while the Denver and Rio Grande employees came in here and testified, their petition indicates that they didn't come in until the Union Pacific [fol. 1810] employees intervened.

Exam. Mullen: Do you desire to reply to that, Mr. Greene?

Mr. Greene: Yes, Mr. Examiner.

I believe I could call attention to a number of decisions where the Commission has considered the status of these employees, one particularly rejecting tariffs proposing to cancel certain through routes.

Now, under the statute I believe it is incumbent on the Commission to find, before this gateway can be opened, that it must be in the public interest. Now, as I view those decisions of the Commission, the status of these employees not only goes to their relationship to the railroad, but what they may be able to do in the way of employment if they are forced to be furloughed from the railroad. And that is the purpose of the exhibit here—to show what chances they have of employment if they are forced to be furloughed by the diversion of traffic. It goes to the status of the public interest.

Exam. Mullen: As affected by possible diversion due to a complaint of the complainant here?

Mr. Greene: Yes, sir.

Exam. Mullen: It may be received for that purpose.

Your objection will be noted on the record.

The Witness: May I proceed?

Exam. Mullen: Yes.

The Witness: The first page of Exhibit 46 deals with [fol. 1811] changes in the number of unemployed covered by unemployment insurance in the states of Colorado and Wyoming for the months of 1948 and 1949.

It will be noted that there is not only a drop within each year in a very general way, but that from 1948 to 1949 there is a very substantial increase in the number of unemployed covered by insurance, and that that increase down to January, 1950, had been continued.

In Colorado, for example, the number of unemployed covered by insurance increased by 2,000 from January, 1948, to January, 1949 and by 4,000 from January, 1949, to January, 1950—a very sharp increase in the number of unemployed and, correspondingly, a decrease in opportunity for employment in that area. First, it indicates a drop in employment itself and, second, a doubling of the number of people who are competing for such jobs that may become available in that area.

The same thing is true in the state of Wyoming.

Exam. Mullen: Is that no- self-evident from the exhibit itself?

The Witness: Yes. I only wanted to draw attention to one figure so that the rest of the information would be clear.

Exam. Mullen: I see.

The Witness: To show its significance. The information or the situation is generally true in all of the states covered by the Union Pacific.

[fol. 1812] Information is available on a somewhat different basis with respect to Nebraska and Kansas. That is shown beginning on page 3.

These figures show labor supply and demand for all classes of work, and then for non-agricultural work. They are as reported by the state government and are applica-

tions for employment on file with the state employment service.

While unquestionably there are some railroad workers among them, railroad men, for the most part, file their unemployment claims and their requests for jobs with the Railroad Retirement Board authorities.

You will note here a very substantial increase in the labor surplus as measured by the difference between the supply and the demand in each of these communities, and increasing from 1949 to 1950.

Again to illustrate that comparison, without going into each of them in detail, you will note, on page 3, that the labor surplus in the Beatrice-Fairbury area in February of 1949 was 437. In February of 1950 it was 517.

The January figure there has been a smaller surplus this year than last year in that particular area. In most of the areas, however, that was not true.

You will see that very sharp increase from February, 1949, to February, 1950, in each of these sections. I emphasize the month of February because the character of [fol. 1813] the industries makes the seasonal factor very important. For the same month you will see a sharp increase in the labor surplus in each of these principal Nebraska areas. The areas themselves are indicated by the names of towns; but they actually cover counties in the areas set up under the state employment service.

I have shown, for these cities along the Union Pacific, and the counties, for each of them, a change for these particular months; and, on page 9, there is a summary of the situation as of February, 1950, shown as between skilled, semi-skilled and unskilled workers.

You will note, at the bottom of that tabulation, a total line. For example, the skilled workers were 2,367 workers available; there was a demand for only 30. But wider margins relate to the semi-skilled and the unskilled groups.

I think it is perhaps unnecessary to point out that for many of the railway skills there would be no demand outside of the railway industry. However, for some of them—such as shop workers—there might be the possibility of adapting their skills; but those skilled men would be in

competition with the men already displaced and available for replacement as any demand develops.

I think it also should be noted that the set-up of the unemployment situation in the United States operates, in one sense, as a discrimination against railroad men. These unemployed are from industries other than the railroads, [fol. 1813a] and are on the unemployment insurance rolls generally, and it is to the advantage of those unemployment systems to restore to employment the men to whom they would be paying unemployment benefits; and, since, the railroad men are on the Railroad Retirement Board rolls, they do not constitute the same kind of a liability to the state employment systems. I think that is natural. I only point it out, not by way of criticism but to indicate what the unemployed railway worker is up against in seeking employment in outside industries.

The same figures, or figures on the same basis, are available for counties in Kansas; the figures beginning on page 10 relate to certain communities served in that state by the Union Pacific Railroad.

You will note here that the earliest figures available were for July, 1948, and a comparison, therefore, would have to be made between December, 1948, and December of 1949, or July of those two years.

Here there are exceptions. Concordia is itself an exception. But you have, in general, the same picture of increasing labor surplus as between December, 1948, and December, 1949.

As to the second city on page 10, there was a surplus of only 35 in Hays in December of 1948, and a surplus of 312 in December of 1949.

The Kansas City surplus is shown on page 11. It in- [fol. 1814] creased by 2,000. That is almost double, or exactly doubled from December 1948 to December 1949.

In general, that is the picture throughout the area: increasing labor surpluses. In some instances labor shortages have been converted into a labor surplus.

Taking the state of Kansas as a whole, there was a labor surplus, in December of 1948—I should not have said as a whole, but for these communities covered—there was a

labor surplus of 4,255. In December, 1949, that surplus had grown to 6,879, an increase of more than 50 per cent.

As nearly as the railroad unemployment figures can be matched up, there would have been added 182 railroad unemployment compensation claims in this same area.

For the Nebraska district the statewide surplus, shown on page 9,—supply, 13,532; demand, 637, making a surplus of 12,895 along the Union Pacific lines—would be increased by the 885 railroad men on the unemployment compensation rolls of the same month.

It would be under that sort of an employment situation that any added unemployment would be projected—a total of 13,700 unemployed people looking for work in those communities along the railroad in Nebraska.

By Mr. Greene:

Q. Do you have any further comments on Exhibit 46?

A. No. Excepting this general statement, what I be- [fol. 1815] lieve to be a general statement of fact: that the unemployment situation is such that any persons newly displaced in the railroad industry, particularly the Union Pacific Railroad, would find it virtually impossible to secure employment either at their current or present crafts or in any outside employment unless they had individual ways of getting preference. A few individuals might be related to someone, but, outside of such bases of preference, they would run up against very definite difficulties by way of preference given to employees already displaced and possessing rights in the industries that may, in the immediate future, be taking on new employees.

Mr. Greene: I had understood ~~that~~ exhibit No. 46 had been offered and received. Is that correct?

Exam. Mullen: No, you had not offered it yet.

Mr. Greene: I will offer it, then, at this time.

Exam. Mullen: It already has been objected to.

It is received in evidence.

(Intervenors' Exhibit No. 46, Witness Greene, received in evidence.)

Mr. Quirk: Subject to objection.

Exam. Mullen: Subject to objection, of course.

By Mr. Greene:

Q. Did you make a study, Mr. Oliver, at certain points along the lines of the Union Pacific, of the economic condition of workers that would be displaced if any diversion of traffic to the Denver & Rio Grande occurred?

[fol. 1816] A. Yes, I did.

Q. Was one of those points Green River, Wyoming?

A. Yes.

Q. And could you state the other points at which you made particular studies?

A. If I may, I think perhaps it would be well to indicate the whole method at one time,——

Q. All right. Fine.

A. ——rather than particular answers to particular questions.

What was done, Mr. Greene, was to make a study that would determine the conditions of the employees presumably to be affected by any traffic diversion.

Now, those directly affected were the ones first considered. That was because they are the only ones that can be actually isolated, while any traffic diversion of the size discussed here would necessarily result in the release of a great many more than this group; but it is possible to say which particular employees would be let out directly in this group of 1200-odd to which reference has already been made. Even that number, however, is too great and they are too widely scattered to have permitted a study of all of them.

It was decided to concentrate on one particular area—in a central area along the Union Pacific which was chosen. An effort was made to get information from all of the employees to be directly affected in the Wyoming division [fol. 1817] of the Union Pacific Railroad excepting those in the city of Cheyenne. The reason for excepting Cheyenne is that it is a point on two divisions, actually; and, also, there are so many affected here that again the size of the problem would be too great.

However, the underlying assumption that the conditions of the Union Pacific employees are the same along the railroad line, I believe, makes a sample taken from the Wyom-

ing division an accurate representation of the total situation.

What we did, then, was to take the seniority rosters of each class of employees affected along the Wyoming division.

The information we had indicated the number of employees in each class who would be displaced as a result of a traffic diversion of the size under consideration here. It was possible to take from the bottom of each seniority roster, then, a number of employees equal to those to be displaced and to say with some degree of certainty that these employees would be the ones who would lose their jobs if a traffic diversion of this kind became immediately effective; and while, of course, such a traffic diversion might not actually become fully effective for a year or so, the assumption is that the employees who would then be at the bottom of the seniority roster might be either these same persons or persons in almost exactly the same economic situation.

Q. Did you take into consideration any employees that were working purely on a temporary basis?

[fol. 1818] A. No. These were employees who had seniority and who were actually employed at the time the study was made. They were the lowest in the seniority on each of the seniority rosters.

Q. Now can you refer to the exhibit covering Green River, Wyoming?

Might we have that marked, Mr. Examiner?

Exam. Mullen: Yes. Exhibit 47.

We can mark the others as we go along, if you wish.

Mr. Greene: If they have all been sorted. The one at Laramie is Exhibit 48.

Exam. Mullen: That is right.

Mr. Greene: The one at Rawlins, Exhibit 49.

Exam. Mullen: Exhibit 49.

Mr. Greene: The one at Rock Springs, Exhibit 50.

Exam. Mullen: Exhibit 50.

(Interveners' Exhibits Nos. 47, 48, 49 and 50, Witness Oliver, marked for identification.)

By Mr. Greene:

Q. Was all the information contained in these four exhibits obtained on the ground, Mr. Oliver?

A. It was; yes.

Q. By personal contact with the employees in question?

A. By personal contact with the individual employees.

Now, in spite of that kind of personal contact it is not always possible to get 100 per cent replies. Some employees may be away from home. He is on vacation, or [fol. 1819] for other purposes, and some may be working—especially the train men—at a point away from home.

Similarly, not all of the questions are answered by all of the individuals. Sometimes they don't know or sometimes they just overlook an answer. But, for the most part, that is a complete coverage of all of the employees to be affected by a traffic diversion of this size.

It was done in these particular towns by a representative from my office working with local representatives of the labor organizations.

We have shown here, first, on page 1, the class, age——

Mr. Quirk: Page 1 of what?

The Witness: Page 1 of the first of the exhibits, Exhibit No. 47.

—the class, age and years of service of the employees to be displaced in Green River.

The number of the employees are shown, and their average age.

The highest average age, you will note, is for yardmasters; but, after that, the shop mechanics and the maintenance of way mechanics have the highest average age. The train and engine service average age, 26.9, is below those other groups at Green River.

The average years of service varies. Firemen and oilers have less than a year, on the average; truckers and laborers, one year, while the shop mechanics have 8.6 years and [fol. 1820] the yardmasters 15.4 average years of service.

That is to be expected because some of these represent promotional groups. That would bring about a situation in which some of them might displace younger employees if employees with less service were in the same seniority

districts. However, for the most part, with point seniority prevailing, that would not be possible. There would be some secondary effect, however, in the train and engine service groups particularly.

On page 2 is a tabulation showing the dependency status of the employees——

Mr. Quirk: Mr. Examiner, I venture to suggest that these four exhibits, 47 to 50, inclusive, are based on the same pattern. It is quite obvious that they are self-explanatory, and it is not necessary to read down the line on each of them as the witness has done on page 1.

Exam. Mullen: He might explain Exhibit 47. I assume all the others are along the same line.

But even your explanation of Exhibit 47 need not go into great detail because it seems to me that the exhibit is self-explanatory.

The Witness: Page 2, dependency status, deals with the question of whether or not the individual employees are married, their dependents and whether or not their dependents are in school.

[fol. 1821] There is some variation with respect to the proportion that are married among these classes. In general the skilled groups have a higher proportion—I mean the higher skilled and higher-paid groups have a higher proportion of married employees than the others.

You will note that the extreme right hand column, the totals column, shows the total number of dependents and the total number of employees.

The average number of dependents per employee includes all employees and not just those with dependents.

The average number of dependents of employees who are actually married is something more than three, so that the average size of the families is a little better than four among these employees.

You will note that there are a substantial number of children in school, and, of this group, three children are actually in college.

The average number of children in school, per employee having such children, is 2.3.

The home-ownership status is dealt with on page 3 of the exhibit. Here again you will find a variation from one to another class of employees.

In general, although not entirely so, the higher paid groups have a higher proportion of home ownership and a [fol. 1822] higher proportion of their homes are mortgage-free. However, of the lower-paid groups, in some instances there is a high proportion of home ownership.

If you will look at the extreme right hand column you will see that in this group of 112 employees 28 own their own homes, and, of those, 16 are mortgaged. The total value of the homes is $182,750, an average value of $6,500. Against that the total mortgage offset is $51,800, an average of $1,850 per home. The net average value is $4,677.

For those who do not own homes, wherever it was possible we secured information on their renting of homes or apartments; and you will note that, of the 65 employees who were renting homes, there was a total rental paid of $30,268, or an average annual rent of $466.00.

That measures in two ways the loss to the community: in the first place, of course, the decline in the actual value of the homes if these employees are displaced and forced, as they almost certainly would be, to look for work outside of their present home area; and then the loss in value to the individual employee—this factor also, which is dealt with or related to this table—the employee with a mortgage on his home typically is making payments on that mortgage and those payments, together with the costs incidental to them, are the equivalent to him of rent and perhaps a little more.

[fol. 1823] Any employee with a mortgaged home who is forced to move to find employment—and presumably to rent at the point to which he moved—would be confronted with a double load, and almost certainly would find that difficult, if not impossible to meet.

In those instances where similar studies have been made before—and there have been several in the history of railway consolidation studies—ordinarily such a movement leads to abandonment of the homes, a decline in their real estate values, a loss of the mortgaged home.

I see no reason, in the economic statistics of these individual employees, to judge that they would find any other way out of their particular problems——

Mr. Quirk: I object to this argument. It is immaterial, Mr. Examiner.

Exam. Mullen: I believe the witness can state those facts. They have a bearing upon the significance to be given to his exhibits.

Go ahead, sir.

The Witness: I may say, Mr. Examiner, as perhaps I should have, that I have made studies of this exact kind both before and after such displacements, and my statement with respect to the conditions subsequent to displacement is based on knowledge derived from those studies.

Exam. Mullen: Go ahead.

[fol. 1824] The Witness: With respect now to the tax situation, and the savings which these employees have, we of course meet here a more difficult situation.

The employees are more reluctant to discuss their savings and taxes and domestic problems than they are such things as their wages or home ownership.

You will note that the employees—the number of employees reporting—while the total is the same, are fewer on some of the individual items.

Here again a variation between classes or occupations of the employees is reflected in the taxes paid. The average tax per employee, shown in the extreme right hand column, is $21 per year on total value of property owned other than homes——

Exam. Mullen: You don't need to read those, Mr. Witness.

The Witness: I only wanted to indicate this, Mr. Examiner; that there are 7 employees owning property other than homes. That is not on the face of the exhibit but would be deduced from it, and there are 15 employees reporting savings.

The average total savings and property owned are shown in the right hand column for individual groups.

As has been indicated, Exhibit 48, Exhibit 49 and Exhibit 50 deal with the same types of subjects. There are variations from one to another community, and I suggest that, while it is perhaps unnecessary to go into them in [fol. 1825] detail here, a comparison will show uniformity in the matter of the number of children per family and the number of them in school, but will show wider variations in the value of the homes, in the mortgages outstanding on them, in the taxes, in the total savings of the employees

and in the proportion that have savings or have property other than their homes.

It is in general true, however, that fewer than 10 per cent own property other than their homes and that approximately 10 per cent have savings of one kind or another that can be expressed in dollars.

That variation from one point to another is partly explained by the variation in the proportions of classes of employees; but it is a general fact, brought out by the study of each of these cities, that the employees do own homes in a very substantial proportion, but a substantial portion of the homes owned are mortgaged; that there is a relatively small group that have savings of other property and that, in general, the size of the families is a fraction above 4.

By Mr. Greene:

Q. Do you have any other comment about the four exhibits, Mr. Oliver?

A. I think not. I believe they are all covered by the comments that I have made. The detailed figures, however, are there to indicate or to permit a consideration of whether or not they are typical. The agreement among the four is close enough to justify a general statistical conclusion, at [fol. 1826] least, that the sample is accurate and well taken.

Q. Under the seniority rights of these employees indicated in these four exhibits, would they be absorbed in any other parts of the Union Pacific system?

Mr. Quirk: I object to that question. This witness is incompetent to answer that.

Exam. Mullen: I don't think this witness is competent to answer that.

Mr. Greene: Very well, your Honor.

I will offer Exhibits Nos. 47 to 50, inclusive, for the record.

Mr. Quirk: I object to each of these exhibits as being incompetent, irrelevant and immaterial and make the observation that we seem to be getting more and more remote from the issues in this case.

Exam. Mullen: The exhibits will be received and the objection noted on the record.

(Interveners' Exhibits 47, 48, 49 and 50, Witness Oliver, received in evidence.)

Mr. Quirk: Just a minute. Could I ask the witness one or two questions?

Mr. Greene: Very well.

Mr. Quirk: He made the statement, apropos of the exhibits, which is in the nature of straightening out of the record.

When you were discussing the first exhibit, Mr. Oliver, I [fol. 1827] thought you said that the situation depicted as to Green River, Laramie, Rawlins, and Rock springs would be more or less typical of the situation of employees at other towns on the Union Pacific.

You didn't mean to say, did you, that, if the Rio Grande were fortunate enough to get 157,000 cars through Ogden, it would be typical of the towns west of McCammon; did you?

The Witness: No. I thought the statement was understood with reference to the information already in the record, as to the employees to be directly affected.

Mr. Quirk: You answered my question. Thank you.

The Witness: However, it would be impossible to measure the other than the 5,000 because we can't identify them. These can be identified.

By Mr. Greene:

Q. Have you prepared an exhibit showing the loss of wages at the four points involved? That is, the points that are covered by exhibits 47 to 50, inclusive?

A. Yes; excepting, in commenting on the statement, that they are shown as relating to only three points.

Q. Three points?

A. Yes.

Mr. Greene: May I have the exhibit, "Annual Wages of Employees to be Displaced at Green River, Laramie, and Rawlins," marked as an exhibit?

Exam. Mullen: Yes, it will be marked Exhibit 51.

[fol. 1828] (Interveners' Exhibit No. 51, Witness Oliver, marked for identification.)

Mr. Quirk: Mr. Oliver, is this, like your other exhibits, based upon the hypothetical potential diversion of traffic that the Union Pacific officials have used in this case?

The Witness: It is based on the figures presented by the Denver and Rio Grande at the original hearing.

Mr. Quirk: It is based on the same assumptions made by Mr. Lynch, Mr. Hanson and Mr. Burns of the Union Pacific, isn't it, that we would get all the traffic if these joint rates were put in?

The Witness: It is based on the total number of cars that would be diverted if the potential diversion were realized.

Mr. Quirk: But the 157,000 cars is the figure used?

The Witness: That is the figure given. Actually, the figure, as I read it, indicated that that was a conservative estimate. I mean the evidence of the original witness.

Exam. Mullen: It is based on that number?

The Witness: It is based on that figure, yes.

Exam. Mullen: All right.

By Mr. Greene:

Q. Will you refer to what has been marked as Exhibit No. 51 and explain that exhibit?

A. Yes.

We have shown here, by class of employees at each of these three points, the annual wage—the total annual wage [fol. 1829] bill and the average annual wages.

A major addition to the evidence already in is made, by this exhibit, which is in a statement of the loss to the individual communities.

The total wage loss at Green River, in addition to the figures shown under the heading of "Annual Wages," would be $299,263.00.

The loss at Laramie would be $377,232, and at Rawlins $260,383.

Mr. Quirk: Mr. Examiner, I suggest again that this is all clear on the face of the exhibit, and I don't see why it has to be repeated.

Examiner Mullen: The totals weren't given. He is reading the totals.

The Witness: This exhibit varies from the preceding

ones in that it shows only three points. The reason for that is that the employees live at four points but their place of employment in the original tabulation is shown as only three points, and it is possible to classify them only according to those three.

Mr. Greene: I offer Exhibit No. 51 for the record.

Mr. Quirk: I object to that for the same reasons heretofore given—incompetent, irrelevant and immaterial.

Exam. Mullen: It will be received in evidence. The objection will be noted.

[fol. 1830] (Interveners' Exhibit No. 51, Witness Oliver, received in evidence.)

Mr. Greene: Might we have the exhibit "Homes of Employees to be Displaced" marked as Exhibit No. 52.

Exam. Mullen: Exhibit No. 52.

(Interveners' Exhibit No. 52, Witness Oliver, marked for identification.)

By Mr. Greene:

Q. Why was Exhibit No. 52 prepared, Mr. Oliver?

A. It was prepared to supplement the information on the actual value of homes by pictures to indicate the types of homes, and the wide range of their types and the range for different classes of employees at these different points.

An examination of them will show that they vary widely from the most humble to the more comfortable homes of the employees of the different classes.

Q. Is there any way by which we could identify those as the homes that are mortgaged?

A. No.

Q. And does this cover all of the homes at the three points that are owned by employees?

A. No. These are intended only as samples.

Q. Samples?

A. They are typical to show the range, the different classes of homes and the homes of the different classes of employees.

[fol. 1831] It does not include all of the homes, nor was it intended to offer such a coverage.

Mr. Greene: I offer Exhibit No. 52 for the record.

Mr. Quirk: I object to it.

Exam. Mullen: On the same grounds?

Mr. Quirk: On the same grounds.

Exam. Mullen: It will be received in evidence, and the objection will be noted in the record.

(Interveners' Exhibit No. 52, Witness Oliver, received in evidence.)

Mr. Greene: Might we have the exhibit entitled "Effect on Employees of Increased Operating Expenses" marked Exhibit No. 53?

Exam. Mullen: No. 53.

(Interveners' Exhibit No. 53, Witness Oliver, marked for Identification.)

By Mr. Greene:

Q. Mr. Oliver, did you prepare an exhibit which shows the estimated line haul costs and interchange costs of traffic being diverted from the Union Pacific and turned to the D&RGW if the joint through rates proposed are established?

A. I did; yes, sir.

Q. And also comparing the relationship of those costs to wages paid employees of the railroads in the United States?

A. Yes.

[fol. 1832] Q. That is Exhibit No. 53?

A. Yes.

Q. Would you explain the exhibit?

A. The purpose of this exhibit was to see if a calculation of the effect of such a proposed diversion on railway employees generally could be made, it being an allegation that the Denver and Rio Grande would profit by the loss of the Union Pacific employees; so the total overall effect was measured for this purpose.

The first page of the exhibit shows the comparative costs of handling freight over the Union Pacific and other railways. These costs were available—the cost per loaded freight car mile for 1948—for all Class I railways in the United States and for all Class I Railways in the Central

Western Region. They were available for both 1948 and 1949 for the Union Pacific Railway and the Denver & Rio Grande Railway. They would be available for other individual railways also, as the reports are just now coming in to the Commission.

You will note that the Union Pacific average is, in 1948, 2 cents per mile below that of all railways in the region; that the Denver & Rio Grande is 2 cents per mile higher than the average for the whole region, and that in 1949 the difference between the two has widened.

The cost of shipping, per freight car mile, on the Denver & Rio Grande Western, is 4.63 cents higher than on the [fol. 1833] Union Pacific Railroad in 1949. In addition, the diversion of each car having to be handled in interchange at Ogden and at Pueblo or Denver, would add to the cost of those cars an amount which we have judged here of $9.26 for the Ogden interchange, using the figure calculated by the Union Pacific Railway and that at Pueblo or Denver using a figure which the Federal Coordinator of Transportation arrived at in a study in 1932. I have no way of knowing whether that figure is low or high. There are counterbalancing and compensating changes since that time. They may have exactly compensated, or the figure may be slightly low or slightly high. However, each car handled over this line would have to have those two interchanges more than are now given.

Exam. Mullen: Your $6.60 figure, is that what it was in 1932?

The Witness: Yes.

Exam. Mullen: All right.

The Witness: The second page of the exhibit deals with the cost of the haul per carload on the two routes. We have taken the haul from Pocatello to Council Bluffs and to Kansas City.

The present route over the Union Pacific is shown first. That is based on the Union Pacific cost per loaded car mile. Below that is the total cost of handling on the different routes.

[fol. 1834] The first element in that is the Pocatello-to-Ogden item on the Union Pacific, and then the costs over the Denver & Rio Grande Western and its connections,

less the Union Pacific portion, and that is assuming an equal mileage.

The third factor is the 240 excess miles.

Now, these various routes of course have variations in excess miles over the present route; some of them are more and some of them are less, but it seems a fair estimate that it would be in the neighborhood of 240 miles additional haul.

The cost of handling this traffic over the more expensive other lines in the Central West, and of the added mileage, brings the total cost, Pocatello to Council Bluffs, to $334.95, as diverted; Pocatello to Kansas City, $364.56. Those comparing with the present costs shown at the top of the page.

Mr. Quirk: Mr. Examiner, I object to this testimony as being incompetent. The witness is merely drawing conclusions.

Exam. Mullen: What are these figures based on?

The Witness: These figures are based on the miles of the present route, the miles of the proposed routes, the cost per loaded freight car mile as reported to the Interstate Commerce Commission, the cost per interchange at Ogden as calculated by the Union Pacific Railway, the average cost per interchange as calculated by Commissioner Easton. No one of these figures is plucked out of the air.

Exam. Mullen: These are the mathematical results of [fol. 1835] applying those various costs to these various distances?

The Witness: Yes, sir.

Mr. Quirk: And this $9.26 cost, I suppose you got that from witness Edens, who is with that Ogden Union Depot Company?

The Witness: I believe that is the name. It was from the testimony offered in this proceeding.

Mr. Quirk: You didn't read the testimony of Mr. Bradford, did you, about that very thing?

The Witness: Yes, I did.

Mr. Quirk: You were unconvinced about that?

The Witness: Completely.

Mr. Quirk: You just accepted the other, even though it shows in the record that it doesn't represent the part of the railroad the Denver & Rio Grande is interested in?

The Witness: I think your conclusion is inaccurate. Obviously, on the face of that evidence, I think the calculation of the Union Pacific is a specific calculation; the other is a guess. And I would prefer that calculation to the guess.

Mr. Quirk: Don't you know it is shown in here that the Union Depot—the Ogden Union Depot Company—acts for the Southern Pacific and the Union Pacific, and that when it makes deliveries to us the Rio Grande is not interested in that cost, any more than they are interested when we make the delivery to the Depot Company?

Exam. Mullen: Suppose we defer the cross examination? [fol. 1836] Mr. Quirk: All right.

Exam. Mullen: Let the record show, however, that the objection is overruled at this point.

The Witness: The only factor here which is not rigidly mathematical is that 240 excess miles. That, as I said, is a fair representation of the additional length, but it couldn't be precisely calculated unless one were to know what proportion of the traffic would move over each of the various combinations of carriers.

That cost, with the interchange cost added in, is shown on page 3 of the exhibit. The total actual cost over the routes, as the cars would be diverted, is $350.81 to the one destination and $380.42 to the other.

That represents an added cost, per car, of $121.71, Pocatello to Council Bluffs, and $126.94 to Kansas City. Now, we have taken a simple average of those two. There may be a variation one way or the other, depending on the distribution of traffic. If the so-called traffic potential were to be diverted it would cost an added $19,614,549 over the present cost, on the basis of that calculation.

That is primarily of interest to the employees because of the fact that, in every effort to raise wages or to prevent wage reductions, every effort to improve working conditions, the financial condition of the industry as a whole is a controlling factor in the minds of emergency boards or [fol. 1837] arbitration boards.

These total cost figures—an added cost of just under 20 million dollars—would mean, as shown on page 4, the cost of various kinds of improvements in wages and working conditions.

One cent per hour, for non-operating employees, would cost only 16 and a half million dollars.

Exam. Mullen: Just a moment. I don't get the connection between those two figures. Will you explain it again?

The Witness: Between the figures on the bottom of page 3 and the top of page 4?

Exam. Mullen: Yes.

The Witness: It is this: If the railways have a diminished net revenue of 20 million dollars it will mean that it will be the equivalent of the cost of any one of these various improvements in wages or working conditions.

That is to say, when the railway employees ask for improvements in wages or working conditions this 20 million dollars reduction in net would be the equivalent of any one of these other changes of the character that the unions are continually requesting.

By Mr. Greene:

Q. Are the figures for employment shown on page 4 covering the United States as a whole?

A. These are national figures, yes.

Q. So that you are not allocating the 20 million dollars to [fol. 1838] any particular railroad?

A. No. It would be the difference in the national net income of the railways. If this traffic were diverted the railways would have 20 million dollars less net revenue because the cost would have to be paid and the revenue would be no greater; and the net revenue is the thing with which the employees must always cope with in any effort to improve wages or working conditions.

It is the equivalent, roughly, of an added cent per hour for non-operating, or two cents per hour for operating employees; or, alternatively, an added week's vacation for non-operating employees with 25 years or more of service or all operating employees.

It is the equivalent of 2 holidays with pay for non-operating employees or 5 holidays for operating employees, or the equivalent of 10 days of sick leave.

These things are listed because each of these is a live request at the moment on the part of railway workers, and it may be said that in other industries a three-week vacation

with pay for employees of long service is becoming a very common practice, as are holidays with pay. These things the railway workers do not yet have.

Exam. Mullen: You are converting, then, this estimated additional cost into what the equivalent would be in wages, vacations, holidays, and so on?

[fol. 1839] The Witness: That is right.

Exam. Mullen: All right.

The Witness: The bases for these calculations are all in the Interstate Commerce Commission reports, except those taken from the Railroad Retirement Board, which relate to the sick leave situation.

Mr. Quirk: What year did you say?

The Witness: The annual report of the Railroad Retirement Board for 1949; the latest monthly statement of the Interstate Commerce Commission.

Mr. Quirk: You said something about some figure for 1932 in here.

The Witness: That was the report of Commissioner Eastman.

By Mr. Greene:

Q. Do you have any other comment on Exhibit No. 53?

A. I have nothing further.

Mr. Greene: I offer Exhibit 53 for the record.

Mr. Quirk: I object to the exhibit as incompetent, irrelevant and immaterial.

Exam. Mullen: The exhibit will be received and the objection will be noted.

(Interveners' Exhibit No. 53, Witness Oliver, received in evidence.)

By Mr. Greene:

Q. Did you prepare an exhibit reflecting the proposed [fol. 1840] diversion of traffic as it applies to the Chicago and North Western Railroad?

A. Yes, I did.

Mr. Greene: May we have the exhibit entitled "Effect of Proposed Traffic Diversion on the Chicago and North Western Railway" marked as Exhibit 54?

Exam. Mullen: Exhibit No. 54.

(Interveners' Exhibit No. 54, Witness Oliver, marked for identification.)

By Mr. Greene:

Q. Will you refer to Exhibit No. 54 and explain its purpose, Mr. Oliver?

A. I don't believe the record yet indicates that I had been requested by the Chicago and North Western employees, through their committee representing all of the unions of that railroad, to make a study of the effect of this proposed traffic change to their employment.

It was not possible to make as detailed a study as had been made with respect to the Union Pacific because the request was made considerably later. However, for the number of employees to be displaced by the immediate effect we did distribute questionnaires.

The questionnaires were compiled, and on this exhibit is shown, on page 1 and the immediately following pages, the number of employees and the annual wage loss by major as well as by sub-classes.

The total wage bill, estimated by the Chicago and North [fol. 1841] Western—total wage loss—is $422,795.

Mr. Quirk: You are still using the maximum potential as a minimum, are you not, that will move over the Ogden gateway?

The Witness: No, I think not.

Mr. Quirk: What figure are you using to make this tabulation?

The Witness: This doesn't use the maximum as a minimum.

Mr. Quirk: You are using 157,000 carloads, are you not?

The Witness: That is right. It is my understanding that the Chicago and North Western calculated its employment loss on the basis of that proportion of the 150,000 cars which would not be handled over the Chicago and North Western—to be diverted from them.

Mr. Quirk: I suppose you assumed what their own witness did: that none of it would come back to the Chicago and North Western at Omaha or Council Bluffs, to any of

the roads that reach Denver or Cheyenne. You made the assumption that the witness for the Chicago and North Western did?

The Witness: I did not make any assumption. I think it would be impossible for us to do that.

Mr. Quirk: You don't know yourself, do you?

The Witness: It would be impossible. I don't know——

Exam. Mullen: Based on the assumption that 100 employees of that railway would be dismissed?

[fol. 1842] The Witness: Yes. However, the union officials felt there, as they did on the Union Pacific, that that was an understatement, and a few more employees were covered by the questionnaires distributed. That is why the total on page 2 is greater than the 100.

The average age and the years of service, you will note, are a little higher——

Exam. Mullen: I don't think we need any comments on that. It seems to me to be self-explanatory.

The Witness: The figures agree closely with respect to the dependency status and other matters that could be covered.

The employment by years, as shown in the Chicago and North Western—as shown in an earlier exhibit—shows a decline by months, and, as shown on page 4, there is a total decline of 4,000 from the same month of the preceding year to the last month.

There, too, as page 5 shows, that unemployment is concentrated very largely in the skilled workers' group—transportation (train and engine), maintenance of equipment and stores, maintenance of way and structures.

The relationship between the unemployment change and the revenue ton miles carried, shown on page 6 of the exhibit, again is substantially the same relationship as has been noted for the Union Pacific and for the railways generally in the area.

[fol. 1843] The unemployment there has been caused by the reduction in traffic. That is to say, the recent very great increase of unemployment was so caused.

Mr. Greene: I will offer Exhibit No. 54 for the record.

Mr. Quirk: I object to that exhibit because, first, it is based upon a false premise, and is based upon matters that

the witness is not familiar with, and therefore is incompetent.

Exam. Mullen: The exhibit will be received. The objection will be noted.

(Interveners' Exhibit No. 54, Witness Oliver, received in evidence.)

Mr. Greene: May we have the exhibit next in order marked as Exhibit No. 55?

Exam. Mullen: Before we mark it, what is the purpose of this exhibit?

Mr. Greene: It is only to show, Mr. Examiner, the status of letters which were delivered to the Interstate Commerce Commission, and now in their possession, which, I understand, are objectionable but may be filed in the docket.

Exam. Mullen: Well, the correspondence is filed in the docket; that is true.

Mr. Greene: It is filed in the docket.

Exam. Mullen: They are not considered as in evidence in this case, so I don't see the necessity of filing this compilation as an exhibit.

[fol. 1844] Mr. Greene: Very well.

Examiner Mullen: This shows, of course,—and the record may show—that the Commission has received a large number of letters from various persons in the State of Wyoming—from Cheyenne, Wyoming, Green River, Laramie and Rawlins.

The originals of those letters are in the correspondence file of this docket.

Mr. Quirk: I suppose also the record shows that these letters were sent to the Commission by this witness—Mr. Oliver. That is what it says.

Exam. Mullen: Yes.

To whom are these letters addressed, Mr. Greene?

Mr. Greene: To the Interstate Commerce Commission.

Exam. Mullen: Not to you?

Mr. Greene: No, not to me nor to Mr. Oliver. They were merely delivered by Mr. Oliver to the custody of the Commission.

Exam. Mullen: I think Mr. Quirk's point is: How did it happen you received it first and not the Commission?

Mr. Greene: I will have to ask that of Mr. Oliver. They were not delivered to me.

By Mr. Greene:

Q. Can you state that, Mr. Oliver?

A. Yes.

Mr. Quirk: Anyway, you didn't inspire them?

Mr. Greene: No.

Exam. Mullen: We will let it stand at that, then.

[fol. 1845] Mr. Quirk: All right.

By Mr. Greene:

Q. Now, Mr. Oliver, could you state your knowledge and experience with reference to seniority rights, and particularly with reference to the Union Pacific employees in the area between Pocatello and Council Bluffs and Kansas City?

A. The information I have on that is what was given to me by the employee representatives themselves. That is the source of my knowledge of it, and that I have already commented on to the effect that it is very largely a point seniority; that employees have, for the most part, no employment rights away from the present place of employment or where they hold their seniority, if they are now unemployed.

Mr. Greene: Now, faced with this situation, if counsel will bear with me, calling some 20 or 25 witnesses to establish that, under the seniority rights with their particular contracts, they could not displace any employee in another territory—Now, if counsel insists that those witnesses be called, I will produce them; but I believe it would be a saving in time if we could have an understanding to that effect.

Mr. Quirk: I am perfectly willing to stipulate that, with the same objections I have been making that if they were on the stand I would object to the evidence as being irrelevant and immaterial.

[fol. 1846] Exam. Mullen: I will stipulate, however, that if they were called that is what you would attempt to prove by them.

Mr. Greene: That is correct.
Mr. Quirk: Therefore it is not necessary to call them.
Exam. Mullen: That is right.

By Mr. Greene:

Q. Do you have any further comment to make, Mr. Oliver?
A. Not at this time; no, sir.

Mr. Greene: You may cross examine the witness.
Exam. Mullen: We will recess for 10 minutes.

(Short recess taken.)

Exam. Mullen: We are ready to proceed.
Mr. Oliver is ready for cross examination.

Cross-examination.

By Mr. Quirk:

Q. Mr. Oliver, I believe you have already admitted that practically all of your calculations as to the alleged adverse effect that the joint rates here sought would have on the employees of the Union Pacific are based upon the assumption made by witnesses for the Union Pacific that the potential available traffic that might move through the Ogden gateway at the joint rates would all move that way?

A. The quantitative measure is based on that assumption. The qualitative is not. That is to say, if only 10 cars were diverted, or 100 cars, or 1,000 cars, some part of the effect would be felt.

[fol. 1847] Q. When you were considering this matter, in working up these figures, did you notice the fluctuations from year to year of the gross revenues of the Union Pacific?

A. No, I didn't work on gross revenues.

Q. You didn't know, then, that the gross revenues of the Union Pacific, in 1946, for example, were 130 million dollars less than they were in 1945?

A. No, I didn't.

Q. Or that the gross revenues of the Union Pacific in 1949 were 38 million dollars less than they were in 1948?

A. I made no study of gross revenues.

Q. But you do know from your experience that there is a very decided fluctuation in the revenues of railroads from year to year?

A. I would be surprised to find any railroad that didn't have fluctuations.

Q. Now, in these calculations did you give any consideration to the increased movement and the effect of the employees of the Union Pacific, on the line of the Union Pacific, down to Ogden?

A. Yes, that is definitely included in the calculation.

Q. Well, if all this potential traffic moves through the Ogden gateway, that group at least would be very much benefited, wouldn't it?

A. There unquestionably would be some people put to [fol. 348] work who are not now working, but it would be counterbalanced by a greater displacement on the rest.

Q. As an economist of large experience—and I know you have had large experience—do you usually accept the assumptions and the figures given to you, or given to your group or to you by the railroads?

A. Not without examination.

Q. You didn't examine these.

A. Oh, yes; I did.

Q. Will you tell the Commission what your conception of the difference betweeen actual and potential is?

A. Well, the difference in the way the material is used by Mr. Earley, I presume, is what you are talking about. I gathered that Mr. Earley was willing to calculate potential, minimum potential, down to the last car, but he was unwilling to offer a figure at all about actual. That is the difference.

Q. Mr. Earley's testimony shows very clearly, if you will look at page 174 of the transcript, that what he was doing was to try to determine, from the figures available to him, the class of traffic that might be affected by these joint rates as distinguished from the class of traffic that wouldn't be affected by these joint rates.

For instance, there was a witness on the stand this morning—Mr. Dyer, for the Sinclair Refining Company—who said they handled about 10,000 cars a year. Now they are

[fol. 1849] located in this area where the hearing is. That would not be affected.

Exam. Mullen: That was in the verified statement.

Mr. Quirk: Yes, in the verified statement by Witness Dyer.

By Mr. Quirk:

Q. So you assumed that the mere fact that Mr. Earley, at my suggestion as counsel, attempted to show the potential traffic that might be available would be the minimum traffic that he would get at all?

A. No, that is definitely not true.

Q. Well, don't you know, as a man of experience, that no railroad ever gets it—all of the potential traffic?

A. Of course that is true.

Q. Well, Mr. Burns, in this case, questioned by me, admitted that while the Union Pacific is a great railroad that operates very well and does very well financially, in the Northwest it has to meet the competition, at many points, of the Great Northern, the Northern Pacific, the Milwaukee and other railroads; and that the Union Pacific, despite that, did not get all of the traffic that was potentially available: What makes you think the Denver and Rio Grande would get it?

A. I have not indicated that I thought so.

Q. You have used the potential to calculate the adverse effect on the Union Pacific employees. Why did you use it?

A. The only figure that was offered by the Denver & Rio Grande that I found, as to the potential traffic diversion, [fol. 1850] was that the minimum potential would be 157,000 cars.

In examining the testimony I thought that probably was a fair statement; that that was a minimum of the potential. What the maximum of the potential would be, I don't know.

Q. Don't you know that Mr. Earley stated very clearly that the figure that he used was considered as the maximum?

A. No. He said the minimum.

Q. He didn't use the word "minimum."

A. I have it here before me. Perhaps he didn't so testify, and I, of course, in using the word "minimum", may be inaccurately paraphrasing, but he did say——

Q. You are willing to let your testimony stand anyway, and the calculations you have made, upon the assumption that the mere establishment of joint rates over a route that now exists will cause all of this traffic that has been mentioned here—the 157,000 cars—to move by the Denver & Rio Grande despite the fact that witness after witness for the Union—One witness said he would not route a single car out of 5,000 cars a year. You nevertheless went ahead with your proposition?

A. I am not certain that that question, as asked, could be answered in any fashion, but the fact is that the only figures that were available to calculate the potential effect on these employees was the figure given for the potential traffic diversion.

Now, insofar as you fall short of attaining that objective, [fol. 1851] of course, the damage would be less. But any attainment of that objective will inflict injury on these employees. If you accomplish the 157,000 car diversion the damage will be substantially that as reflected in these calculations.

Q. Of course the damage will be less if the movement should be 15,000 cars instead of 157,000 cars?

A. There would be no damage at all if the petition were denied, and for every car that moves there will be an added damage.

Q. You are not familiar with the fact that some large concerns, through their representatives, testified in this case that if the gateway was opened at joint rates they would buy more lumber and other things on the Union Pacific than they now buy on other roads? You are not familiar with that?

A. No, I didn't see that particular statement.

Q. There is a man named Johnson, for one, for the Koppers Company, with a creosoting plant at Salida, Colorado, who certainly testified to that effect. And there are others.

Mr. Greene: I think I am going to object to counsel's comments, Your Honor. I think the record speaks for itself here.

Exam. Mullen: I think that is true. This witness, Mr. Quirk, said he is not familiar with that testimony.

Mr. Quirk: He indicated that he was familiar with some other parts of the testimony, and that has some reflection on [fol. 1852] why he didn't look at the whole record.

By Mr. Quirk:

Q. Mr. Earley said, at page 174 of the transcript:

"I also wish to point out with additioanl emphasis that this estimate as to the traffic possibilities for the Rio Grande route does not attempt to show the number of cars which we think will actually move through Ogden via the route of the Rio Grande in connection with the Union Pacific in the event of the establishment of competitive through rates via that junction."

Now, based on your broad experience, how could you get the impression, from that kind of a statement, that all of this traffic would move via the Rio Grande?

A. I don't have that impression. I didn't get that impression.

Q. Why did you use the 157,000 cars to show to the Commission how different employees in different classes might be adversely affected or actually lose wages?

A. This is the potential effect on the employees, just as your figure, as presented, was supposed to be a minimum——

Q. My figure was not supposed to be a minimum.

A. —to be a conservative estimate of traffic potential.

Q. While you are about it, would you read the testimony of Fred C. Hogue, vice president in charge of traffic for the Denver & Rio Grande, put in the record at Boise about a week ago?

[fol. 1853] A. I am not certain whether I have read that one or not.

Q. Well, are you familiar with——

A. I don't have it here with me, in any case.

Q. Are you familiar with the fact that the line of the Union Pacific that reaches down into Los Angeles, and to California and Nevada points, now has joint rates competitive with the other railroads on practically all commodities between points served by the Union Pacific on that line and points in the territory here involved in connection with the Rio Grande?

A. No, I don't know that.

Q. If I told you that Mr. Hogue testified at Boise that the Rio Grande has never been able to get as much as 5 per cent of that traffic, would that affect your judgment?

A. Well, I haven't indicated any judgment as to the part of this potential——

Q. Well, then, let me put it this way——

A. —which will become actual. Your witness said it was guess work, and I don't want to compete in the matter of guess work.

Q. But you have been willing to take the entire amount that might move and base all these calculations on it to impress the Commission, I suppose, as to the possible effect that it might have on the employees of the Union Pacific?

A. Correct.

[fol. 1854] Q. Despite the fact that you are not willing to guess?

A. The possible effect and the potential effect are almost exactly synonymous. This figure was offered as a traffic potential. Whether or not it would be realized is, as Mr. Earley says, guess work—or how far it would be realized—but, insofar as it is realized, it will injure these employees. And if it is fully realized, then the damage will be substantially as in these exhibits.

Q. If you are going to speculate on that, isn't this a correct assumption: Should the Northern Pacific, the Southern Pacific, the Great Northern and the Milwaukee, which serve many points in the Northwest served by the Union Pacific, by more aggressive solicitation or by better service, or service more satisfactory to the shipper, get all of the traffic from those competitive points to competitive points away from the Union Pacific, that would have an adverse effect on the employees of the Union Pacific, wouldn't it?

A. I am not sure I follow your hypothesis. If competing carriers were able to take away from the Union Pacific all of its business—if that is your hypothesis—then of course it would have an adverse effect on the Union Pacific employees.

Q. Now, Mr. Hogue stated, based on long experience and studies made, that the Rio Grande had never received

more than 10 per cent of the potential available transportation—transcontinental traffic—and then he said that there [fol. 1855] is no probability that the Rio Grande would obtain more than 10 per cent of the estimated potential.

That being the testimony of the man who is anxious to get as much of this traffic as he can, how does that affect, in your opinion, the calculations you have made?

A. Well, it affects it in this fashion: You would attribute that 10 per cent to a desire to get the maximum and ask me to interpret the witness' testimony. Actually the witness is primarily concerned in getting the Interstate Commerce Commission to approve the petition of the railroad. It is to his interest to make that figure as low as possible rather than to make it high. Insofar as his line operates, that 10 per cent is unquestionably lower. I don't know how much bias he had. Perhaps he isn't sympathetic with the Denver & Rio Grande Western Railroad Company, but I would not accept the 10 per cent. I would accept the 157,000 figure as a conservative estimate of potential.

Q. I assume that when you accept that you also assume that, of course, the Union Pacific officials who testified about that subject were not biased at all and had no self-interest?

A. I hope they were doing their best to preserve the traffic of the Union Pacific Railroad. I am certain there was considerable concern about it.

Q. But you did accept those figures, although you testified that in other situations you are not very prone to [fol. 1856] accept figures offered by railroads?

A. I accepted no figure that could be checked otherwise, without checking.

Q. How did you check this potential? How could you check the potential?

A. It couldn't be checked otherwise. That wasn't the Union Pacific figures; that was the Denver & Rio Grande figures.

Q. The Union Pacific put in 171,000 cars as movements actually made in recent years, in certain of the recent years.

Did you see those figures?

A. No, I didn't.

Q. They also said that there were 50,000 cars out of that 171,000 that moved to and from points in the coastal area to and from which joint competitive rates now apply via the Southern Pacific, via the Great Northern and the Western Pacific, through Ogden or Salt Lake, and via the Rio Grande, so that would reduce your potential down to 121,000, would it not, at least?

A. Well, if it should have been reduced to 121,000, Mr. Earley should have reduced it. I only took Mr. Earley's figures.

Q. Why were you so prone to accept Mr. Earley's figures?

A. Because it was a statement of the potential traffic diversion which he said was conservative.

Q. Why don't you accept the figures given by Mr. Hogue? He is the vice president of the company.

[fol. 1857] I think Mr. Hogue's judgment is unquestionably good. It seems to me to be a second thought, after the submission of the figure of 157,000, to reduce it to 15,000. It is quite a drastic change.

Q. Well, not when you understand what the 157,000 is supposed to be.

Now, you gave no consideration to the fact, did you, that if the joint rates should be established the Union Pacific would undoubtedly, in self-interest, attempt to persuade the shippers up there that did route via the Ogden gateway and the Rio Grande to also include the Union Pacific in the route from Denver to Omaha?

Did you give any consideration to that?

A. Yes. That was one of the several routes that seemed to be among the possibilities. However, I judged it would be a minimum because the shipper persuaded to divert from the Union Pacific would have to be persuaded to do that by showing that the Union Pacific wasn't serving him properly, and if he was convinced of that by your solicitors he would be very unlikely to say, "Give it back to the Union Pacific at Denver."

Q. A great many shippers route their traffic that way from California, the record shows. Now the Union Pacific gets it back at Denver.

A. That is possible. But it doesn't represent an original diversion, as would be represented by any traffic diverted

[fol. 1858] if the Commission were to approve this rate rearrangement.

The whole thing is very bad for the railroad industry.

Q. You think it would be better if the existing joint rates, through routes of the railroads of the country were to be linked together and the national transportation system be brought back and you would have to transfer at all junction points?

A. No, I didn't indicate that.

Q. I believe in Exhibit 53 you made some calculations that you call costs.

Don't you know, as a man of experience, that if the Rio Grande should be fortunate enough to get a substantial part of the available traffic, or any reasonable part of it, to that extent their haul, the average haul, would be increased? And isn't it your experience that both ton-mile revenue and cost per ton mile decrease with distance?

A. Yes, I think the second part of your question could be answered affirmatively.

Q. Doesn't the cost per car also—Isn't it determined, to a very large extent, by the load of the lading, the weight of the paying load in the car?

A. If I understand your question correctly, the answer to that also is "yes".

Q. Don't you know that the Rio Grande handles a lot of heavy-loading traffic?

[fol. 1858a] A. I have not examined the Denver & Rio Grande traffic.

Q. You have just taken a brush and painted a broad picture of what you call costs in this Exhibit 53, haven't you?

A. No, I didn't use a brush at all. I don't think the figure is at all accurate. This is as precise a calculation as can be made.

Q. Did you, in using your figures on Exhibit 53, assume that the average weight per carload and the average distance were the same on each railroad?

A. No.

Q. What did you assume?

A. I assumed that the cost per loaded freight car mile of the Denver and Rio Grande Western would apply to

added loaded freight car miles in service over that railroad.

I assumed that the Union Pacific cost per loaded freight car mile would apply to that part of the traffic or that part of the haul which remained on the Union Pacific.

I assumed that the Denver and Rio Grande average is approximately that of those Class I railways in the Central Western Region to which it would deliver freight received from the Union Pacific or from which it would receive freight ultimately to be delivered to the Union Pacific Railroad.

Q. In determining what you call the estimated line haul interchange cost—that is the heading of page 1 of your Exhibit 53—you have got all Class I railways in the United [fol. 1859] States, all Class I railways in the Central Western Region and the Union Pacific and the Rio Grande shown.

A. That is right.

Q. Now, in determining the figures for the Rio Grande, did you recognize that, in getting at the average cost of the Rio Grande, you had to keep in mind that the Rio Grande does now operate quite a mileage of what is called narrow gauge railroad?

A. I didn't go into the detailed character of the operation. I took the average cost per loaded freight car mile as reported to the Interstate Commerce Commission by the Denver & Rio Grande Western Railroad.

Q. That is just an average.

A. That is the average.

Q. You do know enough about narrow *guage* operation, I assume, to admit that it would tend to increase the average cost?

A. I shouldn't like to express an opinion on that. I have never seen any comparative figures.

Mr. Quirk: All right. That is all.

Mr. Hill: May I ask a question?

Exam. Mullen: Yes. Go ahead.

Cross-examination.

By Mr. Hill:

Q. Mr. Oliver, taking first your Exhibit No. 44—Do you have it before you?

A. Yes, I have it.

[fol. 1860] Q. What work did you or your associate, Mr. Zimring, do to gather these figures together here, that are on this exhibit?

A. Well, the first page was based on the figures in Exhibit 15, page 8, which shows the number of employees at each point that Mr. Hanson felt would be directly affected by the proposed diversion.

Those figures were arranged in Exhibit by cities. They were not collected by occupation. The occupational grouping is shown on pages 1 and 2. That is to say, the train and engine men are brought together from all of the points shown in the original exhibit. That is with respect to 1 and 2.

Now, on page 3, the summary, there is a compilation of the sub-classes shown in pages 1 and 2 according to the major classifications shown on page 3.

Now, with respect to page 4 of the exhibit, the first column, "Total Employment," we took the annual reports of the Union Pacific to the Interstate Commerce Commission——

Exam. Mullen: Pardon me. Isn't that explained in the footnote?

The Witness: The source is shown, but I understood the question was as to exactly what did we do.

By Mr. Hill:

Q. That's all right. I was particularly concerned with pages 1, 2 and 3.

Now, Mr. Oliver, those figures, then, are merely a rearrangement of those given by Mr. Hanson to put into this [fol. 1861] type of employment; is that right?

A. The figures on pages 1, 2 and 3 are that; yes.

Q. They are not backed by any independent investigation, or any search or check, on your part, of their authenticity?

A. Yes. I should say that the analysis which we made

of the traffic diversion indicated that these figures were not only authentic as to total, but that they were probably only about 25 per cent of the total.

Q. What I want is for you to show me what you did to verify these figures. What was your research that verified these figures? What did you do?

A. I took the figures reported to the Interstate Commerce Commission on traffic in terms of loaded freight car miles of the Union Pacific.

Q. Do you have a work sheet or anything else that you used to get together these figures? Where is your data that you used to verify these figures?

A. They are on page 4 and page 5—page 4, particularly—of the exhibit.

Q. You used the figures on page 4 to verify the figures on pages 1 and 2? Is that your statement?

A. To verify the total—rather, to check the total.

Q. What else? You used these figures on page 4. What other figures did you use to verify the figures on pages 1 and 2?

A. Only those on page 4.

[fol. 1862] Q. Any others?

A. No.

Q. Well, then, you didn't check any of the figures as to how many of these employees would be affected in any particular category at all, did you?

A. No. That is impossible of checking.

Q. It is possible to get it, but it is not possible to check it; is that it?

A. No, it is impossible to check it.

Q. All right.

Actually, then, this exhibit is purely a recompilation of data furnished by the Union Pacific witness; isn't that it?

A. No. The first three pages are; the last 2 are not.

Q. How do the last 2 pages in any way check the figures on pages 1 and 2?——

A. Well, the figures on page 4——

Q. —and 3?

A. The figures on page 4 show the relationship between traffic and employment. The estimated potential traffic diversion is calculable within a fairly narrow range of ac-

curacy. The figures on page 4 show that, with a reduction in traffic, a reduction in employment follows.

Now, the reduction in traffic is measured on page 5 as nearly as could be measured on the basis of the information available.

[fol. 1863] Q. Now, in your——

A. Excuse me.

Q. I'm sorry. Proceed.

A. The evidence of Mr. Hanson was to the effect that if the traffic potential, or the potential traffic diversion were accomplished, there would be a loss of 1200 employees. By checking with the traffic totals it seemed that that figure was conservative by about 3800.

Q. Well, now, you didn't put any of your own independent judgment into this determination of how many employees would be cut off, because you copied the exact figures the Union Pacific witness gave, of 1240 men.

A. No. You will find, on page 5, a figure which I calculated myself without any information from the Union Pacific, and it differs from the figure that the Union Pacific Railroad put in evidence.

Q. I see. Then you think that the diversion is roughly four and a fraction times greater than the Union Pacific itself thinks the diversion will be?

A. The Union Pacific figure of 1240 was subsequently amplified in the evidence by a calculation based on the anticipated or potential traffic reduction. As I recall it, that resulted in a figure in the neighborhood of 5,000. But it was differently calculated from the figure which is offered on page 5 of this exhibit, and there was no agreement on [fol. 1864] the basis of calculation at all.

Q. Well, what research did you do to verify any of these figures other than get this data that is shown on page 4 of Exhibit 44?

A. Well, if you will look at page 5 you will see the figure of 5,144. That was the ultimate check and verification.

Now, the research to accomplish or to arrive at that figure was done in this fashion: The Association of American Railroads publishes weekly figures on carloads handled, or cars handled by individual American railroads. We took the 52 weeks in 1949 and took the figures for the Union Pacific Railroad for each week and added them together,

and we got the total carloads handled by the Union Pacific Railroad—1,511,658. That gave us, then, the carloads.

Now, there is no information available as to the average length of haul of the cars in 1949. The latest available is 1947. We took the 1947 figure as reported by the Interstate Commerce Commission for the Union Pacific as the average miles per loaded freight car. We multiplied the number of loaded freight cars handled by the average mileage per car and arrived at the figure which, is expressed in round numbers, of 1,082,000,000.

Then the ratio of the potential diversion to the total volume of traffic was calculated, which, you will see, is 10.9 per cent——

[fol. 1865] Exam. Mullen: All of that is shown on page 5, Mr. Hill.

Mr. Hill: I am not stopping the witness. If - - has answered my question, I am ready to rest.

Exam. Mullen: Does that sufficiently answer your question?

Mr. Hill: I think so.

By Mr. Hill:

Q. You got the figures of the total carloads of freight handled in 1949 and you took this 157,762 carloads from, I suppose, the exhibit of the D&RGW?

A. That is right.

Q. And translated that into freight car miles and——

A. Yes.

Q. —and your 10.9 is your percentage of loaded freight car miles diverted against the other, or is if carloads against the other?

A. It is the car mileage—loaded freight car mileage.

Q. Your determination of these figures, then, was just from reports made by the Union Pacific and the Interstate Commerce Commission reports? You made no independent investigation of any kind?

A. I wouldn't say that I made no independent investigation. This was an independent investigation. The fact that I used the Interstate Commerce Commission figures doesn't make it anything other than independent.

Q. In your figure of 10.9 per cent reduction of employees,

you did not take into consideration any effect of Dieseliza-
[fol. 1866] tion by the Union Pacific and the resultant loss of employment on that account?

A. No. Any loss of that kind is not included in this 5,000, excepting insofar as it is already reflected in the figure of 47,194 employees of the Union Pacific in January of 1950.

Q. In your exhibit about unemployment, railroad unemployment compensation claims—Is that Exhibit 46?

A. That is 45, I believe.

Q. 45?

Page 8 of that Exhibit 45. You have here a list of a number of railroad unemployment compensation claims as of January 1, 1950, in certain counties of Nebraska, Kansas, and Wyoming; is that correct?

A. That is right.

Q. What period of time of unemployment do these claims indicate, if anything?

A. There is no way you can judge that.

Q. As I understand it, an employee that is unemployed for a 7 days' waiting period, working on the railroad, can come in and apply for compensation; is that right?

A. Not if he is working on the railroad.

Q. I say if he is unemployed for 7 days. He has a 7-day waiting period, hasn't he?

A. Yes, that is my recollection.

Q. Is that right or not?

[fol. 1867] A. I wouldn't want to try to give precise numbers of days from my recollection, but I believe that is right.

Q. Well, now, in order to mean anything, on the basis of number of claims filed, you would have to know something about how long they had been unemployed or what the claim for compensation was, wouldn't you?

A. I don't see why.

Q. They are temporarily unemployed. Is that what you mean?

A. They are unemployed. That is the whole story.

Q. The figure you have here represents that on a certain day there were that many people who were claiming unemployment compensation; is that it?

A. That is right.

Q. And if a man were out of work 7 days he could come

in and claim compensation the next day?

A. Whenever he has been unemployed the minimum amount, whatever it is. I wouldn't want to state exactly.

Q. I take it, Mr. Oliver, that this unemployment and detrimental effect which you forecast, in your various exhibits, on points along the Union Pacific would work to the advantage of the other points in the overall picture if there was a diversion; is that right?

A. No, not necessarily. The actual fact is that, as traffic declines, employment declines faster. As traffic increases, employment rises more slowly. So that the effect of diversion would be to perhaps increase employment; but, if it is [fol. 1868] increased, to increase it less than the cut on the carrier from which the traffic is diverted. So that, while the Denver & Rio Grande employees might gain some employment by this device, they would gain less than the Union Pacific people would lose.

Q. That is true over the long period?

A. That is true over the long period.

Q. In other words, the same amount of traffic handled over the Union Pacific at the present time, if handled over the Rio Grande in addition to their present traffic, wouldn't produce the same number of jobs?

A. That is my judgment.

Q. And on what do you base that judgment?

A. It is based on about 30 years of study of the relationship of traffic to employment changes.

Now, what ordinarily happens with a traffic reduction is that the word goes out that the forces must be cut. And they are cut drastically, and as drastically as possible, because the labor cost increases as traffic declines. The labor cost per unit rises. Consequently, the cuts are made, if possible, more deeply than the traffic.

On the other hand, when traffic rises there is always some slack, and with increasing traffic the tendency for the substitution of labor-saving devices is very great. With heavy traffic it can be more efficiently handled, and the quantity of employment relative to the traffic declines.

[fol. 1869] That is true throughout the United States for the railroads as a whole, and it is true for individual carriers generally. There are many individual years, partic-

ularly war years, where that will not be true for each individual railroad, but that is the general truth.

Q. Are you acquainted with the D&RGW rail system?

A. I don't know what you mean by being acquainted with the system.

Q. Do you know what physical plant they have and where it is located?

A. No. Do you mean, by "physical plant," where their shops are?

Q. Their trackage, the points in the states where they go through.

A. Only in a general way.

Q. Have you been over it?

A. Oh, yes. When I say that I don't mean I have traveled every branch railroad, but I have traveled the Denver & Rio Grande on several different sections of the road at different times.

Q. The statements you made here just a few minutes ago with respect to jobs not being transferred are general statements.

You couldn't give an opinion, as an economist, about what effect it would be in this particular installation unless you knew both roads pretty well, could you—unless you [fol. 1870] knew the volume of traffic they were handling at the present time compared to their potential; and so on?

A. I don't believe any person can prognosticate precisely the effects of a traffic diversion. You can only say that if the past effects are repeated—which is the essence of scientific prognostication—then the effect will be thus and so; but there is no assurance short of the stars that past effects will be repeated.

Q. I was interested in this picture here of some of these homes that you say people occupy shown in Exhibit 52. I am calling your attention now to page 1 of Exhibit 52.

At the top of the page you say "Home of George Paulos, Machinist. 13½ years service."

Does he have 13½ years' seniority? Is that what you mean by "service"?

A. In general, yes. There may be, in some instances, a break in that service; but that is what the term "service" here implies.

Q. You do mean seniority or you don't mean seniority?

A. It means seniority.

Q. All right.

You want this tribunal to believe that that man, with 13½ years of service, will be out of a job because of this diversion? Is that the effect of this exhibit that you mean to convey?

[fol. 1871] A. That is the fact, yes. If the traffic diversion reaches the proportions of the potential traffic diversion, Mr. Paulos will certainly be out of a job.

Q. I see.

What is his seniority up there. What is his place on the machinists' seniority?

A. I can't tell you that without having the seniority roster here, but he is within such range of the bottom of the list that if a number of machinists, calculated by Mr. Hanson, are released, Mr. Paulos will be out.

Q. And you are positive that is 13½ years' seniority?

A. Yes.

Q. Where did you get the figure on the seniority?

A. That figure is from the seniority roster.

Q. Where is it? Do you have it available?

A. I haven't got it here, but I certainly can check it.

Q. Can you produce it in the morning?

Exam. Mullen: What is the purpose?

Mr. Hill: I don't believe this could be true under any circumstance, and I would like to see how they arrived at this figure.

Exam. Mullen: You dispute the fact that he has 13½ years' service?

Mr. Hill: No. I dispute the fact that any man with that number of years of seniority could be cut off by any con-[fol. 1872] ceivable diversion of traffic in Green River.

Exam. Mullen: Don't you think you have pursued that enough?

Mr. Hill: I would like to have the seniority list.

Exam. Mullen: I don't believe that will be necessary.

Mr. Hill: One difficulty of permitting these exhibit- to go in is that you have to go so far afield to try to prove or disprove them.

That is all.

Exam. Mullen: Anything on redirect?

Mr. Greene: I have just one or two questions.

Redirect examination.

By Mr. Greene:

Q. Mr. Oliver, Mr. Quirk asked you about the revenue increases and gross revenue of the Union Pacific.

A. Yes.

Q. Could you in any way use the gross revenues of the Union Pacific in computing the effect of this unemployment situation?

A. No, it would have no relation whatsoever.

Q. It would reflect, of course, increases in rates and things of that kind, would it?

A. Yes.

Mr. Greene: That is all. Thank you.

Exam. Mullen: Witness excused.

(Witness excused.)

Mr. Greene: May I defer at this time to the city attorney, who has a witness to put on?

[fol. 1873] Exam. Mullen: Yes, sir.

Mr. Guy: Mr. Examiner, I would like to call Mr. Nelson, mayor of Cheyenne, please.

Ben Nelson was sworn and testified as follows:

Direct examination.

By Mr. Guy:

Q. Will you state your name?

A. Ben Nelson.

Q. Where do you live, Mr. Nelson?

A. 3043 Snyder, Cheyenne, Wyoming.

Q. What official position do you hold, if any, in the city of Cheyenne?

A. Mayor of Cheyenne.

Q. When were you first elected mayor?

A. 1947.

Q. Have you since been re-elected mayor?

A. Yes, sir; in '49.

Q. Have you prepared a statement which you desire to introduce in the record in this case?

A. I have.

Mr. Guy: I now ask permission of the Examiner for the witness to read the statement.

Exam. Mullen: Go ahead.

The Witnes: I am the mayor of the city of Cheyenne and am authorized by official action of the Cheyenne city council [fol. 1874] to appear in this proceeding.

I live at Cheyenne, Wyoming, and have lived here since 1934. I am 33 years of age. I am married and have two children. My wife is a native of Cheyenne.

I am an employee of the Union Pacific Railroad on leave of absence. I am a member of the Railroad Trainmen Local No. 288.

I entered the service of the Union Pacific at Cheyenne in August, 1936, as a brakeman and have been in the service of the Union Pacific since that time subject to the leaves of absence hereafter noted.

In 1940 I was granted leave of absence for military duty and was in such service for five years. I became a pilot in the air corps and at the termination of my service had the rank of captain. I am *not* a pilot with the rank of major in the air unit of the Wyoming National Guard at Cheyenne.

I returned to Union Pacific service in 1946.

I was elected mayor of Cheyenne in 1947. I attempted to continue with my duties as a Union Pacific trainman while acting as mayor. I found, however, that my duties as mayor took too much of my time to permit this. After my first term I was therefore granted leave of absence from the Union Pacific.

I was again elected mayor in 1949 and am serving my second term. I am a member of various veterans, fraternal and community organizations.

My employment by the Union Pacific, my experience as [fol. 1875] mayor of Cheyenne, my wide acquaintance in

the city and my other activities in the community have resulted in my having extensive knowledge of governmental, business and living conditions in this community. In particular, I know the relationship which has developed and exists between the city of Cheyenne and the Union Pacific Railroad and the importance of the railroad to this community.

It is a matter of common knowledge that Cheyenne was established as a division point on the railroad when the line of the Union Pacific had been built as far west as this point. It has been an important division point on the railroad ever since.

Trainmen and enginemen operating east over the Nebraska Division, and trainmen west over the Wyoming Division have their headquarters here. The Wyoming Division superintendent with his staff and office force are located here. The Division mechanical officer with his staff and office force are also headquartered here. From time to time a general superintendent with wider jurisdiction has had headquarters here. This is true at the present time. There is also a Division traffic office here. There are large mechanical and general shop facilities in Cheyenne. The maintenance and repair of locomotives has particular importance here because of the heavy grade west of Cheyenne.

On the average, there are approximately 3,000 Union Pa- [fol. 1876] cific employees living at Cheyenne. These employees with their dependents would exceed 10,000 persons who are dependent on the Union Pacific at Cheyenne. The total estimated population of the city at present is about 35,000. A similar situation has existed during all of the time that I have lived in Cheyenne. It is common knowledge that this has been true throughout the history of the city.

Many of the employees of the Union Pacific who live here are long-time residents of Cheyenne. Their families have been born and brought up here. Some members of the second generation are now employed by the railroad. As a result, Union Pacific employees are established here and are valued and loyal citizens.

As a specific illustration of this condition which exists here, I, a Union Pacific employee, am now the mayor of the

city. One of the two other elected officials at the present time is Mr. Edward Gowdy, commissioner of finance, who is a long-time employee of the Union Pacific and citizen of Cheyenne, recently retired from the railroad. Mr. Gowdy's immediate predecessor, Mr. Leo Waters, is a Union Pacific employee. Mr. A. W. Trout, the other city commissioner, is also a former Union Pacific employee.

As a further illustration of the importance of the Union Pacific to Cheyenne, at the present time the Union Pacific pays approximately one-sixth of all taxes paid in Cheyenne, [fol. 1877] in School District No. 1, which is the Cheyenne school district, and in Laramie County, of which Cheyenne is the county seat.

There are few industrial organizations in Cheyenne. The Union Pacific is the biggest. It has been the leading industry and largest employer in Cheyenne throughout Cheyenne's history.

Anything which decreases employment on the Union Pacific is immediately felt throughout the city. Businesses, banks and professional offices are affected. This is true, for examples, when seasonal layoffs occur.

Anything which would result in a permanent decrease of Union Pacific employment in Cheyenne would, in my opinion, have a permanently depressing effect in the community.

The obvious purpose of the Rio Grande in this proceeding is to divert to the Rio Grande traffic originating or terminating in Idaho and the Northwest on the lines of the Union Pacific and now moving across Wyoming. Any substantial diversion of such traffic would result in a decrease of Union Pacific employment in Wyoming and in Cheyenne.

Such a result would be especially hard on Cheyenne because of the high percentage of our population dependent on Union Pacific employment.

Our municipal, school and business facilities have been built up in large measure to meet the requirements of the Union Pacific and its employees.

At the present time there are approximately $1,900,000 of [fol. 1878] school bonds outstanding.

Investments in municipal facilities such as municipal buildings, street improvements, and sewers, are not set up in the form of a property value statement, but there are

approximately $462,000 of city general obligation bonds outstanding. A sewer disposal plant bond issue of approximately $1,100,000 of revenue bonds is pending.

Investment in city water facilities exceeds $6,400,000. There are approximately $210,000 of water bonds outstanding, but an issue of approximately $1,900,000 of water bonds for necessary improvements is under immediate consideration.

Current bank deposits in the two Cheyenne banks total approximately $45,000,000.

Any permanent substantial decrease in the Union Pacific employment at Cheyenne will, in my opinion, have a material adverse effect upon business conditions and property values and upon outstanding public indebtedness in the community.

I hardly need comment upon the effect of displacement of any Union Pacific employees in the community. It would be difficult for Union Pacific employees who may lose their jobs to find other employment there. Workers who have established themselves in a community do not like to move away, especially if it becomes necessary to sell their homes. I know this from my personal point of view. In addition to sentimental reasons there are reasons of financial expense and loss involved in such moves.

[fol. 1879] If loss of traffic on the Union Pacific should result in a decrease of our freight trains per day each way, and decrease in employment of over 280 employees at Cheyenne, as I understand was estimated by previous witnesses in this proceeding, the adverse effect on the Cheyenne community would, in my opinion, be very great. Such number of displaced Union Pacific employees might well affect, with their families, as many as 1,000 residents of Cheyenne. The adverse effect of any such result is obvious.

For the foregoing reasons the city of Cheyenne is opposed to the granting of the relief sought by the Rio Grande in this proceeding.

Mr. Guy: You may cross examine.

Cross examination.

By Mr. Quirk:

Q. Mr. Nelson, Cheyenne is a town with a lot of enterprise, is it not?

A. Yes, sir.

Q. A lot of "push"?

A. Yes, sir.

Q. And it has been growing in recent years, has it not?

A. Yes, sir.

Q. Now, the Union Pacific, I suppose, gives Cheyenne good service, good transportation service?

A. Very good, sir.

[fol. 1880] Q. And have they been giving the citizens of Cheyenne, the shippers and others, good service for the past five years or more?

A. To the best of my knowledge; yes, sir.

Q. Now, you are basing your fears and views on information given you largely by the Union Pacific officials, are you not?

A. No, sir; I am not.

Q. Did they tell you that in 1946 the gross revenues of the Union Pacific were 130 million dollars less than the year before?

A. No, sir; they did not.

Q. You didn't close up here then, did you, in 1946?

A. No, sir; we didn't close.

Q. Don't you know that that is many times more than could possibly be involved here? Or do you know that?

A. The only thing I know, in this particular case, is that any loss of particular freight to another railroad that is already going through on the Union Pacific would be a loss to Cheyenne.

Q. Well, but you have already admitted that you were not conscious of any bad effect on Cheyenne in 1946 compared with 1945.

Now, did you know that in 1949 the Union Pacific had a gross revenue falling off, compared with 1948, of 38 million dollars? You didn't know that?

[fol. 1881] A. No, sir.

Q. If 38 million dollars' loss of revenue or 130 million

dollars didn't affect you, what makes you think the diversion that might possibly happen here could affect Cheyenne in a noticeable degree?

A. The effects on the Union Pacific in losing their money does not necessarily, from my information, affect the city of Cheyenne.

Q. Well, you just got through saying it might, the way I understand you.

A. On this diversion, yes, sir—loss in freight. How they lose their money is definitely not my concern.

Q. Well, but you have admitted that you are not conscious of any decline in service or less service or more satisfactory relations with the Union Pacific in 1946 than in 1945.

You weren't even conscious of that, were you?

A. Any acts of God or anything that may take effect to drop business from the East or the West is something that we have always withstood in Cheyenne.

Q. Well, I don't doubt that. We try to withstand them in other places, too. But what I am getting at, Mr. Nelson, is that you seem to be very much concerned about what might happen here; but when something much greater than that happened—twice at least in the last 15 years—you were not even conscious of it.

[fol. 1882] A. I am conscious of it from the standpoint of the personal effect on me as well as the effect on the business people in the city of Cheyenne.

Mr. Quirk: All right. Thank you.

Mr. Hill: No questions.

Exam. Mullen: Any redirect?

Mr. Guy: No redirect. I think that is all.

Exam. Mullen: That is all, Mr. Nelson. Thank you.

(Witness excused.)

Mr. Greene: Mr. Cahill.

MARTIN CAHILL was sworn and testified as follows:

Direct Examination.

By Mr. Greene:

Q. Would you state your name?

A. Martin Cahill.

Q. And have you prepared a statement that you would like to read into the record in this proceeding?

A. It is a very brief one.

Q. You are appearing here on behalf of what organization?

A. On behalf of all of the workers of the State of Wyoming.

Q. I see. What organization represents them through you?

Exam. Mullen: What organization are you president of, in other words.

The Witness: The Wyoming State Federation of Labor.

By Mr. Greene:

Q. Now, if you will, read your statement.

[fol. 1883] A. I am president of the Wyoming State Federation of Labor. My home and headquarters are at Cheyenne. I have lived in Wyoming since 1907. I have been president of the Wyoming State Federation of Labor since 1934.

The Wyoming State Federation of Labor is chartered by the American Federation of Labor. It represents approximately 6,000 employees in the State of Wyoming, exclusive of members who are employed by the Union Pacific Railroad Company and are represented by specific railroad unions in this proceeding.

I constantly travel around the State of Wyoming and come in contact with laboring people in the state and I know about employment and living conditions in Wyoming, including the southern part of the state through which the Union Pacific Railroad runs.

The Union Pacific Railroad, including its coal mining interests, constitutes the principal industrial organization in the southern tier of Wyoming counties, and it has occupied

that position throughout the history of the state.

Wyoming is a sparsely settled state. It has about 275,000 inhabitants and about 100,000 square miles. Aside from the ranches and farms, in Wyoming there are few important industries. The Union Pacific is one of the important industries, and it is a large employer of skilled labor.

Anything which affects Union Pacific employment and Union Pacific payrolls immediately affects business and [fol. 1884] working conditions in the towns and cities through which the Union Pacific runs.

If this proceeding results in diversion of traffic from the Union Pacific, it would undoubtedly cause decreased employment on the railroad and in the Union Pacific mines.

Union Pacific witnesses have testified in this proceeding that such a diversion of traffic would result in a loss of four trains per day in each direction through Wyoming, and that this would result in loss of employment by 478 railroad employees earning annually wages of nearly $2,000,000 and loss of employment by 260 miners earning over $1,250,000 a year.

Such loss of employment on the railroad and in the Union Pacific mines, and such loss of payroll in the cities and towns involved would seriously affect business along the Union Pacific and would undoubtedly result in unemployment of many of the members of the Wyoming State Federation of Labor that I represent here, as well as professional and business men with homes and families in those cities and towns.

Many of the workers along the Union Pacific, both those on the railroad and in the Union Pacific mines, and other workers, own their own homes and have raised their families in the cities and towns where they live and may be considered permanent residents. Displacement of these employees is a serious thing to them. It not only requires [fol. 1885] them to find new jobs, which are difficult to find in Wyoming, but, if they have to move away, it results in losses in moving and in buying and selling property and in other ways.

These workers should not be subjected to displacement in this way except for a very good cause. These workers have assisted in maintaining the towns and cities and the

businesses along the Union Pacific which are necessary to serve the Union Pacific and its employees.

It is our contention that it is against the public interest to displace them in the process of taking business away from a well-established and well-operated railroad in order to give a part of that company's business to another railroad. Such a process will discourage workers from establishing themselves in communities where they are required by a railroad establishment such as the Union Pacific.

I wish to protest the granting of the petition of the Rio Grande in behalf of the workers whom I represent.

By Mr. Greene:

Q. Have you any other comments you desire to make?

A. Well, I want to say that I have no interest in the Union Pacific. I am not working for them. I have lived and stayed here for 43 years. I know many of the professional and business men all along the U. P.; and I know, when I visited those towns in the last two or three months, when this problem first got into the papers they said, "My God, what are you going to do about the Rio Grande," the [fol. 1886] petitioners?

They are going to leave a lot of ghost towns along the U. P. I know they are going to throw a lot of men out of work, and I know they will have to leave the state to find other locations. I am entirely in sympathy with this problem.

Cross-examination.

By Mr. Quirk:

Q. What you know about this has been told you by the Union Pacific, hasn't it?

A. Just what I stated, Mister.

Q. I mean you have not made any separate, independent investigation, have you?

A. No, sir; except with my daily acquaintance with the business men and professional men along the U. P.

Mr. Quirk: That is all.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

Mr. Greene: Mr. Martin.

HOUSTON MARTIN was sworn and testified as follows:

Direct examination.

By Mr. Greene:

Q. Will you state your name?

A. My name is Houston Martin.

Q. Have you prepared a statement which covers the organization you are appearing for here?

A. I have.

[fol. 1887] Q. Would you proceed to read the statement, Mr. Martin?

Mr. Quirk: Mr. Examiner, I glanced at this. It seems to me to be more or less like the other. I am perfectly willing to have it copied into the record without it being read.

Mr. Greene: I am agreeable to that procedure.

The Witness: I am president of District No. 22 of the United Mine Workers of America, which represents the coal miners of Wyoming. I live at Rock Springs, which is also my headquarters. District No. 22 has approximately 4,000 united mine workers in Wyoming. I have lived in Wyoming since 1920. I am familar with employment conditions in the coal mines in Wyoming and with living conditions of coal miners in this state. I have been a member of the legislature of the State of Wyoming.

As I understand this proceeding, the granting of the through rates which the Rio Grande asks would result in the diversion of traffic now moving over the Union Pacific through Wyoming to the lines of the Rio Grande.

I understand there has been testimony that the potential amount of traffic which might be solicited by the Rio Grande from the Union Pacific amounts to over 150,000 cars a year. I understand that Union Pacific witnesses have testified

that this might affect the jobs of over 500 railroad workers earning over $2,000,000 a year and over 250 Union Pacific coal miners, which I consider a very conservative estimate. [fol. 1888] Also, in my judgment, it will reduce the work time of the remaining employees.

Wyoming is a sparsely settled state and there are not many big industries in it. But the Union Pacific and its coal mines have always been a big Wyoming industry, with special importance in southern Wyoming. Anything that affects Union Pacific railroad and mine jobs is of great importance to Wyoming and especially the towns along the Union Pacific and, above all, Rock Springs.

My chief interest is, of course, in the miners but I am interested in rail workers, too, and in all branches of labor.

Anything which affects Union Pacific railroad employees and Union Pacific miners affe-ts other employees in southern Wyoming. I know that many Union Pacific railroad workers and Union Pacific miners and other workers dependent upon Union Pacific employment own their own homes and have raised their families in the cities and towns where they live and want to remain there.

Displacement of workers by loss of jobs is a serious thing because it is difficult for them to find other work, and this is very important in Wyoming because there are fewer other jobs than there are in other areas where there is more industry.

Displacement also may mean moving costs and selling property and buying property and hurts the workers in various other ways. Workers and their families do not like to be pushed out of their homes and away from the [fol. 1889] place where they have established themselves and their families.

It is our contention that it is not good public policy to displace workers except for good reasons. We do not believe that workers who have established themselves in this sparsely settled state of Wyoming to run the railroad and the railroad mines, and to carry on the other work and businesses upon which the railroad and its workers depend, should lose their jobs because of diversion of railroad traffic.

Everybody in Wyoming knows that the Union Pacific

is doing a good job of transportation. We do not see any good reason for taking the traffic away from the Union Pacific and giving it to another railroad.

The Union Pacific has built up its railroad and developed its transportation customers. We do not believe it should now be deprived of the benefits of its work. Our real reason for objecting is, of course, that the result of diverting this traffic is to deprive our workers of their jobs and to displace them from the places where they have established themselves.

In behalf of the workers that I represent and all workers who will be affected, I wish to protest the application of the Rio Grande for the through rates which would have these results.

Exam. Mullen: Do you desire to cross examine?

Mr. Quirk: No.

[fol. 1890] Exam. Mullen: That is all, then. Mr. Martin.

(Witness excused.)

Mr. Greene: Mr. Morgan.

JAMES MORGAN was sworn and testified as follows:

Direct examination.

By Mr. Greene:

Q. Would you state your name, please?

A. My name is James Morgan.

Q. Do you hold a position with the United Mine Workers?

A. I am regional director of District No. 50, United Mine Workers of America.

Q. And you, as such, have prepared a statement for presentation to the Interstate Commerce Commission in this proceeding?

A. I have, sir.

Mr. Quirk: As far as I am concerned, this statement can be copied in the record as though read without the witness actually reading it, if that is agreeable, Mr. Greene.

Exam. Mullen: Is that agreeable, Mr. Greene?

Mr. Greene: That is agreeable to me if it is to the witness. Is that agreeable to you, Mr. Morgan?

The Witness: Yes.

Exam. Mullen: That will be copied in the record and will be considered as if you had read it in the testimony.

The Witness: I am regional director of the United Mine Workers of America, District No. 50, which has about 300 [fol. 1891] members in Wyoming. I live and have my headquarters in Cheyenne. District No. 50 represents trona mine workers in Wyoming and workers in other crafts but not coal mine workers.

I travel about the state in connection with my duties and I know the conditions of mine employment and the living conditions of mine workers as well as the workers I represent and labor generally in the state. I have for many years been familiar with coal mines and coal miners as well as with miners I represent.

It is my understanding that the effect of granting the through rates which the Rio Grande is asking in this proceeding would be to divert the traffic from the Union Pacific lines through Wyoming to the lines of the Rio Grande.

I understand, from testimony of the Union Pacific witnesses, that as many as 260 or more Union Pacific coal miners and over 475 rail workers in Wyoming might lose their jobs as the result. While this does not directly affect the workers whom I represent, my interest is with labor generally and we all know that the Union Pacific is one of the few important industrial organizations in Wyoming and that anything which affects employment on the railroad and in its mines indirectly affects every one else in Wyoming including the workers I represent, particularly in the southern counties.

Displacement of workers is a very bad thing. Many workers in Wyoming have established themselves and their [fol. 1892] families in the towns and cities where they live and they do not like to be uprooted. It is hard for them to find other jobs, particularly where there are few other jobs as there are in Wyoming. It is also expensive to be displaced.

It is the contention of the workers whom I represent that traffic moving over the Union Pacific, which is doing a good

railroad job, should not be diverted to another railroad without good cause. We do not believe that any good cause for such diversion exists here. The Union Pacific has developed the traffic which it is carrying, and it and its workers, and other workers dependent upon their efforts, should be permitted to continue with their jobs in Wyoming.

(Witness excused.)

Exam. Mullen: Off the record.

(Discussion off the record.)

Exam. Mullen: On the record.

Mr. Purvis: Speaking for the Idaho Public Utilities Commission, Mr. Examiner, in its petition of intervention in this proceeding the Idaho commission indicated that during the course of these hearings it would be able to state its position.

Unfortunately, and due to circumstances beyond their control, each of the commissioners were not able to be present during all of the hearings. As a result, the commissioners are not entirely familiar with the testimony of the [fol. 1893] individual witnesses.

Due to these circumstances, the Commission has asked me to request of you permission for the Idaho Commission to state its position on brief. If this permission is granted it will enable each of the Idaho commissioners to make a detailed study and analysis of the testimony of the witnesses on both sides.

We hope counsel for the complainant and for the defendants will acquiesce.

Mr. Quirk: We have no objection.

Exam. Mullen: Any objection from you, Mr. Collins?

Mr. Collins: No, none here.

Exam. Mullen: That may be done, Mr. Purvis.

Mr. Purvis: Thank you, sir.

Exam. Mullen: We will now adjourn until 9 o'clock tomorrow morning.

(Whereupon, at 5:00 p.m., the hearing in the above matter was recessed, to reconvene at 9 o'clock a.m., Tuesday, April 18, 1950.)

[fols. 1894-1895] BEFORE THE INTERSTATE COMMERCE COMMISSION

[Title omitted]

Transcript of Proceedings—Cheyenne, Wyoming, April 18, 1950.

Met, pursuant to adjournment, at 9:00 o'clock a. m.

Before: Frank E. Mullen, Examiner.

APPEARANCES: (As heretofore noted.)

[fol. 1896] PROCEEDINGS

Exam. Mullen: We are ready to proceed, gentlemen.

Mr. Hill: Mr. Examiner.

Exam. Mullen: Mr. Hill.

Mr. Hill: I would like identified or numbered an exhibit which was to be prepared by Mr. Chipman yesterday, and have it stipulated that this exhibit is the exhibit to which the witness, A. J. Chipman, referred to in his testimony yesterday at this hearing.

Exam. Mullen: Is that the one that was to be furnished after the hearing?

Mr. Hill: Yes.

Exam. Mullen: We will give it number 55.

(Complainant's Exhibit No. 55, Counsel Hill, marked for identification.)

Exam. Mullen: Is this offered in evidence?

Mr. Hill: Yes, I would like to offer it in evidence.

Exam. Mullen: Any objection?

Mr. Greene: I have no objection.

Exam. Mullen: It will be received in evidence.

(Complainant's Exhibit No. 55, Counsel Hill, received in evidence.)

Mr. Hill: We are ready to proceed. I understand we are to go ahead with our witnesses.

Exam. Mullen: Proceed.

Mr. Hill: Mr. Warner.

[fol. 1897] E. W. Warner was sworn and testified as follows:

Direct examination.

By Mr. Hill:

Q. State your name.
A. My name is E. W. Warner.

Exam. Mullen: I cannot hear you, sir.
The Witness: E. W. Warner.

By Mr. Hill:

Q. Where do you reside, Mr. Warner?
A. My office is 721 Ernest and Cranmer Building, Denver, Colorado.
Q. What is your present position, Mr. Warner?
A. I'm presently General Chairman of the Brotherhood Railway Carmen of America on the Denver and Rio Grande Western Pacific Railroads.
Q. How long have you held that position?
A. Ten years.
Q. And prior to that time, what was your position?
A. I worked as a carman at the trade on various railroads throughout the country. I believe you interrupted me.
Q. Excuse me.
A. I had not gotten clear through what I represented.

Exam. Mullen: Mr. Warner, would you mind raising your voice? It is very difficult to hear you.
The Witness: All right sir.
I'm also Secretary Treasurer of System Federation No. 10, which represents the seven so-called shop crafts on the [fol. 1898] Rio Grande Railroad.

By Mr. Hill:

Q. How long have you had that position?
A. Six years.
Q. And in connection with your positions, have you become familiar with the D&RG System?
A. I have.

Q. In this proceeding, for whom are you appearing?

A. The seven so-called shop carfts.

Q. Can you name those crafts?

A. The International Association of Machinists; the International Brotherhood of Boiler Makers; Iron Shipbuilders and Helpers of America; International Brotherhood of Blacksmiths; Drop Forgers and Helpers; Sheet Metal Workers International Association; the Brotherhood of Electrical Workers; the Brotherhood of Railway Carmen of America; and the International Brotherhood of Firemen and Oilers on the Rio Grande.

Q. And your representation is restricted to those organizations on the Rio Grande?

A. That is right.

Q. Are you acquainted somewhat with the Union Pacific System, the Defendant in this case?

A. In a general way, yes.

Q. Do you know the locations of its rails and the areas served by it?

A. In a general way, yes.

[fol. 1899] Q. In regard to your crafts, how is seniority handled on the Rio Grande?

A. We generally have so-called point seniority. It varies in some few instances where outlying points are under a point.

Q. To give an example, would that mean that a mechanic working in Denver could transfer to Salt Lake City for the same work?

A. It does not.

Q. In other words, he is restricted in his employment to a point, is that it?

A. That is right.

Q. Are you familiar, generally, with the volume of freight traffic that has been handled by the D&RG system?

A. Yes, sir.

Q. And does that familiarity extend over the period of your holding your present position?

A. Yes, sir.

Mr. Hill: May we have this exhibit identified?

Exam. Mullen: Number 56.

(Complainant Exhibit No. 56 marked for identification.)

By Mr. Hill:

Q. Mr. Warner, will you identify Exhibit No. 56 in this proceeding?

A. This is a statement of the average number of employees on the D&RG Railroad as taken from the monthly report of the company for the various groups, part of which I represent. I want to talk briefly about Group No. 4, which is the so-called Shop Groups. It generally reflects [fol. 1900] the employment situation in 1937 which was 3,212 employees in that group. For the various years to and including 1949, and I want to call your attention that gradually of course that employment situation increased up to the year of 1946, which then saw a considerable decline. I want to call your attention to one thing that occurred in 1947 that irrespective of that is not reflected in the figures here. The Denver and Rio Grande Western Railroad, and the Denver and Salt Lake Railroad merged and/or consolidated their services and facilities at Denver, and the employees that we took over from the Denver and Salt Lake were merged into the various seniority rosters of the Denver and Rio Grande and their total figures are reflected in this 1947 figure. Were it not for the fact that we had taken those employees over, of course, our figure for that year and the following years would have been considerably less than they are.

Q. Can you give the date of that consolidation?

A. It was in April of 1947.

Q. And can you tell approximately how many employees on the D&SL were merged with the other groups in the D&RGW?

A. There were somewhere in the neighborhood, I believe, of 75 employees of all classes.

Q. About how many in your class of Group 4?

A. Approximately 175.

[fol. 1901] Q. And would that additional force, added through the consolidation, be proportionately carried through in 1948 and 1949?

A. That is right. They are reflected in those figures. I might say in addition to that it reflects that at the present time in the group that we represent we must have something

in the neighborhood of a little better than a thousand employees furloughed on the Denver and Rio Grande.

Q. Now you're speaking of your group?

A. Of my group only.

Q. And those furloughed men would be proportionately over the entire system, would they, or not?

A. Yes.

Q. Are you acquainted with the skills of the men represented by you, the crafts represented by you here?

A. Yes, sir.

Q. Can you, in your opinion, state whether or not these men would have the capacity so far as their employment was concerned to handle any additional traffic which might be derived through this diversion, were it effected?

A. I'm sure those we have furloughed and those we have employed could take care of any additional business we might secure from any source.

Q. Have you any examples or illustrations of taking care of additional business which might be commensurate, not necessarily commensurate, but illustrative as to the point. [fol. 1902] Exam. Mullen: You mean as to skill? Technical skills?

Mr. Hill: Yes.

Exam. Mullen: I think that will be admitted.

Mr. Hill: I see. All right.

By Mr. Hill:

Q. Now, were you present here yesterday during the testimony of the witness Oliver?

A. I was.

Q. Calling your attention to his Exhibit 45, page 8, have you any knowledge of any circumstances existing as of January 1, 1950, which might reflect on the integrity of those figures as indicating a general circumstance?

Mr. Greene: I think that could be answered yes or no.

The Witness: I can say yes, in this respect, that it seems to me this exhibit and others probably tend to reflect certain figures that without understanding the background of what occurred at those points doesn't mean anything. For instance, it shows that in the mechanical department, the

group which I represent, there were five employees where claims for compensation were filed with the Compensation Board. That doesn't seem excessive to me for a railroad of this size. I think at that time, with the small railroad we had, there were many, many more than that for a while. In addition to that, Mr. Oliver didn't say, but I'm sure he didn't make a breakdown of the figures of the Retirement Board, it is customary when employees retire under the Railroad Retirement Act they will take their sickness and [fol. 1903] unemployment benefits for a period of time before they are retired, and that might be reflected, I presume it is, in these figures.

By Mr. Hill:

Q. Is there any other circumstance existing in January 1, 1950, which might make these figures erroneous in the picture here?

A. Well, yes. At that time, the country, everyone knows, was in quite distress over the coal mining situation, and unemployment was general throughout the country. The steel organizations were having difficulties with their managements, and I think business in general was in trouble.

Q. Now, Mr. Warner, calling your attention now to Exhibit No. 52 by the Union Pacific employees, presented yesterday by Mr. Oliver, and particularly to the machinist, George Paulson, mentioned at the top of the page, mentioned on the first page of the exhibit, can you give possible explanations of the illustration here of 13½ years of service and being deprived—the inference being he would be deprived of a job by diversion here.

Mr. Greene: I am going to object to that, Mr. Examiner. I think it would be pure speculation and guess by this witness.

Exam. Mullen: Do you know anything about this particular man, Mr. Paulson, Mr. Witness?

The Witness: Not about this particular man, but I think I can point out instances.

Exam. Mullen: That question was directed to that par-
[fol. 1904] ticular person. Mr. Hill, this witness is not informed about that.

Mr. Hill: I might suggest apparently the witness yesterday wasn't either, but then I will reframe my question.

Exam. Mullen: Okay.

By Mr. Hill:

Q. Are there situations where a man with 13½ years' service may be the man first cut off on a seniority roster?

A. Yes, very definitely.

Q. How do those arise?

A. In the first place I want to say something about the word "service." "Service" does not necessarily mean seniority. Mr. Oliver has used the word service, and I presume he does mean seniority all the way through here, but a man could conceivably have 13½ years' service and only have six months' seniority which would place him on the bottom of the seniority roster. In addition to that it is not unusual for an employee to have 13½ years' service and be furloughed, if you understood the situations at that particular point. For instance, *may there* had been a lot of employees hired under him during the 13½ years, but recently they had a force reduction which would lay off practically all the men under him, and they didn't return to work, and as a result he would be on the bottom of the roster, or nearly so.

By Mr. Hill:

Q. Let me ask you this: suppose the Union Pacific would transfer its mechanical department, or part of it, from one [fol. 1905] point on their line to another, what effect does that have on the seniority list and the right to service?

A. Now the employee——

Mr. Greene: Again, I am going to have to object unless the witness is qualified to show what the situation is on the Union Pacific.

Exam. Mullen: What is the purpose of this testimony?

Mr. Hill: The purpose is to show so many factors enter into the question of who is to be cut off and who isn't to be cut off, without going into each case there is no conclusion which can legitimately be drawn from the evidence.

Exam. Mullen: You seek to establish there are various causes which lead to men being let off?

Mr. Hill: Various causes.

Exam. Mullen: Furloughed?

Mr. Hill: Which are not reflected merely in the statement of service.

Exam. Mullen: I think Mr. Greene will concede that, won't you?

Mr. Greene: Yes.

Exam. Mullen: Mr. Greene will concede that. That is conceded.

By Mr. Hill:

Q. Then will you state in your opinion what the effect would be on the present Union Pacific employees' jobs in your craft of the diversion if it were accomplished through this proceeding?

[fol. 1906] A. I seriously doubt if there would be any adverse effect.

Q. Why do you say that?

A. Well, for the simple reason that I'm sure the Rio Grande would aggressively put solicitors in that district that might secure additional business for even the Union Pacific that has been going by other means of transportation; or they might induce industry to locate along either one of the two properties with outlets in the other district that would increase business. Healthy competition is good, I think; for any industry.

Mr. Hill: You may inquire.

Cross-examination.

By Mr. Greene:

Q. Mr. Warner, if a Union Pacific man were furloughed because of the diversion of traffic to the D&RG, and sought employment in one of your crafts with the D&RG, where would he go on your seniority list?

A. As any new employee, on the bottom of the roster.

Q. So that in the case of any U. P. man in the shop crafts who might be displaced, there would be a thousand D&RG furloughed employees who would have priority in those crafts before a U. P. man could get a job on the D&RG?

A. System-wide that is true.

Q. Now calling your attention to Exhibit No. 56——

A. Mr. Greene, I didn't get all of the exhibits of Mr. Oliver's yesterday.

Q. This is your exhibit.

A. I see. Pardon me.

[fol. 1907] Q. Now can you explain why, in 1938, there was a reduction in the shop crafts of almost 900 people?

A. I think so, there was a general retrenchment in 1937 and 1938 which brought about a reduction in maintenance of equipment on all railroads.

Q. As a matter of fact, the reduction only shows in two classes. One is maintenance of way, and the other is maintenance of equipment.

A. That is right. It didn't reflect in the transportation, probably, but they had gotten their equipment up in shape and the forces were reduced.

Q. Isn't it a fact the cause, in 1938, of that reduction, was because the D&RG converted to diesel-operated equipment?

A. No, sir, we didn't get diesels until long after that.

Q. Then would it be your statement this reduction in 1938 is nothing more than a normal fluctuation in the shop crafts on the D&RG?

A. It's not any more unusual on the D&RG than any other railroad in the United States.

Q. I say it is nothing more than the normal fluctuation in the shop crafts between 1937 and 1938?

A. I don't think it is normal. I think the figures bear that out, it is not normal. At least over the last ten years it has not been normal.

Q. Let's put it this way. It happened in the ordinary [fol. 1908] course of business. There wasn't anything unusual that happened at that time that caused this particular reduction?

A. Yes, there was.

Q. What was it?

A. The maintenance of equipment departments had concluded a considerably large building program that was temporarily discontinued until they could get some more started. I think that was the reason for it.

Q. Doesn't that occur regularly on the D&RG?

A. Not regularly, no. It occurs on any railroad, occasionally.

Q. Now when did the conversion to diesel equipment take place on the D&RG?

A. I can't give you the exact dates. Approximately, I think, about 1942 or 1943.

Q. Well, was that reflected by a reduction in the number of men employed in the shop crafts?

A. No, I don't think we had any reductions.

Q. For instance, the elimination of boiler makers, and things of that kind?

A. Sir?

Q. The elimination of boiler makers, boiler apprentices, boiler washers?

A. Not at the outset, because at that time we were in the war period, and we were still using our steam locomotives to the extent that we needed that particular class of employee.

[fol. 1909] Q. Then I take it these thousand employees that you say are now furloughed in the shop craft represent men who had been furloughed because when you quite using the steam equipment, when the drop in traffic came after the war, that you no longer had any use for the boiler men and apprentices that you had when you were using the steam equipment?

A. Some of it of course is due to that fact.

Q. Now, of course you have no information as to the cause of the compensation claims shown on Mr. Oliver's Exhibit 45, page 9.

A. You say I have no knowledge?

Q. You have no actual knowledge?

A. I have never secured these figures from the Retirement Board, no, sir.

Q. Do you have any similar figures for employees of the D&RG?

A. No, sir.

Q. Now, are you familiar with the petition and intervention filed by the employees of the D&RG?

A. Yes, sir.

Q. I assume you signed that petition, did you not?

A. Yes, sir.

Q. Do you recall the statement in that petition that the D&RG employees felt that the shippers should have the right to determine which route that they use?

A. Very definitely.

[fol. 1910] Q. Now, is any of your shop craft shippers?

A. Sir?

Q. Are any of your shop craft men shippers over the D&RG?

A. I wouldn't know that.

Q. I see. Well, has any shipper requested your union to intervene in this proceeding?

A. I don't think that is true of any union appearing here.

Q. All right, then, if you feel that the shippers are the ones that should determine whether this gateway should be opened, I'm wondering what interest your union has in the matter?

A. I would be glad to explain that to you, Mr. Greene. I think we are very much interested in a good old American principle, that free enterprise——

Q. I'm talking about the shippers, Mr. Warner.

A. You asked me what my interest was.

Q. I asked you what your interest was, if you say the shippers are the ones who should have the right to determine if the gateway should be opened.

Mr. Quirk: Mr. Examiner, I suggest since there is a statutory right given the shippers to route traffic no purpose is being served by this sort of questioning.

Exam. Mullen: Well, it is to test, I suppose, the interests of the D&RG Union in this traffic.

The Witness: I believe that is what he asked me, Your Honor.

[fol. 1911] Mr. Greene: That is correct.

The Witness: That is what I was trying to state.

Exam. Mullen: The question is now directed as to interest of shippers, *ro* what extent are you informed on that?

The Witness: I have no information at all from the shippers.

By Mr. Greepe:

Q. You are not speaking for any shipper in this proceeding?

A. I don't purport to speak for any shipper.

Q. Do you find on the D&RG, as traffic fluctuates generally, the employment in the shop craft fluctuates, is that correct?

A. I worked on three railroads, and I find that is true on all of them.

Q. Yes. Then would you expect, Mr. Warner, that if there is an increase in traffic on the D&RG, by diversion from the Union Pacific, that would cause an increase in the D&RG employment in the shop crafts, that that would cause a reduction in employment in the shop crafts on the Union Pacific which is presently handling that traffic?

A. I think that is true of any railroad.

Q. Then I take it that your position here is that you are hoping to assist in correcting the present unemployment situation in the shop crafts of the D&RG at the expense of the shop crafts of the Union Pacific, is that true?

A. That isn't it at all. We hope to break down an artificial rate discrimination that we believe discriminates [fol. 1912] against us to the benefit of another career, and we hope thereby to be able to get solicitors in that territory which will not only increase the business of the Union Pacific, but that of the Rio Grande as well.

Q. Well, the effect of it, however, will be that if you increase employment in the shop crafts on the D&RG, to reduce the employment in the shop crafts on the Union Pacific would it not?

A. I don't think that is true at all.

Q. Why not?

A. I think we will be able to secure enough additional business in there from other sources, as I said at the outset, to offset any diversion of traffic that we may be able to secure.

Q. Well, from what other sources do you expect to procure this traffic?

A. There must be a lot of other methods of transportation in the northwest territory there.

Q. That is available to you now, is it not? The opening of the gateway won't affect that traffic?

A. That is available to the Union Pacific, but if we can induce the shippers to ship over the Union Pacific, via the Rio Grande, I think both roads would benefit.

Q. Do you mean to make the statement then, that if there is a diversion from the Union Pacific, so that employment is increased in the shop crafts on the D&RG that there will be no effect on the shop crafts of the Union Pacific?

[fol. 1913] A. If the forces on the D&RG are increased only because of a diversion, then I assume there would be some loss of employment; but not nearly to the extent that witnesses have indicated.

Q. Yes. Now, you have read Mr. Farl-y's testimony at Salt Lake City, have you not?

A. I have not.

Q. We will assume for purposes that he estimated a traffic potential of 157,000 cars of traffic that is presently handled by the Union Pacific would open to solicitation for diversion to the D&RG, to the extent that there would be any diversion of that traffic then there would be a loss to the Union Pacific employees, wouldn't there?

A. In the first place, I understand, and I have not read the testimony, but I understand the figure of 157,000 represented the very maximum. In the second place, a reduction in traffic on the Union Pacific, as any other road, would probably be met with a reduction in force.

Q. Now; did you hear Mr. Oliver's testimony yesterday?

A. Yes, sir.

Q. Have you seen a copy of his Exhibit No. 53?

A. Mr. Greene, I got a few of those yesterday, but I gathered up some more around here, and they all aren't numbered.

Q. The exhibit I have reference to is where he showed what he called excess cost of transporting traffic via the D&RG as compared to the Union Pacific.

[fol. 1914] Mr. Quirk: I object to that. This man has not testified about costs.

Exam. Mullen: That is true, but I have not heard the question yet.

By Mr. Greene:

Q. I asked whether he was familiar with the exhibit.

A. I am not.

Q. You heard him testify that the cost of transporting this traffic potential, would result in some $19,000,000 excessive cost if transported via the Union Pacific?

A. I believe I heard those figures.

Q. And he also testified that if that cost were available for employee pay, that it would pay all operating employees of railroads in the United States five days' holidays with pay, did you hear that testimony?

A. I heard that.

Q. Now, would you prefer, Mr. Warner, to have that $19,000,000 spent for transportation costs, or would you prefer to have it available for distribution to the employees of the D&RG for holidays with pay?

Mr. Hill: I object to that. It is wholly immaterial and has no bearing on this case at all.

Exam. Mullen: It strikes me as being immaterial as far as this witness is concerned.

The Witness: I might say this, I didn't know he was [fol. 1915] negotiating with the company. If that is an offer, we will consider it.

Mr. Greene: Did you rule he could answer the question, Mr. Examiner?

Exam. Mullen: He may, if he desires.

The Witness: What was the question?

Mr. Greene: I asked whether you would prefer to have that $19,000,000 spent for transportation costs of this traffic via the D&RG, or whether you would prefer to have it available for distribution of pay to operating employees for holidays with pay?

The Witness: Can you assure me that it will be used for that purpose if I would prefer——

By Mr. Greene:

Q. Could you answer my question?

A. I have no idea on the question at all.

Mr. Greene: That is all.

Mr. Hill: That is all.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

Mr. Hill: I call Mr. McDonald.

R. H. McDonald was sworn and testified as follows:

Mr. Hill: May I ask that Exhibit 56 be admitted into evidence?

Exam: Mullen: *If there is no objection* it will be received in evidence. It is received in evidence.

(Exhibit No. 56 Witness Warner, received in evidence.)

[fol. 1916] Direct examination.

By Mr. Hill:

Q. State your name, please.

A. R. H. McDonald.

Q. What is your residence, Mr. McDonald?

A. Denver, Colorado.

Q. What is your present position, and how long have you occupied it?

A. I'm Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen on the Denver and Rio Grande Western's System. I have held that office for the past eight years.

Q. Do the duties of that position require you to be familar, and are you familiar with the D&RG system?

A. Yes, sir.

Q. And are you acquainted in general with the Union Pacific's system and its location of its rails and areas served?

A. Generally, yes.

Q. Are you acquainted with the services performed on the D&RG system by the employees represented by your committee?

A. Yes, sir.

Mr. Hill: May this exhibit be identified?

Exam. Mullen: Number 57.

(Exhibit No. 57, Witness McDonald, marked for identification.)

By Mr. Hill:

Q. Mr. McDonald, will you identify Exhibit No. 57, which I have just handed you?

[fol. 1917] A. This exhibit shows the brakemen as shown on the seniority list of what is known as the Utah Lines Seniority District List, which covers the territory Grande Junction to Ogden, and branches.

By Mr. Hill:

Q. What does the figure 59, at the bottom of the exhibit represent?

A. That represents men on this seniority district that are furloughed as of April 1, 1950.

Q. Are the brakemen represented by you promoted to conductor on the D&RG system?

A. Yes, sir.

Q. Do you know how many conductors were back serving as brakemen at the time these 59 were cut off?

A. In fact, all men on the Utah Lines that braking now are promoted men, and are eligible for work as conductors.

Q. What does that mean in terms of number of men who might be conductors who are back firing at the time these 59 brakemen were cut off?

A. I didn't get your question, it made reference to firemen?

Exam. Mullen: You said firemen, do you mean brakemen?

Mr. Hill: Excuse me, yes.

By Mr. Hill:

Q. How many conductors would be back braking at the time these 59 brakemen are cut off? If you don't know——

A. On this district there would be approximately 40.

Q. Now were you familiar, Mr. McDonald, with the han-

[fol. 1918] dling of traffic on the D&RGW during the storm in December, 1948, January and February of 1949, which cut off the service on the main line of the Union Pacific through Wyoming?

A. Yes, sir.

Q. Were you also familiar with the traffic handled by the D&RGW during the war years when the Ogden Gateway was partially opened?

A. Yes, sir.

Q. What effect did the partially opening of the Ogden Gateway during the war years have on the employment of brakemen on the D&RGW?

Mr. Collins: Mr. Examiner, I would like to make a correction for the record in that respect. There was no opening of the Ogden Gateway during the war periods. Traffic might have been routed, but it was not an opening in the tariff sense, and this record shows it.

Exam. Mullen: Do you accept that statement?

Mr. Hill: I don't challenge that statement. I don't know.

Mr. Quirk: I do challenge it. That is a matter of argument in this case. The route is there, it is open today, the only thing that is lacking is non-discriminatory rates.

Mr. Collins: There were no changes in tariff publications. The rates were just the same as they are now.

Mr. Hill: I had no idea of challenging that question, or bring it into the question. The point I wanted to make——

[fol. 1919] Exam. Mullen: Then rephrase your question.

Mr. Hill: I will rephrase it, Mr. Examiner.

By Mr. Hill:

Q. Are you familiar with the fact that cars were diverted or operated through the Ogden Gateway during the war years on direction of Kirk, I believe it was, for the railroads?

A. There were cars handled through the Gateway, transferred from the Rio Grande to the Union Pacific, and vice versa during that time, yes.

Q. And what effect did the diversion which did occur, or the transfer through that gateway, have on the number of brakemen employed on the D&RG?

A. To some extent it required——

Exam. Mullen: Just a moment, isn't that covered by Exhibit 56?

Mr. Hill: Not the extent of it.

Exam. Mullen: You have the numbers there?

Mr. Hill: You have the total number, but the point I seek to bring out is not in the exhibit at all.

Exam. Mullen: All right, go ahead.

The Witness: It required the carrier to press in service additional brakemen to handle this business during that period of time, which increased the list of working brakemen on our seniority rosters.

Exam. Mullen: That is because you had an increase in [fol. 1920] traffic, wasn't it?

The Witness: Increased traffic through a source that we had not had advantage of before.

By Mr. Hill:

Q. Will you state, Mr. McDonald, why the people you represent are interested in this proceeding and what their interest is?

A. We are interested in this proceeding primarily in the principle involved, and we might state here it isn't our interest here to try to deprive the Union Pacific employees of work or any such matter, but there is a principle involved here of free enterprise and competition. Now the men that hire out on the Denver and Rio Grande Western Railroad, and that were hired during the emergency periods, feel that they have a right to share in the progress of this western country, and that is they feel they are being discriminated against by a fictitious rate here that discriminates against the Denver and Rio Grande Western Railroad insofar as obtaining the free flow of traffic between the two lines. We also are interested because we think this is bad for the railroad industry, and we think such things as this are the things that are driving traffic off the railroads and causing unemployment not only on our lines, but on other lines. Furthermore, it works to reduce the morale of the men on the Denver and Rio Grande Western for the reason that they feel that there is no future for them to expand, and it is natural that every man wants to progress, and he is look- [fol. 1921] ing forward, if he does a good job, he thinks by giving good service that will contribute to the carrier getting additional business, and when he realizes that the carrier cannot compete for this business, it isn't much of an incen-

tive for that man to go out and try to improve the service and do a better job to which he is assigned. I think we have an interest in this, not only as employees, but as public citizens. We believe in free enterprise, and we feel in this case the Rio Grande Western Railroad is practically the only railroad that is being discriminated against, that there are competitive rates established with other railroads, but not with the Denver and Rio Grande Western through the Ogden Gateway, although they do have through rates, as I understand, established from the Union Pacific Southwestern Lines to the Denver and Rio Grande Western at Salt Lake.

Mr. Hill: You may inquire.

Cross-examination.

By Mr. Greene:

Q. Mr. McDonald, is that right?

A. That is correct.

Q. Are you familiar with this exhibit No. 56 prepared by Mr. Warner?

A. To a certain extent, yes.

Q. Would you say the fluctuation in the number of trainmen employed, as shown in that exhibit, is about a normal fluctuation, considering the economic conditions during those years?

[fol. 1922] A. I believe it is.

Q. You don't recall anything unusual occurring that has caused an unusual displacement of men or unusual employment of men during that period?

A. Well, there was some employment of men there that was directly involved by the emergency condition of having to route certain traffic through the Ogden Gateway, and then there is a reduction there that is also reflected when this business ceased to be routed through that gateway.

Q. Now as I understand it, you are not here with the idea of trying to deprive any Union Pacific employes of their jobs?

A. That is not our purpose here.

Q. But you are willing for the principle that you mentioned, you are willing to see that traffic is diverted from

the Union Pacific to the D&RG, are you not? That is your purpose for being here?

A. We are willing to see that our railroad, which should have the right, is conceded the right to solicit business in competition with any other railroad.

Q. You do agree, do you not, that if you do divert any substantial amount of tonnage from the Union Pacific to the D&RG, so that there is an increase in the employment in your brotherhood, that it will result in a decrease in Union Pacific employees' employment?

[fol. 1923] A. Not necessarily.

Q. Why not, Mr. McDonald?

A. Because we learn competition is something which is essential in all industries, and if there is competition between the Denver and Rio Grande Western Railroad and the Union Pacific Railroad they will move this traffic and maybe some of these trains will be cut down so they can get over the road in less time, and it won't be necessary to make a reduction in the employment of these men.

Q. On the D&RG you find that the number of your employees usually varies with the volume of traffic transported, doesn't it?

A. The employees we represent work only when there is traffic to be moved.

Q. Yes. And that same situation would apply to the Union Pacific, wouldn't it?

A. That is correct.

Q. Then do you believe that the Union Pacific would be charitable enough to employ men in your craft when there is no traffic for them to handle?

A. We feel there will be traffic there for them to handle. We have not heard any testimony here to the contrary. We have heard considerable assumption, but there is no positive testimony here, that I have heard, to that effect.

Q. I take it it is your hope, however, that if the D&RG is [fol. 1924] successful in this case that some of these 59 men that you say were cut off as of April 1 on your Exhibit 57 will be able to go back to work?

A. We hope that they have the opportunity to get back to work through competition with these other railroads which we feel they should have.

Q. Through getting additional traffic, so there will be work for them to do?

A. Yes, additional traffic might come from traffic solicited by the Rio Grande Railroad on other railroads that would be delivered to the Union Pacific, and vice versa.

Q. Was there any particular cause for these 59 men to be laid off as of April 1, or is that just a normal decline in traffic?

A. This year there was a normal decline in traffic, about this time of the year, which caused this reduction, the falling off of the coal business, and stuff like that.

Q. Does that occur generally every year about this time of the year?

A. It occurred last year and this year, although last year, through the misfortune of the Union Pacific, when business was falling off, we did have a diversion of traffic as a result of the Union Pacific being tied up, which employed many of these men over a short period, and it carried on for several months after.

[fol. 1925] Q. I was wondering why on Exhibit No. 57 you show only the 59 cut-off as of the year 1950, and don't show the number cut off in the other ten years that you have on exhibit? Was there any particular reason why you picked out 1950 to show this layoff?

A. No, only that that is the current year, and those figures were available.

Q. Do you have them available for any of the other years?

A. Not at the present time.

Q. How long have you been employed by the D&RGW?

A. Thirty-three years.

Q. During that period of time, how many emergencies have you had such as occurred in the winter of 1948-1949?

A. We have had several emergencies. They didn't always involved the Union Pacific. They involved the Santa Fe on several occasions.

Q. How many have you had that involved the Union Pacific?

A. The one is all that I have any knowledge at the present.

Mr. Greene: That is all.

Redirect examination.

By Mr. Hill:

Q. Mr. McDonald, is there any situation in the Salt Lake division which causes an increased employment of brakemen during the last say three years?

A. I don't know about the last three years, but of course there has been an increase of work over there as a result of [fol. 1926] new industries and things that have been established during that time.

Q. What new industry was established over there of major importance?

A. The Geneva Steel plant.

Q. When did that come into the picture, when was that established? About what year?

A. I think about 1944.

Q. Does that plant require the employment of additional brakemen to take care of its transportation requirements?

A. Yes, the handling of coal from Columbia Junction to Geneva has created additional service for brakemen on that district.

Q. Would you have any idea to what extent it created such a demand?

A. Yes, it is considerable. I would say that it would involve maybe twenty men.

Mr. Hill: That is all.

Mr. Greene: May I ask one or two more questions, Mr. Examiner?

Exam. Mullen: Based on the redirect? You will have to limit it now.

Mr. Greene: Very well, I refrain.

Exam. Mullen: That is all. Thank you.

(Witness excused.)

Mr. Hill: That is all we have. May I have this Exhibit 57 [fol. 1927] admitted into evidence?

Mr. Greene: I have no objection.

Exam. Mullen: It will be received in evidence.

(Exhibit No. 57, Witness McDonald, received in evidence.)

Mr. Gray: Mr. Examiner, I am Norman Gray and I have two witnesses that I would like to call on behalf of the Intervenor, State Board of Equalization and Public Service Commission of the State of Wyoming.

Exam. Mullen: All right, sir.

Mr. Gray: I call Mr. Hudson.

Exam. Mullen: Mr. Hudson.

WALTER W. HUDSON was sworn and testified as follows:

Exam. Mullen: Off the record a moment.

(Discussion off the record.)

Exam. Mullen: On the record. All right, Mr. Gray.

By Mr. Gray:

Q. Will you state your name, please?

A. Walter Hudson.

Q. Where do you reside, Mr. Hudson?

A. At the present time I reside in Cheyenne, Wyoming.

Q. Do you hold any official position with the State of Wyoming?

A. I'm a member of the Board of Equalization of the Public Service Commission.

Q. How long have you held that position, Mr. Hudson?

[fol. 1928] A. Since March 1, 1949.

Q. In your work with the Public Service Commission of the State of Wyoming, do you have some function to perform with relation to railroads in the State of Wyoming?

A. Yes, we have the authority to tax the trackage, and have charge of transportation.

Q. And you have the powers of regulation over those railroads?

A. Yes, we do.

Q. Now, prior to your assuming your present position, Mr. Hudson, where did you reside?

A. I resided in Goshen County. I was a farmer and livestock raiser.

Q. How long did you reside there?

A. Thirty years.

Q. How large is that trade area in Goshen County, Mr. Hudson?

A. Goshen County is a very highly productive farming area, there is a good deal of irregation over there.

Q. About what is the approximate population, do you know?

A. A little over 12,000 people.

Q. Is that served by the Union Pacific?

A. Partly.

Q. While you were residing there, Mr. Hudson, did you have any occasion to represent your county in the state legislature?

A. Yes, I represented Goshen County from 1937 to 1947.

Q. 1947 was your last term?

[fol. 1929] A. From 1945 to 1947 was my last term.

Q. You were Speaker of the House at that time?

A. I was.

Q. From those functions, Mr. Hudson, do you feel that you have acquired some knowledge of the railroad situation in the State of Wyoming, and the economy of the State of Wyoming?

A. Anybody serving that long in the state legislature would require some knowledge of the state government and things that go to make it up.

Q. And has the Public Service Commission of the state of Wyoming Mr. Hudson, given some thought and consideration to the complaint filed herein?

A. It has.

Q. And have you, as a result of that study and thought, prepared a statement to present to the Examiner here?

A. Yes, I have.

Mr. Gray: If the Examiner please, in the interest of saving time, I ask that the statement prepared by Mr. Hudson be made a part of the record as though having been read, and we will afford the opponents an opportunity to cross-examine if they so desire.

Exam. Mullen: Any objection to that procedure?

Mr. Quirk: I have no objection to the statement being put in the record without being read, but I would like to ask the witness one or two questions.

[fol. 1930] Exam. Mullen: Certainly. It will be copied in the record, then.

The Witness: My name is Walter W. Hudson. I am a member of the State Board of Equalization and Public Service Commission of Wyoming, located in the State Library and Supreme Court Building, Cheyenne, Wyoming. I have been a member of that body since March 1, 1949. Prior to assuming that position I was engaged in the business of farming and livestock raising in the Goshen County area of Wyoming. I have also been a member of the Wyoming House of Representatives serving as Speaker of that body in 1945.

The State Board of Equalization has general supervisory authority with respect to assessment of taxable property, taxation, and equalization of taxes throughout the State of Wyoming, and has specific authority to assess for taxation the trackage and other facilities of railroads within the state.

The Public Service Commission of Wyoming is an administrative body created by the State Legislature in April, 1915, with regulatory powers and duty relating to all methods of transportation and other public utilities, including the adequacy and sufficiency of facilities thereof, and with authority to appear before the Interstate Commerce Commission on any matter relating to interstate transportation that involves the state of Wyoming.

The State Board of Equalization consists of three mem-
[fol. 1931] bers including the chairman, and those members are Ex-officio members of the Public Service Commission.

The Wyoming Commission is of the opinion that the result sought by the Complainant in this proceeding, the diversion to its lines of traffic that originate, or terminates on the Union Pacific Railroad in Idaho and the northwestern territory, will deprive the Union Pacific, in serving such areas, the long haul via its established lines. Mr. T. K. Early, a witness for the Complainant, testified at Salt Lake City that the potential traffic in Idaho and the northwest territory amounts to at least 157,762 cars per year. The Commission assumes therefore, the Denver and Rio Grande Western desires to divert a substantial amount of that traffic to its lines. This, in our opinion, will result in

a reduction of a number of trains per day across the state of Wyoming. Any reduction of trains operated and subsequent displacement of employees is a very serious matter to the state of Wyoming.

Wyoming is a sparsely settled state. The estimated population is now about 275,000. The total area is nearly 100,000 square miles. There are few large industries. The population of the southern tier of counties is as follows:

Albany County	18,000
Carbon County	17,000
Laramie County	46,000
Lincoln County	10,564
Sweetwater County	22,500

The Union Pacific with its affiliated interests, particularly [fol. 1932] mining, is one of the few. Anything which adversely affects the economy of the Union Pacific directly and markedly affects the economy of Wyoming, particularly the southern tier of counties. The current assessed valuation records of the Board of Equalization show for the Union Pacific and its subsidiaries a total of $69,292,583.00. The annual taxes paid total $2,264,957.00. The tax valuation in the counties the Union Pacific traverses is 30.06 per cent of the total of all valuations in those counties, and 12.18 per cent of the total tax valuations in the state.

The Commission is aware that a large percentage of the employees of the Union Pacific and its subsidiaries own their own homes within the state and pay taxes on those homes. It can readily be seen that any reduction in the valuation of, or of the taxes paid by, the Union Pacific and its subsidiaries, or displacement of empoloyees, might result in a direct additional tax burden upon other taxable property in the state.

It has been the policy of the Wyoming Commission to respect the rights of pioneering transportation agencies and other utilities so long as they provide safe, efficient, and adequate service. We hope such a principle will prevail in this proceeding.

The Union Pacific is a pioneer in the development of Wyoming. It has kept pace with progress and public need and has expended vast sums of money in constructing and

maintaining a very modern and highly efficient double track [fol. 1933] system to better enable it to serve the territory. As for example I refer to the recently opened second bore of the Aspen Tunnel located near Evanston, Wyoming, which completes a vital link in the double track system. This should be of great importance to our country, particularly in time of war.

We believe the Union Pacific had confidence that the traffic of the areas it has assisted in developing would be retained, otherwise it would not have made such investments. The future development of this railroad undoubtedly depends, in no small measure, upon the retention of such confidence. The development of the coal mining industry in Wyoming is due, in no small measure, to the Union Pacific. Wyoming is now one of the important coal areas of the world. The Union Pacific has developed and used the product of its mines in operating trains in Wyoming and, I presume, elsewhere.

While there have been objections to proposed abandonments of branch lines and closing of stations, as evidence of the satisfactory character of the service performed by the Union Pacific in Wyoming, so far as the records show there has been no complaints to the Commission with respect to service. Since the Commission has jurisdiction over sufficiency of service, the absence of complaints is significant.

The rail lines of the Union Pacific have been developed through Wyoming to meet the requirements of freight and passenger traffic, both interstate and intrastate. Most of [fol. 1934] the traffic is interstate. As an indication of the ability to handle the traffic in peace, or war, records on file with the Public Service Comm-ssion show that the total tonnage carried more than doubled during the war and is now decreasing. Had there been any substantial shortage of equipment or facilities in Wyoming during the war emergency we feel certain such information would have come to the attention of the Commission. From personal observation and information coming to the attention of the Commission I feel justified in stating that the Union Pacific satisfactorily met all reasonable requirements of the emergency war traffic.

It seems clear that the Union Pacific facilities in Wyoming are fully sufficient to handle any and all traffic presently available, and it is obvious that such facilities have been built in contemplation of traffic which it has developed. If such traffic is diverted to other lines the development will have become wasted effort.

The Union Pacific has two branch or subsidiary lines in Wyoming, the Laramie, North Park and Western Railroad, serving southeastern Wyoming and northeastern Colorado, and the Saratoga and Encampment Valley Railroad serving the Platte Valley in Carbon County, Wyoming, which would suffer by loss of rail service. Previous attempts have been made to abandon these lines. Abandonment would result in a serious loss to the areas served even though a limited [fol. 1935] amount of traffic is offered from those areas and the rail transportation facilities operate on a marginal basis at present. Loss of traffic by the Union Pacific may cause a renewal of such attempted abandonments.

Livestock, Petroleum, and Wool production are other main industries in Wyoming which would suffer inconvenience and delay by any reduction of trains as a result of diversion of traffic from the Pacific.

The State Board of Equalization and Public Service Commission of Wyoming realizes that convenience and necessity for all the people must be given full consideration, but in so doing so we trust that the Interstate Commerce Commission will seriously consider the effect upon Wyoming of the diversion of traffic from the Union Pacific and will further seriously consider the effect upon the service now being rendered by that railroad.

Cross-examination.

By Mr. Quirk:

Q. Mr. Hudson, there is no income tax in the state of Wyoming, is there?

A. There is not.

Q. The taxes you deal with are ad valorem taxes, I assume?

A. Ad valorem taxes and sales taxes.

Q. The sales tax doesn't apply to transportation charges, does it?

A. Not directly, no. Some things they buy it does.

Q. Now the statement that you have submitted here, which [fol. 1936] has been copied into the record, the assumptions made in there are based on facts given you by the Union Pacific, I assume, is that correct?

A. All railroads must file with the Public Service Commission yearly, and they are based upon those facts.

Q. Well, but your statement deals very largely with the assumption that if the complainant here should prevail in this proceeding, the interests of Wyoming will be adversely affected. You have based the statements made in that connection in information given you by the Union Pacific representatives, isn't that true?

A. We base the 157,762 cars upon a statement by Mr. T. K. Early, and I believe we state if a substantial amount of it is diverted.

Q. Well, Mr. Early merely gave an estimate of the potential maximum that might be reached. The exhibits in this case show the Union Pacific handled about one million and a half carloads. Of course some of the traffic wouldn't be affected by this case in any way. Now, you also mentioned four trains a day that would be eliminated. You of course got that from the Union Pacific, didn't you?

A. Yes.

Q. You have no personal knowledge——

A. No.

Q. —of these things, in other words?

[fol. 1937] A. No.

Mr. Quirk: That is all.

Exam. Mullen: That is all. Thank you, sir.

(Witness excused.)

Mr. Gray: I think that is all.

I call Mr. Williamson.

C. D. WILLIAMSON was sworn and testified as follows:

Direct examination.

By Mr. Gray:

Q. Will you state your name, please?

A. C. D. Williamson.

Q. Where do you reside, Mr. Williamson?

A. At Hanna, Wyoming.

Q. Where is Hanna, Wyoming?

A. Approximately 125 miles west of Cheyenne on the main line of the Union Pacific.

Q. And how long have you resided there?

A. Just two months less than forty-one years.

Q. What is your business or occupation?

A. I am President of the Wyoming Timber Company, which conducts logging and timbering operations in southern Wyoming. I'm also President of the Hanna State and Savings Bank, and have a few other business interests in that part of the state of lesser importance.

Q. Do you hold any official position with the State of Wyoming?

[fol. 1938] A. Yes, I am Chairman of the Wyoming Commerce and Industry Commission.

Q. How long have you been Chairman of that Commission?

A. Since it was recreated in 1947, March of 1947.

Q. Will you state briefly the function of that Commission?

A. As set forth by the legislative act creating it, it is used for the purpose of fostering industry in the state of Wyoming and developing new industries of all classes.

Q. That is your paramount function, is it not, Mr. Williamson?

A. Yes.

Q. The purpose is to create as much employment as possible in the state of Wyoming?

A. That is correct.

Q. Now, in those functions, Mr. Williamson, do you have occasion to get out over the state of Wyoming?

A. Yes. It becomes necessary for me to travel throughout the entire state of Wyoming, visit all of the communities,

make a study of their resources, and ambitions and their problems in a business way.

Q. Have you been doing that to a more or less extent since you occupied this official position with the state of Wyoming, Mr. Williamson?

A. Yes, I have covered every part of the state in that capacity in recent years.

Q. Have you recently had occasion, more fully and care-[fol. 1939] fully, to cover the state of Wyoming?

A. Yes, not, however, primarily because of my connection with the Wyoming Commerce and Industry Commission.

Q. What has brought that about, Mr. Williamson?

A. Well, to be stated briefly, I have announced my intention to run for the Governorship of this state.

Q. As a result of your contacts in traveling over the state of Wyoming, Mr. Williamson, do you feel that you have acquired familiarity with the economics of the state of Wyoming?

A. I do.

Q. Have you given some thought and study, Mr. Williamson, to the complaint filed here by the D&RGW Railroad?

A. Yes, I have given it considerable study.

Q. And in connection therewith, have you prepared a statement to be offered by you in this proceeding to the Examiner?

A. I have.

Mr. Gray: Mr. Examiner, without objection, I would like to have the statement of Mr. Williamson made a part of the record as though having been read.

Exam. Mullen: Any objection to that as a procedural matter?

Mr. Quirk: We have no objection to that, but I would like to ask the Governor a few questions.

Mr. Gray: You may.

The Witness: Thank you, you are early.

Exam. Mullen: You may copy it into the record.

[fol. 1940] The Witness: I appear here as a witness for the Wyoming Commerce and Industry Commission and in support of the Chambers of Commerce and other civic organizations of the State which have intervened, as well

as the Town of Hanna, the City of Rawlins and myself personally.

Hanna is a coal mining community with a population of approximately 1200. Practically all of the population is engaged in coal mining and railroad employment, the coal being primarily furnished to the Union Pacific Railroad for railroad operation. A few are employed in strip coal mining operations in the vicinity. The Union Pacific Coal Company employs about 350 miners at Hanna so that it can be readily seen that these miners with their families constitute almost the entire population of the town. I understand the payroll of these miners is about $1,125,000.00 annually, and the entire business of the community is dependent upon these coal mines, including the bank of which I am President.

It is my understanding that Denver & Rio Grande witnesses testified at Salt Lake that there will be over 157,000 cars of freight subject to their solicitation if they are successful in their complaint to the Commission in this proceeding.

The Union Pacific witnesses have testified that this number of freight cars, if diverted to the Rio Grande, would result in a decrease of four trains each way per day through Wyoming. They have also testified that this [fol. 1941] would result in the displacement of approximately 475 railroad employees in Wyoming, some of whom are located in the Rawlins-Hanna area. Union Pacific witnesses have also stated that the diversion of such an amount of traffic would result in a reduction of 268 employees of the Union Pacific Coal Company, because of the reduced amount of coal required to operate the remaining trains. This approaches the number of Union Pacific mine employees at Hanna and while I do not have any information to the effect that the Union Pacific is considering the closing of the Hanna mines should this traffic be lost, it appears to me that this might prove to be the case. Certainly it seems to me, as an outsider, that this might receive serious consideration because of the simplified supervision which would be possible if its operations were concentrated in its other producing mines. In any event the effect of such a reduction of coal mine employees is forcefully illustrated by what would be the effect if the mines at

Hanna were closed. Briefly and generally stated that effect would be to wipe out an entire community in this sparsely settled area, create another "ghost town", and force the liquidation of our bank and a number of other local businesses dependent upon the coal mine operations there.

It must not be overlooked that the coal mining industry is of great importance to the State of Wyoming. The State has very large bituminous coal reserves—in fact I [fol. 1942] have been informed by competent authorities that they are some of the greatest in the world. Many of the most important coal mining areas are located on the line of the Union Pacific at Kemmerer, Rock Springs, and Hanna. It is a well known fact that the coal industry has suffered in recent years from various conditions adverse to it. Among such conditions are competitive use of natural gas, oil and, of course, labor conditions. Anything which threatens further reduction of coal production and coal use in the state of Wyoming is of the utmost interest to this state. The state must do everything possible to encourage the use of coal and discourage its reduction in use. The importance of reduction in coal use to such communities at Rock Springs and Hanna is of even greater importance than to the rest of the state. The Union Pacific Railroad has cooperated with the coal mining industry of Wyoming by using coal in its operations to the greatest extent possible—not only from its own mines but from independent producers as well.

The Wyoming Commerce and Industry Commission is devoted to bring new industries into the State of Wyoming. It is recognized that it is equally important to retain industries already existing in the state. Ours is a sparsely settled state, with an estimated population of 275,000 people spread over an area of about 97,000 square miles. Carbon County—a large county—has a population of ap- [fol. 1943] proximately 17,000. There are few large industries in the State and the Union Pacific is possibly the largest. It has been in Wyoming from the earliest days of the State, has been—and is—a growing and sustaining one and is regarded as the largest single factor in the development of the state from its wilderness beginning.

The Union Pacific and the communities along its line in

Wyoming have had a mutual and interdependent development. The communities have grown to sustain the needs of the railroad and its coal mining facilities and they in turn owe their prosperity and growth in large part to the existence of the railroad. This course of mutual growth has extended to all phases of community activity. Businesses have developed in these communities in a very real sense to support the Union Pacific and its employees. Likewise all of the municipal and public utilities services which are required by these communities have grown along with the railroad. Debts have been created in the form of bonds and otherwise; houses and business structures have been built. The values of lands and improvements have increased. Along with this development has necessarily gone the building of a tax structure to support the governments of the State, counties and cities.

There is an obvious and necessary relation between the development of such an important industry as the Union Pacific and the communities along it which have grown up in its support. This is particularly true where, as in the [fol. 1944] community in which I live, the Union Pacific is practically the only industry.

In the work of the Commerce and Industry Commission I have been impressed with the fact that cooperation between communities and industries located therein is a vital element in securing and holding industries in the state. To obtain such cooperation it is necessary that the community should have some assurance of the continuance of the industry. Otherwise the community and its inhabitants will not be encouraged to do the things which are necessary to support the industry. If the communities along a railroad, particularly in sparsely settled areas like the state of Wyoming, are to be deprived of the fruits of their efforts in building up communities and business activities in support of the railroad, they will lack the necessary incentive for such efforts. If the Wyoming communities involved here are to be deprived of the fruits of their efforts in building up communities and business activities in support of the railroad, they will lack the necessary incentive for such efforts. If the Wyoming communities involved here are to be deprived of the benefits of their efforts by the

diversion of traffic from the Union Pacific as proposed in this proceeding, and the resultant decrease in employment and business activity, it would certainly indicate that other communities on other railroads will be discouraged from making similar efforts. This is contrary to public interest. Rawlins is a market center for Carbon County and [fol. 1945] for people living in Hanna. I have business dealings of various kinds in Rawlins. My understanding from testimony of Union Pacific witnesses in this proceeding is that as many as fifty employees of the railroad located at Rawlins earning as much as $260,000.00 a year may be affected by such diversion of traffic. Rawlins is primarily and essentially a Union Pacific railroad community and anything which affects railroad employment there in a substantial way is a serious matter for the city, just as it is in all of the communities along the line of the Union Pacific in Wyoming. The population of Rawlins is approximately 8,500.

One of the matters which is unquestionably involved in a proceeding of this kind is whether the Union Pacific is doing a good transportation job. I am in a position to know the quality of its service, and I know that its freight and passenger services in and through Wyoming are both of the highest quality. Mrs. Williamson and I do considerable cross-country traveling and recently took a trip to the eastern part of the United States during which we could not help comparing the quality of passenger service on the Union Pacific with that on other railroads. While comparisons sometimes may be odious, I can readily say that we found no better passenger service anywhere. From long experience I am familiar with the high quality of Union Pacific livestock service to shippers in Wyoming. [fol. 1946] I wish to protest the granting of the relief sought by the complainant herein for the reasons I have stated including the following:

1. The Union Pacific Railroad is handling the traffic which would be diverted from its lines through Wyoming efficiently and well.

2. Such diversion would displace employees of the Union Pacific and its coal mines who have become rooted in Wyoming communities.

3. Such diversion would adversely affect the coal mining industry, which is of great importance to the State of Wyoming.

4. Such diversion would adversely affect the communities along the line of the Union Pacific and the business interests therein which have been built up in cooperation with, and in support of the railroad and its mining interests, contrary to the public interest.

5. Such diversion would similarly adversely affect the town of Hanna and the City of Rawlins in Carbon County.

Cross-examination.

By Mr. Quirk:

Q. Now you show considerable concern here about the effect that the diversion of traffic from the Union Pacific to the Denver and Rio Grande might have on the coal properties. Isn't it a fact, Mr. Williamson, that the dieselization of the Union Pacific, of the power of the Union Pacific, has had more effect on the coal properties over here than any [fol. 1947] diversion of traffic could possibly have that would occur as a result of this case?

A. I believe not, because the dieselization of the Union Pacific is far from a complete conversion.

Q. I know, but Mr. Stoddard recently announced apropos of the lingering coal strike and its adverse effect, he was going to run the railroad, and he was going to bring about complete dieselization if that was necessary.

A. If Mr. Stoddard made that statement he also made the statement more recently that insofar as possible he was going to operate steam power on all freight traffic moving from Green River to Council Bluffs, and from Green River to Kansas City.

Q. Mr. Williamson, the statements that you make in this statement that has been allowed to be copied into the record, as to the possible adverse effect are based upon this proposition, are they not? First, that there will be, that all of the potentially available traffic move via the Rio Grande, and second, on such other information as the Union Pacific representatives have given you, isn't that true?

A. That is essentially correct, yes. I have used the maximum potential.

Q. Thank you very much.

A. Which witnesses of the Rio Grande have set forth.

Mr. Quirk: That is all.

Mr. Gray: That is all. Thank you, Mr. Williamson.

[fol. 1948] (Witness excused.)

Mr. Gray: That is all I have, Mr. Examiner.

Exam. Mullen: We will take a recess for ten minutes.

(Short recess taken.)

Exam. Mullen: We are ready, Mr. Greene.

Mr. Greene: Mr. Examiner, I have present in the hearing room ten additional witnesses who have prepared statements, and there are two witnesses who are available but who are not present. I understand from Counsel that they are agreeable that the ten who are present can be sworn at once and their statements submitted as verified statements.

Exam. Mullen: All right, sir, will you call them, please?

Mr. Greene: Mr. Hollingsworth, Mr. Pence, Mr. Marble, Mr. Anselmi, Mr. Rogers, Mr. Walther, Mr. Lathrop, Mr. Sorenson, Mr. Hoffman, and Mr. Crippa, will come forward.

Exam. Mullen: We will save time, gentlemen, if we swear you all together.

(The above-mentioned witnesses were sworn.)

Exam. Mullen: I understand you all have prepared statements and they will be submitted as verified statements in the record.

Mr. Greene: Mr. Examiner, attached——

Exam. Mullen: That will be all, thank you.

Mr. Greene: Attached to Mr. Walther's statement is an exhibit which I would like to have given a number.

Mr. Quirk: Just a moment. I don't know what is going [fol. 1949] on here. I do want to ask Mr. Hollingsworth a few questions.

Exam. Mullen: We will now mark the statements with

numbers. If you will call off the names, I will assign a number.

Mr. Greene: Mr. Hollingsworth will be the first one.

Exam. Mullen: That will be Verified Statement No. 65.

(Verified Statement No. 65 received in the record.)

Mr. Greene: Mr. Pence.

Exam. Mullen: No. 66.

(Verified Statement No. 66 received in the record.)

Mr. Greene: Mr. Marble.

Exam. Mullen: No. 67.

(Verified Statement No. 67 received in the record.)

Mr. Greene: Mr. Anselmi.

Exam. Mullen: No. 68.

(Verified Statement No. 68 received in the record.)

Mr. Greene: Mr. Rogers.

Exam. Mullen: No. 69.

(Verified Statement No. 69 received in the record.)

Mr. Greene: Mr. Walther.

Exam. Mullen: No. 70.

[fol. 1950] (Verified Statement No. 70 received in the record.)

Mr. Quirk: There is an exhibit attached to Mr. Walther's statement.

Mr. Greene: I was going to offer that later.

Exam. Mullen: That will go in as one Verified Statement, No. 70. What is the next one?

Mr. Greene: Mr. Sorenson.

Exam. Mullen: Did you skip Mr. Lathrop?

Mr. Greene: Mr. Lathrop would be next, that is correct.

Exam. Mullen: No. 71.

(Verified Statement No. 71 received in the record.)

Mr. Greene: Mr. Sorenson.

Exam. Mullen: 72.

(Verified Statement No. 72 received in the record.)

Mr. Greene: Mr. Hoffman.
Exam. Mullen: No. 73.

(Verified Statement No. 73 received in the record.)

Mr. Greene: Mr. Crippa.
Exam. Mullen: 74.

(Verified Statement No. 74 received in the record.)

[fol. 1951] Mr. Greene: The other two witnesses are not present in the hearing room, but I understand from Counsel the statements may be received under the same stipulation with Mr. Collins at Boise.

Mr. Quirk: Yes; John W. Hay, Jr., of Rock Springs, Wyoming.

Exam. Mullen: That will be No. 75.

Mr. Greene: 76 would be John A. Reed.

Exam. Mullen: Is it so stipulated?

Mr. Quirk: Yes.

Exam. Mullen: All right.

Mr. Quirk: Mr. Examiner, I would like to make this statement. It is substantially similar to the statements I have made in connection with other verified statements which have been filed without the testimony being presented orally. I stipulate with the understanding, one, that I object to all incompetent or irrelevant matter in all of these verified statements; two, I object to all unsupported conclusions; three, I object to all argumentative matter that may be contained therein; four, I request that it be understood in this stipulation that if the witnesses were asked on cross examination questions similar to those asked other witnesses similarly situated, their respective answers would be substantially the same.

Mr. Greene: I have no objection to that.

Exam. Mullen: They will be received, then, under the stipulation.

[fol. 1952] Mr. Greene: That is all I have, Mr. Examiner.

Exam. Mullen: Did you desire to call one of these witnesses?

Mr. Quirk: I want to call Mr. Hollingsworth and ask him one or two questions.

Exam. Mullen: Mr. Hollingsworth.

M. E. Hollingsworth was previously sworn with the group and testified as follows:

Cross-examination.

By Mr. Quirk:

Q. Mr. Hollingsworth, apropos of your statement which is designated here as Verified Statement 65, you say on page 3, that the Milwaukee has no connection with the Denver and Rio Grande, and that unless the Union Pacific can handle the traffic to and from Council Bluffs, the Milwaukee cannot hope to participate in the handling of the traffic.

A. That is right.

Q. Doesn't it connect with the Rock Island there?

A. Council Bluffs, yes.

Q. Doesn't it connect with the Missouri Pacific?

A. At South Omaha. That is right.

Q. That is in the same switching area, isn't it?

A. Practically the same area, yes.

Q. Does the Milwaukee have any other rail connections at Council Bluffs, Omaha, or south Omaha?

A. Not in connection with the railroads just mentioned. [fol. 1953] It does in connection with the D&RG.

Q. I suppose you know that the Burlington runs from Omaha, Council Bluffs, to Denver, and Cheyenne, Wyoming?

A. Yes, sir.

Q. And that the Rock Island also runs to Denver from Omaha?

A. Yes, sir.

Q. And the Missouri Pacific goes to Pueblo from both Omaha and Kansas City?

A. Yes, sir.

Q. If there should be traffic diverted to the Rio Grande at Ogden, and if it should move from Denver or Pueblo by any one of these lines, including the Missouri Pacific, the Milwaukee would still interchange, and was routed via the Milwaukee, they would still interchange?

A. If it was routed that way, I imagine so.

Q. Do you know that there are rates now from the line of the Union Pacific reaching into California and that traffic is routed, and is permissible under the tariffs to route traffic to Salt Lake or Provo, Denver and Rio Grande, and back to the Union Pacific at Denver. The traffic that would move that way under this same system of rates, if established, could also be interchanged with your Milwaukee Railroad at Council Bluffs by the Union Pacific?

A. That is correct.

Mr. Quirk: That is all.

[fol. 1954] Redirect examination.

By Mr. Greene:

Q. You would have to depend on the Burlington or the Rock Island or some railroad operating between Denver and Council Bluffs in order for the Milwaukee to get that traffic, would you not?

A. That is correct.

Q. You couldn't get it in any way direct from the Rio Grande itself?

A. No, sir.

Mr. Greene: That is all.

Mr. Quirk: Wait a minute.

By Mr. Quirk:

Q. You can't get any business at Council Bluffs from the Southern Pacific, can you?

A. Not unless it is routed over the Union Pacific or some other connection.

Q. The Rio Grande is no different in that respect than many railroads, is it?

A. No, I guess not.

Mr. Quirk: All right. Thank you.

(Witness excused.)

Exam. Mullen: Are there any more witnesses to be heard at this hearing?

Mr. Greene: I have none.

Exam. Mullen: I think you had a statement to make, sir?

Mr. Wood: My name is Thomas S. Wood, Rate Expert [fol. 1955] of the Public Utility Commission, State of Colorado. I have had the pleasure of following this proceeding from its inception. I heard all the testimony at Salt Lake City, and I heard all the testimony at Boise and I have heard all the testimony at Cheyenne. Based on the record, as made, the position of the Public Utility Commission is in favor of opening of the Ogden Gateway.

Exam. Mullen: Do you intend to file a brief in this case?

Mr. Wood: We propose to support the complainant on brief.

Exam. Mullen: Does anybody desire to ask Mr. Wood any questions? Thank you, Mr. Wood. That is all.

Mr. Quirk: I would like to ask Mr. Wood a question.

I assume, Mr. Wood, from what you have stated, you consider the record as adequate for your purposes and that is the reason why your Commission has not introduced any evidence, is that correct?

Mr. Wood: That is correct.

Mr. Collins: Mr. Examiner, I wonder if Mr. Wood has given sufficient advance thought to his brief to indicate now to us just what the grounds are that caused the Colorado Commission to support the complainant when you come to write your brief? Would you anticipate that your brief would make that clear?

Mr. Wood: Well, from the information, Mr. Collins, I would say our position is based primarily on transit.

Mr. Collins: That will be made plain in the brief, I suppose.

[fol. 1956] Mr. Wood: We will try to.

Mr. Collins: Yes. Thank you.

Exam. Mullen: Thank you, Mr. Wood.

Exam. Mullen: I suppose the parties want to brief this case?

Mr. Gibson: Yes, sir.

Exam. Mullen: Do the parties want a proposed report in this case?

Mr. Quirk: Yes.

Mr. Collins: I do for the Defendant.

Exam. Mullen: I will allow 60 days for filing of briefs;

that will make briefs due on June 19. Are there any other matters to be considered at this time?

That completes the hearing. Thank you all, gentlemen.

Mr. Collins: Mr. Examiner, is it an invariable rule of the Commission to require concurrent briefs in a situation like this?

Exam. Mullen: Where there is a proposed report, yes.

Mr. Collins: I see. All right.

Exam. Mullen: The same date for all briefs, which will be June 19, 1950.

Mr. Collins: Then each party may answer the other side, I take it.

Exam. Mullen: On exceptions. There are no answering briefs.

[fol. 1957] Mr. Collins: I see.

Exam. Mullen: That is all, gentlemen. Thank you.

(Whereupon, at 10:50 o'clock a.m., the hearing in the above-entitled matter was concluded.)

[fol. 1958] BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPT FROM ORAL ARGUMENT OF MR. COLLINS

Proceedings

Chairman Alldredge: Mr. Collins, are you ready to proceed?

Mr. Collins: Yes, sir.

Argument of ELMER B. COLLINS (resumed).

Chairman Alldredge: Before you start, Mr. Collins, may I ask you a question?

I assume there is no dispute about the fact that from a physical standpoint these routes are open; that is, business physically can be interchanged between the Denver & Rio Grande and the Union Pacific.

Mr. Collins: Yes, sir; exactly. As was the case in the Western Pacific case.

Chairman Alldredge: You contend, however, that you have closed this route on the traffic here in question.

Mr. Collins: That is right.

Chairman Alldredge: Now, will you tell this Commission exactly how you closed the routes?

Mr. Collins: We canceled the joint through rate billing. We provided by tariff publication that the joint rates would not apply via Ogden with the D. & R. G. W.

Chairman Alldredge: You provided in the tariff that the joint rates would not apply?

Mr. Collins: A restriction in the route.

Chairman Alldredge: That is the joint rate?

Mr. Collins: Yes, sir.

[fols. 1959-1960] Chairman Alldredge: Do you think that closes this route for this traffic?

Mr. Collins: No, I don't think so, if they want to pay more, if they want a route via the Rio Grande and pay the price.

Commr. Patterson: This traffic can't always move on combination rates, can it not?

Mr. Collins: If these routes are open in the sense that there is in the course of business a transporting of traffic over the route, over the Rio Grande route, then there is an open through route at every place where there is a physical connection between the carriers. And if that is the case then Section 15(3) and (4) might as well not be printed in the next edition of the Interstate Commerce Act.

Chairman Alldredge: I did not mean to lead you into a discussion of that question. I just wanted to know what the facts were and how you closed this route, from your point of view.

Mr. Collins: Just as Mr. Stillings has told you.

Chairman Alldredge: Very well.

[fol. 1961] VERIFIED STATEMENT No. 1

I.C.C. Docket No. 30297

Statement of Vaughan Stewart, Blackfoot, Idaho

My name is Vaughan Stewart and I am Secretary-Manager of the Stewart Produce Company, a corporation of the State of Idaho. My father, Joseph Stewart, is the

President of the Company, but I am in active charge of the business conducted by the company.

The Stewart Produce Company is engaged in producing, buying and selling of potatoes in Bingham County, Idaho, with headquarters at Blackfoot, Idaho. The company owns and operates a warehouse and packing and processing plant located on trackage and served by the Union Pacific Railroad at Blackfoot. The warehouse is used for the storage of potatoes and has a capacity of approximately 20 carloads. The packing plant is used for the processing, packing and shipping of potatoes.

The Stewart Produce Company also owns and operates the following farms: One farm located approximately 12 miles northeast of Blackfoot having an area of 320 acres, and one farm located southwest of Blackfoot containing an area of 160 acres. It also operates under lease a farm 6 miles east of Moreland containing 160 acres, and during the year 1949 operated under lease a farm comprising 320 acres located 4 miles east of Shelley. The latter farm has been sold and the Stewart Produce Company no longer has a lease on this farm, but is now negotiating for and hopes to secure a lease on another farm of approximately the same acreage as the one operated under the lease which has expired and which I have, heretofore, described.

[fol. 1962] Storage cellars are located on the farms owned by the Stewart Produce Company, each with a storage capacity of 3,000,000 pounds of potatoes.

In addition to the above described operations, the Stewart Produce Company has in contemplation, the erection of warehouses at Rockford and Moreland on the Mackay Branch of the Union Pacific Railroad.

During the farming season, the Stewart Produce Company employs regularly 7 employes and during part of the season, 10 or 12 extra employes. During the harvesting season, the company employs as many men as are available in the area, usually ranging between 60 and 70 employes. During the processing and shipping season, the company employs about 30 employes.

The Stewart Produce Company produces on the farms above described, approximately 6,000,000 pounds, or 60,000 bags containing 100 pounds each, of potatoes per year. In

addition to the potatoes produced on the farms, the Stewart Produce Company also purchases from growers in the territory in which it operates, approximately 500 carloads of potatoes per year. All of the potatoes produced on the farms above described or purchased from growers are processed through the Stewart Produce Company's plant at Blackfoot.

During the past season, the Stewart Produce Company shipped in the neighborhood of 600 cars of potatoes. The majority of the potatoes shipped by the Stewart Produce Company are shipped to eastern markets and are routed via the lines of the Union Pacific Railroad Company and its connections either at Omaha or Kansas City.

[fol. 1963] The Stewart Produce Company has never found occasion to route shipments of its potatoes via the lines of the D&RGW for the reason that there are sufficient markets open to it via the direct route of the Union Pacific. Because of this and the further fact that the D&RGW is a substantially longer route and shipments via that line would require interchange at Ogden, Utah, and entail considerable delay in transit, the Stewart Produce Company would not in any event wish to use the route of the D&RGW, as expedition in transit is of importance to our company in the handling of its potatoes. In other words, once a carload is loaded and billed, it is of advantage to have the car transported to destination with as little delay as possible.

The service rendered by the Union Pacific Railroad, both in the matter of furnishing cars, switching and transit of cars, has been entirely adequate and satisfactory to the Stewart Produce Company. There have been periods when there was a car shortage and we were unable to secure all the cars we needed as promptly as needed, yet we realize the responsibility for the shortage was not that of the Union Pacific and the Stewart Produce Company and the shippers in this area have been treated as favorably as shippers generally in this respect.

It is my understanding that the D&RGW in this case seeks by means of solicitation to secure routing on a substantial amount of traffic originating in the States of Idaho, Oregon, Washington and Montana, including traffic originated at Blackfoot. It is my further understanding that that com-

[fol. 1964] pany does not contemplate building a railroad

into the state or performing any service in the state, but merely intends to solicit traffic to be routed away from the Union Pacific and interchanged to the D&RGW at Ogden, Utah.

I am a citizen of the State of Idaho. The Union Pacific is the railroad that serves that state and particularly my company. It has provided the main and branch lines, furnishes the car supply, performs the switching and renders the transportation service in the state. It is the largest taxpayer in the state and maintains a large payroll. The D&RGW does not do any of these things, nor is it in a position to do any of them. In short, it is not in a position nor does it intend in any way to contribute to the economy of the state.

It is my belief that if a substantial amount of traffic presently handled by the Union Pacific were diverted to the D&RGW after the Union Pacific performs the service in gathering the traffic, that either one of two things might reasonably be expected to happen; either the service presently performed by the Union Pacific would not be as good or it would be necessary for it to increase its rates. Any curtailment of service, either on the main or branch lines, would be of distinct disadvantage to my company, as would an increase in rates.

I am in favor of permitting the Union Pacific, after having furnished the transportation facilities and performing the service of gathering the traffic, to transport it the longest possible distance on its railroad rather than diverting it to the D&RGW who seeks to participate in the revenue from [fol. 1965] such traffic. If that were done and the Union Pacific thereby rendered unable to provide the service to the people of Idaho that it presently does, my company would be hurt.

Representatives of the D&RGW called on me asking that I support them in this case, and they were advised that I would not support them but intended to support the Union Pacific, the railroad that furnishes service to our company.

For the reasons above stated, I am appearing here as a witness in support of the Union Pacific Railroad and in opposition to the D&RGW in this case.

[fol. 1966] VERIFIED STATEMENT No. 2

I.C.C. Docket No. 30297

Statement of H. H. Zimmerli, Pocatello, Idaho

My name is H. H. Zimmerli. I live at Pocatello, Idaho. I do business at Pocatello under the firm name of H. H. Zimmerli Company, which is wholly owned by me and is not incorporated. My operations consist of purchasing, processing, loading and shipping throughout the United States of potatoes which are produced principally in the State of Idaho.

The H. H. Zimmerli Company has potato warehouses located on the tracks of the Union Pacific Railroad at Chubbuck, Aberdeen, Buhl and Arco, Idaho. During the year 1949, I originated through my warehouse facilities at the points above mentioned, a total of 362 cars of potatoes, 329 cars of which were shipped to the Missouri River area and east, and 33 cars west, principally in the State of California. In addition to this, I shipped approximately 600 additional cars of potatoes which were grown and produced in Idaho, through local, independent processors and track dealers. All of the shipments were made via the lines of the Union Pacific Railroad and principally interchanged with connecting lines either at Kansas City for points north, south and east; at Denver for points south and southeast; and Council Bluffs, Iowa, for points south, east and north. None of the shipments were routed via the lines of the D&RGW.

With the variety of routes open to us via the Union Pacific and its connections, we have at no time found any difficulty in reaching markets with our products and I can say definitely that the Union Pacific throughout the years has done a good job of railroading on our shipments.

[fol. 1967] I have never in my business had occasion to use the routes of the D&RGW and do not anticipate that I will ever require such routing; nor do I see how the opening of the Ogden Gateway, which would permit routing via the D&RGW at through rates, would be of any advantage to me in my business. The Union Pacific Railroad is the line that serves the people in Idaho and has rendered adequate and expeditious service for the purposes of by business; it has

been prompt in the furnishing of an adequate supply of cars for the movement of my potatoes; it has furnished reasonable switching, and it has moved the potatoes to destination in an expeditious manner. Once potatoes are loaded and billed, it is of particular interest to me as a shipper that they be moved to destination with the least possible delay, and the Union Pacific has the most direct route to consuming points where potatoes handled by me are shipped. It is to my advantage to route via this direct route. If the route of the D&RGW were used via the Ogden Gateway, this would be a circuitous route and unquestionably would result in delay, which would work to the disadvantage of my business.

It is my understanding that the D&RGW does not contemplate the building of a railroad into the State of Idaho; that it does not contemplate furnishing of cars for the shipment of my potatoes; it is not nor will it be in a position to render any service in the way of switching and spotting of cars and, in short, it is not in a position to render any service in connection with shipments from Idaho except the transportation over its lines of any of such shipments which may be routed via its lines and interchanged with it at Ogden. [fol. 1968] The Union Pacific Railroad is the railroad that furnishes the facilities in the State of Idaho and renders service to its shippers. If any substantial amount of business originating on its lines would be diverted to the D&RGW in the event the Ogden Gateway were opened, it is reasonable to assume that the Union Pacific would not be in position to furnish the prompt service which it has in the past, and any curtailment of service or increase in rates which might result from the reduction in revenues would work to my disadvantage as a shipper and to the disadvantage of the citizens of the State.

I am, therefore, appearing here as a witness for the defendants in this case, particularly the Union Pacific, in opposition to the petition of the D&RGW and in support of the Union Pacific and other defendants.

[fol. 1969] VERIFIED STATEMENT No. 3

I. C. C. Docket No. 30297

Statement of Albert Carlson, Collins, Idaho

My name is Albert Carlson and I am Superintendent of the Idaho Potato Starch Company, a corporation of the State of Idaho. The latter owns and operates a plant for the manufacture of starch from potatoes, located on trackage of the Union Pacific Railroad at Collins, Idaho, on the Mackay Branch.

The Idaho Potato Starch Company uses in its manufacturing process, cull or second-grade potatoes which are purchased at a price substantially less than potatoes of first-grade or first quality. We have been engaged in the manufacture of starch at the location above described since the fall of 1941 and produce annually approximately 150 carloads. To process this amount of starch requires about 800 pounds of potatoes for each 100 pounds of starch. The potatoes are secured in the territory where our plant is located and most of them are trucked to the plant by the growers and dealers from whom they are purchased. The price paid for the potatoes used in our processing, varies from 15 cents per 100 pounds upwards, with a general average of 25 cents per 100 pounds.

During the past year, the Union Pacific Railroad sponsored a proposal and established as a result thereof, a reduction on the rate of potato starch to Chicago so as to enable my company to compete with manufacturers in the Chicago area and in the southeastern markets. It is reasonable to assume that if the Union Pacific were to be short-hauled on the traffic originated at my plant, it would not be able to maintain the low rate which it presently assesses on [fol. 1970] the freight from my plant.

While there would never be any intention on the part of our company of depriving the Union Pacific of its longest possible haul on the traffic which we control, the fact is that most of our products are sold f.o.b. at our factory at Collins, Idaho, and the routing is controlled by the purchaser or consignee. I can realize that, in the event the Ogden Gateway is opened, the D&RGW and its Colorado connec-

tions will conduct intensive solicitation among the receivers of our products in the east and which might result in short-hauling the Union Pacific in the routing of some of the traffic. Undoubtedly, this will also be true of other products sold in like manner and shipped out of Idaho and the result might well be a serious decline in the revenues of the Union Pacific. This might make necessary a curtailment of some of the branch line service on which our company necessarily depends, and to the extent frequent and dependable service is a factor in the sale of our manufactured products, might affect the sale of our products. This eventuality would prove a serious threat to the continued successful operation of our business.

There have been times in recent years when a purchaser of our products has requested that the shipment be billed and shipped without delay. In such instances, it is decidedly to our advantage to have the shipments move via the shortest and most direct route since delivery at destination is an important factor in securing such orders.

It is my belief that if the Union Pacific were deprived of a [fol. 1971] substantial volume of its traffic, it would be necessary for it either to curtail service or increase rates, either of which would greatly be to the disadvantage of our company.

I understand that the D&RGW, in this case, seeks to secure the routing on traffic originating in the States of Idaho, Oregon, Washington and Montana. It does not intend to provide railroad facilities in the State of Idaho, nor does it intend to provide any of the service presently rendered by the Union Pacific, such as the trackage facilities, the furnishing of cars, the switching of cars and the transit thereof out of the State of Idaho.

The Union Pacific is the largest taxpayer in the State of Idaho, it maintains a large payroll in the State and it contributes generally to the economy of the State, while the D&RGW does not or cannot in any way contribute to the economy of the State. All it seeks to do is, by solicitation, to divert from the Union Pacific, revenues from traffic originated in Union Pacific territory. I can see no possible advantage to my company in having the Ogden Gateway opened, but, for the reasons above stated, I can see some

very strong disadvantageso For that reason, I am appearing here as a witness for the Union Pacific Railroad in this case and in opposition to the petition of the D&RGW.

[fol. 1972] VERIFIED STATEMENT No. 4

I. C. C. Docket No. 30297

Statement of Clyde Hess, Idaho Falls, Idaho

My name is Clyde Hess. I reside in Idaho Falls, Idaho, where I am engaged in the retail coal business and the feed and grain business, including the operation of a grain elevator located on Union Pacific tracks at Idaho Falls. I am a member of the Idaho Falls Chamber of Commerce. My business at Idaho Falls is located on trackage of the Union Pacific Railroad Company. I am also a distributor of beer.

I am not a producer of grain but purchase grain from local producers and most of this grain is then sold by me to the Globe Mills or other elevators in Ogden, Utah.

During the year 1949, I shipped about 150 carloads of grain and received approximately 25,000 tons of coal from Rock Springs, Wyoming, and Carbon County, Utah. All of the outbound shipments of grain were routed via the Union Pacific Railroad, as well as the coal received from Rock Springs, Wyoming. The coal received from Carbon County, Utah, was routed via the lines of the Utah Railway Company and Union Pacific. During the year 1949, I also received approximately 20 carloads of beer from the Anheuser Busch Company, St. Louis, Missouri, which was routed via the Union Pacific Railroad from Kansas City to Idaho Falls.

I have never had occasion to route any shipments via the lines of the D&RGW nor have I ever requested either the Union Pacific or the D&RGW for the establishment of a joint through rate via the D&RGW through the Ogden Gateway. I can see no advantage to me or my busines in opening the Ogden Gateway as requested by the D&RGW in this [fol. 1973] case.

The service afforded by the Union Pacific Railroad has always been satisfactory and adequate for my needs. I am

in touch almost daily with employes of the Union Pacific. Expeditious service is of importance to me in the shipment of my products and I would have no need or desire to use the longer, more circuitous route via the D&RGW in the shipment of beer received by me from St. Louis.

The Union Pacific Railroad is the railroad that serves the people of Idaho. It maintains a large payroll in the state, is a large taxpayer in the state and contributes generally to the economy of the state. The D&RGW does not propose to build a railroad into the State of Idaho or render any service to the people of the state and, in short, will contribute nothing to the economy of the state.

It is my understanding that the D&RGW seeks through solicitation to divert traffic originating on the lines of the Union Pacific to its lines via the Ogden Gateway and thus participate in the revenue on that traffic. I do not favor such a proposal for the reason that the Union Pacific has expended the money necessary to provide the transportation facilities, furnishes the cars and renders the transportation service. If the D&RGW were able to divert a substantial amount of this traffic to its lines, it is reasonable to assume that the decrease in revenue to the Union Pacific would require it to either reduce its service or increase its rates. Either of these alternatives would be disadvantageous to my business and to the economy of the State of Idaho.

[fol. 1974] I am, therefore, appearing here as a witness in favor of the defendants in this case, particularly the Union Pacific Railroad, and in opposition to the application of the D&RGW.

[fol. 1975] VERIFIED STATEMENT No. 5

I. C. C. Docket No. 30297

Statement of F. G. Thompsen, Pocatello, Idaho

My name is F. G. Thompsen. I reside at Pocatello, Idaho and am engaged in business there under the name of Thompsen Distributing Company. I am a distributor of beer in southeastern Idaho and during the year 1949 received for distribution in my territory 57 carloads of beer and forwarded 27 carloads of empty containers. The beer

of which I am distributor is shipped from St. Louis and Denver, all routed via the lines of the Union Pacific. The Union Pacific has rendered satisfactory and adequate service for my purposes.

I have had no occasion nor do I anticipate that I ever will have occasion to route shipments of beer for distribution in Idaho via the lines of the D. & R. G. W. I have therefore never requested either the Union Pacific or the D. & R. G. W. for the establishment of joint through rates via the lines of the D. & R. G. W.

The Union Pacific is the railroad that serves the State of Idaho and, as I understand it, the D. & R. G. W. does not contemplate building a railroad into the State, it pays no taxes in the State, it has no payroll in the State and does not contemplate establishment of any thereof or of rendering any service in the State. The Union Pacific is a substantial tax-payer and maintains a large payroll in the State. I am opposed to taking away traffic from the Union Pacific and diverting it to the D. & R. G. W. because, in my opinion, such diversion of traffic might render the Union Pacific less able from an income standpoint to render the service it is presently rendering or increase its rates, either of which would be detrimental to my business.

[fol. 1976] I am, therefore, appearing here as a witness for the Union Pacific Railroad in opposition to the petition of the D. & R. G. W. in this case.

[fol. 1977] VERIFIED STATEMENT No. 6

I. C. C. Docket No. 30297

Statement of Marion Olsen, Paradise, Utah

My name is Marion Olsen. I live in Paradise, Utah. I am President of the Cache Valley Turkey Growers Association, an association of approximately 55 growers, all located within Cache and Rich Counties, Utah. The association has a plant on trackage of the Union Pacific at Trenton, Utah.

I am also a member of the board of directors of the Cache County Farm Bureau. I am speaking here as an individual

grower and shipper and in behalf of the Cache Valley Turkey Growers Association, as well as the Cache County Farm Bureau.

The association deals in the production and processing of dressed turkeys and ships the finished product to eastern points, and is a receiver of shipments of feed for all types of livestock which is grown in the Cache Valley.

The Cache Valley Turkey Growers Association shipped from Trenton, Utah to eastern points 59 cars during the 1949 turkey season. The business of the association is increasing and we expect to handle more carload shipments during the year 1950. The association also received at Trenton 25 cars of feed shipped from points in Illinois, Minnesota, Oregon, Utah, North and South Dakota, Iowa and California. All shipments from and to the association at Trenton, Utah are shipped via the lines of the Union Pacific. The service rendered by that company has been most satisfactory and adequate.

In the nature of things, the business of the association requires refrigerator cars and the Union Pacific has been prompt and efficient in arranging for the requisite number [fol. 1978] of refrigerator cars when needed by the association. The association has never routed any of its shipments via the D&RGW nor has it had any occasion to use the services of that line. We have never felt the need or desire for service via the route of the D&RGW, nor have we ever asked either the Union Pacific or D&RGW to establish through routes via that line, which I understand the D&RGW is seeking from the Interstate Commerce Commission in this case. The association does not anticipate the need or desire for service via the route of the D&RGW nor can it see how it would derive any benefit if such route were open to it. In short, the service rendered by the Union Pacific is satisfactory and adequate and it is my view that if the Gateway should be opened and the D&RGW would receive any substantial amount of traffic now routed via the lines of the Union Pacific, that that company would necessarily have to curtail its service or increase its rates, either one of which would have unsatisfactory effects on the association which I represent.

Our association feels that the Union Pacific has provi-

ded the trackage and the expense of developing the business in the territory in the the States of Idaho, Utah, Oregon and Washington, and that such traffic should not be diverted to the lines of the D&RGW after the Union Pacific has spent the money and provided the facilities in assembling the traffic. Our association, therefore, is opposed to the application of the D&RGW and in favor of the Union Pacific in this case. The association has heretofore gone on record in favor of the Union Pacific in this case and opposed to the application of the D&RGW and has heretofore addressed the Public Service Commission of Utah expressing [fol. 1979] our attitude with respect to this application and asking the Utah Public Service Commission to intervene in this case in behalf of the Union Pacific.

The business of the association depends upon prompt receipt of refrigerator cars and prompt shipment after loading so as to reach markets on a given date. The Union Pacific has always provided an adequate supply of cars at the time needed and has transported the carloads of turkeys promptly after loading. The association feels that the D&RGW is not in a position to compete with the service of the Union Pacific, and as heretofore stated we feel that the D&RGW is not entitled to the business originated at Trenton, Utah, for which it could not possibly contribute anything in the way of facilities or assembling of shipments, and therefore I personally and as President of the association am unalterably opposed to the opening of the Ogden Gateway as requested by the D&RGW in this case.

As heretofore stated, I am also a director of the Cache County Farm Bureau. The Cache County Farm Bureau is an organization consisting of between 750 and 760 farm families. It is federated with the Cache County Sugar Beet Growers Association, the Utah-Idaho Canning Crops Association, the Cache Valley Dairy Association and the Cache County Poultry Producers. The Farm Bureau is not directly a shipper. Its members, however, are the growers of the products which are processed and shipped by the above named associations.

I am acquainted with the shipping needs of the various Cache Valley associations who ship the products of the members of the Cache County Farm Bureau of which I am a director.

[fol. 1980] It is my understanding that the D&RGW in its complaint seeks to have diverted to it traffic originating on the lines of the Union Pacific Railroad. I understand further that it does not contemplate building a railroad into the territory and that it is not in a position to render any service, that it merely seeks a division with the Union Pacific of the revenue on the traffic originated in this territory.

We had one experience in this area of a railroad being abandoned, namely, the Utah-Idaho Central, which resulted in considerable disruption of business, the severance of railroad connections and costly relocation of many business enterprises. We do not wish to see railroad service into Cache Valley curtailed but rather to have additional facilities installed.

I believe that action nullifying the opportunity of the Union Pacific to utilize fully its facilities in handling freight originating on its lines would not be conducive to improved service nor expanded facilities. We know that if business is lost, train service will necessarily be curtailed or rates increased. That in my opinion would be detrimental of the best interests of the agricultural economy of Cache County. I am, therefore, as a director of the Cache County Farm Bureau, opposed to the petition of the D&RGW.

The board of directors of the Cache County Farm Bureau, on September 23, 1949, adopted a resolution setting forth its position in this case. That resolution reads as follows:

Resolution

Whereas, the Denver & Rio Grande Western Railroad Company has filed a complaint with the Interstate Com-
[fol. 1981] merce Commission requesting the Interstate Commerce Commission to compel the Union Pacific Railroad Company to establish joint through rates on commodities shipped over the Union Pacific Railroad from points in Idaho, Oregon, Montana, Washington and Northern Utah, by way of Ogden, to common railroad points east thereof, and to establish a basis of division of such through rates with the Denver & Rio Grande Western Railroad Company, and

Whereas, the Union Pacific Railroad Company has deter-

mined to resist the application and the request as so filed with the Interstate Commerce Commission, and

Whereas, the Union Pacific Railroad Company has played a large part in the development of Northern Utah, Idaho, and other territory to the northwest thereof, and have contributed to the growth and development of Cache County and the entire Cache Valley area as it extends into Southern Idaho and have given and continue to give good service to shippers and consignees shipping and receiving merchandise over the Union Pacific Railroad, and

Whereas, a substantial portion of the Cache Valley area is served by the Cache Valley Branch of the Union Pacific Railroad Company and depends upon such branch line for rail transportation of commodities shipped out and received in Cache Valley, and

Whereas, members of Cache County Farm Bureau know that without the revenues received from long hauls, a railroad company cannot ordinarily maintain its branch lines so as to give the service necessary upon such branch lines, and

Whereas, the Union Pacific Railroad Company has in the past and continues at present to contribute substantially to [fol. 1982] the economic welfare of Cache County by way of taxes and payroll for employment of labor in Cache County, and in addition thereto, the Union Pacific Railroad Company has in the past and does now continue to encourage the farm youth, not only of Cache County, but of the entire Inter-mountain area, by awarding Carl Raymond Gray scholarships to Future Farmers and 4-H Club members, enabling and assisting such farm youth to study at the Utah State Agricultural College, and

Whereas, in the opinion of the Cache County Farm Bureau and its members, better service will be rendered to shippers by allowing a railroad company to carry a shipment upon the originating line as far as it can without transfer, and that the unnecessary transfer and switching from one rail line to another would give opportunity for delay and damage to such shipments.

Now, therefore, Be It Resolved that the Cache County Farm Bureau does not favor or approve the application as filed by the Denver & Rio Grande Western Railroad

Company with the Interstate Commerce Commission but is opposed to and disapproves the same.

[fol. 1983] Verified Statement No. 7

I.C.C. Docket No. 30297

Statement of Guy Gray, Dillon, Montana

My name is Guy Gray. My home is Dillion, Beaverhead County, Montana. I have been a resident of Beaverhead County, Montana all my life, 60 years, where I have been engaged in the livestock business for the past 15 years. I annually handle approximately 8,000 head and during the year 1949 shipped from the station of Dillon, 56 carloads destined to points in California, Iowa and Nebraska for the most part, with the preponderence of the shipments moving to points in California for feeding or slaughter. The stock shipped by me to the points mentioned is loaded at stockyards facilities maintained by the Union Pacific Railroad Company, for the most part of the stations of Divide, Dillon, Armstead and Monida, Montana, all located on the lines of the Union Pacific Railroad.

All of the shipments of stock handled from these points are routed via the lines of the Union Pacific. I have never had occasion to use the lines of the D&RGW or to solicit either the Union Pacific or D&RGW for joint through rates via the lines of the D&RGW. The Union Pacific is the railroad that renders service to me and has been reasonably prompt in making delivery of cars.

As I understand the case relating to the Ogden Gateway, it is that the D&RGW hopes to have rates established which will enable it to take the business of the Union Pacific originating in the States of Idaho, Oregon, Washington and Montana, where it will ship it via the lines of the Union Pacific to Ogden thence D&RGW to Denver where it will [fol 1984] have some other line take it, depriving the Union Pacific of its long haul.

As a citizen of Montana, I am interested in the Union Pacific, first, because it renders the service to the citizens of that state, while the D&RGW renders no service. I was

for a period of one term, the county treasurer of Beaverhead County, Montana, and as such realized for the first time the substantial amount of taxes paid by the Union Pacific Railroad. It is the largest single taxpayer in Beaverhead County. I, as a shipper and as a citizen of the State of Montana, am interested in the Union Pacific maintaining a financial position so that it will be enabled to render service to its shippers on its lines in this state.

In the shipping of stock, I am interested in the expeditious movement thereof, and understand that since the Union Pacific is the most direct route to destination point, I would therefore not wish to route any traffic via the D&RGW, the longer and necessarily less expeditious route.

I am appearing here as a witness in favor of the Union Pacific and in opposition to the D&RGW, who I understand has no intention of building a line of railroad into this state or of rendering service to the people of Montana, but merely seeks to secure a division of the revenues of that traffic handled by the Union Pacific. I am unalterably opposed to the petition of the D&RGW in this case.

[fol. 1985] VERIFIED STATEMENT No. 8

I.C.C. Docket No. 30297

Statement of L. J. Roedel, Baker, Oregon

My name is L. J. Roedel and I am Vice President and General Manager of the Oregon Lumber Company with headquarters at Baker, Oregon. I am appearing here in support of the position of the defendants in this case.

During the year 1949, my company shipped approximately 1,000 carloads of lumber from Baker, Oregon, a large percentage of which was consigned to Denver, Colorado, and points east and south thereof and were all routed via the Union Pacific route. Our inbound carload traffic from trans-continental origins consists of materials and supplies and while not of substantial volume, all are handled over the Union Pacific routes. The service of the Union Pacific has been very satisfactory from all transportation standpoints, including car supply and time in transit. The

Union Pacific has always been most sympathetic and helpful in establishing satisfactory rates and practices governing the movement of our traffic. The routes of the Union Pacific are entirely adequate and sufficient for our purposes, permitting our shipments to move freely to all consuming territories.

Prior to this hearing, I was interviewed by representatives of the D&RGW and urged to support it in this proceeding. We have never felt any need, nor do we anticipate any need for the routes and rates proposed by the D&RGW and we have never sought from either the Union Pacific or the D&RGW for their establishment. Such routes would not in any manner benefit my company.

[fol. 1986] My company has no lumber for sale for milling or remanufacturing in transit at any point. From my knowledge of the pine lumber industry in general in the States of Oregon, Washington and Idaho, it is my opinion that there is a shortage of lumber for remanufacture by the plants located in that territory. There is ample capacity within this area to provide drying and planing facilities for all the small sawmill production of the area. It is not economically sound to ship this small mill production any great distance via rail to be planned and finished. All of it can be sold to local manufacturing plants at favorable market prices. Pine lumber is not a structural lumber and therefore is not generally used for railroad ties, poles, bridge timbers, etc., and therefore, is not available for treating purposes. The pine lumber is used generally as finish lumber and as stated heretofore, is manufactured into finished boards, trip, moulding, etc., at the local manufacturing plants in the area.

My company has two operations, one at Baker, Oregon; of which I am the operating head, served by the Union Pacific; the other at Dee, Oregon, served by the Mt. Hood Railroad, whose only connection is with the Union Pacific at Hood River, Oregon. Being thus absolutely dependent upon the Union Pacific for our transportation needs, any order of the Commission which may be entered in this proceeding that would affect the Union Pacific by decreasing its revenues with consequent curtailment of service by it, would vitally affect the continued operations of my

company. For the foregoing reasons, I am emphatically opposed to the complainant in this case.

[fol. 1987] VERIFIED STATEMENT No. 9

I.C.C. Docket No. 30297

Statement of Fred E. Lanzer, La Grande, Oregon

My name is Fred E. Lanzer and I am Assistant General Manager and Sales Manager of the Mt. Emily Lumber Company of La Grande, Oregon, and appear in this proceeding in opposition to the D&RGW.

My company operates two lumber producing plants, one located at Enterprise, Oregon, which furnishes some of the rough lumber consumed at our other plant which is located at La Grande, Oregon. The La Grande plant is a complete lumber manufacturing operation, turning out finished boards, mouldings, knocked down furniture items, etc., and we ship annually in excess of 1,000 carloads, 90% or more of which is shipped to Denver and points east and south of Denver, all via the Union Pacific through routes.

Both of our plants are located on and served exclusively by the Union Pacific Railroad and the service given us by Union Pacific as to car supply, switching service, transit time, rates, etc., is and has been very satisfactory.

Our manufacturing plant at La Grande, Oregon, dries and remanufactures all of the lumber produced at that plant as well as the entire production of the plant at Enterprise, Oregon. We therefore have no rough lumber for sale for milling or otherwise remanufacturing in transit. The establishment of any milling in transit rates on the D&RGW would be of no benefit whatever to my company.

There are already established in this area, remanufacturing plants at Elgin, Oregon, Baker, Oregon and Ontario, [fol. 1988] Oregon, which have ample capacity to handle the production of small mills who are not equipped to prepare their production for the market.

Prior to taking a stand on the D&RG complaint, we were approached by representatives of the D&RGW. Consideration was given to their position. We have never felt any

need for the establishment of the routes proposed by the D&RGW, nor do we anticipate any need therefor. Certainly we would derive no benefit therefrom.

If the proposed routes of the D&RGW are established and substantial loss in revenue thereby sustained by the Union Pacific, such revenue losses would necessarily have to be offset by the restricting of service, reduced maintenance and increased rates. Either one or all of these contingencies would greatly affect and injure our operations. So far as our company is concerned, we trust the Commission will take no action detrimental to the welfare of the Union Pacific and the area they serve.

[fol. 1989] VERIFIED STATEMENT No. 10

I. C. C. Docket No. 30297

Statement of Fred E. Kiddle, Island City, Oregon

My name is Fred E. Kiddle, residing at Island City, Oregon, and I am President of the Pioneer Flouring Mill Company there and of the Union Flouring Mill Company located at Union, Oregon. In addition, my companies operate grain elevators at Alicel, Imbler, Elgin, La Grande and Union, Oregon. I am a member of the Pacific Northwest Grain & Grain Products Association, the North Pacific Miller Association, the Pacific Northwest Grain Dealers Association and the Pacific Northwest Pea Growers Association.

I have been engaged in the flour milling business for the past 31 years. By reason of my long experience in the flour milling business and my constant contacts with other millers throughout Oregon, Washington and northern Idaho represented by the organizations named, I am generally conversant with the industry and particularly its traffic problems.

The transportation problems confronting my companies in the marketing of our flour are typical of those confronting the other mills located in the Pacific Northwest.

During the year 1948, my companies shipped approximately 50 carloads of flour eastbound from their mills, all of

which moved to points Denver and east thereof via the Union Pacific long haul route.

Our experience with Union Pacific service, both with respect to the transportation of our wheat and the transportation of our flour east and westbound, has been satisfactory. We are vitally interested in such features of the [fol. 1990] transportation service as car supply, time in transit, switching at our mills and elevators. The service presently afforded us meets our requirements satisfactorily. The through routes now open to us via the Union Pacific are both adequate and satisfactory, therefore, we have never requested either the Union Pacific or the D&RGW to establish any additional routes, especially those proposed in this proceeding. We have never received any inquiries as to the purchase of grain or flour from points local to the D&RGW and consequently have never used their service.

It is our understanding that if the request of the D&RGW for the establishment of through routes and joint rates via Ogden is granted that traffic now handled via the Union Pacific long haul routes will be subject to diversion to the D&RGW at Ogden. Such routing would, of course, short-haul the Union Pacific on its through traffic, and at least to that extent would reduce the revenue now received by it.

Any reduction in revenue to the Union Pacific which might result in the restriction or curtailment of service now rendered to us, either road-haul, switching, car supply, transit privileges, etc., would definitely adversely affect the operation of our plants. Also, on or about October 17, 1949, the Pacific Northwest Grain & Grain Products Association, on behalf of its members, filed with the Trans-Continental Freight Bureau an application which has since been docketed as TCFB Docket No. 5975, asking the trans-continental carriers to consider and grant to the milling interests of the Pacific Northwest reductions in rates for the transportation of grain and grain products to points in trans-continental territory from points of origin in Oregon, [fol. 1991] Washington and Northern Idaho. With particular reference to the flour milling industry, there are twenty-seven flour mills located in the territory mentioned with a daily capacity of 74,300 hundred-pound bags of flour and, due in large measure to the level of the rail rates, ship-

ments from the Pacific Northwest to points north of the Ohio River decreased from 3,784,647 hundred-pound bags in 1945 to 324, 877 hundred-pound bags during 1949, and to points south of the Ohio River such shipments declined from 418,078 hundred-pound bags in 1945 to 102,768 hundred-pound bags in 1949. My companies, as well as all other millers in the Pacific Northwest, are hopeful of favorable action by the carriers on the Association's request for the rate reductions mentioned in order that we may again be in position to compete in the furnishing of flour for consumption in trans-continental territory. We are fearful that if the financial standing of the Union Pacific is reduced by reason of the diversion of even a portion of the traffic now handled by it via its long haul through routes that action on our request for reduced rates will be seriously and adversely affected, and for that reason also we would be opposed to the proposal of the D&RGW.

[fol. 1992] VERIFIED STATEMENT NO. 11

I. C. C. Docket No. 30297

Statement of E. S. Harper, Idaho Falls, Idaho

My name is E. S. Harper. I am a member of the partnership of E. S. Harper Company, the partners being myself and my two sons, E. M. and H. H. Harper. I am a member of the Chambers of Commerce of Idaho Falls, Idaho, Twin Falls, Idaho, and Payette, Idaho. The firm of which I am a member is engaged in the buying, packing and distributing of potatoes and onions produced in the State of Idaho and Eastern Oregon, through warehouse and packing plants owned by this firm at Idaho Falls, Twin Falls and Payette, Idaho, all located on the lines of the Union Pacific Railroad Company. At present, the plant at Idaho Falls has a capacity of 100 carloads and in the future, we hope to have a packing and processing capacity of 500 carloads.

During the year 1949, our firm purchased and shipped to eastern and western markets approximately 500 carloads of onions and 1,000 carloads of potatoes. The produce

shipped from Payette is largely produced in Malheur County, Oregon. Of the products shipped, the majority of them are shipped to eastern markets commencing at the Missouri River and extending to the eastern seaboard, although our firm does ship a substantial volume into the southwest, including Oklahoma and Texas. Approximately 10% of the volume of the produce shipped is consigned to markets in California, Oregon and Washington.

All of the produce shipped by the E. S. Harper Company is shipped via the lines of the Union Pacific Railroad, on which our warehouses and packing plants are located. [fol. 1993] The E. S. Harper Company has never found occasion to route shipments via the D&RGW nor has it ever requested the Union Pacific or the D&RGW to establish joint rates via that line for the reason that there is available to our company, markets which can be reached via the more direct line of the Union Pacific and its eastern connections. The E. S. Harper Company, like other shippers in the State of Idaho, is dependent for railroad transportation entirely on the Union Pacific Railroad, which owns and operates a main line and many branch lines in the state, the branch lines affording a basis for assembling the products produced in the state and bringing them to main line points from whence they are shipped to market.

As a member of the E. S. Harper Company, I am interested in the Union Pacific because I depend upon it for service. The service of the Union Pacific in the matter of furnishing a supply of cars, switching and transit is entirely satisfactory and adequate for the needs of the E. S. Harper Company. There has never been a time during my 25 years of operations on the Union Pacific Railroad when I have had a problem with respect to the transportation of my products that the Union Pacific has not been willing to sit down with me and work out a solution which has been satisfactory to me.

It is my understanding, the D&RGW in this case seeks, through solicitation, to have diverted to its lines through the Ogden Gateway, a substantial amount of the traffic originated in the northwestern states, namely, Utah, Idaho, Oregon, Washington and Montana, for the sole purpose of [fol. 1994] enhancing its revenues, but without contributing

anything to the economy of the state in which my business is located and operated. As I have heretofore stated, the Union Pacific has provided the transportation facilities in the state. It is the largest taxpayer in the state; it maintains a large payroll in the state. If business which it originates on its lines through its facilities is diverted to the D&RGW if the so-called Ogden Gateway were opened, it is reasonable to assume that it will not be in as strong a position to render service as it would be if it were permitted to continue as at present to transport the freight originated on its lines to Missouri River points. If the revenue is decreased, it is reasonable to assume that either one of two things will happen——either rates will have to be increased or service reduced. Either of these would be a distinct disadvantage to my firm's operation. In addition to this, if the route via the D&RGW were opened, the distance via that route between shipping points to eastern markets is considerably longer. Expedition in transit of the products shipped by the E. S. Harper Company is of particular advantage. In other words, when cars are loaded and shipped, it is to our advantage that they be moved to market with the least possible delay, and it is my belief that if it were diverted to the D&RGW through the Ogden Gateway, considerable delay would be entailed in moving through the Ogden terminal, in addition to the longer route via the D&RGW.

I have been solicited by representatives of the D&RGW on a number of occasions to testify in their behalf in this case and on each occasion, I refused.

[fol. 1995] The development of the State of Idaho has been made possible by the construction, maintenance and operation of the main and branch lines of the Union Pacific Railroad. It is my belief that the interests of the people of Idaho lie in permitting the Union Pacific to enjoy the longest possible haul over its lines of the products shipped out of the territory which it serves, and there is no logical reason, in my opinion, why the D&RGW should be permitted to participate in the revenue on such shipments since it is not in a position to render service to the people of Idaho either in the way of car supply, switching, assembly or transit.

I am, therefore, unalterably opposed to the application of

the D&RGW in this case and am appearing here as a witness for the defendants, particularly the Union Pacific, and in opposition to the petition of the D&RGW.

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[fol. 1996] VERIFIED STATEMENT No. 12

I.C.C. Docket No. 30297

Statement of Frank A. Mason, Dedham, Massachusetts

My name is Frank A. Mason. I reside in Dedham, Massachusetts. I am one of the partners of Hallowell, Jones and Donald of Boston, Massachusetts. We have been one of the largest handlers of domestic wool for more than 50 years and handle substantial weights of wool from growers in the States of Idaho, Oregon, Utah, Colorado and Wyoming. The wools purchased in these states are shipped to Boston on the lines of the Union Pacific Railroad and connections.

We have enjoyed friendly relations with the railroads all over the United States and appreciate their problems. The Union Pacific has rendered satisfactory service for our requirements over the many years on wools originating on their railroad. We fail to see where there would be any benefits on wools originating on the Union Pacific lines in Oregon and Idaho by the establishment of through joint rates between the Union Pacific and D&RGW, which is sought by the complainant in this case. Hallowell, Jones and Donald has never requested either the Union Pacific or the D&RGW to establish joint rates with respect to these wool shipments, since the services and facilities of the Union Pacific are adequate and the route of the Union Pacific is more direct on wools originating on its lines and there is an advantage to us in shipping via direct route and in avoiding delay which would be occasioned if the wools were to move via Ogden, thence Rio Grande and connections, which would involve a circuitous routing plus the necessity of additional interchanges between railroads. [fol. 1997] The Union Pacific has been reasonably prompt in supplying cars for our shipments of wool and has further rendered satisfactory and adequate service on the movement of these wools to the Boston market.

I expressed my views with respect to the Ogden Gateway case in my letters of December 2, 1949 to Mr. H. S. Bennett, Chairman, Public Service Commission of Utah, Salt Lake City, and Mr. W. B. Joy, President, Public Utilities Commission of Idaho, Boise, Idaho, each of which was identical, reading as follows:

"For some time now I have observed with interest the activities of the D&RGW Railroad Company and the Union Pacific Railroad Company throughout the inter-mountain and Pacific Northwest territories respecting the so-called Ogden Gateway case involving complaint filed by the D&RGW Railroad seeking establishment of through rates and routes in connection with their line between Ogden and Denver on traffic originated by the Union Pacific Railroad Company.

"In order to avail myself with a complete understanding of this case, I have purposely avoided corresponding with you heretofore; but after a careful study, it is our considered opinion the Interstate Commerce Commission should finally render a decision favorable to the Union Pacific Railroad and deny this complaint. To that end we respectfully urge your consideration and unqualified support.

"A substantial volume of wool is purchased in and shipped from Utah, Idaho, Oregon, Washington and Montana origins by Hallowell, Jones & Donald. During the shipping season, transit time is a decided factor, and if for any reason we were obliged to route these shipments in connection with the D&RGW Railroad, a delay of at least 24 hours and perhaps as much as 48 hours in transit time would necessarily result, and obviously this would be detrimental to our best interest. Additionally, there is nothing which the D&RGW can offer in the way of additional or more desirable diversion privileges, service, or facilities.

"In view of the foregoing, it is our desire that the Commission intervene in behalf of the Union Pacific Railroad Company in these proceedings, and your favorable consideration will be appreciated.

Very truly yours,

(S.) Frank A. Mason"

[fol. 1998] I am, therefore, appearing in this case as a witness for the defendants, particularly the Union Pacific Railroad, in opposition to the petition of the D&RGW.

. . . . . .

[fol. 1999] VERIFIED STATEMENT No. 13

I. C. C. Docket No. 30297

Statement of J. C. Stauffer, Willard, Utah

My name is J. C. Stauffer, and I reside at Willard, Utah. I am a member of the Box Elder County Farm Bureau and a member of the Utah Cattle and Horse Raisers Association. I own and operate 2,000 acres of land in Box Elder County, Utah, on which I raise hay, grain, vegetables, fruit and livestock. I am appearing here as an individual shipper of livestock and as a representative of the Box Elder County Farm Bureau.

In my livestock operations, I raise an average of 900 head of cattle per year. My summer range is located in Wyoming and the winter range in Utah. Approximately one-half of these 900 head of cattle are shipped from Evanston, Wyoming, and one-half from Brigham, Utah, and consigned to dealers, commission men and packing houses in Kansas, Nebraska and Iowa.

In addition to the livestock which I produce, I purchase approximately 5,000 head of cattle each year. Some of this livestock is purchased in D&RGW territory and are shipped to the west coast, and about half of the cattle purchased in Union Pacific territory is shipped to the west coast and the remainder to eastern points, mainly in Iowa, but some in Kansas and Nebraska.

The service afforded by the Union Pacific Railroad is entirely satisfactory and adequate for my needs, including car supply and transportation to destination. I have never requested either the Union Pacific or the D&RGW for the [fol. 2000] establishment of joint rates via Ogden for the reason that the route of the Union Pacific is the most direct for the shipment of my livestock to eastern points. The service afforded by the D&RGW on the livestock which I purchase and ship from D&RGW territory in no way com-

pares with the service rendered by the Union Pacific Railroad.

The Union Pacific is the railroad that furnishes the transportation facilities and performs the necessary service for the shipment of my livestock in northern Utah and Idaho. The D&RGW does not contemplate building a railroad into this territory nor does it intend to furnish any service in this territory. A few years ago when the Utah Idaho Central Railroad was being abandoned, the D&RGW had an opportunity to purchase that railroad and thereby render service in the territory served by the Utah Idaho Central. However, the D&RGW did not take advantage of that opportunity to acquire a line of railroad in northern Utah and Idaho and render service to shippers in that territory. I do not believe that the D&RGW should now be permitted to participate in the revenue on traffic originated in this territory by the Union Pacific without performing any service in connection therewith.

It is my belief that if the D&RGW should prevail in this case and secure a substantial diversion of traffic originating in the States of Utah, Idaho, Oregon and Washington to the lines of the D&RGW, it would be necessary for the Union Pacific either to curtail its service or increase rates, either of which would work to my disadvantage. A substantial [fol. 2001] portion of the shipments of my livestock originates on the lines of the Union Pacific east of McCammon, Idaho, and Ogden, Utah, and if traffic were diverted to the D&RGW at Ogden, it is reasonable to assume that service on the lines of the Union Pacific east of McCammon, Idaho, and Ogden, Utah, would not be as frequent as that presently rendered, and this reduction in service would be disadvantageous to me.

As heretofore stated, I am a member of the Box Elder County Farm Bureau. The views of that bureau are set forth in a resolution adopted by it on the 4th day of October, 1949, Exhibit —. I have been authorized to testify here in behalf of that bureau, and I am in accord with the views expressed in the resolution.

For the above reasons, I am preparing here as a witness in favor of the defendants in this case, particularly the Union Pacific, and in opposition to the application of the D&RGW.

[fol. 2002] EXHIBIT TO VERIFIED STATEMENT No. 13

I. C. C. Docket No. 30297

Witness: J. C. Stauffer

RESOLUTION

It has been brought to the attention of the Box Elder County Farm Bureau that the Denver & Rio Grande Western Railroad Company has filed a complaint with the Interstate Commerce Commission requesting the Interstate Commerce Commission to compel the Union Pacific Railroad Company to establish joint through rates on commodities shipped over the Union Pacific Railroad from points in Idaho, Oregon, Montana, Washington and northern Utah, by way of Ogden, to common railroad points in Colorado and common points east thereof, and to establish a basis of division of such through rates on long haul rates with the Denver & Rio Grande Western Railroad Company.

The Bureau has also been advised that the Union Pacific Railroad Company has determined to resist the application as filed with the Interstate Commerce Commission.

Inasmuch as the Union Pacific Railroad is the only rail outlet available, the Box Elder County Farm Bureau membership depends to a great extent upon the Union Pacific Railroad for the movement of their produce to market. A substantial portion of Box Elder County is served by the [fol. 2003] Malad Branch of the Union Pacific Railroad and the various members of the Bureau know and realize that the revenues received from branch line operations of a railroad are not ordinarily sufficient of themselves to maintain adequate service, and that without the long haul and the revenues derived therefrom the Union Pacific Railroad Company cannot maintain its branch lines and give the efficient service necessary thereon.

The Union Pacific Railroad Company has played a large part in the development of northern Utah, Idaho, and other territory to the northwest thereof, and is at the present time an important element in the economic structure of Box Elder County because of the fact they pay substantial taxes to Box Elder County, as well as to the State of Utah, and

furnish a considerable amount of employment in Box Elder County.

In addition, it is recognized that the Union Pacific Railroad can give better service where shipments are not transferred from one railroad to the other, causing unnecessary delays as well as difficulties in tracing and diverting shipments.

[fol. 2004] In view of these and other circumstances, it is hereby resolved that the Box Elder County Farm Bureau does not favor or approve the application as filed by the Denver & Rio Grande Railroad Company with the Interstate Commerce Commission but is opposed to the granting of through rates that will deprive the Union Pacific Railroad Company of the benefit of revenues derived from a long haul to which it is entitled.

The Secretary of the Box Elder County Farm Bureau is hereby authorized and directed to furnish four certified copies of this resolution to the proper officials of the Union Pacific Railroad Company.

(Sgd.) A. V. Smoot, Pres. South Box Elder Farm Bureau.

[fol. 2005] VERIFIED STATEMENT No. 14

I.C.C. Docket No. 30297

Statement of Robert D. Gallafent, Pocatello, Idaho

My name is Robert D. Gallafent. I reside at Pocatello, Idaho. I am the owner of the Bannock Motor Company at Pocatello and handle Pontiac and Cadillac automobiles and GMC trucks. I am at the present time a member of the Pocatello Chamber of Commerce and during the year 1949, I was the President of that organization.

During the year 1949, I received 11 carloads of automobiles and trucks from Kansas City, which were shipped via the lines of the Union Pacific Railroad. The service afforded by the Union Pacific has always been satisfactory and adequate for the requirements of my business. I have never had occasion to use the lines of the D&RGW nor do I anticipate that I will ever have occasion to route ship-

ments via that line. I have never requested either the Union Pacific or the D&RGW for the establishment of joint through routes via the Ogden Gateway.

As previously stated, during the year 1949, I was President of the Pocatello Chamber of Commerce. On August 12, 1949, the Board of Directors of the Pocatello Chamber of Commerce adopted a resolution opposing the application of the D&RGW in this case and supporting the position of the Union Pacific Railroad. The resolution recited that the Pocatello Chamber of Commerce had made an extensive study of the effect on the State of Idaho which might result from the opening of the Ogden Gateway and called attention to the fact that the economy of the State of Idaho is largely extractive and the products of the State, which are exported, must be sold in the major markets of [fol. 2006] the country. The resolution also stated that the Union Pacific, with the long haul arrangements which it has enjoyed, has been able to adopt freight rates which makes it possible to market the products of the State of Idaho, and the continuation of these present competitive rates is directly dependent upon the continuation of the present long haul arrangements which are enjoyed by the Union Pacific.

Additionally, the resolution stated that the Union Pacific Railroad has contributed materially to the development of the State of Idaho and that if the State is to grow and prosper, it is necessary that it be served by a strong, aggressive railroad. The resolution further stated that the opening of the Ogden Gateway, with the possible attendant short-hauling of traffic by the Union Pacific would weaken the Union Pacific and might make it necessary to curtail its activities in connection with furthering the development of the State.

As a receiver of freight in Pocatello, Idaho, via the lines of the Union Pacific Railroad and as a representative of the Chamber of Commerce of Pocatello, Idaho, I am opposed to the application of the D&RGW in this case for the reason that anything that would affect the ability of the Union Pacific to serve the people of Idaho, who are dependent upon that railroad for service, is detrimental to the interests of the State. I am opposed also for the reason that anything that would reduce employment on the

Union Pacific resulting from curtailed train service due to the diversion of traffic from the Union Pacific to the D&RGW and the consequent loss of revenue to the Union Pacific, would adversely affect my business, as well as [fol. 2007] business generally in Pocatello and the State of Idaho.

I am, therefore, appearing here as a witness in favor of the defendants in this case, particularly the Union Pacific, and in opposition to the petition of the D&RGW.

[fol. 2008] VERIFIED STATEMENT No. 15

I.C.C. Docket No. 30297

Statement of E. E. Pugh, Springston, Idaho

My name is E. E. Pugh and I am Sales Manager and Treasurer of Russell and Pugh Lumber Company of Springston, Idaho, which company is engaged in the production and manufacture of lumber, principally pine, and appear in this proceeding in support of the defendants.

My company manufactures a substantial portion of the rough lumber produced by it into finished lumber and markets it in the territory east and south of Denver.

During the year 1949, we forwarded 197 carloads to the territory east and south of Denver, all of which moved via the Union Pacific through routes. The service of the Union Pacific in the supplying of cars and the moving thereof has been entirely satisfactory. The routes maintained by the Union Pacific are entirely adequate and sufficient for our purposes.

My company's production consists roughly of 60 per cent pine and 40 per cent red and white fir lumber, most of which we manufacture into finished state and therefore have no rough lumber for sale for manufacturing in transit or otherwise. Indeed, there is a shortage of rough lumber in the territory in which we operate.

My company has no need for the routes and rates sought by the D&RGW in this proceeding and we have never asked either the Union Pacific or the D&RGW to establish the same.

Our plant is located on and served by the Union Pacific and we are entirely dependent upon that company for satisfactory transportation service. Any curtailment of [fol. 2009] that service, either switching or line-haul which would be made necessary by the diversion of traffic to the D&RGW with consequent loss of revenue by the Union Pacific would be detrimental and injurious to our business. It is for these reasons that we oppose the complainant in this case.

[fol. 2010] VERIFIED STATEMENT No. 16

I.C.C. Docket No. 30297

Statement of Clyde Bunting, Boise, Idaho

Clyde Bunting is my name and I reside at Boise, Idaho. My position is that of President of the Bunting Tractor Company, having headquarters in that city. The Bunting Company is in the business of retail sales of agricultural implements, heavy duty tractors and contractors' equipment. Practically all of our rail shipments originate in the east, principally from the Caterpillar Tractor Company at Peoria, and from whatever locations John Deere Company has manufacturing plants. I might say that I have been in this business for approximately 40 years.

Some idea of the volume of our rail shipments might be indicated by the fact that in 1948, we had 111 carload shipments from the east, and in 1949, the number was 102. In all cases I think the Union Pacific had the rail haul on these cars from Missouri River junction points.

Our outbound shipments from Boise and our other plants in this area in 1949 numbered 32, 4 of which moved east and 28 west.

Generally speaking, time is very important to our company in securing delivery of the types of equipment which we handle. This is so because they are what might be termed seasonal articles. In fact, any delay in transit might well result in serious losses to our customers, particularly contractors engaged in construction of highways and other expensive projects. It is for this reason that we would in all cases, rates being equal, use the shortest possible

route so as to minimize the time in transit. As I understand it, the use of the Rio Grande route through Denver [fol. 2011] and Ogden from Peoria, Illinois, for instance, would involve substantial additional mileage over the direct route of the Union Pacific. In addition to this, I understand the Rio Grande route would necessitate one and perhaps two additional terminal interchanges with connecting lines. This, of course, would result in additional transit time. In this situation I think it is obvious that the company which I represent would not derive any benefit from the establishment of this new route by way of better transportation service, and I do not understand that the question of rates is involved.

The important consideration which has moved me to appear here today is that the Union Pacific is the only railroad available to our company and other shippers in southern Idaho. Thus, we must depend upon the Union Pacific entirely for adequate rail service, and this would be true even if the Ogden Gateway were opened because I understand that the Rio Grande does not intend to project its railroad into this state. As a businessman, I can readily realize that the Union Pacific must have adequate revenues to sustain its operations, and if it is deprived of its long haul on the business which it has been receiving in the past, there can only be two alternatives: One is increased rates on the traffic which it continues to handle, or a curtailment of service. Of course, I am opposed to both.

[fol. 2012] VERIFIED STATEMENT No. 17

I.C.C. Docket No. 30297

Statement of Jay Malvin, Boise, Idaho

My name is Jay Malvin and I am appearing in this proceeding as Purchasing Agent of the Idaho Power Company in support of the Union Pacific and in opposition to the complaint of the Denver and Rio Grande Western Railroad Company.

The Idaho Power Company, which has its headquarters

at Boise, Idaho, operates throughout southern Idaho and in eastern Oregon.

Our Company, like the Union Pacific, has spent very large sums of money for new lines, plants and facilities in order to meet the increasing demands of the people and industries in the towns and communities which we reach and also in anticipation of future needs.

As I understand the Rio Grande's proposal here, it does not intend to build a line of railroad beyond Ogden into Idaho and thereby offer to the shipping public any added railroad facilities. Moreover, I do not understand that the Rio Grande offers any lower transportation costs than are now in effect via the Union Pacific, and neither do they claim that they can better the service rendered by the Union Pacific.

Our Company is a rather substantial user of rail transportation of various kinds of freight via the Union Pacific and its connections. We move in a substantial number of carloads each year. A considerable number of these cars come from the east, and notwithstanding the fact that they originate at many scattered points, we have throughout the years found that the routes and service of the Union Pa- [fol. 2013] cific have been entirely adequate and satisfactory. For this reason then, I see no advantage on shipments which might be made over the Rio Grande route, and as far as I know, none of the firms from which we make purchases has indicated any interest in that route. Inasmuch as the Rio Grande cannot offer any better rates or service than the Union Pacific, and in all probability cannot match that service, we obviously would derive no benefit from opening of the Ogden Gateway.

The point I want to emphasize in appearing here is that the Union Pacific, like the Idaho Power Company in its field, is the backbone of the transportation industry in the southern part of Idaho and eastern Oregon. The common territory which the two companies serve is not densely populated and distances are great. Moreover, much of the land is yet unproductive. Throughout the years, the Union Pacific has recognized the need and desirability of expanding the state's economy. In company with other business, it has carried on an intensive campaign to promote and encourage the development of this area. The result is

that today Idaho ranks high among the states in agricultural pursuits, in lumber output, and is expanding industrially. Being the only railroad in the southern part of the state, obviously it is a vital factor in the economy of our area; in fact, it is the only railroad to which shippers can look with confidence in solving transportation problems.

It is my considered belief that if this area is to continue its growth and development, then it must continue to be served by a strong railroad—in other words, one that is able to render service at the lowest possible rates con- [fol. 2014] sistent with adequate and efficient service. I believe the Union Pacific has been doing just that in the past. The proposal here that the Union Pacific deliver southern Idaho traffic to the D&RGW at Ogden and let it have the intermediate haul to eastern markets is, in my judgment, not justified. It seems to me that the Union Pacific should be entitled to the long haul on shipments originating on its own lines. Obviously, if this is denied them, it would have the inevitable effect of substantially reducing their earnings and eventually weaken it in the same manner that any other business enterprise would be weakened if its earnings were impaired. Faced with this situation the Union Pacific would, I believe, have no alternative but to adjust its expenses to its revenues or increase its rates. Plainly, either alternative would have a detrimental effect upon the economy and welfare of the state.

It is for these reasons that I appear in this proceeding in support of the Union Pacific's position.

[fol. 2015] VERIFIED STATEMENT No. 18

I. C. C. Docket No. 30297

Statement of Fred A. Phillips, Baker, Oregon

My name is Fred A. Phillips of Baker, Oregon; I am engaged in business as a dealer in livestock, principally cattle, and am appearing here in support of the Union Pacific Railroad and against the contentions of the D&RGW.

I have been engaged in the livestock business as a producer, buyer and seller, since 1894; was President of the

Northwest Livestock Shippers Traffic League from 1931 to 1949; served as President of the Oregon Cattlemen's Association for four terms commencing in 1923 and was President of the Oregon Wool Growers' Association for two terms commencing in 1928.

During the year 1949, I shipped approximately 4000 head of cattle consisting of 160 carloads, from the vicinity of Baker, Oregon, to points Denver and east thereof and also to California. Of the 160 carloads mentioned, 60 carloads, approximately 40% were shipped east over the Union Pacific routes and the service rendered by that Company as to car supply, transit time, etc., has been very satisfactory. The routes and services of the Union Pacific are entirely adequate and sufficient for my purposes as a shipper and I have never requested either the Union Pacific or the D&RGW to establish the through routes now requested by the D&RGW, nor do I anticipate any need for such routes.

It is extremely important in the shipment of my livestock that they be handled on the fastest possible intransit time with the fewest number of interchanges. As I understand the complaint in this case, it seeks to have diverted from the [fol. 2016] Union Pacific route, traffic that would originate in my territory, to the D&RGW at Ogden, thence via D&RGW and connections beyond. The handling of livestock via that route would result in longer time in transit and additional interchanges than is now necessary via the Union Pacific route. Such additional handling would be detrimental to my interests as a shipper.

Also, the diversion of traffic from the Union Pacific to the D&RGW would result in loss of substantial revenue to the Union Pacific. Such loss in revenue would necessarily be offset by curtailment in the present service and possible increase in rates, or both, either of which would be disadvantageous to me and injurious to my business.

Producers in this area have no difficulty in disposing of their feeder cattle and lambs, and the opening of the Ogden Gateway is not necessary from a marketing standpoint nor would it influence the price paid to the producer for such livestock.

[fol. 2017] VERIFIED STATEMENT No. 19

I. C. C. Docket No. 30297

Statement of Edward E. Parsons, Payette, Idaho

Edward E. Parsons is my name and I live at Payette, Idaho. I am in the business of operating a packing plant under the name of Parsons Fruit Company, handling several kinds of perishable vegetables and fruits commonly grown in western Idaho and eastern Oregon.

I have been in this business for 18 years. My dealings in most instances are confined to sales through some of the nationally known concerns located at Kansas City, St. Louis, Chicago and Denver. I also sell quite a lot to the Idaho representative of one of the largest chain stores in the country. Last year, I shipped 399 cars.

My No. 1 potatoes and large onions generally move to St. Louis, Chicago and east, and occasionally to the southeast, while the No. 2 potatoes and the smaller onions go mainly to Kansas City, Missouri, and the southwest. In the case of the latter shipments, I have been able, when a car is rejected at a point between Denver and Kansas City, to sell or reconsign it to a purchaser in Kansas or the southwest on existing joint rates, and I have suffered no loss on account of not being able to find other markets for such cars.

The reason I am supporting the Union Pacific here is that my plant at Payette is reached by its railroad—in fact, there is no other railroad for many miles. I must depend upon the Union Pacific and they have given me good service in every way. It is the shortest and fastest route to the east, southeast and southwest and I would not have used the Rio [fol. 2018] Grande even if the rates were the same over that line. The through routes and rates now in effect over the Union Pacific allow me to reach all points where our products are in demand, so that opening of the Ogden Gateway is not necessary on that account.

My concern here, however, and this is the main reason for appearing here today, is that the consignee or purchaser controls or designates the routing on many of my shipments. In the past, the Union Pacific has had the long haul to Missouri River junction points, but I am afraid that if the

Rio Grande gets what it wants in this proceeding, it and its connecting lines will solicit eastern consignees to divert their shipments from the Union Pacific, leaving it only the short haul to Ogden, regardless of how much I must depend upon the U. P.

Even if the Rio Grande gets the Ogden route opened up, that will not increase the rail service at Paget's, and I would still have to rely upon the Union Pacific for local service for cars, for switching and for rate adjustments. I cannot see how sandwiching of the Rio Grande into the rate would be of any benefit to me. On the contrary, I believe it would actually hurt me because it can have no more effect than to reduce the earnings of the Union Pacific. Other effect the shippers of Idaho cannot expect. Certainly, continue to spend money to give service and make improvements if it is faced with the imminent threat of diversion of a large portion of its traffic.

[fol. 2019] VERIFIED STATEMENT No. 20

I. Docket No. 30297

Statement of Marcus A. Pomeroy, Hansen, Idaho

Marcus A. Pomeroy is my name and my place of business is Twin Falls, Idaho. That business consists of the growing of potatoes, cattle feeding and general farming; also the shipping of potatoes. I have been affiliated with the potato industry for 19 years in the Twin Falls territory. From 50 to 75 carloads of potatoes are grown on my farm-residence at Hansen, Idaho, each year. I also purchase from growers about 150 cars of potatoes a year. My potatoes go to markets in southern California and to Kansas City and Chicago. No. 1 potatoes shipped east go mostly to Chicago, while No. 2's are sold through firms at Kansas City, from which point they are diverted by buyers to points beyond.

First, let me say that the main reason why I am supporting the Union Pacific here is that it has pioneered the growth and development of not only the Twin Falls district but the entire southern portion of Idaho. I have lived in the Twin Falls area since 1905 and the Union Pacific Railroad is prob-

ably one of the first things I remember in my youth. Later, when I went into the potato business, and ever since, I depended upon it for about everything connected with getting my shipments to market. The U. P. has meant a lot to me throughout the years, and unless the Rio Grande can do a better job of railroading, and I don't see how they can because of their much longer distance, then I don't see any need for opening the Ogden Gateway.

If the Rio Grande had spent its money and worked the [fol. 2020] way the U. P. has to develop the state, perhaps I would look at it differently, but under their deal they would have absolutely nothing in the state that would help me assemble and start my potatoes to market as the U. P. now does.

The Union Pacific have several thousand employes in Idaho and it is a heavy tax-payer. The Rio Grande, though, would not contribute anything along those lines to the state. In the past, the Union Pac : has been considerate of me and given my shipments excellent handling, but if some railroad like the Rio Grande is going to be able, only by solicitation, to take away a lot of the U. P.'s business, then I am afraid it will not have the money necessary to properly maintain its properties in order to give the good service it has in the past. If that happens then the U. P. will have to give me and other shippers only mediocre service.

Prompt and dependable rail service is absolutely necessary to the growing, shipping and marketing of the perishable commodities grown in this state.

For my part, I cannot see that any good can come out of the Rio Grande's proposal to me and others in the same line of business in Idaho. On the other hand, I am convinced that in the end, it will have serious adverse effects upon us all, and consequently I am vigorously opposed to the opening of the Ogden Gateway.

[fol. 2021] VERIFIED STATEMENT No. 21

I. C. C. Docket No. 30297

Statement of Frank H. Adams, Twin Falls, Idaho

My name is Frank H. Adams, and my residence is Twin Falls, Idaho. I am President and General Manager of the Idaho Growers Association, shippers and packers of potatoes, beans and onions for domestic and export markets, with pioneer experience of 45 years in this valley.

The principal markets for the products my firm handles are at points east and south of Denver, Colorado, and we use the New Orleans port mostly for export to South American points.

During my years of experience as a shipper, I have had no difficulty in marketing the products we handle via the existing routes through the Denver or Kansas City Gateways, and at no time have we had need for the Rio Grande, as there are no markets on that line that consume Idaho products we ship. To points beyond the Rio Grande, yes, we have the direct line service of the Union Pacific, and time being the essence in our perishable business, we would not have used the Rio Grande even if the same rates applied, the Union Pacific being more direct and faster to the Denver and Kansas City Gateways.

On an annual basis, our shipments average over 200 carloads, and considering what the Union Pacific has done for the State of Idaho, (and as a pioneer shipper, I know) I do not want to see it deprived of revenue on traffic which it originates here, only to be turned over to a foreign railroad near our state line, which has no taxable interest in Idaho. There is no question but the Union Pacific's revenue would [fol. 2022] drop off if the D&RGW takes business from it, and cause the Union Pacific to start cutting expenses in Idaho and elsewhere.

To summarize, the reasons why I am opposing the Rio Grande complaint follow:

First, I think a high-class railroad such as the Union Pacific should have the benefit of its long haul once it has furnished the cars and borne the expense of assembling the traffic for movement.

It is inconceivable the D&RGW would expect such a windfall to happen without any financial interest in Idaho, which would greatly retard Union Pacific Railroad interest in Idaho by extensive loss in revenue to a parallel line just outside of the state, the answer? Let the D&RGW cross into Idaho with a railroad and compete by paying Idaho taxes and nobody would complain and would help them. On the other hand, if outside railroads near Idaho are allowed to open up Gateway privileges just outside the state, thereby robbing the Union Pacific Railroad of the long haul freight it originates, *we never will have but a one-man railroad state.*

Finally, if Idaho is to be a one railroad state, and apparently the Rio Grande intends it shall continue to be, then I am thankful that we have the Union Pacific, and it logically follows that we should fight to keep it in a healthy position, financially and physically, to be able to continue to give good service, unhampered by outside connecting lines.

We need another competitive railroad in Idaho, but I am against weakening what we already have by opening a Gateway to the D&RGW Railroad so near our state.

[fol. 2023] VERIFIED STATEMENT NO. 22

I. C. C. Docket No. 30297

Statement of Frank Stubbs, Yakima, Washington

My name is Frank Stubbs of Yakima, Washington, and I am President of Stubbs Fruit Company. I am a member of the Yakima Valley Traffic Association and a member of the Board of Directors of the City of Yakima Chamber of Commerce and joined in the resolutions passed by those organizations supporting the position of the Union Pacific Railroad in this case. I am appearing here in support of the defendants on behalf of myself.

My Company is engaged in the storage, packing and marketing of apples, pears, peaches and prunes produced in the Yakima Valley and during the year 1949, shipped approximately 153 carloads of the fruits named, of which 148 carloads moved via the Union Pacific long-haul routes

to points East and South of Denver. My place of business is located on the Union Pacific Railroad, whose service from the standpoint of car supply, transit time, diversion orders and other such service has been highly satisfactory. In so far as my needs are concerned, the routes of the Union Pacific and the service thereover are entirely adequate and sufficient for my purposes.

In the shipment of the perishable fruits which I handle it is important that they move by the most direct route with the fewest possible interchanges between carriers, as expeditiously as possible. The route proposed by the Denver and Rio Grande Western being longer than that of the Union Pacific would result in longer time in transit, and more interchanges, and therefore would not benefit me in any manner.

In addition, as I understand it, the diversion to the routes [fol. 2024] proposed by the Denver and Rio Grande Western would divert from the Union Pacific traffic now handled over its long-haul routes, with consequent loss of revenue. If this is accomplished, it naturally follows that such reduced revenues would necessarily have to be met by decreased operating expenses, which in turn would mean the curtailment of service by the Union Pacific. Anything that would reduce in any manner the service now rendered me by the Union Pacific would be disadvantageous and injurious to my business.

For the reasons outlined above, I am opposed to the proposal of the complainant in this case.

[fol. 2025] VERIFIED STATEMENT No. 23

I. C. C. Docket No. 30297

Statement of Frank W. Shields, Yakima, Washington

My name is Frank Shields and I am the Secretary and Manager of the Yakima Valley Traffic Association of Yakima, Washington. I am testifying here on behalf of that Association and for the Yakima Chamber of Commerce. I live in Yakima, Wash.

On November 16, 1949, after consultation with repre-

sentatives of both the Union Pacific and Denver and Rio Grande Western, at a general meeting of the membership of my Association, a resolution was unanimously adopted favoring the position of the Union Pacific Railroad Company in this proceeding.

There are 90 members of the Association, of which 65 members are engaged principally in the production, warehousing, storage, marketing and selling of apples, pears, peaches, prunes, apricots, plums and cherries produced in the Yakima Valley, Washington.

The Association appears before the Interstate Commerce Commission and the Various State Commissions in all cases affecting the interests of its members and in such proceedings, appearance on behalf of the Association is usually made by me. Such proceedings involve rates, routes, and all other transportation problems with which the fruit industry of the Yakima Valley is concerned. In addition, the Association compiles crop, shipping and sales data for the information and guidance of its members.

The Association as such has been in existence for approximately 33 years and I have occupied my present position with it for about 5 years.

[fol. 2026] During the year 1949, the members of the Association whom I represent shipped in excess of 20,000 carloads of which approximately 5,000 carloads were shipped over the Union Pacific. The majority of these carloads moved to destinations beyond the territory served by the Denver and Rio Grande Western Railroad. Westbound shipments received by the membership consisted of fruit baskets, spray material, fruit wrappers and other supplies, originating for the most part East and South of Denver. The general route of movement has been via the Union Pacific on both outbound and inbound shipments and the service given by the Union Pacific, including car supply, transit time, protective service, diversion, tracing and all other facilities connected with the movement of these shipments has been extremely satisfactory and for the purpose of the Association's membership, is entirely adequate and sufficient.

Neither the Association nor any of its members have asked that any additional routes, including that of the

Denver and Rio Grande Western, be established. And, after full consideration of the application of the Denver and Rio Grande Western, it was concluded that no benefit whatever would be derived from the establishment of such routes.

Since all shipments made by the Association's membership consist of perishable fruits, the time in transit and protective service rendered is of utmost importance. If the route requested by the Denver and Rio Grande Western is established, it will be longer than the present Union Pacific route and that, together with the additional interchanges would, of course, require time in transit and in-
[fol. 2027] crease the opportunity for damage to lading and consequent customer dissatisfaction. Such could not possibly benefit the members of the Association.

Defendant Northern Pacific Railway Company was the original line in the Yakima Valley. At great expense the Union Pacific, years ago, extended its line to Yakima and constructed feeders in connection therewith, and as the territory developed, secure a share of the traffic originating in the Valley. We understand that the purpose of this complaint is to secure to the Denver and Rio Grande Western at Ogden, traffic originated by the Union Pacific, thus depriving the latter company of the long haul now enjoyed by it, with consequent loss of revenue. It is but natural if the Union Pacific is deprived of some share of the revenue it now receives from the handling of this traffic, such loss will have to be compensated by reduction in operating expenses through less frequent train schedules, shorter periods of switching service, less frequent switching, and generally curtailed maintenance. Also, it would seem that the ability of the Union Pacific to reduce rates, provide more and better equipment and generally to improve its service would be vitally affected. Anything tending to curtail the present rail service to the members of the Association would be disadvantageous to them and injurious to their business. For these reasons, we are opposed to the Denver and Rio Grande Western in this proceeding and ask that the Commission take no action which might result in an impairment of the service now rendered to us by the Union Pacific.

[fol. 2028] Resolutions passed by each of those organiza-

tions in behalf of the Union Pacific Railroad Company in this case are submitted as Exhibit —.

[fol. 2029 EXHIBIT TO VERIFIED STATEMENT No. 23

Exhibit —

Witness: Frank Shields

Statement and Resolution

Ogden Gateway Case: ICC Docket 30297

By the Yakima Traffic Association, Yakima, Washington on Behalf of Growers and Shippers of the Yakima Valley Who Annually Ship More Than 20,000 Carloads of Perishable Tree Fruits

Statement

The application of the Denver and Rio Grande Western Railroad Company to open the Ogden Gateway was considered by the members of the Yakima Valley Traffic Association at a meeting of the membership, November 16, 1949.

After a discussion of the many circumstances relating to the application of the Denver and Rio Grande Western Railroad Company, it was the consensus of the members that the opening of the Ogden Gateway was not in the interests of the producers and Shippers of the Yakima Valley or the welfare of the State of Washington.

The more important points on which the members predicate their opposition to the opening of the Ogden Gateway are as follows:

1. The applicant does not own a supply of refrigerator cars which it could contribute to the movement of the perishable traffic in which it seeks to share. The supply of refrigerator cars and also the facilities to provide accessorial services essential to the transportation of perishable farm products would, therefore, continue to be the burden and responsibility of the Union Pacific on freight moved via the Ogden Gateway.

2. The Union Pacific, in expectation of the freight traffic of this area, has made extensive investments in refrigerator cars, ice plants and accessorial facilities to adequately provide the special transportation requirements of the perishable products of the Yakima Valley.

[fol. 2030] 3. The investment which the Union Pacific already has made and must continue to make to adequately serve the transportation needs of this area, require and deserve the undivided revenue of the freight traffic originating to them in this area.

4. The Union Pacific also contributes substantially to the state's economy through tax payments and payroll wages, whereas the Denver and Rio Grande Western Railroad Company makes no such payments.

5. The Denver and Rio Grande Railroad Company is not in position to provide transportation service via the Ogden Gateway to terminal markets that would be comparable to the service now provided by the Union Pacific.

6. The opening of the Ogden Gateway offers no advantages of convenience or necessity to the shippers or receivers of freight of this area. Any division of the freight traffic of the Union Pacific from and to the Yakima Valley could result only in increasing the revenue of the applicant at the expense of the Union Pacific.

Resolution

Thereupon, on motion duly made and seconded, it was moved and carried; that the secretary-manager be directed to prepare a statement of the "reasons why" this association is opposed to the application of the Denver and Rio Grande Western Railroad Company to open the Ogden Gateway; to deliver a copy of the statement and this resolution to the Union Pacific Railroad Company and also to the Washington Public Service Commission; and to request the commission to join with this association in opposing the opening of the Ogden Gateway.

Yakima Valley Traffic Association, by (S.) F. W. Shields, Secretary-Manager.

[fol. 2031] **Statement of the Yakima Chamber of Commerce upon the Application of the Denver & Rio Grande Railway to the Interstate Commerce Commission for the publishing of joint rates via its lines between Ogden and Colorado Junctions on Traffic originating in and Moving to this Territory on the Union Pacific Railway.**

The Transportation Committee of the Yakima Chamber of Commerce opposes the granting of the application for the following reasons:

Granting of the petition would not result in better service since the Union Pacific has excellent facilities and an excellent road-bed paralleling the route of the D&RGW.

Granting of the petition would not lower freight rates, since there is no intent to ask for rate reductions.

Granting of the petition would result in loss of revenue to the Union Pacific, since they would have to split their income with the petitioning railroad. It would impair the ability of the Union Pacific to maintain payrolls, taxes, improvements, and purchases in the Yakima territory, with no resultant increase in expenditures by the D&RGW within the area.

Any impairment of the revenue of the Union Pacific, with no offsetting gain, would eventually reflect in poorer and more costly service to the shippers and receivers of the Yakima Valley.

Upon consideration of this recommendation by the Board of Directors of the Chamber, it was moved that it be adopted, and that the Chamber go on record as opposing the Granting of the petition. The motion was seconded and carried.

(Signed) L. W. Markham, Secretary.

Adopted at the regular Yakima Chamber of Commerce meeting of the Board of Directors, Yakima, September 9, 1949.

[fol. 2032] VERIFIED STATEMENT No. 24

I.C.C. Docket No. 30297

Statement of Reese Lamb, Freewater, Oregon

My name is Reese Lamb and I am General Manager of F. G. Lamb & Company located at Freewater, Oregon. I am appearing here in favor of the position of the Union Pacific Railroad and the other defendants.

Our company is engaged in the business of packing, processing, shipping and storage of fruits and vegetables. The fresh fruits handled are cherries, prunes and apples. The fruits we freeze are strawberries, prunes, sliced apples, peaches, apricots and cherries; and the vegetables we freeze are peas, asparagus, and lima beans. We also can prunes and peas. We have both cooler and zero storage space, and our storage business includes the storage in transit from local points of fresh fruits and frozen foods.

Inbound shipments received at our plant from eastern and southwestern points consist principally of paper boxes from Wisconsin and fruit baskets from Texas. During the year 1948, we handled approximately 14,000,000 pounds of frozen fruits and vegetables. Our outbound shipments during that year, transported via the Union Pacific routes, consisted of 4,142 tons of frozen goods, 3,900 tons of fresh fruits and 515 tons of canned goods, all of which were transported to points Denver and east.

The handling of our shipments via the Union Pacific through routes has been entirely satisfactory, including the furnishing of cars, time in transit, protection during transportation, diversions and tracing, and in so far as our needs [fol. 2033] are concerned, the routes maintained by the Union Pacific are adequate and sufficient for our purposes.

Most of the commodities which we handle are perishable in nature, therefore, transportation via the most direct and shortest routes with a minimum of handling in transit is important. The Union Pacific has provided us with superior service, protective facilities and prompt diversion, reconsignment and tracing. The routes proposed via the D&RGW, we feel result in longer time in transit, more handling through terminals with exposure to further delay

and damage to shipments, not to mention to render more difficult the tracing, reconsignment and diversion, which services on the lines of the Union Pacific are performed by the Pacific Fruit Express Company, whose operations, we understand, do not extend to the lines of the D&RGW.

We are opposed to any action by the Commission in its consideration of this case which would jeopardize or in any way weaken the ability of the Union Pacific to continue the complete, efficient, and entirely satisfactory service which it now provides in the handling of our traffic.

[fol. 2034] VERIFIED STATEMENT No. 25

I.C.C. Docket No. 30297

Statement of George P. Stadelman, The Dalles, Oregon

My name is George P. Stadelman and I am a partner in the Stadelman Fruit Company, whose headquarters are located at The Dalles, Oregon. The business of that company is growing, packing, storage and shipping of fresh tree fruits of all descriptions. We have plants located at The Dalles, Hood River and Milton-Freewater, Oregon, Zillah, Yakima, Wenatchee, Oroville, Chelan and Chelan Falls, Washington, and Payette, Idaho. We are the largest shippers of fresh cherries and Italian prunes in the United States. I am a former Mayor of The Dalles, Oregon. I am a member of The Dalles, Oregon, Chamber of Commerce which passed a resolution in favor of the Union Pacific Railroad Company's position in this case, and having been authorized to appear here and testify for The Dalles Chamber of Commerce, my appearance is in support of the defendants both for myself and for that Chamber.

The fresh fruits shipped by my company are destined to points in California, the Dakotas and Montana, and to points east of the Missouri River, with about 70% of our shipments going to the latter territory. The general movement of this fruit is via the Union Pacific through routes and we annually ship approximately 3,000 carloads via those routes.

Union Pacific service in the handling of our shipments

has been satisfactory. Its routes and services are entirely adequate and sufficient for my purposes as a shipper, and for the purposes generally of shipper members of The Dalles Chamber of Commerce.

[fol. 2035] We have never had any need for or desired the establishment of the through routes via the D&RGW proposed in this proceeding and have asked neither the Union Pacific nor the D&RGW that they be established.

In the movement of our shipments, which consist entirely of perishables, time in transit is of primary importance and the Union Pacific's long haul routes being the shortest, we feel that transit time via its routes could not be improved upon via the longer route of the D&RGW with consequent additional interchanges between railroads. For these reasons alone, we would not route shipments via the D&RGW if the routes requested were established as a result of this proceeding.

In the event the complainant in this case is successful in having the routes requested established, and as a result thereof, the revenue of the Union Pacific Railroad Company should be reduced and train service, switching service, as well as other services now available to us via the Union Pacific, including protection of our perishables in transit, should be reduced or curtailed in any manner, our business would be greatly damaged and injured.

The Union Pacific, with its payrolls and facilities at The Dalles, is an important contributor to the welfare of our city. Certainly, we would be opposed to any action by the Commission in this proceeding which would weaken the Union Pacific's position financially or otherwise, and since the D&RGW will provide no service, have no trackage, station facilities, payrolls, etc., nor pay taxes in the Pacific Northwest territory, we see no reason why the Union Pacific [fol. 2036] should be weakened in order to strengthen the financial position of the complainant in this case.

[fol. 2037] EXHIBIT TO VERIFIED STATEMENT No. 25

I.C.C. Docket No. 30297

Witness: Geo. P. Stadleman

RESOLUTION

Whereas, the Board of Directors of The Dalles Chamber of Commerce, at its regular meeting, October 3, 1949, reviewed and discussed the application of the Denver and Rio Grande Western Railroad, for through rates on traffic to and from the Pacific Northwest, in connection with the Union Pacific Railroad, at Ogden, and,

Whereas, such joint through rates would in no way serve The Dalles by expansion of markets, reduction of freight charges to or from this point, nor improve rail service,

Therefore, it was resolved that the Board of Directors of The Dalles Chamber of Commerce is opposed to the application of the Denver and Rio Grande Western Railroad, for the purposes above cited.

Adopted by the Board of Directors of The Dalles Chamber of Commerce, at its meeting, October 3, 1949.

(Sgd.) C. P. Horn, President. (Sgd.) W. S. Nelson, Secretary.

[fol. 2038] VERIFIED STATEMENT No. 26

I.C.C. Docket No. 30297

Statement of Frank E. Freshwater, Yakima, Washington

My name is Frank E. Freshwater of Yakima, Washington, and I am Vice President of Perha Fruit Corporation, Yakima, Washington. I am a member of the Yakima, Washington, Chamber of Commerce, a Director in the Yakima Valley Traffic Association, Vice President and member of the Executive Board of the Northwest Horticultural Council and of the Oregon-Washington-California Pear Bureau. The Yakima Valley Traffic Association and the Yakima, Washington, Chamber of Commerce passed resolutions favoring the position of the Union Pacific Railroad in this

case, and I am appearing here in support of the Union Pacific Railroad and the other defendants.

The Perham Fruit Corporation is engaged in the business of growing, storing, packing and marketing of apples, pears, cherries, prunes, peaches and apricots, all of said fruits being produced in the Yakima Valley, Washington. Generally speaking, the fruit shipped by my company is destined to points east and south of Denver, and during the year 1949, we shipped a total of 298 carloads, of which 226 carloads were destined to points east and south of Denver and were transported via the Union Pacific through routes. The routes now open to us via the Union Pacific are entirely satisfactory and sufficient for our needs. We have never felt the need or desire for the establishment of the through routes proposed via the D&RGW and have never asked either company that they be established.

Our experience with Union Pacific service as to all our transportation needs has been excellent. Neither my com-[fol. 2039] pany nor others engaged in similar business in this territory has any need to ship fruit to any intermediate points served by the D&RGW for storage in transit. There are sufficient storage and other facilities for the handling locally of all fruit produced in the Yakima Valley and, therefore, storage in transit privileges which would be available at points on the D&RGW, if complainant is successful in this case, would be of no benefit to either the producer or marketer of fruit grown in this territory.

All of the commodities handled by my company are of a perishable nature and, therefore, require prompt and expeditious handling in refrigerator cars. The Union Pacific has provided a sufficient number of cars to fulfill our needs, has set up and provided a system of tracing reconsignment and diversions, maintains "on-line" offices to supply us with shipping information such as rates, routings, etc., together with necessary facilities for the protection of our shipments in transit by furnishing both icing and heater service which, as a whole, assures us of satisfactory transportation service for our commodities. After full consideration of the proposal of the D&RGW, we have concluded that the D&RGW is not in position to add anything by way of car supply or other transportation facilities and service

which would result in any more efficient handling of our shipments or open new markets for our products. On the contrary, the longer routes via the D&RGW, with the consequent additional interchanges would result in longer time in transit and offer opportunity for damage to our shipments. Also, with more carriers involved in the transportation of our products, diversion, reconsignment and tracing would be more difficult.

[fol. 2040] Should the traffic now handled via the Union Pacific long haul routes be diverted to the D&RGW at Ogden, the resultant loss in revenue to the Union Pacific would probably be reflected in operating economies by that company in the way of curtailment of service, both switching and line haul, maintenance of its property and equipment including replenishing and expanding its refrigerator car supply, and protective service facilities, any of which would be detrimental to the fruit industry of the Yakima Valley in general and the business of this company in particular. Under the circumstances, we are opposed to any action by the Commission that might result in these conditions arising.

[fol. 2041]

VERIFIED STATEMENT No. 27

I.C.C. Docket No. 30297

Statement of E. S. Prentice, Yakima, Washington

My name is E. S. Prentice. I am President of the Westbrook Packing & Storage Company, Inc., Westbrook, Washington, served by the Yakima Valley Transportation Company; of the Prentice Packing & Cold Storage Company, Inc., and the Prentice Packing & Storage Company, Inc., these latter two having their places of business in Yakima and served by the trackage of the Union Pacific. My residence is Yakima, which point is also the headquarters of my companies. I am a member of the Yakima Chamber of Commerce and of the Yakima Valley Traffic Association, both organizations having passed resolutions supporting the Union Pacific's position in this case. I was present at the meeting of the Yakima Valley Traffic Association at

which its resolution was adopted and voted in favor of that action. My appearance here is solely on behalf of my companies.

My companies are engaged in the buying, storage, packing and shipping of fresh fruits, consisting of apples, pears, peaches, apricots, prunes, plums and cherries. The traffic we handle is produced locally in the Yakima Valley and is shipped to destinations principally east and south of Denver. We use the through routes of the Union Pacific extensively, having shipped via those routes in 1949, a total of 524 cars, of which 492 moved to the eastern territory described, the remainder to points in California, Montana and the Dakotas. Our received traffic from the eastern territory mentioned is extremely light, in 1949 having totaled seven cars, all transported via Union Pacific.

[fol. 2042] Our experience with the Union Pacific service has been very good and we certainly would not wish anything to transpire as result of this proceeding which would in any way result in any curtailment of same. Its schedules are fast and dependable and its routes are adequate and sufficient for our needs. We have experienced but few instances of car shortages but when those instances have occurred, it has been our experience they have been general rather than local and were remedied without undue delay. We have never felt any need or desire to route shipments via the D&RGW for transit or other purposes, and, therefore, have never asked either the D&RGW or the Union Pacific to establish joint through rates via the route requested in this complaint. The present routes of the Union Pacific protect all our markets and, therefore, preclude any possibility of difficulties through pocket markets.

Our products, being perishable, must move via the shortest routes on fast and dependable schedules with as few interchanges as possible, and we must at all times know the whereabouts of our shipments in transit to properly protect possible diversions, reconsignments, and arrange for whatever changes in protective service in transit may be necessary. The Pacific Fruit Express Company which provides the protective services, including refrigerator car supply, on perishable traffic moving over the rails of the Union Pacific, maintains an office in Yakima. It not only

arranges the necessary supply of refrigerator cars to accommodate our loading requirements, but also handles our diversions, reconsignments, protective service requirements [fol. 2043] at Yakima as well as in transit, and furnishes us with prompt and accurate car movement information. Since the Union Pacific also maintains a traffic agency in Yakima and there is close coordination of efforts between that office and the office of the Pacific Fruit Express Company, we have, in effect, two transportation agencies bearing the responsibility of the satisfactory transportation service over the Union Pacific routes. It is our understanding the Pacific Fruit Express Company does not operate over, nor does it provide any protective services on the lines of the D&RGW, and, therefore, should any of our traffic be routed via that line, it would be lost so far as the ability of the Union Pacific and the Pacific Fruit Express Company to provide us with the prompt, complete service we are now receiving on cars traveling over the routes of the Union Pacific.

If the route sought in this complaint should be granted and by such action revenues of the Union Pacific be reduced to a point where it would be necessary to curtail services, including switching at Yakima as well as on the line of the Yakima Valley Transportation Company which is owned by the Union Pacific, my business would be adversely affected. The additional interchanges required in the event the route sought in this complaint is established will result not only in longer time in transit, but will also subject shipments to damage by reason of terminal switching necessary to make the move between railroads. Even if route requested were established, we would not use it for storage in transit, stopping in transit to partly unload, or for any other purpose, and, therefore, are opposed to the establishment thereof because of the injurious [fol. 2044] effect it might have to our business through reduction of revenues of the Union Pacific.

[fol. 2045] VERIFIED STATEMENT No. 28

I.C.C. Docket No. 30297

Statement of Charles C. Gossett, Nampa, Idaho

My name is Charles C. Gossett and my home is at Nampa, Idaho. I am Manager of the G. K. Livestock Feeding Company located at that point, which company is in the business of feeding cattle. My experience in purchasing and handling livestock throughout the Northwest has extended over a period of 25 years, the past two years of which I have been connected with the G. K. Company in purchasing cattle for our feeding operations at Nampa. We make purchases locally in Idaho, also at various points in the States of Montana, Oregon, Nevada, Eastern Idaho, Colorado and Iowa.

During 1949, we fed and fattened at our Nampa yards in the neighoborhood of 5,000 head of cattle.

In buying cattle in the areas which I have mentioned, our aim is to get the type and quality of cattle that can take on good increased weight. Obviously, we cannot know and do not know where they will ultimately be sold, moved and slaughtered; this for the reason that our markets have been at such points as Portland, Los Angeles, Seattle, Denver and Omaha. To be specific, we have in the past purchased a large number of feeder cattle in Montana which, after feeding and fattening, have finally moved on a backhaul to such points as Denver, Omaha and California. In this situation then we would have no transit billing behind such a movement. Another illustration is where we have bought cattle in Oregon; and after the fattening operation was completed, they were sold and returned over the Union Pacific to the Portland market. Here again there would be no transit billing, and flat rates were paid on the inbound and outbound movement.

[fol. 2046] Many of the cattle which we buy, both feeder and short feeder cattle, are bought on the auction markets. In the process of bidding, it is not the custom at these auction markets to indicate whether or not transit billing is available on one animal or on the lot. However, if after the transaction is completed, it does develop that there is some transit billing available, it has in some instances been

passed on to the purchaser, but the existence or non-existence of transit billing has never been the controlling factor in the transaction.

In conclusion here I want to say that I have been in the livestock business in its various phases in the Snake River Valley in Southwestern Idaho and Eastern Oregon for about 25 years. In this business, of course, I have had occasion to use the rail service of the Union Pacific on many hundreds of carload shipments of livestock. Such service and car supply on my shipments has been reasonably prompt and reliable, and I do not see how the intentions of the Rio Grande Railroad here could in any way improve or change the situation. By that I mean that the Rio Grande does not plan to add any railroad facilities or service in this area; and, consequently, as I see it, there can be no improvement in the transportation situation because I must still look to the Union Pacific to do everything necessary to serve me locally. Certainly, we cannot expect the Union Pacific to continue to spend large sums of money for improvements, for new cars and for maintenance of a network of branch lines in this area if it is required to share with the D&RGW the largest part of the haul on the traffic which it originates and terminates. The Union Pacific has contributed much to the welfare and economy of the State of Idaho, and I hope it will be able to continue to [fol. 2047] do so. Obviously though, if an out-state railroad like the D&RGW, without having any obligation whatever toward Idaho shippers or investment in the state, including freedom from payment of taxes, is to be permitted to tap the traffic and revenue of the Union Pacific, then in the end it will only impoverish the one railroad upon which we must depend for rail service.

[fol. 2048] VERIFIED STATEMENT No. 29

I.C.C. Docket No. 30297

Statement of Russell O. Vognild, Tacoma, Washington

This is Russell O. Vognild speaking, Assistant Western Sales Manager, Hooker Electrochemical Company, Tacoma, Washington, representing my employer and its affiliated

company, Hooker-Detrex, Incorporated, both located on the Tacoma Municipal Belt Line, served by the Union Pacific. Our testimony supports the Union Pacific and its stand in its proceedings involving the D&RGW. Our Tacoma Chamber of Commerce, of which we are active members, added its official support of the Union Pacific position.

Over the Union Pacific during 1948, our two companies Hooker and Hooker-Detrex, shipped 203 carloads and received 200 carloads. The majority of these 403 carloads moved to and from eastern destinations, particularly east of the Missouri River. The Union Pacific service and routes have been adequate and satisfactory both on incoming raw materials and supplies, and in supplying cars and movements of outgoing shipments including liquid chlorine, caustic soda, muriatic acid, hydrogenated oils and tallows, and trichlorethylene.

My employers neither need nor request the routes and rates sought via D&RGW, nor would they benefit thereby in transit at points on the D&RGW, or reconsignments or diversions. Time is of great importance in our company shipments, so we do not favor establishment of a longer route via D&RGW which would, of course, require more time in transit than the present satisfactory Union Pacific service.

[fol. 2049] Understanding the D&RGW complaint seeks to divert Union Pacific traffic to and from Union Pacific points, adversely affecting Union Pacific revenues, we believe this would naturally curtail existing essential train schedules and movements, including switching, any part of which would seriously injure our business. We oppose the D&RGW proposal.

[fol. 2050] VERIFIED STATEMENT No. 30

I. C. C. Docket No. 30297

Statement of F. Lowden Jones, Walla Walla, Washington

My name is F. Lowden Jones. I am Secretary-Treasurer and General Manager of the Walla Walla Canning Company of Walla Walla, Washington. I am a member of the

Walla Walla Chamber of Commerce and was a member of the special committee appointed by that organization to consider the issues involved in this complaint and to submit recommendation to the Chamber for action thereon. This committee unanimously recommended support of the Union Pacific's position and subsequently the Board of Directors of the Chamber of Commerce adopted a resolution supporting the position of the Union Pacific. I am appearing here in support of the Union Pacific on behalf of my company and also on behalf of the Walla Walla Chamber of Commerce.

The business of my company is in the processing and canning of peas, asparagus, spinach and prunes, and during the year 1949, we packed 558,369 cases of these items, of which approximately 70% was shipped by rail. Of our tonnage by rail, approximately 90% moved over the routes of the Union Pacific, with 70% going to points east of the Missouri River, the remainder to destinations in California and the Pacific Northwest.

The service which the Union Pacific has rendered us has been eminently satisfactory. Our cars have moved through with dispatch. Its car tracing and other service is prompt and accurate. Much of our loading is in refrigerator cars and that type of equipment which the Union Pacific has supplied us has been generally adequate and always in good condition.

[fol. 2051] To the best of my knowledge, we have never routed any shipments over the D&RGW. We have never requested the Union Pacific or the D&RGW to establish the routes sought by this complaint and we do not anticipate any need in the future to do so. Should the routes sought be established, they would be of no benefit to us either as to storage in transit at points on the D&RGW, stops to partly unload at such points, or as to opening of additional markets since none would be opened to us. The present routes of the Union Pacific are satisfactory and are adequate for our needs.

Although we make every effort to load our cars in a manner which, with normal handling, should insure their arrival at destination in good condition, it is common knowledge that switching in connection with interchanges as between

carriers through terminal yards frequently results in shifted loads with resultant damage to lading. Since establishment of the route which the D&RGW requests would necessitate additional interchanges more than now are experienced on our shipments via the routes of the Union Pacific, it is obvious that traffic so handled would be exposed to the hazards mentioned.

Many of our cars are pool cars, that is, they contain shipments for two or more customers. On this traffic particularly, time in transit is an extremely important factor and obviously anything that would tend to delay our cars or to expose them to damage through excessive switching and interchanges would be unsatisfactory to us and to our customers.

The Union Pacific has always been helpful to my company in connection with its transportation and rate prob- [fol. 2052] lems. It owns industrial properties in Walla Walla and has been helpful in bringing industries to our city. Through its payrolls and taxes and through its interest in industrial development, it has added to the economic improvement and welfare of the community.

On behalf of my company, as well as the Chamber of Commerce, we register our opposition to any action which the Commission might take in this proceeding which would be injurious to the Union Pacific and which, in turn, would cause it to reduce its expenditures by curtailment of services at Walla Walla or in the expeditious handling of our traffic in transit.

[fol. 2053] EXHIBIT TO VERIFIED STATEMENT No. 30

I. C. C. Docket No. 30297

Resolution

Whereas the Denver & Rio Grande Western Railroad has filed with the Interstate Commerce Commission an application for through rates on traffic to and from the Pacific Northwest in connection with the Union Pacific Railroad at Ogden and Salt Lake City, and

Whereas the granting of such application would require the Union Pacific to share with the D. & R. G. W. revenues

on traffic originating or terminating on lines of the Union Pacific without increasing the volume of such traffic, and

Whereas the Union Pacific has made heavy capital investments in this territory and is contributing substantially to our local economy through payrolls, taxes and purchases.

Now, Therefore, Be It Resolved that the Walla Walla Chamber of Commerce go on record in support of the Union Pacific Railway Company's position in respect to the complaint of the D. & R. G. W.

Recommended for adoption to Board of Directors by Transportation Committee.

Approved by Board, October 4, 1949.

Attest:

(Sgd.) Alfred McVey, Secretary-Manager.

[fol. 2054] VERIFIED STATEMENT No. 31

I. C. C. Docket No. 30297

Statement of Harold A. Cohn, Heppner, Oregon

My name is Harold A. Cohn of Heppner, Oregon. I am a member of the Executive Committee of the Oregon Wool Growers' Association and am engaged in the business of producing, buying and selling of sheep and lambs, and appear in this proceeding in support of the defendants.

The principal destinations to which I ship are points in Illinois and Iowa, with some to California. During the year 1949, I personally fattened and disposed of 3,600 lambs.

I annually ship about 250 carloads of sheep and lambs via the Union Pacific long haul routes and the service given by the Union Pacific as to the furnishing of cars, time in transit, etc., has been very satisfactory. The routes maintained by the Union Pacific are entirely adequate and satisfactory for my purposes as a shipper and I have had no need for, nor do I anticipate a need for, the routes and rates proposed by the D&RGW.

The producers of sheep and lambs in this territory need no additional outlets for their production and would derive no benefit whatever, market or otherwise, from the establishment of the routes proposed.

In the shipment of my sheep and lambs, time in transit and the general handling thereof is important to me, therefore, the use of the longer route proposed by the D&RGW with the consequent increase in the number of interchanges between carriers could not benefit me but, on the other hand, would adversely affect my operations. Also, the longer [fol. 2055] route would require use of the cars, both loaded and empty, for a longer time than is now the case when shipments move via the long haul route of the Union Pacific. These extra car days could very well jeopardize the ability of the Union Pacific to supply me and other shippers with cars for loading in the desired quantity and on the days needed.

The diversion of traffic now handled via the Union Pacific long haul routes to the D&RGW at Ogden, with resultant loss of revenue to the Union Pacific, might well result in curtailment of the service now rendered by the Union Pacific and possibly increase the rates which I am now required to pay. All of this would be disadvantageous to me and injurious to my business as a producer, buyer and shipper of sheep and lambs.

[fol. 2056] VERIFIED STATEMENT No. 32

I. C. C. Docket No. 30297

Statement of William H. Steiwer, Fossil, Oregon

My name is William H. Steiwer. I live in Fossil, Oregon. I am engaged in the production of sheep and cattle near Fossil, Oregon. My range consists of approximately 35,000 acres on which I run between 5,000 and 6,000 head of sheep and 250 to 300 head of cattle. During the year 1949, I marketed about 4,500 lambs. At the present time, I am President of the Oregon Wool Growers' Association. I appear here as an individual in opposition to the D&RGW in this proceeding.

I annually ship via the Union Pacific routes from 4,000 to 5,000 feeder lambs. I have been engaged in this particular business for 25 years, and during that time have patronized the Union Pacific routes exclusively, which routes

have proven satisfactory to me as a shipper from the standpoint of service in transit, car supply, and rates. I have never felt any need for routes and rates via the D&RGW and consequently have requested neither that company nor the Union Pacific for the establishment thereof, even though such routes and rates would be open to me.

The satisfactory movement of my shipments requires the shortest possible time in transit with the fewest possible interchanges between railroads. It is common knowledge that livestock in transit suffers by reason of interchanges which not only delay the movement but also exposes it to the possibility of injury. In view of this, I can see no need for the longer route via the D&RGW.

[fol. 2057] Livestock producers in my territory have no difficulty in disposing of their feeder livestock to purchasers located upon the present available through routes. The establishment of the routes proposed could not affect the market for the available feeder stock by any increase in price or otherwise since purchases are made on the basis of the anticipated ultimate market price of the fat livestock, there being a price generally established for feeders beyond which the purchaser will not go. There is sufficient competition today in the purchase of the available supply of feeder livestock to absorb the production in the area and insure top prices. For these reasons, feeding in transit rates at points on the D&RGW would be of no benefit to me as a producer.

While the diversion to the D&RGW at Ogden of the long haul traffic now handled by the Union Pacific, with the consequent loss of revenue to the Union Pacific, is of great concern to the Union Pacific Railroad, it is but common sense that substantial loss of revenue in any business will result in restricting expenses wherever possible. This is but good business judgment. If, as a result of the loss of revenue to the Union Pacific, its present service, maintenance, etc., was curtailed, it undoubtedly would have an adverse affect upon my operations, resulting possibly in longer time in transit or increased rates, or both. Such would seriously affect my ability to continue as a substantial producer of livestock.

For these reasons, I protest any possible action of the

Commission which would so substantially affect the Union Pacific Railroad.

[fol. 2058] VERIFIED STATEMENT No. 33

I. C. C. Docket No. 30297

Statement of Marion Weatherford, Arlington, Oregon

My name is Marion Weatherford of Arlington, Oregon, and I am a wheat farmer operating a wheat ranch consisting of 9,000 acres and producing 80,000 bushels of wheat annually in the vicinity of Arlington, Oregon.

I am President of the Pacific Northwest Grain and Grain Products Association, an organization of growers, millers and dealers in grain and grain products, drawing membership from the States of Oregon, Washington and Northern Idaho. I am a member and Vice Chairman of the Oregon Wheat Commission, a body created by general law of the State of Oregon, charged with the duty of finding new markets for Oregon wheat. I am now Chairman of the Rate Committee and Past President of the Oregon Wheat League, a commodity group concerned with the problems of the wheat producer. I have appeared as a witness in numerous rate and other related proceedings before the Interstate Commerce Commission and the state regulatory bodies.

The Northwest Grain and Grain Products Association and the Oregon Wheat League have each passed a resolution favoring the position of the Union Pacific Railroad Company in this case and I am here appearing for the defendants, both for myself and for the two organizations mentioned, restricting my testimony on behalf of the Pacific Northwest Grain and Grain Products Association to the movement of grain.

While much of the grain produced in this territory is shipped to Pacific Coast ports for export, nonetheless, [fol. 2059] there is a normal movement of that produced in this territory which is shipped to California, Chicago and points east and south thereof to flour and feed mills. Eastern shipments move via all of the four transcontinental lines serving the Pacific Northwest area, the choice of route

being dependent upon the loading point. With respect to the grain which originates in Oregon destined to Eastern points, transported via Union Pacific long haul routes, insofar as I am aware, the experience of shippers with Union Pacific service as to car supply, transit time and other transportation factors is generally satisfactory. Certainly my own experience with Union Pacific service in this regard has been excellent and the organizations whom I represent have had registered with them no complaint of such service.

The routes and services provided by the Union Pacific from the territories served by it are adequate and sufficient for my purposes as a shipper and for the purposes, generally, of shippers of my organizations. In my business, and as President of the Northwest Grain and Grain Products Association, which is concerned principally with rates and other traffic matters of the grain industry, and as Past President of the Oregon Wheat League, we have never felt any need for the establishment of the joint rates and routes proposed by the D&RGW and neither myself nor those organizations have requested the Union Pacific or the D&RGW that such rates and routes be established.

Grain produced in this territory moves to its markets in bulk and therefore, its satisfactory transportation requires [fol. 2060] high-class equipment with tight walls, sides, floors, and roofs. The Union Pacific has furnished such high-type equipment for the transportation of our grain and we are concerned over the ability of the Union Pacific to continue to do so if any appreciable part of its revenues should be drained away from it through the diversion of traffic to the short haul route which would be established if the D&RGW is successful in its complaint.

We understand that the D&RGW by this complaint seeks an order of the Commission the affect of which would be to divert to it the traffic now handled by the Union Pacific via its long haul through routes. Such diversion necessarily would result in the loss of substantial revenue to the Union Pacific and in order to compensate therefor, it may be expected that operating economies in the way of curtailment of train service, less frequent switching of cars in spotting for loading, curtailment of maintenance of roadway and equipment would be affected. Any such

measures taken by the Union Pacific would adversely affect the movement of grain and grain products from this territory, not alone to Eastern destinations, but to the Coast Ports for export, all of which would be detrimental to the business of the grain industry.

[fol. 2061] EXHIBIT TO VERIFIED STATEMENT No. 33

I. C. C. Docket No. 30297

Witness: Marion Weatherford

RESOLUTION

At a meeting of the Executive Committee of the Oregon Wheat Growers League held at Pendleton, Oregon, on September 14, 1949 the following Resolution was adopted:

"Resolved that the Executive Committee of this organization goes on record as opposing the petition filed by the Denver & Rio Grande Western Railroad with the Interstate Commerce Commission, requiring that the Union Pacific Railroad Company publish joint thru rates with the Denver & Rio Grande Western Railroad. We oppose this petition for the following reasons:

1. There are no apparent advantages from the standpoint of freight rates in forcing the Union Pacific Railroad to join with the D&RGW on thru rates.

2. Should the Union Pacific Railroad be forced to share its traffic with the D&RGW its service would be impaired and transit time of shipments would be lengthened.

3. The Union Pacific Railroad has made large investments in the Northwest in building its main line and branch line railroad, and it contributes substantially to the income of the State thru payrolls, taxes and purchases made. These contributions by the Railroad would be impaired if it were forced to share its revenues with another line.

4. We recognize Union Pacific as being one of the "home industries" of the Northwest and oppose its being forced to share its revenue with the D&RGW,

which Company has no investments in the Northwest and is in no position to be of any service to the communities in the Northwest states."

[fol. 2062] I, the undersigned, President of the Oregon Wheat Growers League, do hereby certify that the above resolution is a true copy of the same adopted at the Executive Committee Meeting referred to above.

(S.) Paulen Kaseberg, President.

[fol. 2063] EXHIBIT TO VERIFIED STATEMENT No. 33

I.C.C. Docket No. 30297

Witness: Marion Weatherford

RESOLUTION

At a meeting of the Board of Directors of the Pacific Northwest Grain and Grain Products Association held at Portland, Oregon, on November 17th, 1949, the following resolution was adopted.

"Resolved that the Board of Directors of this Association goes on record as favoring the position of the Union Pacific in the matter of the opening of the Ogden Gateway known as I.C.C. Docket No. 30297, Denver and Rio Grande Western Railroad v. Union Pacific et al.

We are favorable to the position of the Union Pacific for the following reasons:

1. There does not appear to be any advantage from the standpoint of freight rates in establishing joint through rates between the Union Pacific and the Denver and Rio Grande Western Railroad.

2. That the service of the Union Pacific is adequate and it does not appear that the transit time of shipments would be improved.

3. The Union Pacific Railroad built into and made great contributions to the development of the Pacific Northwest in the building of its main and branch railroad lines into this territory, and further, it is a sub-

stantial contributor to the economy and income of this territory through payment of payrolls, taxes and purchases made.

[fol. 2064] We the undersigned, President and Acting Secretary respectively, of the Pacific Northwest Grain and Grain Products Association do hereby certify that the above resolution is a true copy of the same adopted at the Board of Directors meeting referred to above.

(Sgd.) Marion F. Weatherford, President.
(Sgd.) F. P. Aughnay, Acting Secretary.

[fol. 2065] VERIFIED STATEMENT No. 34

I.C.C. Docket No. 30297

Statement of W. B. Savage, Kimberly, Idaho

My name is W. B. Savage, and my home is in Kimberly, Idaho, which is on the Twin Falls Branch of the Union Pacific. I operate the W. B. Savage Produce Company, headquarters at Kimberly, with branch houses at Murtaugh and Gooding, Idaho, the business of which is the processing and shipping of potatoes. I also operate the W. B. Savage Ranches, Inc., the business of which is farming, growing of potatoes and feeding cattle. We have 1200 acres of irrigated land, also 900 acres of dry farm land upon which we are drilling wells for irrigation. Prior to 1948, when both businesses were operated as one unit, we were also large onion shippers. I have been in the produce business in the Twin Falls district about 38 years. In the year 1949, we shipped 354 cars of potatoes. In addition, we make substantial sales to track buyers who ship under their own name.

The No. 1 potatoes we ship, which is the large size, are marketed in practically all instances at points east of the Mississippi River. No. 2 potatoes are sold in the area from Denver to Kansas City and Omaha, and in the southwest, which includes the States of Oklahoma, Texas and portions of Louisiana, in addition to eastern markets. In a

few instances, we found it necessary to find another buyer for a car rejected at certain Kansas towns, but we have had no trouble here because the through routes and joint rates let us go to the southwest on the kind of potatoes which are shipped to these Kansas points.

As I said, up until about two years ago, I was a large shipper of Idaho onions. Our large sized onions are, in the [fol. 2066] trade, three inches or larger, and are sold from Chicago to the Atlantic Seaboard. The smaller size onions invariably go to markets in the States of Kansas, Oklahoma, Texas and Missouri River cities. Here again, we had no trouble with an occasional car of rejected onions because we can always reship to towns in the Southwest.

In the case of livestock, I am a pretty heavy feeder. My practice is to sell to local buyers who in practically all instances move the fat cattle they buy from me to Pacific Coast markets. For a good many years, I have also shipped a lot of mules. These have moved via the Union Pacific to Kansas City for sale and diversion to points such as Oklahoma City and Memphis on through rates.

In the 38 years that I have been in this business in Idaho, shipping hundreds of cars, I have always rather considered that once the Union Pacific got my shipments assembled and on the way, my worries are over. In fact, I've depended upon the Union Pacific for cars, switching and for about everything in that way. Its local people have always been around ready to help me, and going back on my long experience, I think the U. P. has done a fine job of railroading.

I cannot see any reason why a shipper such as I am would want to have his cars go east over the Rio Grande, first, because it is an out-of-the-way route and slower, and because I don't think it would help the U. P. and the users of rail transportation in Idaho who must depend on it for service.

The Union Pacific is really a part of Idaho, paying taxes and hiring several thousand employees here, and as long [fol. 2067] as we are going to have only one railroad line in the state, I want to patronize it all I can so that it will have the money with which to pay its taxes, maintain its payroll and continue to give good service. Taking the business away from the U. P. though and giving it to the Rio Grande will prevent the U. P. from doing these things. This

is my personal opinion, and I have given much thought to it.

Opening of the Ogden Gateway, in my opinion, will not increase the railroad service in Idaho. I do not see how shippers will be charged lower rates via the Rio Grande, or be benefitted in any other way.

So long as the Union Pacific continues to give us efficient service, so long as it continues to maintain its heavy investment in Idaho after having developed Idaho both directly and indirectly, so long as it alone continues (alone of the railroads concerned in this case) to help us to pay our tax burden, helps us to educate our children, and provides a livelihood for the thousands of families living in Idaho and connected with its system, I think that Idaho shippers and producers will fail to benefit in any way by the opening of the Ogden Gateway.

[fol. 2068] VERIFIED STATEMENT No. 35

I.C.C. Docket No. 30297

Statement of Leroy W. Hayes, Caldwell, Idaho

My name is Leroy W. Hayes and my home is in Caldwell, Idaho, where I am General Sales Manager of the Simplot Western Idaho Produce, Inc. We operate shipping houses on the main line of the Union Pacific at Mountain Home, Nampa, Feltham and Weiser, Idaho, and at Ontario and Nyssa, Oregon. We also operate shipping houses on branch lines of the Union Pacific at Marsing and Homedale, Idaho, and at Adrian, Vale and Jamieson, Oregon.

During the 1949 crop shipping season, we shipped from the above named houses approximately 2,000 carloads of potatoes, 1,200 carloads of onions and 100 cars of lettuce.

I have been in the perishable shipping and wholesale marketing business since 1926, having served a large distributing organization for 19 years prior to coming with the Simplot organization in 1946. During that time, I worked in the States of Michigan, Illinois, California, Washington and Idaho.

From 60 to 80% of our potatoes are marketed at points Missouri River and east. The balance is marketed in the

States of Nebraska, Kansas, Oklahoma, Texas and the Pacific Coast. Our No. 1 potatoes are sold principally at Chicago and east with a very limited volume moving to Texas and Oklahoma. About half of our No. 2 potatoes are marketed in the States of Minnesota, Illinois, Iowa and Missouri. These sales are generally made on the wire through brokers or direct to buyers or to local cash track buyers representing firms in those states. The other 50% of the No. 2's are marketed either on direct wire sales or [fol. 2069] through brokers located principally at Kansas City and some at Omaha. These potatoes are generally disposed of by brokers or through direct sales at those points or through diversion to Kansas, Oklahoma, Texas and Louisiana.

Approximately 90% of all our potatoes are sold on a firm contract wherever the market. The balance are mostly sold within a few days after shipment and are diverted to buyer's destination. The variety of through rates and routes available to us via the Union Pacific and its eastern connections has enabled us to reach all the desirable markets with our potatoes.

In marketing of about 1,200 carloads of onions during the past shipping season, sales have been made in such States as California, Kansas, Oklahoma, Texas and the markets of Kansas City and Omaha and east and southeast thereof. In marketing onions, we have found that the existing tariff routes are adequate. Here again about 90% of our onions are sold on firm contracts before shipment, while the other 10%, or at least the majority thereof, were mostly sold within a few days after leaving shipping point.

Lettuce is a short-season crop in Idaho and eastern Oregon, and our marketing practices vary widely from year to year. During periods of keen demand, we can sell 100% to local cash track buyers and terminal operators who make shipments to their various houses throughout the Midwest, Southeast and East. When the lettuce market is sluggish we sell on the wire direct to terminal operators or roll to Kansas City or Omaha for sale and diversion en route or from those points. Here again, the present tariff routes are flexible enough to permit us to go to all of the markets we [fol. 2070] desire to reach.

I am appearing here in opposition to the opening of the Ogden Gateway for the following reasons: First, because of the perishable nature of our products and our comparatively long distance from the large consuming markets of the East, we invariably use the shortest and fastest rail routes. As the situation now stands, we do have the direct and short line route of the Union Pacific to those markets. However, it is a fact that although a substantial portion of our products are sold on an F.O.B. origin basis, we must, in order to meet competition, see that the merchandise reaches destination in good condition. With exclusive Union Pacific service to the Missouri River, we have experienced little, if any, difficulty in meeting that requirement. However, on a large portion of our sales, the purchaser-consignee is in a position to instruct the routing; and, consequently, my fear is that these purchasers might well be influenced by eastern solicitation to route a goodly number of their purchases from us through Ogden and over the longer route of the Rio Grande Railroad and its eastern connections. The longer time in transit might result in the shipment reaching destination in a deteriorated condition, and if this does happen, then in order to retain the purchaser's account and good will, we may find it necessary to assume a part of the damage even though the shipment was not routed by us over the longer route.

The Union Pacific has pioneered and played a vital part in the growth and development of southwestern Idaho and eastern Oregon. Of course, it is the only railroad serving this area, and we have had to look to it to establish rates and [fol. 2071] make adjustments from time to time in a manner that enables us to compete in the distant markets of the East. It is my personal view that the time may not be far distant when Idaho may require some further rate revisions in order to enable perishable producers to maintain their competitive position in the eastern markets, and unless the Union Pacific has the protection of its long haul as in the past, it seems to me that there would be serious doubt as to its ability to make whatever further adjustments are necessary.

Whatever comes out of this proceeding, I know that the Union Pacific will have to continue to see that refrigerator

cars are available for us, ice them, set them for loading and then assemble loaded cars from numerous main and branch line points. Obviously, the Rio Grande, without intending to add any physical facilities whatever in this territory, can take no part in that operation. Unless the Union Pacific is to have the financial resources necessary to provide the kind of service it has given in the past, then, of course, only two things can happen, either our rates will go up and not down or the standard of rail service will be reduced.

In conclusion here I want to say that the Union Pacific has long maintained a well-staffed Agricultural Development Department. The staff of this department has worked closely with County Agents, shippers and growers in developing new markets, new crops and increased yields, also in experimental work looking to improved loading and storing methods. It seems to me that out of all this pioneering and development work, and which is still being carried on at considerable expense, the Union Pacific is entitled to its continued long haul and maximum revenues in order [fol. 2072] that it will have the finances with which to continue to provide this territory with adequate and reliable railroad service.

[fol. 2073] VERIFIED STATEMENT No. 36

I. C. C. Docket No. 30297

Statement of Charles Baker, Walla Walla, Washington

My name is Charles Baker. I live in Walla Walla, Washington. I am Secretary-Manager of Pacific Supply Cooperative. This organization is a wholesale farm marketing and supply cooperative serving the States of Oregon, Washington, Idaho, Western Montana and Northern California. We have 135 local farmer cooperatives as members of our organization. They, in turn, serve more than 75,000 farmers in the Pacific Northwest, either by furnishing them with farm supplies essential to production of farm crops or in marketing products grown on the farms. Our organization began doing business in 1934 and has rapidly expanded its facilities during the past 15 years. This growth and development is still continuing.

Among the commodities handled from the supply standpoint are: farm machinery, originating in the East; fertilizers which may originate in the East or in California or Canadian markets, depending upon the type and quality; various types of steel products essential to farmers' needs; building supplies; lube oils, greases; grains, feed concentrates, insecticides, tires, and similar farm supplies generally found necessary in farming operations.

In order to adequately serve the territory on these commodities, we maintain Warehouse distribution points at Pocatello, Idaho; Ontario, Oregon; Walla Walla, Washington; Portland, Oregon; Redmond, Oregon; Klamath Falls, Oregon. In addition to our own Warehouse points, much of our heavy merchandise is shipped in pool cars direct to [fol. 2074] local associations existing throughout the Area.

In addition to supplying our farmers with necessary products for producing crops, we also engage in the marketing of field seeds and potatoes in a substantial manner. We own and operate seed cleaning facilities at Ontario, Oregon; Madras, Oregon; Redmond, Oregon; Klamath Falls, Oregon, and Tulelake, California, where field seeds, including alfalfa, clovers, rye grass and vetch are produced in substantial quantities in the Northwest are processed and made ready for shipment to markets primarily in the Midwest, Eastern Seaboard, and the South. In addition to the facilities which we own and operate ourselves, many of our local associations also have seed cleaning and processing plants, through which field seeds of various types are processed by them and marketed by our association.

During the past year, we handled approximately 1,500 carloads of merchandise. Approximately 50% of this, or 750 carloads, moved over the through routes of the Union Pacific Railroad, primarily for the reason that this is the shortest and most direct route, either to markets to which we are shipping products, or from the factories to our points of distribution. The present through route of Union Pacific Railroad, for our particular needs, is the shortest and most direct route, and since time is an important factor in getting delivery on supplies or in getting products which we are marketing to the customer, we are not interested in the establishment of a less direct route which would lengthen the time needed to receive deliveries of merchandise.

Under modern high costs of merchandise, which in turn [fol. 2075] requires excessive capital, it is our desire and general objective to try to hold inventories at the minimum point. Quick delivery on shipments from Eastern suppliers over the shortest route possible, aids materially in keeping our inventories at reasonably low levels and thus conserves our capital requirements.

In the marketing of our field seeds in the fall of the year, time of delivery is of utmost importance, and occasionally we are badly crowded to get the seed through our processing plant and delivered to the customer in the East in sufficient time for his fall requirements. The use of longer or more circuitous routes would only tend to embarrass us from the standpoint of being unable to make prompt delivery within the minimum time allowed and receiving prompt payment therefore on delivery.

Our experiences with the service performed by the Union Pacific Railroad during the past several years has been generally very satisfactory. Excepting during war-time conditions, cars have been furnished promptly, the service has been uniformly good, and the routes maintained by the Union Pacific Railroad have been adequate to serve our needs.

As I understand the request of the D&RGW before the Interstate Commerce Commission, if granted, would result in short hauling the Union Pacific Railroad on a substantial portion of the tonnage originating on their system in the Northwest or originating from the other points in the East for the Pacific Northwest. We are unable to see any advantages to ourselves as a shipper from the standpoint of improvement in rates or service or the opening of any new [fol. 2076] markets from such proposal, should this request be granted.

On the other hand, it is obvious that if Union Pacific is to be short-hauled on this tonnage, the inevitable result is to deplete their income, reduce their personnel, and undoubtedly put them ultimately in a position where they would be hard-pressed to render the type of service they are presently giving.

For the foregoing reasons, it seems to me, (and I may say my Board of Directors, after having given this matter very

careful consideration, concur) that the request of the Denver & Rio Grande Railroad to open the Ogden Gateway would in all probability do our company material harm by depriving us ultimately of the very fine service which we are presently enjoying from the Union Pacific Railroad. We see no sound reason which would indicate that the proposal would in any way result in any benefits to us or other shippers residing in this area.

(Sgd.) Charles Baker.

[fol. 2077] VERIFIED STATEMENT No. 37

I. C. C. Docket No. 30297

Statement of Stanley D. Jenkins, Pilot Rock, Oregon

My name is Stanley D. Jenkins and I am Manager of the Pilot Rock Lumber Company of Pilot Rock, Oregon, which company has purchased and, effective June 1, 1950, will operate the Pendleton Lumber Company of Pendleton, Oregon. The entire output of both companies is sold to the Kerns Company of Oregon, Ltd., which latter organization is a partnership, the members of which are the stockholders in the lumber companies named and for which I am authorized to speak. The production of the companies consists of finished pine lumber, furniture parts, cut stock, etc.

During the year 1949, the Kearns Company shipped approximately 700 carloads of the items named, nearly all of which was destined to points east and south of Denver and was routed via the Union Pacific through routes. During 1950, we expect to ship about 1,200 carloads. The Union Pacific service has been entirely satisfactory from the standpoint of furnishing of cars and the movement thereof to destination. Its routes and services are adequate and sufficient from our standpoint.

All of the lumber produced by my company is manufactured into finished state. We have no rough lumber for sale for milling or manufacturing in transit and therefore any rates permitting such on the D&RGW would be useless to my company.

Our plants are served exclusively by Union Pacific Railroad and consequently any curtailment of service, line haul

[fol. 2078] or switching, would be injurious to our business. As we understand it, the D&RGW seeks to have diverted to it at Ogden shipments originating or terminating on the Union Pacific which would otherwise move via the Union Pacific giving it its long haul. Such diversion and its consequent loss of revenue to the Union Pacific would be expected to result in curtailment of service or increases in rates, or both, by the Union Pacific, either one of which would vitally affect our operations. In our opinion, our presently strong Union Pacific Railroad should not be weakened in any manner merely for the purpose of benefiting another railroad which does not serve our territory and which is not in a position to render any service whatever to my company.

For the above reasons, we protest any action by the Commission supporting the complaint of the D&RGW.

[fol. 2079] VERIFIED STATEMENT No. 38

I. C. C. Docket No. 30297

Statement of Denny H. Hogue, Twin Falls, Idaho

My name is Denny H. Hogue and I live at Twin Falls, Idaho, where I operate the Long Valley Farms. My principal business is the growing of potatoes and clover seed and the shipping of potatoes and onions principally to the eastern markets. My potatoes are grown in the Twin Falls area and near McCall, Idaho, both of which are on branch lines of the Union Pacific.

My shipments exceed on the average 1,000 cars per year. In the sale of No. 1 potatoes, the principal markets are Chicago and east. However, I do ship a good volume of No. 1's in straight carloads to the larger cities in Texas, such as Waco, Austin, Ft. Worth, Dallas and San Antonio. The market for No. 2's extends throughout the States of Kansas, Oklahoma and Texas, but there is a movement of mixed cars of No. 1's and 2's to points throughout the same area. Seldom, if ever, do we have rejects of mixed cars of No. 1's and 2's because these contain specific quantities of

special packs and sizes and the shipment cannot easily be replaced by the buyer.

All of our potatoes are sold on a firm contract, about 80% of which are sold on a delivered basis and the balance on a F. O. B. basis. At no time have we experienced difficulty in marketing potatoes because of a lack of tariff routes.

In the sale of onions, our principal markets are Chicago and east, and these are sold on a firm contract basis. Here again we have no difficulty marketing our onions with the variety of tariff routes that are now available to us.

[fol. 2080] My purpose in appearing in opposition to the opening of the so-called Ogden Gateway is to make known to the Commission the fact that in the 20 years I have been in the produce shipping business in Idaho, the Union Pacific has afforded me reliable and dependable transportation service. I think the Commission knows that the Union Pacific is the only railroad serving the Twin Falls and McCall areas—in fact, the only railroad for many miles around—and whether or not the Ogden Gateway is opened or not I, like other shippers, will have to call upon the Union Pacific for cars, car icing and everything connected with my transportation problems.

If the Rio Grande, mainly by eastern solicitation, is able to divert a large volume of traffic from the Union Pacific via the Ogden route (and here I want to say that the consignee does control the routing on many of my shipments) then the revenues of the Union Pacific will be substantially reduced. When that happens, the Union Pacific can do only two things, either curtail service or seek an increase in rates. That is the simple reason why I strongly oppose the opening of the Ogden Gateway.

[fol. 2081] VERIFIED STATEMENT No. 39

I. C. C. Docket No. 30297

Statement of Dan J. Cavanaugh, Twin Falls, Idaho

My name is Dan J. Cavanaugh and my home is at Twin Falls, Idaho, which is on the Twin Falls Branch of the Union Pacific. I am in the business of producing, feeding and

marketing sheep and have been since 1934. I run about 5,000 head on the range with lambing quarters near Buhl, Idaho, which is the end of the Twin Falls Branch.

Our sheep are run on public range and the lambs are loaded at Rogerson and Ketchum, Idaho, and are sold at the Ogden stockyards to various buyers who reconsign them to southern California points and to Omaha and points farther east. To Omaha and the other eastern markets the Union Pacific makes no extra charge for the out-of-line movement through the Ogden market and then east over its main line.

Our fat lamb shipments average about 30 cars a year and in addition we have about 5 or 6 cars of old ewes which are also shipped for slaughter purposes.

Up to four or five years ago, the general practice was to ship lambs to Denver to try the market and if not sold there, they were moved on to Omaha or Chicago. However, since that time, Ogden has supplanted the Denver market for first try and in practically all cases, we sell on the Ogden market to buyers who are stationed there.

I am not in the business of producing feeder sheep for sale outside of the State of Idaho. Based on my experience in the sheep business, I can say that to the best of my [fol. 2082] knowledge, there is no surplus of feeder animals in the local Union Pacific Idaho territory, and as a matter of fact, the demand exceeds the supply. Because of this shortage of feeder stock, also a shortage of replacement or breeding stock in the State of Idaho, there is little or no movement of feeders or breeding stock out of Idaho. In fact, I have in the past gone as far as Wyoming and Montana for replacement ewes. Of course, anything moving in from Wyoming and Montana is on flat rates and has no transit value for use on the outbound movement. The absence of transit billing and the application of flat rates has not hampered my operations.

The Union Pacific has helped me a lot in getting my lambs to market. It is most important in the marketing of lambs to have them available on the Ogden market around 3:00 or 4:00 a. m. of the day following loading. To meet this condition, the Union Pacific has put on special service from Rogerson and Ketchum, Idaho, during the lamb shipping season so as to move loaded cars from shipping points to

main line connections for runs in through trains to Ogden for early morning arrival. This allows enough time for feeding and fill before sale, which is most important to us shippers. With this type of train service being furnished by the Union Pacific from Rogerson and Ketchum, which are both branch line points, it seems fair to me that they should be rewarded with the rest of the haul to eastern markets after sale at Ogden. I think that a substantial reduction in the earnings of the Union Pacific will in the long run result in curtailment of the special train service on lamb shipments which we now have and which is most neces- [fol. 2083] sary to us. I appreciate what the Union Pacific has done in the way of furnishing company owned scales, good stockyards and other facilities needed in its livestock territory, and I also appreciate the service which the Union Pacific has given me in the past. But I am anxious that it continue to get the long haul and the maximum revenue on my shipments routed east of Ogden by the buyers, so that it will have the incentive to keep on giving the same good service.

[fol. 2084] VERIFIED STATEMENT NO. 40

I. C. C. Docket No. 30297

Statement of Donald Wallace, Tacoma, Washington

My name is Donald Wallace. I am Traffic Manager of the Tacoma Chamber of Commerce, Tacoma, Washington. I am duly authorized to appear here in support of the defendants and in opposition to the complaint of the Denver & Rio Grande Western Railroad. The action of the Tacoma Chamber of Commerce in adopting a resolution in opposition to the complaint resulted from a recommendation of the Traffic Committee, of which I am Secretary. That committee is an exclusive shippers' committee and the recommendation was made after contacting the principal shipper members.

The Tacoma Chamber of Commerce, with over 1300 company memberships, including commercial, professional and industrial enterprises, embraces practically all of the in-

dustries located in Tacoma. The membership includes forest products industries, such as lumber, plywood, door and furniture factories; flour and feed mills; chemical and metallurgical manufacturers; stockyards; meat packing and other food processing plants; boat builders and many other diversified industries. Other members are engaged in wholesaling and jobbing of groceries, drugs, dry goods, hardware, coal, fuel, etc. Some of these industries are located on exclusive Union Pacific trackage while others are served by the Union Pacific through joint switching rates or other trackage arrangements.

The Traffic Bureau of the Tacoma Chamber of Commerce acts in the capacity of traffic advisor to many of its members, [fol. 2085] and in that capacity also appears, either in behalf of the Chamber of Commerce or in behalf of individual firms in proceedings before the Interstate Commerce Commission and State Commissions. To my knowledge none of our members has asked for the establishment of joint through rates on transcontinental traffic in connection with the Denver & Rio Grande Western Railroad. At the discussion preceding the action of the Traffic Committee of the Chamber of Commerce, it developed that Union Pacific service and routes have been satisfactory and adequate. Union Pacific Railroad has substantial holdings of industrial properties in the Tacoma area and has been and is actively engaged in attracting industries to locate thereon and to likewise develop industrial property owned by the Port of Tacoma and since the construction of its line into Tacoma has located on its property, and property of others, industries which have and are continuing to contribute substantially to the economic welfare of the City of Tacoma and the State of Washington.

As we understand the complaint, the D&RGW seeks to have diverted to it at Ogden, transcontinental traffic which is now handled by the Union Pacific via its routes. Such diversion over the proposed longer routes of the D&RGW will necessarily increase the time in transit of shipments to and from Tacoma and greatly decrease the earnings of the Union Pacific on such diverted traffic. As in business generally, any substantial decrease in revenue to the Union Pacific must necessarily be compensated for through

economies in operation which would be accomplished by [fol. 2086] curtailment of service, less frequent train schedules, less frequent switching movements for the spotting of empty cars and the pulling of loaded cars, reduced maintenance of roadway, power and rolling stock, with the possibility of increased rates. Such action would forestall the possibility of any reduction in rates, and generally would affect substantially and adversely the industries now located in the Tacoma area and preclude the natural and aggressive development of new industries by the Union Pacific in that area. For these reasons, the Tacoma Chamber of Commerce and the industries represented by it is opposed to the position of the D&RGW as set forth in its complaint.

Copy of resolution adopted by the Tacoma Chamber of Commerce with respect to this proceeding has been reproduced and is tendered by the record as Exhibit —.

[fol. 2087] EXHIBIT TO VERIFIED STATEMENT No. 40

I. C. C. Docket No. 30297

Witness: Donald Wallace

Resolution

Whereas, it has come to the attention of the Tacoma Chamber of Commerce that the Denver & Rio Grande Western Railroad Company has filed a complaint with the Interstate Commerce Commission alleging that the failure of the Union Pacific Railroad Company to establish competitive joint rates on freight traffic "via its Colorado and Utah Gateways, between places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington, British Columbia and Colorado common points and points east thereof and between Utah common points on the one hand, the places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia on the other hand" is a violation of the Interstate Commerce Act and deprives the public of freight routings which are necessary and desirable in the public interest.

Whereas, the petition of the Denver and Rio Grande

Western Railroad Company has received the consideration and study of the Chamber of Commerce and that, in its opinion:

1. No economic good for the Pacific Northwest could come from an order by the Interstate Commerce Commission requiring the publication of such competitive joint rates.

2. The Union Pacific would be forced to share traffic which [fol. 2088] it has originated and developed with its competitor.

3. The Denver and Rio Grande Western would construct no additional trackage or other facilities.

4. Much of the traffic concerned has been developed due to the construction of trackage and other facilities by the Union Pacific in the Pacific Northwest.

5. While it is a policy of the Tacoma Chamber of Commerce that wherever possible, there should be competing transportation agencies, such policy does not require one such agency to share business which it has developed with its competitor.

Therefore, Be it resolved that the Tacoma Chamber of Commerce is opposed to the position of the Denver & Rio Grande Western Railroad in the aforementioned complaint.

Dated at Tacoma, Washington, this 12th day of September, 1949.

Tacoma Chamber of Commerce, M. S. Erdahl, President.

[fol. 2089]

VERIFIED STATEMENT No. 41

I.C.C. Docket No. 30297

Statement of K. H. Klopp, Spokane, Washington

My name is K. H. Klopp. I am President and General Manager of the White Pine Sash Company, Spokane, Washington, and a resident of that city. I am a member of the Spokane Chamber of Commerce, Western Pine Association, National Lumber Manufacturers Association, National Wooden Box Association, Inland Empire Wooden Box Association, and a member and Director of the National Wood Work Manufacturers Association. The Spokane Chamber

of Commerce, by majority vote of its Directors, passed a resolution supporting the Union Pacific in this proceeding.

My company is engaged in the manufacture of lumber and millwork from logs, and also from dry rough lumber purchased from sawmills and remanufactured under transit privileges into lumber and millwork. The logs we use come from timber stands in Eastern Washington and Northern Idaho; and the dry rough lumber from sawmills in various points in Oregon, Washington, Montana and Northern California. We also process green pine selects purchased from Chelan, Washington. At our plant we have a complete operation for the manufacture of finished lumber from logs and from rough dry and green lumber, consisting of sawmill, planing mill, millwork plant and dry kilns.

Our shipments over the Union Pacific will approximate 1,800 carloads annually, slightly heavier inbound than outbound. Carloads received consist of logs from Northern Idaho, and dry rough lumber from points on the Union Pacific and its connections in Idaho and Oregon. Carloads shipped consist of finished lumber and millwork to destina-
[fol. 2090] tions Salt Lake City, Utah, Denver Colo., and east and south of the latter point. The Union Pacific's service has been satisfactory from the standpoint of supplying cars for loading and moving my shipments to and from our plant. Its routes and services are entirely adequate and sufficient for my purpose as a shipper, and from my knowledge of the lumber business in the Inland Empire, I should say they are adequate and sufficient for the purpose of moving the traffic to all Eastern destinations.

In the conduct of my business, I have never felt any need, and do not anticipate any need, for the routes and rates in connection with the D&RGW sought in this case. I have never asked either the D&RGW or the Union Pacific for the establishment of such routes nor do I see how I could derive any benefit from them in the form of transit at points on the D&RGW or otherwise.

Generally speaking, time is of importance to my company in the movement of our shipments, and this is especially true of carloads of millwork which are sold on the basis of 2% five days after arrival, 60 days net. Obviously, therefore, and from a financial standpoint, we route our traffic over the fastest and most dependable routes and

accordingly favor the Union Pacific with the major portion of our cars destined to Eastern territory. Its service, including tracing and passing reports, is entirely satisfactory and I can see no need or benefit for a longer route by way of the D&RGW which would, of course, require more time in transit not only because of the greater mileage but also because of the additional interchanges involved.

Establishment of the rates and routes sought by the D&RGW would not open new or additional markets to me [fol. 2091] or others similarly engaged in this territory for there is no surplus lumber of any description in this territory. Actually, there is a shortage. There are enough buyers in the Inland Empire territory representing Eastern and Western interests to purchase all available dry lumber at market prices.

My experience as a transit operator, especially in the remanufacture of rough green fir, has proven it cannot be profitably done unless the distance between the green mill and the transit point involves only a short haul by truck. This is because of the loss through drying and surfacing and by the competitive price offered by Douglas Fir mills on the Coast having dry kilns and surfacing facilities.

As I understand it, the purpose of this complaint is to divert to the D&RGW traffic now handled by the Union Pacific to and from points on its lines and its connecting lines with the result that Union Pacific would lose substantial amounts of its revenues. It has been my experience that in times of reduced traffic and revenue, the service of the railroads, including the Union Pacific, falls off in the form of less frequent train schedules, less frequent movements for spotting empty cars and moving outbound loads, and if operating economies are not sufficient to compensate for the loss of revenue, then increases in rates follow. Should any or all of these conditions arise, they would be decidedly to the detriment of my company. I do not want to see the financial structure of the Union Pacific or any of the Northern transcontinental railroads impaired in any way by short-hauling them.

[fol. 2092] Any thing that would curtail my rail service or tend to cause an increase in our rates would be disadvantageous to me and injurious to my business. For these

reasons, I am opposed to the position of the D&RGW in this case.

[fol. 2093] VERIFIED STATEMENT NO. 42

I.C.C. Docket No. 30297

Statement of Verne R. Woods, Ault, Colorado

My name is Verne R. Woods. I live at Ault, Colo., where I am engaged in farming and the livestock feeding business. Ault is just north of Greeley, Colorado, on the Cheyenne-Denver main line of the Union Pacific. My farming operations consist of 160 acres devoted to general agricultural purposes, principally potatoes and sugar beets. The feeding operations are carried on by a partnership having the name of Woods & Deffke and involve the feeding of both cattle and lambs, principally lambs. On an annual basis, we feed and ship approximately 11,000 lambs for our own account. Of these, about 5,500 are fed at Ault and 5,000 in Kansas at a point called Kanorado, which is a station on the Rock Island Railroad in northwest Kansas. Our cattle feeding operations are confined to Ault, Colorado. We will feed there about 700 head a year.

Last year in addition to purchasing and shipping sheep for account of the partnership, I purchased about 30,000 lambs for my neighbors and other clients in the northern Colorado district. Of a total of about 41,000 lambs purchased and shipped, about 30,000 came from points in Idaho and Montana on the Union Pacific north of Idaho Falls and the remainder originated at points on Union Pacific in Wyoming.

Our cattle were purchased in western Nebraska, eastern Wyoming, Kansas, Colorado, New Mexico and Texas. [fol. 2094] None of our cattle came from Idaho or Montana.

All of the lambs which we purchased either for clients or ourselves in Idaho, Montana, and Wyoming were routed over the lines of the Union Pacific Railroad to Ault and other destination points in northern Colorado.

My purpose in appearing here is to say, first, that I am opposed to the opening of the Ogden route or anything else

that would give feeders in the Arkansas Valley the same rates from Idaho and Montana to eastern markets that I have through my feed lot at Ault unless I was given the same treatment on rates from Arizona, New Mexico and Texas. I am not a rate expert by any means, but as I understand it the rates from Idaho and Montana through northern Colorado to the eastern markets are based on the direct line mileage of the Union Pacific and that higher rates apply from origins in those states through the Arkansas Valley and thence east because of the greater distance. On cattle which I purchase in Texas and New Mexico, I pay higher rates through northern Colorado than the Arkansas Valley people pay because of the longer distance my shipments must travel, and I have no complaint to make on that score. I am not asking for the same rates from the southwest and I do not feel that Arkansas Valley feeders are entitled to the same rates from Idaho and Montana that I have. In other words, they have the rate advantage where their distances are shorter and I have the advantage where my distances are shorter and I do not feel that I should lose my advantage unless they also give up theirs.

[fol. 2095] I have been in the sheep and cattle business for about 11 years during which time I have used the rail service of the Union Pacific on many hundreds of cars. I can say that it has been very dependable.

[fol. 2096] VERIFIED STATEMENT No. 43

I.C.C. Docket No. 30297

Statement of E. J. Maynard, Denver, Colorado

My name is E. J. Maynard. I live in Denver, Colorado. I am General Livestock Consultant for The Great Western Sugar Company and as that Company is also engaged in the direct feeding of livestock at several of its factories, I am also in charge of supervision of its feeding operations.

The Company is the owner and operator of twenty-one beet sugar factories in the States of Colorado, Nebraska, Wyoming and Montana, thirteen of such plants being lo-

cated in Northeastern Colorado, five in Nebraska, two in Wyoming and one in Montana. The Company has feed-yards at Windsor and Ovid, Colorado, and at Scottsbluff, Nebraska, and is currently feeding cattle in each of such yards. My principal duty for the Company is in agricultural extension work with beet growers in the areas in which sugar beets are grown for factories of the Company, to encourage livestock feeding on beet growing farms, the use of most efficient rations, and the improvement of feeding methods and results.

I have been with the Company a total of fourteen years. Prior to that time, I spent twenty-one years in college and agricultural experiment station work in animal husbandry in New Mexico, Colorado, Iowa and Utah.

Of the factories operated by the Company in the irrigated farming territory in Northern Colorado and Western Nebraska, nine are located on the line of the Union Pacific Railroad, namely, the factories at Eaton, Greeley, Fort Collins, Brighton, Fort Lupton, Ovid and Sterling, Colo- [fol. 2097] rado, Gering and Lyman, Nebraska. In addition to these nine factories, the Union Pacific by connection with The Great Western Railway reaches our factories at Windsor, Loveland and Longmont, Colorado. Also, the Company's factories at Mitchell, Scottsbluff and Bayard, Nebraska, while not on the line of the Union Pacific, are within two to three miles distant of points upon the line of that railroad.

In order that farmers secure profitable acre yields of sugar beets and processors obtain sufficient volume to maintain efficient sugar production costs, beet farmers should feed livestock consistently on their farms. Also, farmers who grow sugar beets in any of these western irrigated farming areas cannot maintain these essential farm feeding operations unless they can fatten livestock for market at production costs that are no greater than those of beet growers in other areas or of feeders in the corn belt.

The total cost to the feeder of livestock in the different feeding areas of the country is composed of separate costs which vary to some extent from area to area. The cost of feed varies from one area to another; likewise, the cost of labor. It is also a fact that the transportation costs of shipping livestock from western range areas to the points

at which such stock is fed and from those points on to market are a definite factor in determining the ultimate cost of feeding operations.

The great volume of western livestock feeding, the fattening of range cattle and sheep for market, is carried on in the irrigated farming areas and the volume of western feeding is greatest in the sugar beet producing areas because of the greater efficiency of livestock fattening rations which [fol. 2098] include the sugar beet by-products—tops, wet or dried pulp and molasses. The great majority of these beet farmers do not raise cattle or sheep on their farms but depend on the supply of feeder cattle and lambs secured from the vast range areas of the west for their feeding operations. The relative proximity of these range areas as well as the comparative numbers of feeder cattle and lambs available from various areas are factors that influence the cost of these feeding operations.

In comparing the feeding operations of beet farmers in Northern Colorado and Western Nebraska with similar feeding operations of farmers in the Arkansas Valley of Southern Colorado and in the irrigated valleys of Western Colorado, each such feeding area has advantage over the others in transportation costs from naturally tributary areas in which feeder livestock are grown. Western Colorado feeder farmers have had and now have an advantage in transportation costs from certain tributary range areas lying west and southwest. Southern Colorado farmers have had and now have an advantage in transportation costs on feeder cattle and lambs from the southwest range areas, including Southern Colorado, New Mexico, Texas, Arizona, and parts of Utah. On the other hand, Northern Colorado and Western Nebraska farmers have had and now have an advantage in transportation costs in the securing of their feeder stock from Wyoming and the northwest range areas.

The statements that I have just made are illustrated by the following examples:

1. The carload rate on cattle and on sheep, shipped doubledeck, in cents per hundred pounds, from Amarillo, Texas, feed in transit at Swink, Colorado, and to market in Chicago, is $1.19 whereas the carload rate

[fol. 2099] from the same point of origin to the same market with feeding in transit privileges at Greeley, Colorado, is $1.30.

2. Using Gallup as a point of origin, the rate to Chicago, feed in transit at Swink, is $1.34, whereas it is $1.48 if the stock is fed in transit at Greeley.

3. Similarly, the feeder at Greeley has an advantage in the transportation cost of feeder livestock bought for example at Ashton, Idaho, feeding in transit at Greeley, for market in Chicago. His cost is $1.53 per hundred pounds. The feeder at Swink would pay $1.61½ per hundred pounds for the same livestock to feed at Swink and market at Chicago.

I would like again to make the point that the final feeding cost of the farmer feeder in any area is determined by a combination of prices and costs which in his case vary with those of feeders of other areas. It is impossible to provide that each item of such cost shall be identical in every area. Some areas have advantages in respect to certain items; other areas have advantages in respect to other items.

There is now a considerably larger supply of feeder cattle and lambs suitable for fattening purposes available from the southwestern range areas than there is from the northwestern range areas. Any change in existing transportation costs on livestock shipped from the northwestern range areas in favor of Southern and Western Colorado farm feeders would affect comparative area feeding cost in that it would reduce the existing advantage to Northern Colorado and Western Nebraska feeders and improve the position of Southern and Western Colorado feeders in respect to transportation costs from the naturally tributary feeder area of the Northern Colorado and Western Nebraska group. I think it is important to recognize that this would be the effect of the proposal under consideration as I understand it.

[fol. 2100] As a matter of fact, there is at the present time a much greater movement of feeder stock into Northern Colorado and Western Nebraska from southwestern range areas at higher transportation costs than would apply to Southern Colorado destinations than the present movement of feeder stock from northwestern range areas

to Southern Colorado feeders. This is due primarily to the relative numbers of feeder cattle and lambs available from the two areas and also to the relative size and crop producing capacity of the two irrigated farming areas under consideration.

As regards the relative availability of feeder lambs from the southwest and northwest range areas, the most recent estimates of stock sheep numbers by the U. S. Department of Agriculture indicate 10,919,000 sheep in Colorado, New Mexico, Texas, Utah and Arizona and only 5,562,000 sheep in Washington, Oregon, Montana, Idaho and Wyoming. Furthermore, the percentage of feeder lambs available is much greater from the southwestern ranges due to the fact that a greater proportion of the northwest lambs go to early slaughter direct from the range. As an example, some 60 to 65% of the lamb crop from Idaho and Washington and 50% of the lamb crop from Oregon goes directly to slaughter by early fall. On the other hand, while 40 to 45% of the Colorado range lambs are ready for the fat market in the fall, some 98% of the New Mexico lambs and nearly all Texas and Arizona lambs are available as feeders.

These factors further favor the Southern Colorado lamb feeders in their ability to secure a more abundant supply of feeder lambs at lower transportation costs than are possible [fol. 2101] for the Northern Colorado and Western Nebraska feeders.

There have been drastic changes in this Western winter lamb feeding situation since the five-year period 1929 to 1933 when Northern Colorado and Western Nebraska feeders fattened a yearly average of 1.5 million lambs and Arkansas Valley feeders fattened an average of 385,000 lambs. During the past five years, for instance, these Northern feeders fattened an average of only 703,000 lambs and the Arkansas Valley feeders 113,000.

In recent years the significant reduction in sheep population has been largely responsible for this reduction in feeding in both areas concerned, but this reduction in sheep numbers and consequent supply of feeder lambs has been noticeably more severe in the northwest range areas.

For instance, during the past eight years sheep numbers in the five northwestern range states, Washington, Oregon,

Idaho, Montana and Wyoming, have been reduced from 11,525,000 head to 5,562,000 head, a reduction of 51.7%, while sheep numbers in the five southwestern range states, Colorado, New Mexico, Texas, Utah and Arizona, have only been reduced from 17,180,000 to 10,919,000, a reduction of 36.4%.

Furthermore, the steadily growing West Coast demand for both feeder and fat stock has in recent years created a natural outlet for the major portion of the lambs and for practically all cattle from the northwest area, further reducing numbers available from this source to Colorado feeders.

A comparison of the Northern Colorado feeding territory with that of the Southern Colorado territory in the [fol. 2102] Arkansas Valley may be measured in terms of the average numbers of cattle and lambs fattened in these two areas during the past ten years. According to U.S.D.A. reports, Northern Colorado feeders have fattened an average of 571,000 lambs and 144,400 cattle during this period while Southern Colorado feeders in the Arkansas Valley have fattened an average of 121,000 lambs and 14,500 cattle or 17.5% of the lambs and 9% of the cattle fattened in Colorado during the period.

The smaller capacity of the Southern Colorado feeding industry and its closer proximity to greater supplies of feeder lambs and cattle are facts to be taken into account in considering whether that area needs lower freight rates on feeder stock from the northwest.

Surveys and studies by the Agricultural Department of The Great Western Sugar Company indicate the need for livestock feeding on many more farms in the Northern Colorado and Western Nebraska territory if soil fertility for profitable crop production is to be maintained.

Annual surveys by the field force of The Great Western Sugar Company give an approximate idea of the amount of livestock presently fed for market in their Northern Colorado and Western Nebraska territory served in whole or part by the Union Pacific Railroad.

During the feeding season of 1948-49, farmers in this area fed 299,310 cattle, 29,116 calves, 505,278 lambs and 61,228 ewes.

As these farmers, in order to secure sufficient feeder

stock for their fattening operations, must secure large numbers of cattle and lambs from southwestern range areas [fol. 2103] and as they must pay higher transportation costs on these animals than are paid by Western Colorado or Southern Colorado feeders, it would appear that they are entitled to an advantage in transportation costs in the very limited supplies presently available from the northwest.

[fol. 2104] VERIFIED STATEMENT No. 44

I. C. C. Docket No. 30297

Statement of H. W. Farr, Greeley, Colorado

H. W. Farr is my name and I reside at Greeley, Colorado, which is on the Denver-Cheyenne main line of the Union Pacific about 50 miles north of Denver.

My appearance here, today, is in two capacities—one as President representing the Weld County Lamb Feeders Association, and in the other capacity, I speak for myself, as a livestock feeder of both sheep and cattle in the Greeley district. I should also mention that I am President of Farr Farms Company, who own and operate six farms and one large feed lot adjacent to the Greeley sugar factory, where we feed about 10,000 head of cattle per year and 6,000 lambs.

The Weld County Lamb Feeders Association is a voluntary association formed for the purpose of promoting and advertising lamb. It has about 175 members and has been in existence since 1928. I am President of this Association and have held that office since 1928. Of course, I am also a member of the Association. The Association which I represent and, I, as an individual, have about the same interest in this proceeding. If there is any difference in that respect, it is only because I also feed cattle in addition to lambs, whereas the essential function of the members of the Association is lamb feeding.

Perhaps, it will simplify matters if I explain the nature of my own feeding operations in the Greeley area. Myself and Farr Farms feed about 25,000 lambs a year, and from 10,000 to 12,000 cattle. These lambs are purchased wher-

ever the opportunity affords, and taking into consideration [fol. 2105] such factors as price, freight rate and time of delivery. In the past, we have purchased and shipped lambs from Idaho, Utah, Montana, Wyoming, New Mexico, Arizona and southwest Colorado. As to cattle, these have been bought and shipped from practically all states in the Inter-Mountain country, including Idaho and Montana, and in Texas and the southwest.

The lambs which we feed eventually go to Denver or Missouri River markets like Kansas City and Omaha, and even to points farther east. Our cattle, after feeding, go mostly to Denver, but some of these reach the Omaha and other eastern markets.

My purpose in appearing here in the dual capacity which I have just explained is to register my protest against the proposal of the Denver & Rio Grande Western Railroad to secure the opening of the so-called Ogden Gateway, as against the Union Pacific. At the present time sheep and cattle are fed extensively in the Arkansas Valley in southeastern Colorado, and I want to emphasize that these operations are carried on in competition with similar feeding operations in northern Colorado conducted by members of our Association, including myself. While I am not thoroughly versed in the matter of freight rates, it is my information that rates on cattle and sheep from Idaho and Montana to Omaha, for instance, via feed yards in northern Colorado, are predicated upon the Union Pacific direct short line distance. Because of the longer distance involved the rates from Idaho and Montana to Omaha via Denver and the Arkansas Valley are somewhat higher than our rates. For instance, the rate from Dillon, Montana, at which [fol. 2106] point we have purchased and shipped a large number of sheep, to Omaha, after stopping at Greeley, Colorado, for feeding in transit, is $1.12 per cwt., while the rate via Denver and the Arkansas Valley to Omaha is $1.22, a spread of only 10 cents. On the other hand, when I and members of our Association go into New Mexico for sheep, and we have done this to a considerable extent in the past, we are, because of the longer distance involved through Greeley thence to Omaha as compared with that through Arkansas Valley to Omaha, forced to pay a rate which is 12 cents higher from such a representative shipping point

as La- Vegas, New Mexico, while the differential from Gallup, New Mexico, where we have purchased a large number of sheep in the past, is 15 cents.

The point that I want to emphasize is that at present, feeders in the Greeley, Colorado, district (Weld County), by reason of the shorter distance involved from Idaho and Montana, have the rate advantage in competition with feeders in the Arkansas Valley, who might purchase lambs and cattle in that territory. On the other hand, Arkansas Valley feeders have even a greater advantage than we do by reason of the shorter distance involved when they purchase lambs or cattle in Texas and New Mexico in competition with us when we find it necessary to go into those areas. I am not complaining about this situation, but as I understand the Rio Grande's proposal here, they now seek the same rate on cattle and sheep from Idaho and Montana via Ogden and points in the Arkansas Valley to the ultimate market that now applies via the short route of the Union Pacific through northern Colorado. Thus, our Arkansas [fol. 2107] Valley competitors would be placed on a rate equality with feeders in northern Colorado, but we would continue to be at a distinct disadvantage when we go into the Southwest for lambs and cattle. To me, the objective of the Rio Grande Railroad here is unfair and economically unsound—unfair because it seeks an advantage for itself and for feeders on its railroad at the expense of the Union Pacific Railroad and feeders in northern Colorado; uneconomic because it results in the wasteful use of transportation and the use of a route that is expensive by reason of being substantially longer and because it would involve at least two more interchanges than are now required over the direct route of the Union Pacific.

For the reasons I have explained, we earnestly hope that the Commission will deny the petition of the Rio Grande Railroad. My appearance here today was specifically approved by the Board of Directors of the Weld County Lamb Feeders' Association by resolution adopted on March 11, 1950. I have reproduced that resolution and an excerpt from the Minutes of that meeting of the Board of Directors, which I offer now as Exhibit No.—

[fol. 2108] EXHIBIT TO VERIFIED STATEMENT No. 44

I. C. C. Docket No. 30297

Witness: H. W. Farr

Extract from Minutes of Meeting of Board of Directors of Weld County Lamb Feeders' Association Held at Greeley, Colorado, on the 11th Day of March, 1950

President Farr brought up for discussion the proceeding now pending before the Interstate Commerce Commission involving complaint filed with that body by the Denver and Rio Grande Western Railroad Company against Union Pacific Railroad Company and certain other railroads in the country in which the Rio Grande Railroad seeks an order from said Commission requiring the opening up of the so-called Ogden Gateway on traffic; including sheep and cattle, moving between points in Idaho, Montana and the Pacific Northwest, on the one hand, and certain eastern territory.

He explained his reasons for feeling that this Association and its members have a direct and vital interest in this proceeding because if the Rio Grande Railroad is successful in its complaint before said Commission, then there will immediately be involved the freight rates on sheep and cattle moving from the States of Idaho, Montana, Oregon and Washington to the east over the Union Pacific and the Rio Grande Railroad through Ogden to competitive feed yards located in southeastern Colorado. He explained that if the Rio Grande Railroad should succeed in its endeavor here, it would have the very effect of placing these competitive feed yards on a relatively more favorable freight rate basis than applies to feed yards in northern Colorado, and [fol. 2109] that by reason of that fact, the members of this Association would be seriously affected. Accordingly, he recommends that this Association take an active part in the proceeding in order to represent and protect the interests of its members.

Now, therefore, on motion, duly made and seconded, it was resolved that this Association should interest itself in and take an active part in the above mentioned proceeding in opposition to the contentions of and relief sought by the Rio Grande Railroad, and

Be it further resolved, that Mr. H. W. Farr, President of this Association, be and he is hereby authorized to attend the forthcoming proceeding scheduled to be held at Boise, Idaho, on April 3rd, 1950, to represent and speak for this Association and its members in opposition to the petition of the Rio Grande Railroad, and to take such other and further action as he deems advisable and necessary to actively oppose said petition on behalf of this Association and its members.

I, W. D. Farr, Secretary of the Weld County Lamb Feeders' Association, do hereby certify that the above and foregoing is a true and correct copy of the preamble and resolutions duly adopted by the Board of Directors of the said Association at a meeting of said Board held at Greeley, Colorado, on the 11th day of March, 1950, at which a quorum was present.

Dated at Greeley, Colorado this 11th day of March, 1950.

(S.) W. D. Farr, Secretary, Weld County Lamb Feeders' Association.

[fol. 2110] WELD COUNTY LAMB FEEDERS ASSOCIATION

Greeley, Colorado
March 11, 1950

A special meeting of the Board of Directors of the Weld County Lamb Feeders Association was held at 701 Seventh Street, Greeley, Colorado, at 1:30 p. m. Saturday, March 11th. The following resolution was unanimously adopted at this meeting:

Resolved: That the President be authorized to appear on behalf of the Weld County Lamb Feeders at the Ogden Gateway hearing to be held in Boise, Idaho, before the Interstate Commerce Commission, beginning April 3, 1950.

Signed by the following Directors present:

H. W. Farr.
C. E. Veden.
Otto Wykert.

John S. Peterson.
David Simpson.
Henry Danielsen.
Geo. L. Andersen.

[fol. 2111] VERIFIED STATEMENT No. 45

I. C. C. Docket No. 30297

Statement of Harold Smillie, Eaton, Colorado

My name is Harold Smillie. I live at Eaton, Colo. I am a partner in the firm of Gilbreath Bros. & Smillie of Eaton and Monte Vista, Colorado, which engages in the business of buying, feeding and selling sheep. I should also mention that my other business connection consists of being a member of a partnership with J. D. Wilson of Eaton, which is entirely a commission business engaged in selling feeder lambs, which total 40,000 to 60,000 annually, for various clients. I have been in the sheep business for about 30 years.

We handle approximately 8,000 to 10,000 sheep a year at Eaton. The lambs which we feed are shipped mostly to Missouri River points and east. About half the lambs which our firm feeds at Eaton, Colorado were secured last year from the Dillon, Montana area and the remainder from Wyoming. The transportation movement from both Montana and Wyoming to Eaton was over the lines of the Union Pacific entirely.

I am appearing in this proceeding in opposition to the complaint of the D&RGW Railroad Company for the reason that as I understand it the rates from Idaho and Montana available to lamb feeders in southeastern Colorado will be reduced if the Rio Grande is successful here, but that no change in my rates will be made. Distances from Idaho and Montana via northern Colorado, such as Eaton, to eastern markets are substantially shorter than via the route of the Rio Grande through the Arkansas Valley where other feeders are located and their rates are higher, as they should be, because of the longer distance involved.

[fol. 2112] From Texas, New Mexico and Arizona the rates to eastern markets are lower through Arkansas

Valley feeding points than through northern Colorado because of the shorter distances, and I have no complaint to make about that. I do object, though, to the opening of a new route via the Rio Grande which will reduce the rates from Idaho and Montana to the east via the Arkansas Valley and cause me to lose the advantage which my shorter distances entitle me to unless the same equalization of rates is made from Texas, New Mexico and Arizona to the east via Eaton. It seems to me that northern Colorado and the Arkansas Valley now both have what their shorter mileage entitles them to in the way of rates and I am opposed to any change that would give our competitors an advantage to which I do not think they are entitled. There was a time when in our business we sold on commission and shipped a large number of lambs from Texas and the southwest but because of the higher rates from that territory through northern Colorado to the east, we are not able now to handle any large number of animals from that territory in competition with the Arkansas Valley.

So far as my own operations are concerned, I want to close by saying that the service of the Union Pacific rendered on my lamb shipments from Montana in the past has been very satisfactory.

[fol. 2113] VERIFIED STATEMENT No. 46

I. C. C. Docket No. 30297

Statement of Walter J. Gooding Salt Lake City, Utah.

My name is Walter J. Gooding. I reside in Salt Lake City, Utah. I am one of the partners of the Inland Wool Company, a co-partnership, with principal place of business at Salt Lake City, Utah. The Inland Wool Company is engaged in the commission business and purchases wool from growers in the States of Idaho, Oregon, Utah and Wyoming. The wool purchased from those locations is shipped to the Inland Wool Company and received in its warehouse at Salt Lake City, located on Union Pacific tracks. After receipt of the wool in the warehouse at

Salt Lake City, it is graded and then shipped to manufacturers and top makers in various parts of the country, namely, Rhode Island, New Jersey, Massachusetts, New York, Kentucky, Illinois, Pennsylvania and Oregon.

During the year 1949, the Inland Wool Company received from the points above mentioned 75 carloads of wool, all routed via the lines of the Union Pacific, and shipped from Salt Lake City 88 carloads of wool, which would include the 75 carloads above referred to, plus wool received in its Salt Lake City warehouse via truck from local areas. The 88 carloads of wool shipped from Salt Lake City were transported via the lines of the Union Pacific and delivered by that railroad to eastern connections at Council Bluffs, Iowa, or Kansas City.

In addition to shipments above referred to, the Inland Wool Company also receives wool in its Salt Lake City plant shipped via the D&RGW from Rio Grande local points, and such wool, when graded and shipped from the [fol. 2114] Salt Lake City warehouse, is routed via the D&RGW so as to take advantage of the transit.

There is no advantage nor would there be any advantage to the Inland Wool Company to route via the lines of the D&RGW shipments of wool received in its Salt Lake City plant which originated on the lines of the Union Pacific at the points above mentioned, nor has the Inland Wool Company ever requested the Union Pacific or the D&RGW to establish joint rates with respect to such shipments since the services and facilities of the Union Pacific are adequate for its needs with respect to this wool.

The Union Pacific has rendered satisfactory and adequate service for the requirements of the Inland Wool Company and has been reasonably prompt in supplying cars for its shipments. No benefit would be derived by the Inland Wool Company with respect to shipments of wool originating on the lines of the Union Pacific if joint rates were established via the D&RGW as our company has had no occasion to route any such shipments via the lines of the D&RGW, nor does not anticipate that it ever would require such routing. The route of the Union Pacific is more direct on wool originated on its lines and there is an advantage to the Inland Wool Company in shipping via the

direct route and in avoiding delay on such shipments which would be occasioned if the wool were interchanged to the D&RGW at Ogden and there handled by that line to Salt Lake City, where it would again be necessary to interchange back to the Union Pacific for delivery to our warehouse on the tracks of the Union Pacific.

It is my understanding that the D&RGW in this case seeks to have diverted to its lines a substantial amount of traffic presently moving via the lines of the Union [fol. 2115] Pacific. Any loss of revenue to the Union Pacific would necessarily affect the economic condition of that railroad and might result in an application for increases in rates or curtailment of service, either of which would work to the disadvantage of the Inland Wool Company.

I expressed my views with respect to this case in a letter to Mr. H. S. Bennett, Chairman, Public Service Commission of Utah, under date of November 18, 1949, reading as follows:

"9-7671

November 18, 1949

Mr. H. S. Bennett, Chairman
Public Service Commission of Utah
Salt Lake City, Utah

Dear Sir:

We are substantial shippers of wool in the State of Utah to various markets and practically all of our tonnage moves via railroad.

We are especially interested in the so-called "Ogden Gateway Case" that is to be heard by the Interstate Commerce Commission, December 12th, in Salt Lake City and we respectfully request that the Utah Commission intervene in behalf of the Union Pacific Railroad in these proceedings.

The present service from the territory in question is more direct via Union Pacific and movement by the Denver and Rio Grande Western would result in delay of at least 24 hours on the Eastbound movement. The present service is adequate and any impairment of

the Union Pacific to serve the territory in question would be detrimental to our best interests.

Respectfully, Inland Wool Company, (Sgd.) W. J. Gooding

I am, therefore, appearing in this case as a witness for the Union Pacific Railroad in opposition to the petition of the D&RGW.

[fol. 2116] VERIFIED STATEMENT No. 47

I. C. C. Docket No. 30297

Statement of Paul Blood, Morrill, Nebraska

My name is Paul Blood. I reside near Morrill, Nebraska, and am engaged in the livestock feeding business, principally at South Morrill, but also at numerous other places in the North Platte Valley, in Nebraska and eastern Wyoming. I am President of the Colorado-Nebraska Lamb Feeders' Association, but I am appearing here only as an individual. I have been engaged in this business about 15 years. Most of my feeding operations are adjacent to the Union Pacific Railroad Company.

In my business, I feed approximately 75,000 lambs and 1,000 cattle each year and also engage in order buying, principally lambs (sheep) for various purchasers.

Sources of supply of feeding stock, especially lambs (sheep) are varied, ranging through New Mexico, Arizona, Colorado, Wyoming, Utah, Idaho, Montana and California, depending upon market conditions and availability. Idaho is usually one of the principal sources. For example, in the Fall of 1949, I received 42 carloads (about 12,000 head) from that area. Some of these were direct purchases and some from the market at Ogden on Union Pacific Idaho transit billing and all were shipped to me in the North Platte Valley via Union Pacific Railroad Company.

There have been times, especially in recent years due to reduced lamb population in the country, when supplies were difficult to obtain, that we have on several occasions purchased feeder stock without regard to transit con-

[fol. 2117] siderations. This, however, is not generally economical and stock which can feed in transit without charge for out-of-line haul is naturally more desirable to handle.

Feeder lambs from Idaho can move on through rate via the Union Pacific Railroad to the East via North Platte Valley points stopping there for feeding in transit, without additional charge other than the usual transit charge. From Arizona and New Mexico, on the other hand, for example, there is a substantial charge for out-of-line haul when moved via Pueblo and Denver to Union Pacific Railroad North Platte Valley stations for feed, thence to eastern markets.

There are feeders in the Arkansas Valley in Colorado (east of Pueblo) who are in direct competition with my operation, who buy and sell in the same general markets. These Arkansas Valley feeders have an advantage on New Mexico or Arizona lambs by reason of the lower rates applying via those points. These Arkansas Valley feeders may use Idaho lambs at an added charge of 8½ cents per 100 pounds when moving via Union Pacific-Denver and connecting lines, however, this 8½ cent added charge is less than the similar added charges applying on the New Mexico and Arizona lambs fed in the North Platte Valley which varies somewhat according to origin.

If the Commission should grant the petition of the Denver & Rio Grande Western Railroad in this case, the Arkansas Valley feders would in almost all instances be able to purchase feeder lambs in Idaho, moving them on through rates via Ogden, thence D&RGW, feeding in transit in the Arkansas Valley at no additional charge other than the tran- [fol. 2118] sit charge, placing them on an equality with my operation from that territory, and still retaining their advantage on the New Mexico and Arizona origins. This would also be true of any feeding operation on the D&RGW in Colorado west of Pueblo or Denver, or between those two points. This would work a definite hardship on my business by adding competition in purchasing in the Idaho origin territory. The same hardship would be felt by all other feeders in the Association and in this North Platte Valley area.

I have never, in my experience, felt any need for through routes via the D&RGW to and from Idaho and the Pacific Northwest territory involved, nor do I anticipate any such need. Such through routes if established would be of no advantage whatever to me, but would result in a definite disadvantage, and could in certain circumstances result in a curtailment of my operations.

[fol. 2119] VERIFIED STATEMENT No. 48

I.C.C. Docket No. 30297

Statement of W. E. Anderson, Topeka, Kansas

My name is W. E. Anderson. I am one of the partners in Anderson Brothers, a produce firm, with houses at Topeka, Salina, and Hays, Kansas. I reside in Topeka and am in charge of the Topeka house. Our firm was started by my father, W. O. Anderson about 61 years ago. I grew up in the business, and have been operating the Topeka house since 1925. I am a past president of the United Fresh Fruit & Vegetable Association, having served in that capacity in 1937 and 1938.

For about the past 8 or 9 years, our firm has received annually approximately 2,000 cars of fresh fruits, vegetables and paper products. The majority of these cars have moved to our business locations from the Pacific Northwest, Idaho, Utah and from California and the southwest. All of our places of business are located on the Union Pacific Railroad and practically all of our shipments have moved over the lines of that road so far as possible. The Union Pacific's service has been very satisfactory from the standpoint of supplying cars, and moving our shipments to our destinations. Its routes and service are adequate and sufficient for our purposes. It furnishes excellent tracing service, and virtually daily, we are provided with list of cars, by car numbers and commodities, and location or progress of our cars in transit.

The subject matter of this proceeding has been explained to me, and I am familiar with what is involved. In my busi-

ness, I have never felt any need, and I do not anticipate any future need for the routes and rates sought by the [fol. 2120] D&RGW in this case, nor have I asked either the D&RGW or the Union Pacific to establish such routes. There is no way that I can think of that I could derive any use or benefit from them in the form of transit, or reconsignment or diversions.

In the fresh fruit and vegetable business, time is of utmost importance in the movement of our shipments. Union Pacific's service has been very satisfactory and I can see no present or future need for a longer route from the Pacific Northwest by way of the D&RGW which would, of course, require more time in transit.

In our territory, any dealer with any volume of business would not have use for a stop to partly unload privilege except in an unusual case, for example, where a commodity was very scarce or the price exceptionally high. This might occasionally apply with respect to new onions from Texas, as they are very highly perishable, and the price is high, but potatoes and onions from Idaho move in substantial volume regularly. In addition, the cost of the stop to partly unload privilege would be prohibitive on all except unusual shipments.

As I understand it, the D&RGW, if successful in this case, will be in position to divert traffic now handled by the Union Pacific to and from points on its lines, and to its connecting lines, with the result that Union Pacific would lose substantial amounts of traffic, and consequently its revenue thereon. It has been my experience that when traffic and revenues fall off, the service of the railroad suffers, and the shippers are hurt thereby. Any deterioration in service on the Union Pacific, either line-haul service, switching service, or even reduction in other services, such as the [fol. 2121] tracing service I mentioned, would be a disadvantage to me and would be injurious to our business.

I am familiar with what is known as the "pocket market" situation, but it plays only a minor part in our business, and our rejections of shipments for any cause is so small as to be almost negligbile. However, any fruit and vegetable shipper accepts the "pocket market" as a normal incident of their business, and is bound to encounter it some time,

and will expect it, and make his shipping and selling arrangements accordingly.

For the reasons I have stated, I am opposed to the position of the D&RGW in this case.

[fol. 2122]. VERIFIED STATEMENT No. 49

I.C.C. Docket No. 45-30297

Statement of Leeland U. Grieve, Savery, Wyoming

My name is Leeland U. Grieve. My address is Savery, Wyoming. I am a cattle and sheep rancher and as a livestock shipper am interested in the service of the Union Pacific Railroad. My ranch holdings are located near the Colorado-Wyoming border south of Rawlins, Wyoming and we have access to both the former Denver & Salt Lake Railroad (now Denver and Rio Grande Western) and the Union Pacific. Years ago our stock, that is, from my ranch and others in the same vicinity, was trailed over Battle Mountain to Encampment, Wyoming a station on the Saratoga & Encampment Valley Railroad, operated by the Union Pacific. For some years now since the highways have been improved in our section, it is more economical to truck the livestock to the railroad, than to trail. We move most of our stock since the trucking started to the stockyards on the former Denver & Salt Lake Railroad because the highway has been better and the distance shorter than to go to Rawlins or Wamsutter on the Union Pacific. However, we do still ship some stock on the Union Pacific and because of the generally unsatisfactory service on the former Denver & Salt Lake road in recent years, I recently joined with a number of other ranchers in our section, asking the Union Pacific to construct a stock shipping yards at Creston, a station at the junction of the Baggs highway from our section, with Highway 30 where it crosses the Continental Divide west of Rawlins. This would give us about the same trucking distance as it is to Craig, Colorado, on the former D.&S.L. Line.

[fol. 2123] I have been in the ranching business in Wyoming all of my life and in addition have been active in

handling stockmen's problems as well as other civic affairs. At present, I am President of the Snake River Cattlemen's Association, a local organization with a membership of about 56 livestock shippers. I am also a member of the Executive Board of the Wyoming Stock Growers' Association; on the board of the Green River Development Company, handling reclamation development. I am a member of the Wyoming legislature as State Senator from Carbon County. Because of these activities, I am frequently in contact with ranchers and other business people in our state and am familiar to a considerable extent with their problems, including the rail transportation service needs of ranchers.

The Denver & Rio Grande Western has only one stock train a day, which requires ranchers to have their stock ready to load at a specified time to be picked up on that train. This is difficult because delays are encountered getting stock into the pens at the ranch to load, loading onto the trucks and hauling 50 miles or more to the railroad which has no facilities to feed and water livestock which are held over in the railroad stock pens. Various delays are possible that make it difficult to reach the railroad at a specified time.

On the Union Pacific with a number of fast freight trains moving each day, we are assured of service even though we are delayed getting the stock to the railroad yards.

As I understand this case, the Denver & Rio Grande Western Railroad are asking that a route through Ogden be opened to permit that line to handle traffic from the Northwest via Denver for example. This, of course, would [fol. 2124] reduce the number of trains handled over the Union Pacific and to that extent would give less service to the Wyoming livestock shippers using that line. While this would increase the business on the Denver & Rio Grande, it would not in any way help our present service, or improve the service on the former Denver & Salt Lake Line which is operated by the Rio Grande. The Rio Grande has had difficulties in clearing livestock shipments at Utah Junction without delay. In many cases, livestock are held over at this point for from 12 to 18 hours. The Commission men naturally don't like this kind of service and neither

does the shipper for the reason that it is financially unprofitable to both of them, besides it's cruel to the stock in transit. The service situation in our territory has reached the point where unless we can get some help from the Union Pacific for a stock yards at Creston, we ranchers will have to arrange for trucks to get our stock to Denver. We have objections to trucking for the reason we do not get as good a sale by truck as by rail shipments. There is also a benefit from railroad billing, as the railroads permit a sale in transit on the Denver market with the buyer taking up the rail billing at the rate from origin, when stock is moved beyond Denver to markets, packers or feed lots. With my ranch located tributary to both the old D.&S.L. line and the Union Pacific and my attendance at conventions or other meetings as a representative of the Stock Growers Association, I come in contact with livestock shippers using the old D.&S.L., D.&R.G.W., Union Pacific and other railroads. Also as a shipper on both the D.&S.L. and Union Pacific; I am familiar with the service and opinions expressed by others, including the members of the Snake River Cattle-[fol. 2125] men's Association. I can say from my own knowledge and the opinion of others shipping stock, the Union Pacific has a reputation for giving better local service on livestock than either the former D.&S.L. or D.&R.G.W. We have also had less difficulty getting stock cars during the heavy shipping season as the Union Pacific have the reputation of filling the orders on time, while delays have been encountered on the D.&S.L. and D.&R.G.W. lines.

I wish to enter my protest to the opening of the route through Ogden. I and other land owners are taxed for the cost and maintenance of the Moffat Tunnel. When the D.&R.G.W. acquired control of the D.&S.L., it acquired control of the tunnel. Since then, the service on the D.&S.L. has become very poor. The result is that after the D.&R.G.W. acquired the tunnel which we are paying for, it gave preference to its service over the D.&R.G.W. Line and deprived us of the good service we previously had on the D.&S.L. Line. I regard this as unfair and as an improper rail transportation policy, as we who are paying for the tunnel are entitled to service through the tunnel sufficient to get our livestock to market. What the D.&R.G.W. is

attempting to do in this proceeding is to divert from the Union Pacific traffic the Union Pacific has developed, which appears to be a repetition of the tactics or business methods used to deprive us of service over the former D.&S.L.

[fol. 2126] VERIFIED STATEMENT No. 50

I.C.C. Docket No. 30297

Statement of L. G. Harding, Chugwater, Wyoming

My name is L. G. Harding. I am a resident of Chugwater, Wyoming, operating ranches in that vicinity, also raise sheep on ranches near Rock River, Wyoming; have a cattle ranch in South Dakota and feed lambs in Worland, Torrington, Wheatland, Wyoming, with extensive sheep feeding operations in Kansas in feed lots located on the Union Pacific, Missouri Pacific, Rock Island and the Santa Fe lines. I was raised on a farm and have been in the livestock business all of my life. I have lived on a ranch in Wyoming since 1916, attended schools and the University at Laramie, Wyoming, and have been on stock judging teams while in school. I have been in the sheep feeding business since about 1932 and a lamb and wool buyer since 1934. We feed from 20,000 to 50,000 lambs a year at the present time and will lamb about 10,500 ewes from our sheep raising operations this year. In addition, I buy wool for Webb & Company of Philadelphia and buy fat lambs for Morrell & Company and Hormel & Company.

Our feeding operations are carried on all over the wheat feeding area of western Kansas, also western Nebraska, southeastern Wyoming and some at Worland in northern Wyoming, so these operations bring me in contact with most of the railroads in this area. We purchase our feeding lambs generally in Wyoming, Montana, Colorado, Utah and Idaho. We have purchased a small number of lambs in New Mexico, but generally we are out of that territory due to freight rates. This also applies to Texas or Arizona lambs.

[fol. 2127] I have read the statement made at the Salt Lake hearing in the Ogden Gateway case by Mr. Elmer J.

Wagner of the Arkansas Valley Stock Feeders Association regarding the competitive situation and their opinion about buying Idaho lambs to feed in Kansas and the Arkansas Valley. We have bought Idaho lambs in the past, but this was during the war when it was advantageous to buy heavy feeding lambs weighing 80 to 90 pounds. These heavier lambs when fat weigh 105 pounds or more and during the war could be sold more readily and for higher prices than did lighter lambs. The service forces found these big lambs cut up to better advantage so there was a ready market because of this Government demand for all we could produce. Normally, there is a good limited market for a relatively small amount of heavy lambs to supply the U. S. Government service needs and possibly some discriminating hotel, resort or other such trade. The housewife insists on smaller cuts of lamb and as a result most lambs now are sold at a weight of about 100 pounds and these weights dress out to around 45 to 47 pounds a carcass, there being a differential of 6 to 8 cents per pound on lamb carcasses of similar grade in favor of those weighing under 45 pounds as compared with those weighing over 55 pounds. Since the war, because of the change in the market for fat lambs, where only a limited number of lambs of 105 pounds or more can be marketed at a price, we are, in our feeding operations, taking very few of the Idaho lambs and getting back to buying lambs weighing 60 to 70 pounds which when fattened up make the handy weight lambs of 95 to 100 pounds, bringing the top market price. We have some feeders in Wyoming in the Torrington-Scottsbluff area who like the [fol. 2128] Idaho lambs because they, what we term, force feed them, that is, put on a short number of pounds in a short time, then market them. In the Kansas wheat fields, we put on more pounds in a longer time, which we think makes a much safer business operation. I mention this from my experience, as I believe other Kansas feeders are in the same position we are and the reason they do not buy more Idaho lambs is because of these changed market conditions.

With regard to freight rates, while they, of course, are an item of expense to be considered in stock feeding operations, the most important item is the gain made in weight

of the animal. We frequently buy and ship lambs that have extra freight from a combination or a differential. For example, Northern Montana lambs where we have paid 20 or 30 cents extra freight. When we route lambs into Kansas wheat fields, if they originate on the Union Pacific in Wyoming for instance and the feed lot we have for them is on the Rock Island, we pay 8½ cents differential in freight. This figures 8 or 9 cents an animal. We have paid the 8½ cents to get quicker and better rail service and avoid shrinkage. We paid this extra freight to get our lambs on the Union Pacific when the through billing did not apply over that line.

With fat lambs especially, service on the way to the packer is all important as the first unloading for feed takes off one per cent of the yield and each following feed cuts the yield down one-half per cent. In money, this would represent 50 cents a hundred on the first feed and 25 cents a hundred pounds on each following feed, because each pound of lamb [fol. 2129] is worth about 50 cents a pound wholesale. In other words, 25 cents per hundred freight only figures about 25 cents per animal. Weight gain in feeding or loss in shrinkage in shipping the fat animal is represented by the price of 25 to 27 cents per pound live weight. When we feed a 70 pound animal up to 100 pounds or a 30 pound gain, this represents a money gain of $6.00 to $8.00 an animal so you can see the item of 25 to 50 cents out-of-line freight would not stop our purchase of good lambs if we feel we can put on the gain at a comparative cheap price as we do in the Kansas wheat fields.

This sheep feeding business is competitive. We in our operations know about where we can secure feeder lambs that can be shipped into our feed lots economically and speedily with a proper opportunity for profit. Other feeders have the same situation. If the Arkansas Valley feeders were given what they ask—a cheaper freight rate from Idaho and other northwest points—they would be given an additioanl advantage and be additional competition to Wyoming feeders, or other feeders such as we are with operations in Wyoming and Kansas, without relinquishing the present advantage the Arkansas Valley feeders have on buying lambs from Arizona, New Mexico and Texas where

we are practically shut out. I see no reason for disturbing this present situation without making it equally beneficial for all feeders, at least so far as Wyoming feeders are concerned. As a matter of fact, I do not see just where the Ogden Gateway would enter into feeding lambs in Kansas is concerned, as they can be shipped via the Union Pacific to Denver and beyond to Kansas at the through rate if fed on the Union Pacific, or distributed to feed lots on other [fol. 2130] lines at the 8½ cent differential as previously explained.

The Union Pacific in my opinion based on my shipping experience, have livestock service equal to any of the railroads in this area and better than most. They have feed yards at terminals such as Green River, Rawlins and Laramie to properly feed and water animals in transit and they give special attention to the service and handling of livestock. In fact, we make an extra effort to get our lambs on the Union Pacific for shipment because we feel they will receive the best possible handling. To further indicate why we believe in the Union Pacific service to stockmen, during the storm a year ago, we had lambs at Chappel, Nebraska, without feed and while the railroad was in serious trouble with delayed trains in the storm, they furnished us over night about 26 stock cars to get these lambs out of the storm area. We also had a band of sheep near Rock River without feed and the railroad put men and machines in their Rock River stockyards to clear the snow out so we could get these lambs into the yards and loaded on the cars. You can understand from this why we in Wyoming protest any change that would take business away from the Union Pacific. Less trains would give livestock shippers less service on the railroad and it could possibly result in stockyards or other facilities not being kept up in the shape we have been accustomed to, if the railroad's revenues are reduced. I have had experience shipping on many railroads, some on which the service was not too good and we are interested in maintaining this Union Pacific service which is so important in our business.

[fol. 2131] VERIFIED STATEMENT No. 51

I.C.C. Docket No. 30297

Statement of Ralph R. Crow, Saratoga, Wyoming

My name is Ralph R. Crow. My address is Saratoga, Wyoming. I am President of the R. R. Crow & Company of Saratoga, Wyoming. This is a forest products milling operation and we produce various lumber products including railroad ties and timbers and coal mine ties, props and timbers.

I am a member of the Western Pine Association, also a director on the board of this Association. Several months ago, the question of the D.&R.G.W. request for opening the Ogden Gateway was brought before the Association and later it was brought up for a vote by the directors, a majority at that time voting not in favor of entering the case. At our San Francisco directors' meeting in February, the matter was again brought to a vote and in this instance a slight majority voted in favor of entering the case.

However, such action by the association is contrary to the best interests of my business and I have notified the Association President and Secretary in writing that my firm is not to be represented by the Association in their intervention in behalf of the D.&R.G.W. Railroad. In fact, I wish to state for the record in this case that R. R. Crow & Company are opposed to granting the request of the D.&R.G.W. as it will not only adversely affect my timber business, but also have a generally adverse affect on the economy of Wyoming, at least to the economy of Southern Wyoming along the line of the Union Pacific. My company furnishes railroad ties to the Union Pacific and mine props and timbers to the Union Pacific Coal Company. The [fol. 2132] furnishing of rail ties and mine props is directly connected with the railroad tonnage handled and the coal produced for the railroad company. In other words, when rail tonnage is down, coal production would be down and our prop or other timbers would follow the same course. I have an investment in a timber mill and timber in the forest built up to a large extent to take care of railroad

and coal company orders and have made these investments with the expectation that Union Pacific business would be fairly well stabilized because of the large territory they serve as a trans-continental railroad. Diversion of a share of the Northwest traffic as here proposed by the D.&R.G.W. via the line in Colorado would result in curtailment of my timber operations and that of other operators in the Medicine Bow Forest area adjacent to the Union Pacific. This would result in laying off timber and mill workers and in turn a loss of business to merchants and others in that area. These workers could no be absorbed as there is no other employment available, or any other industry that could use these workers and they would be required to leave our community to seek employment elsewhere.

My plant and our community is served by the Saratoga & Encampment Valley Railroad, a branch of the Union Pacific, running south from Walcott, Wyoming, the connection with the main line of the Union Pacific, a distance of 20 miles to Saratoga and 24 miles to Encampment. This branch line has operated at a loss for years so far as local operations are concerned and early in the war, the Union Pacific petitioned the Interstate Commerce Commission for permission to abandon the line. This petition was later withdrawn before hearings were held on the expectation and [fol. 2133] hopes of additional business, some of which has developed from my milling operations, but not as expected from other industry. I would be fearful that a reduction such as testified to by the D.&R.G.W. indicating they could secure from the present Union Pacific traffic, as much as four trains daily each way, would make it necessary for the Union Pacific to again consider savings necessary and to again ask for abandonment of this branch.

I wish to strongly oppose the granting of the request of the D.&R.G.W. that would divert traffic to Colorado that has and is now moving through Southern Wyoming as being extremely detrimental to my business and to the economy generally of Southern Wyoming.

[fol. 2134] VERIFIED STATEMENT NO. 52

I.C.C. Docket No. 30297

Statement of Wayne I. Snyder, Morrill, Nebraska

My name is Wayne I. Snyder. I am Assistant Sales Manager of Chester B. Brown Company, carlot dried bean and pea dealer, with headquarters in Morrill, Nebraska. Our company has plants for cleaning, sorting and packaging of dried beans and peas at Morrill, Nebraska, on the CB&Q Railroad, and Gering, Nebraska, on the Union Pacific Railroad. We also have receiving and storage warehouses at Lyman and South Mitchell on the Union Pacific Railroad and at Lingle and Torrington, Wyoming and at Morrill, Minatare and Bayard, Nebraska, on the CB&Q Railroad.

I am appearing at this hearing in opposition to the application of the Denver & Rio Grande Western Railroad that routing to and from Idaho and the Pacific Northwest generally be established in connection with the Denver & Rio Grande Western Railroad and the Union Pacific Railroad through Ogden, Utah. Our company feels the establishment of such routing would serve no useful purpose generally so far as distribution of the bean crop from the territory involved is concerned, but it would, on the other hand, work a definite hardship on our operations.

Our business consists of assembling dried beans (and peas, but principally beans) of various varieties, in carload lots from producing areas in California, Utah, Oregon, Washington, Idaho, Colorado, Wyoming, Montana and Nebraska, cleaning, sorting and packaging them at our plants at Morrill and Gering, Nebraska, and shipping from those points [fol. 2135] in carload lots to jobbers for distribution to retail trade in the territory generally east of Colorado and Wyoming to the Atlantic Seaboard, including also Oklahoma and Texas.

The packaging of beans especially is accomplished in a wide range of package sizes and varieties of beans. For example, we pack individual 1#, 2#, and 5# cellophane bags of the several varieties from the various producing territories and also put up 25 pound paper bags and larger units of each up to 100# cloth bags. Thus, in filling a car-

load order for a jobber from our Gering, Nebraska, plant, the car may and usually does contain a large assortment of varieties and package sizes. As illustrative, it may contain both large and small lima beans from California, red and Great Northern beans from Idaho, pinto beans from Colorado, and locally grown beans from the North Platte Valley in Wyoming and Nebraska, all packaged in various sizes according to the wishes of the customer.

This cleaning, sorting and packaging operation is performed on an "in transit" basis (except for strictly local origin beans), under the privileges authorized in the applicable tariffs naming rates from origin to final destination and the charges for the allowable transit privileges, out-of-line hauls, etc. These transit privileges are a very important factor in our business as is source of supply.

We often find it necessary, in order to maintain a full line of varieties of beans, to purchase certain varieties in origin territory from which through rates do not apply to the final destination to which we may ultimately ship, [fol. 2136] there being an added charge in some instances for certain out-of-line hauls, which must be absorbed in meeting competition. Then, too, there are instances in which, to fill an order, we will use beans from origins on which no transit is available and on which the combination of rates into the processing station and from there to the destination is the only rate applicable. This is, of course, avoided if possible.

As an illustration of the out-of-line haul situation just mentioned, we must and do secure considerable tonnage of pinto beans from Colorado, largely in D&RGW territory (some 60,000 one hundred pound bags per year), on which the added charge for out-of-line haul over the direct through rate is presently 7 cents per 100 pounds when processed at Gering on the Union Pacific and the final destination is at the Missouri River or beyond. We cannot handle Colorado beans via Gering to points west of the Missouri River except at combination of rates into and out of Gering.

This is not an unusual situation and many bean dealers in the western territory find themselves in a similar position with respect to supplies from certain origins and either absorb the added cost or avoid such sources of supply.

As I said earlier in this statement, our company has two plants at which this processing is done, relatively close together, at Gering, Nebraska, on the Union Pacific, and at Morrill, Nebraska, on the CB&Q, both involving a large investment. These were established in order to handle beans from as large an origin area as possible and with the least possible absorption of costs for out-of-line haul, etc., [fol. 2137] recognizing that a railroad granting the transit privileges and performing the terminal services, is entitled to its long haul into and out of the transit station from its origin territory. Thus, as a rule, we process at Gering, Nebraska, on the Union Pacific, beans from Idaho, California, Washington, Colorado and Nebraska, for example, and at Morrill, beans from Wyoming, Montana and other origins where rates are applicable via Morrill, as well as Nebraska and Colorado beans.

Should the request of the D&RGW in this case be granted, it would have a detrimental effect on our business for the reason it would open up to our competition, now located or later locating south of Denver to Pueblo on the D&RGW especially, sources of supply in Idaho and the Pacific Northwest on the Union Pacific Railroad, for movement to consuming territory at the Missouri River and beyond which they cannot now handle on an equal basis.

Such a processor would be added competition in purchasing in the Idaho market, where we obtain some 65,000 one hundred pound bags per year, and would be better able to invade our eastern markets without losing any advantage he now has. He can now obtain Colorado beans at no cost over the through rate, on which we pay the out-of-line haul charge of 7 cents per 100 pounds when final destination is at the Missouri River or beyond and a straight combination of local rates when destination is west of the Missouri River. In addition, he now already has free access to Utah and California and would have added free access to Idaho, Oregon and Washington on the Union Pacific for shipment to Missouri River and beyond.

[fol. 2138] There is no need for the D&RGW routing so far as distribution of the bean crop in the territory under discussion is concerned. Beans from all origins involved can move freely to any consuming territory. The addition of

the route would not result in any rate reduction or saving to the growers, processors of the consuming public generally, and the only advantage we can see would accrue to the processor or processors located south of Denver on the D&RGW at the expense of others, including ourselves, and the additional traffic the D&RGW might obtain at the expense of the Union Pacific Railroad.

[fol. 2139] VERIFIED STATEMENT NO. 53

I.C.C. Docket 30297

Statement of N. H. Troelstrup, Julesburg, Colorado

My name is N. H. Troelstrup. I presently reside and maintain an office in Julesburg, Colorado.

I am appearing in this case as an individual engaged in the livestock business, principally feeder cattle, which are handled at and through my home ranch near Barton, Nebraska, a siding on the Union Pacific Railroad just east of Julesburg, Colorado. I am a member of the Denver Livestock Exchange.

I have been in the livestock business for approximately 38 years, purchasing feeder cattle mostly on the Denver market which have been shipped in for sale from a wide range of origins, including Colorado, New Mexico, Texas, Wyoming, Utah, Idaho, Montana, Oregon, and Washington. In purchasing feeder cattle, we prefer to buy those with rail billing, or those that have moved in by rail, although, we do purchase local cattle which may have been trucked in. The cattle are then shipped by rail from Denver to Barton, Nebraska, where they are distributed to various feeders for feeding in transit and movement out to market. During recent years, we have handled some 5,000 or more head per year.

I am appearing in this case in opposition to the application of the Denver & Rio Grande Western Railroad that routing to and from Idaho and the Pacific Northwest be established between that railroad and the Union Pacific Railroad through Ogden, Utah.

In all my years in the cattle business, I have felt no need for this routing nor can I anticipate any future need for it. [fol. 2140] So far as I can determine, the establishment of such routing would be of no benefit to the livestock industry generally.

In purchasing feeder cattle on the Denver market, we are always glad of an opportunity to purchase stock from Idaho and eastern Oregon on transit billing; however, in the past few years, it has been difficult to obtain cattle from that area as West Coast markets are taking a greater share of the supply. In 1949, we were able to get only six cars from Idaho, and none in 1948 or 1947.

It has been necessary then that we go to other origins and we have found generally ample supplies from the D&RGW Western Slope territory in Colorado, also in the Trinidad, Colorado, area and in West Texas and New Mexico.

We find that cattle from the Texas and New Mexico origins, although generally available, bear a penalty out-of-line haul rate when fed in transit at Barton, Nebraska. This may range rather widely. However, for example, from Las Vegas, New Mexico, a shipment of cattle feeding in transit at Barton, Nebraska, and finally moving out to Chicago, would pay a rate of $1.26 per 100 pounds, plus the feed in transit charge of $11.34 per car. If this same shipment fed in transit at Lamar, Colorado, in the Arkansas Valley, with final destination Chicago, the rate would be $1.13 per 100 pounds, plus $11.34 per car for the feeding in transit privilege. This represents 13 cents per hundred pounds when feeding at Barton over the cost when feeding at Lamar, Colorado, by reason of the out-of-line haul.

Another example would be a shipment from Raton, New Mexico, from where the rate to Chicago, stopping to feed [fol. 2141] at Barton, Nebraska, would be $1.21 per 100 pounds, plus $11.34 per car for feeding in transit privilege, where as if the same shipment fed at Lamar, Colorado, the rate would be $1.07 per 100 pounds, plus $11.34 feeding in transit privilege charge. The difference here is 14 cents per 100 pounds in favor of the Arkansas Valley operator.

A similar situation obtains in the case of a shipment from

Raton, New Mexico, feeding in transit at Barton, Nebraska, with final destination at Kansas City, Missouri. The rate in this instance would be 89 cents per 100 pounds, plus $11.34 per car feeding in transit charge. The rate on the same shipment if fed in transit at Lamar, Colorado, would be 76 cents per 100 pounds, plus the feeding in transit charge of $11.34 per car or 13 cents in favor of Lamar.

Cattle from Idaho may be moved via Union Pacific through Denver and connecting lines at an extra charge of 8½ cents per 100 pounds, plus the $11.34 feeding in transit charge when fed in transit at Arkansas Valley points, with final destination at eastern markets, such as Kansas City, Chicago, etc. This would apply at Lamar, Colorado. Idaho cattle may be fed in transit at Barton, Nebraska, without any out-of-line charge and pay only the $11.34 per car charge for the privilege. This is, of course, an advantage Barton has over the Arkansas Valley feeder on Idaho cattle, but that advantage is much less than 13 cents, 14 cents and 15 cents per 100 pounds the Arkansas Valley feeder has over Barton, Nebraska, as shown in the preceeding examples, on cattle from Las Vegas, and Raton, New Mexico. Similar examples from other origins could be found, and these are only cited as representative.

[fol. 2142] If the Ogden Gateway is opened and through rates applies via Union Pacific Railroad-Ogden-D&RGW and its connections, the Arkansas Valley feeder (Lamar for example) will no longer be at a disadvantage with feeders at Barton, Nebraska, and other Union Pacific Nebraska points on Idaho cattle, as the 8½ cent charge previously referred to would be eliminated. There would, however, be no change in the out-of-line charges at Barton or similar Nebraska points on the Union Pacific on cattle from Texas and New Mexico as represented by the examples cited heretofore.

This would be a definite hardship to us in the purchase of Idaho cattle, already in short supply for this territory by reason of increased competition, and except for some advantage to a small number of individual operators in the Arkansas Valley and eastern Colorado (west of Denver and Pueblo) at the expense of my own operation and those of other Nebraska operators, there would be no real

advantage to the livestock industry. No rate reductions or improved service are involved and in the circumstances, am definitely opposed to the application.

[fol. 2143] VERIFIED STATEMENT No. 54

I.C.C. Docket No. 30297

Statement of Emmett A. Torney, Kellogg, Idaho

Testimony to be given at
Ogden Gateway Hearing at
Boise, Idaho April 3, 1950

My name is Emmett A. Torney. I reside at Kellogg, Idaho and I am presently employed by the Bunker Hill & Sullivan Mining and Concentrating Company, Smelter Division, as Office Manager. I have been with this Company for 21 years and was its Traffic Manager for 13 years. I am testifying in behalf of that Company and also the Sullivan Mining Company of Kellogg, Idaho.

The Bunker Hill & Sullivan Mining and Concentrating Company and the Sullivan Mining Company are engaged in the business of mining, milling, smelting and shipping by freight, various non-ferrous metals including lead, zinc, cadmium and antimony, and various smelter by-products, including baghouse fume, drosses, matte and speiss.

During 1948, a representative year, we shipped approximately 2420 carloads of such products, of which approximately 73% were destined to points on and east of the Missouri River. In addition, we received approximately 70 carloads of machinery, fire brick, steel, etc., from points on and east of the Missouri River. Of the carloads moving from and to points east, all but 42 carloads were handled via Union Pacific long haul routes.

In this connection, the service afforded us has been ample and satisfactory from the standpoint of supplying cars, [fol. 2144] transit time, switching, tracing, etc.

To my knowledge, we have never been requested to include the D&RGW in routings on Eastern shipments, nor have we ever had a reason to prefer such a routing. To my

knowledge, we have never lost any business because the D&RGW was not a party to tariffs covering such shipments.

The Union Pacific has testified that if this request is granted and used, they will suffer a decrease in revenue, and with less revenue they maintain, they might be required to curtail service and take other economic measures that might seriously affect the business of the Companies which I represent.

Assuming these contentions to be correct, we are opposed to the position of the D&RGW in this case and request that the Commission take no action which might result in the impairment of the ability of the Union Pacific to continue to render the satisfactory service it now provides.

[fol. 2145] VERIFIED STATEMENT No. 55

I.C.C. Docket No. 30297

Statement of Sam W. Ditty, Dillon, Montana

My name is Sam W. Ditty. I live at Dillon, Montana. My principal business is the purchase and sale of livestock, mainly sheep although I handle some cattle. I have been engaged in this business during the past 26 years and I ship livestock principally from the following stations on the lines of Union Pacific:

Dillon, Montana	Lima, Montana
Divide, Montana	Monida, Montana
Silver Bow, Montana	Spencer, Idaho
Armstead, Montana	Dubois, Idaho
Dell, Montana	Idaho Falls, Idaho

Also from the following stations on the lines of the Northern Pacific:

Deer Lodge, Montana	Polson, Montana
Gold Creek, Montana	Helena, Montana
Drummond, Montana	Avon, Montana
Missoula, Montana	

During the year 1948, I shipped 104 carloads of sheep and approximately 15 cars of cattle and less number in 1949

because of a decrease of sheep. With few exceptions all of these livestock shipments were routed via the lines of the Union Pacific Railroad Company to destination points in the States of Idaho, Utah, Colorado, Minnesota, Iowa, Illinois and Indiana, with the preponderance of the shipments to destination in the State of Iowa. The Union Pacific service and routes are satisfactory and adequate for my business. The Union Pacific has been reasonably prompt in furnishing a car supply. I have never had the occasion, either from Union Pacific or the D&RGW, to seek joint [fol. 2146] rates via the D&RGW Railroad. I have no interest in using the lines of the D&RGW in the handling of the shipments of livestock above enumerated, all of which are shipped via the Union Pacific Railroad with the exception of a few carloads of breeding ewes originating in Montana and destined to Grand Junction, Colorado and Rifle, Colorado, located on the lines of the D&RGW. On such shipments, there is now existing a through rate with the D&RGW so that there would be no occasion for any further through rates, such as requested in this case, because they don't go into Grand Junction and Rifle for feeder purposes. In the event I ship replacement ewes from points on the Northern Pacific or Great Northern Railroads to points on the D&RGW there would be no through rate to Denver or eastern destinations in any event, whether the Rio Grande or the Union Pacific got the haul beyond Ogden.

It is my understanding that the D&RGW in this case seeks to have the Ogden Gateway open so that it may, through solicitation, secure routing of some traffic via its lines and participate in revenue on this traffic to the detriment of Union Pacific Railroad Company. I, as a shipper of livestock and as a citizen of the State of Montana, am interested in the Union Pacific, who is a large tax payer in the State, maintaining its financial position so that it may continue to pay taxes, maintain its railroad and render service to the shippers on its line, and am particularly interested in the Railroad Company being in position to render service to myself as a shipper.

I am opposed to the petition of the D&RGW in this case and am appearing in behalf of the defendants in this case, but particularly the Union Pacific Railroad Company.

[fol. 2147] VERIFIED STATEMENT No. 56

I.C.C. Docket No. 30297

Statement of Leo J. Falk, Boise, Idaho

My name is Leo J. Falk. I reside at Boise, Idaho, and am President of The Falk Mercantile Co., Ltd., with stores at Boise, Caldwell, Nampa, Twin Falls, Idaho, and La Grande, Oregon. All of these towns are located on the Union Pacific Railroad. These stores are department stores, handling general lines of dry goods, clothing, major appliances, furniture, shoes, etc. We are probably the oldest business concern in the State, and were among the first users of Union Pacific railroad service, our original store in Boise having been established in 1868, prior to the coming of the railroad.

First, I want to point out that all of the towns in which our stores are located are served by only one railroad, and that is the Union Pacific. While we receive comparatively few of our shipments in carload lots, and make only less-than-carload shipments, it is true that we receive many thousands of pounds of traffic each year, mainly through use of forwarder rail service. In all above mentioned towns, the Union Pacific maintains a very substantial payroll, and its employees constitute a goodly number of our customers. Therefore, anything that affects the general welfare of the Union Pacific and its employees, indirectly affects our Company.

As I understand the proposal of the Rio Grande, it does not intend to serve the southern Idaho area with its own rails, but merely seeks to share in the traffic which the Union Pacific is already handling by way of denying the [fol. 2148] Union Pacific its long haul to eastern points, but to turn it over to the Rio Grande at Ogden. The Rio Grande would not bring anything new to this community in the way of capital improvements and new employees, and neither would it assume or relieve the Union Pacific of some of the taxes which it pays for the upkeep of our local government, schools, etc. In short, the Rio Grande's gain would be the Union Pacific's loss.

The Union Pacific is the railroad upon which we necessarily must depend for rail transportation whether or not

the Rio Grande is successful here. As a businessman, I can readily understand that the Union Pacific, like any other organization, must have just so much money to run its business, and any substantial reduction or depletion of its gross earnings will obviously call for offsetting reductions in operating expenses, including reduction in working forces. This, of course, would have a direct and immediate adverse effect upon my business and all other kinds of businesses in this area.

I do not believe that the benefits to be derived from the opening of The Ogden Gateway would in any way offset the disadvantages and the loss to Southern Idaho. In conclusion, there is a matter that I wish to deal with because of the personal aspect. It was just twenty-five years ago this month that the Union Pacific connected up what was then known as the Boise Branch with its main line at Orchard, Idaho, and put Boise on the Main line. Since then, all the Union Pacific trans-continental passenger trains run via Boise. This project included the construction of our beautiful new passenger station and called for the [fol. 2149] expenditure of a large amount of money. I mention this because I was a member of the local committee that worked so hard to encourage the Union Pacific to put Boise on the Main line, and the results have been most satisfactory to Boise.

[fol. 2150] VERIFIED STATEMENT NO. 57

I.C.C. Docket No. 30297

Statement of Joe Hirschfeld, North Platte, Nebraska

I am Joe Hirschfeld. I reside at North Platte, Nebraska. I operate two men's clothing stores at North Platte and one at Kearney, Nebraska. I am a director of the McDonald State Bank of North Platte, and I am a member of the North Platte Chamber of Commerce.

I have been in business in North Platte 32 years. I came here when it was a town of less than 10,000 and I have seen it grow to a city of approximately 20,000.

Throughout that time, a large part of my business has been with employees of Union Pacific Railroad, and with

their families. I would estimate at the present time that approximately 35% of our business comes from Union Pacific employees.

A force reduction on the Union Pacific at North Platte is noticeable immediately in our businesses, both in cash sales and in credit business. A loss of half a million dollars payroll in North Platte would be a serious thing to the community, and would be reflected in almost exact proportion in our business. We depend upon the Union Pacific payroll to a large extent for our livelihood and it is to our interest, and to the interest of the entire community, that the Union Pacific remain in good financial condition and maintain its traffic and revenues so that our town can continue to be a prosperous and growing community.

[fol. 2151] VERIFIED STATEMENT No. 58

I.C.C. Docket No. 30297

Statement of H. D. Wiese, North Platte, Nebraska

My name is H. D. Wiese. I am Secretary-Treasurer of the Mutual Building and Loan Association of North Platte, Nebraska, an institution with assets of three and a half million dollars, which has assisted in the development of North Platte during the past sixty two years. I have been employed as managing officer of the Mutual Building and Loan Association for the past twenty six years and, prior to that, was employed by the McDonald State Bank of North Platte.

I am a member of the board of directors of the North Platte Chamber of Commerce, have twice served as president of that organization, and I was present at a meeting of that Chamber at which a resolution was adopted supporting the Union Pacific position in this case, and I voted for that resolution.

Our Association is vitally interested in the welfare of the Union Pacific in general and especially at North Platte for the prosperity of our community is directly dependent on the prosperity of the Union Pacific.

Four hundred eight of our 1120 borrowers and 420 of our 1530 savings accounts are Union Pacific employees and their families. This represents 37% of our outstanding loans and 28% of our savings accounts. The percentages in each category would be higher, a great deal higher, if they were made to include the borrowers and the savers whose well being depended on their business dealings with the people who are directly dependent on the Union Pacific for their employment. Any reduction in force at North [fol. 2152] Platte is immediately reflected in our business. If one of our borrowers is laid off, in a force reduction, it usually means a payment missed and, unless he goes back to work soon, we may lose the loan and he may lose his home.

We are presently financing about 60% of the new home construction and much of this construction is by Union Pacific employees. Our town has a 1950 building program under way amounting to several hundred thousand dollars and, since we are a railroad town, this construction consists mostly of small homes and apartments for wage earning, working people, the majority of them employed by the Union Pacific.

The Union Pacific has constructed a three and a half million dollar retarder yard at North Platte and a new freight transfer station which, I understand, is bringing about 200 additional families to North Platte. All of these employees must have housing and a substantial portion of it is being financed by our Association.

If the Union Pacific lost 157,000 odd cars of traffic to the Denver and Rio Grande with an attendant loss of 125 employees in North Platte, the effect upon our business, and upon all North Platte businesses would be great indeed. We are dependent largely upon the Union Pacific North Platte payroll of nearly eight million dollars; and, if that should be reduced by the nearly $600,000.00 pay of the 125 employees who might be dismissed, then it is certain that our building program would be slowed down or stopped entirely, home values would decline sharply, and general business would be seriously affected.

[fol. 2153] North Platte has grown steadily since the early days. In 1910 it was a town of about 5000 people. At the present time its population is probably sixteen to seventeen

thousand people, including 1800 Union Pacific employees. These employees, with their families, would probably total about 4000 people.

Our growth has not been spectacular but has been a steady, healthy one with the fortunes and prosperity of our people closely tied to the fortunes and prosperity of our largest employer, the Union Pacific Railroad. It would mean a serious loss to our community, to our Association, and to the people we are helping buy homes if Union Pacific revenue, through loss of this traffic, declined so that 125 of our fellow townsmen were thrown out of employment. These 125 families, however, are not the only ones to be affected; each and every family in North Platte is deeply concerned.

For the reasons I have stated, I am opposed to the D&RGW's attempt to open the Ogden Gateway.

[fol. 2154] VERIFIED STATEMENT No. 59

I.C.C. Docket No. 30297

Statement of W. A. Reutlinger, Grand Island, Nebraska

I am W. A. Reutlinger. I am Manager of Kaufman Stores and live at Grand Island. Kaufman Stores operates "junior department stores" at Grand Island, Kearney and Lexington, and has been in business 43 years in Grand Island. I have been in their employ 41 years at Grand Island.

Our volume of sales in our Grand Island store for 1949 was $727,000, and it is estimated that approximately 10% of this was derived from the 800 Union Pacific employees in Grand Island and their families. It is estimated that Union Pacific employees and their families make up 2,500 of our population, which is now estimated to be 25,000. Union Pacific's pay roll in Grand Island amounts to $3,101,121 annually.

I understand that if the Union Pacific is required to make the joint rates which the Denver & Rio Grande seeks it would result in laying off 72 employees at Grand Island, with pay roll of $305,000. This is serious to Grand Island,

and would have a substantial effect on our business here, and to a lesser extent, would affect our business at Kearney and Lexington.

Our business is dependent upon rapid turnover of our stock. Since we receive at least 75% of our merchandise by rail, the greater portion originating in Chicago and points east, it is of vital importance that the service of the [fol. 2155] Union Pacific Railroad be maintained. Its service is excellent at this time and they have many trains passing through Grand Island. If this service were curtailed, we would again experience the same difficulties we encountered during the depression when the number of trains was drastically reduced. The result was a definite detriment to business in general and particularly to businesses who depend on the railroad for transportation.

It is our sincere belief that if the Union Pacific found it necessary to discontinue any of their trains through Grand Island it would reduce our present rail service and would directly affect our business.

Our business establishment, as well as many others in Grand Island, has given the Union Pacific the major proportion of our freight business. This has been mutually beneficial, enabling the railroad to maintain its forces and pay roll at Grand Island, which in turn contributes to the progress of our business and to the community as a whole. We are all vitally interested in the welfare of our community and in seeing it continue to grow and progress.

The Union Pacific has one of the largest pay rolls in Grand Island and our prosperity is closely geared to the prosperity of the Union Pacific and the maintenance of that pay roll.

If we lose any of that pay roll or any of the present Union Pacific employees and their families from Grand Island as [fol. 2156] a result of the action of the D&RGW, it is bound to be a serious blow to our business as well as to many others in Grand Island. For these reasons I am opposed to the position of the Rio Grande.

[fol. 2157] VERIFIED STATEMENT No. 60

I.C.C. Docket No. 30297

Statement of George Martin, Grand Island, Nebraska

My name is George Martin. I am Manager and part owner of George W. Martin Company, which operates O. P. Skaggs stores at Grand Island, Hastings, Kearney and Holdrege, Nebraska. We are now completing a second store in Grand Island. I have been in Grand Island for 11 years, and have held my present position during that time.

We operate grocery and food stores. Our annual sales volume at Grand Island is $920,000. Of this, it is conservatively estimated, Union Pacific employees and their families account for $125,000. The Union Pacific has 805 employees at Grand Island with an annual payroll of $3,000,000 upon which Grand Island merchants depend for a large portion of their business. In addition to the amount of business we do directly with Union Pacific employees we also consider that a considerable portion of our volume is derived indirectly from the Union Pacific's payroll because other people who depend on the Union Pacific's business also trade with us.

It is my understanding that if the Denver & Rio Grande is successful in obtaining the business it anticipates, it would result in a force reduction at Grand Island of 72 employees, with annual payroll of $305,000. This loss would have a substantial effect on our business and on our community, both directly and indirectly. We are therefore opposed to the position of the D&RGW.

[fol. 2158] VERIFIED STATEMENT No. 61

Statement of B. K. Smoot

My name is B. K. Smoot, 1029 United Building, Salina, Kansas, representing Smoot Elevator Company at Salina, Salina Terminal Elevator Company operating at Kansas City, Missouri, Salina, Kansas, Hutchison, Kansas, Enid, Oklahoma, the Western State Mill Company of Salina,

Kansas, Weber Flour Mills Company, Salina, Kansas, Gooch Milling and Elevator Company, Lincoln, Nebraska, and Inland Mills, Incorporated, Des Moines, Iowa. I am in charge of management of the Smoot Grain Company and the Salina Terminal Elevator Company and in charge of the grain departments which handle grain purchases for the above milling companies. My grain experience started in 1915. The Smoot Grain Company was organized in 1926. From my knowledge of grain operations in Kansas I believe I can say that our operation is typical of the elevator and milling operations in that State.

I have had experience purchasing grain from Utah, Idaho, Oregon and Washington for movement east whenever market conditions justified from 1923 to current date. Our purchases of soft white wheat, hard white wheat and winter wheat in recent years from Northern Utah and Southern Idaho have been:

1945	31 cars	1948	219 cars
1946	20 cars	1949	296 cars
1947	1178 cars	1950	43 cars

For purposes of our grain operations and our milling operations we do not buy grain from that territory unless it is competitive with Missouri River values.

[fol. 2159] We handle about forty million bushels of wheat per year of which about one million bushels per month, or 12 million bushels per year, are consumed in milling operations. The bulk of our grain for merchandising and milling operations is procured from the southwest wheat area, but at times when values are competitive we obtain a portion of our requirements from the northwest.

In addition to our wheat purchases for milling we use in a portion of our milling operations approximately ¼ of 1% of malted wheat. This is wheat which originates in the northwest and is malted at Wichita, coming to us on transit billing from Wichita with other than northwest billing applied.

In our experience we have found that the routing we have is adequate for our needs. I am opposed to the opening of the Ogden Gateway or any gateway that short hauls the originating carrier who is responsible for fur-

nishing of adequate car supply and the maintenance of such supply during times of car shortages, particularly during the grain shipping season. It has been my purpose throughout the years in recognition of this principle to accord the originating line the longest possible haul, and I believe such practice to be fundamental in the continued efficient operation of American railroads.

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[Vol. 2160] VERIFIED STATEMENT No. 62

I.C.C. Docket No. 30297

Statement of James E. Dyer, Bronxville, New York

My name is James E. Dyer and I live at 447 California Road, Bronxville, New York. My office address is 630 Fifth Avenue, New York City, N.Y.

I am Vice President and a Director of Sinclair Refining Company. Among other duties, I am Manager of the Transportation Supply and Distribution Department of the Company.

I have spent more than 35 years in the oil industry and I have been with Sinclair Refining Company ever since it started in operation.

Sinclair Refining Company is the manufacturing, marketing and transportation subsidiary of Sinclair Oil Corporation whose interests embrace all of the divisions of the industry, namely, production, refining, transportation, distribution and marketing of petroleum and petroleum products.

I am here today to appear on behalf of our company in opposition to the complaint and to urge that the prayer of the complainant be denied. From our examination of the complaint, it appears to us that the granting of the prayer would result in great damage to our interests and we appear in order to protect our own interests as we see them.

The Sinclair interests in Wyoming and contiguous areas served by the Union Pacific consist of crude oil reserves, producing crude oil wells, crude oil pipelines, a refinery at Sinclair, Wyoming, and marketing and distribution facilities, altogether having an estimated value of approxi-

mately one hundred million dollars. It is, of course, impos- [fol. 2161] sible to give any precise value to oil underground and to the value of a going business, but I think the figure I have named is a fair reflection of the size of this part of the enterprise.

The Sinclair Companies in the State of Wyoming employ over 600 employees who, as well as their families and dependents, are residents and citizens of the State of Wyoming.

Sinclair's refinery at Sinclair, Wyoming, is a modern, up-to-date refinery which has a capacity of approximately 21,000 barrels per day of crude oil and which now is running at the average daily level of 15,000 barrels per day. It is Sinclair's policy to develop and utilize its resources in Wyoming to the greatest extent possible within the State. That has been, is now, and will continue to be our policy. Our refinery at Sinclair, Wyoming, is the only means by which we can convert the Wyoming raw materials into finished saleable products for the market.

Our Company's shipments over the Union Pacific Railroad, practically all of which originate at Sinclair, Wyoming, have averaged about 15,000 cars per year over the past three years. We are the largest industry and shipper on the Union Pacific rails in the State of Wyoming and one of the largest on the entire Union Pacific System.

If the prayer of the complainant is granted, it is our understanding that a large volume of traffic now moving over the rails of the Union Pacific through the State of Wyoming will be diverted. The diversion of this large tonnage from the Union Pacific through Wyoming will result in a curtailment of the number of trains operated and a lowering of both the quality and quantity of service rendered to shippers.

[fol. 2162] With the loss of tonnage and the lowering of services by the railroad, shippers finding the service inadequate or unsatisfactory will look for alternatives. It is not necessary for me to be an alarmist to envision the ultimate inescapable consequences of this process. Reduced and impaired service invites further reductions in tonnage, all touched off by the chain reactions following the first serious blow.

As far as we are concerned on our traffic out of Sinclair, Wyoming, delays and lacks in service will put us at a serious competitive disadvantage as against those operators using pipe lines or other methods of transportation. The Sinclair refinery is now a highly efficient manufacturing unit, the efficiency of which depends on sustained high-yield production. Any service disability will result in loss of business and that, in turn, will curtail or eliminate the profit which this unit now shows. Reduced refinery production will necessitate cutting back crude oil production with further losses in revenue to our company. The State of Wyoming will also experience a loss since a portion of our crude oil production in the State is on leases from which the State receives rentals and royalties. There will also be a loss of revenue to various tax authorities; Federal, State and Local.

Such a reduction in our traffic will result in further losses to the Union Pacific; over and above those involved in the movement of traffic to and from the territory actually involved in the complaint.

We submit that granting the prayer of the complaint would do incalculable and irreparable damage to our own interests and we respectfully request that the complainant's prayer be denied.

[fol. 2163] VERIFIED STATEMENT No. 63

I.C.C. Docket No. 30297

Statement of Emmet J. Smith, Chicago, Illinois

My name is Emmet J. Smith. I am General Traffic Manager of Edward Hines Lumber Company and Traffic Manager of the Oregon and Northwestern Railroad Company. My headquarters are in Chicago, Illinois. I have occupied my present position 2-½ years and have been in the employ of the Edward Hines Lumber Company more than four years, and prior thereto was in the employ of the Grand Trunk-Canadian National Railway System at Chicago, Illinois, from 1929 to 1946.

Edward Hines Lumber Company is engaged in the lumber and millwork business, conducting logging operations on a sustained-yield basis at Burns, Oregon, and Westfir, Oregon; saw mills at both of these points as well as at Bergland, Michigan, and Park Falls, Wisconsin; wholesale yards at Chicago, Illinois, and Park Falls, Wisconsin; also 23 retail yards in Chicago and environs. In addition, we handle a substantial volume of lumber from other origins on a wholesale or brokerage basis. In short, the Hines Lumber Company provides a complete service on lumber and related products from forest to ultimate consumer.

Our principal milling operation is located at Burns, Oregon, from which point we ship 4,000 to 5,000 cars annually, all of which leave Burns via Union Pacific. In addition, we favor the Union Pacific with a comparable volume of competitive traffic from other territories.

[fol. 2164] Our experience with the Union Pacific has generally been most satisfactory. Their schedules are fast and their service in moving our traffic, in handling tracing records, in accomplishing diversions and related matters is very good. Our only real complaint concerns periodic shortages in car supply which have developed during recent years at the time of the Fall heavy grain shipping season. We recognize this is not wholly within the control of the Union Pacific and want the record to show that we feel we have been fairly treated in the distribution among all shippers of the available car supply. However, we wish to emphasize that a car shortage is extremely costly to our mill and our customers. It badly disrupts our business at the busiest season of the year. It can diminish our total lumber production which is badly needed for construction purposes.

Edward Hines Lumber Company also favors the D&RGW with a substantial volume of traffic from territory where through rates and competitive services are available in connection with that line. During the year 1949, 266 cars of our traffic were routed via D&RGW. I mention this so it will be understood that we are not unfriendly to that railroad.

Insofar as the complaint in this case is concerned, we have never had reason to request the establishment of routing from our Burns mill to eastern territory via Ogden and

the D&RGW. Present rates and routing in connection with the Union Pacific have been entirely adequate for our purposes. Much of our competition is with southern lumber producers, and the through movement time is an important [fol. 2165] consideration in the successful marketing of our production at Burns. Inclusion of the D&RGW between Ogden and Denver or Pueblo would add considerably to the distance shipments must be transported and to the time required for such movement, hence is neither necessary nor desirable from our standpoint.

I mentioned our difficulty with occasional car shortages. This is expensive for us because it means we lose mill operating days. The longer time via D&RGW, on both loaded and empty cars, will require additional car-days without adding to the over-all car supply. This will directly reduce efficient use of available equipment and will contribute further to our occasional difficulties in obtaining a full car supply during car shortage periods.

I mentioned earlier that I am Traffic Manager of the Oregon and Northwestern Railroad Company. This railroad extends 51 miles from Seneca, Oregon, to Burns, Oregon, at which point it connects with the Union Pacific exclusively. It has no other interchange with any other railroad. The Oregon and Northwestern Railroad Company participates in through rates with the Union Pacific and connections on lumber and miscellaneous class and commodity rates on other traffic originating or terminating at points on its line.

Previously, I commented on the equitable car distribution practices of the Union Pacific during car shortages. We have some direct experience on this through the Oregon and Northwestern which serves a number of mills located on its line, and which mills are direct competitors of Edward Hines Lumber Company. I know for a fact that on empties brought into Burns, the distribution which the Union Pacific [fol. 2166] makes as between those loaded by Edward Hines Lumber Company and those delivered to the Oregon and Northwestern Railroad for placement at the other mills mentioned, has been accomplished in a meticulously equitable manner.

The Oregon and Northwestern Railroad is a member of the American Short Line Railroad Association, which As-

sociation has intervened in this proceeding in behalf of complainants. The Oregon and Northwestern does not agree with this action by the American Short Line Railroad Association and desires the record to show that Association had no authority to speak for the Oregon and Northwestern Railroad in the premises.

We are not in accord with intervention of the American Short Line Association in this case because the Oregon and Northwestern, unlike any other short line railroads, is a stub-end railroad which connects only with a long line railroad at only one junction. The Oregon and Northwestern Railroad in effect is comparable to a branch line of the Union Pacific Railroad. Witnesses have testified in this case that any action which tends to reduce the amount of revenue chargeable to Union Pacific branch line operations makes the affected branch line less able to operate at a profit and more susceptible to eventual abandonment. Any action which tends to reduce the Union Pacific's revenue on traffic from and to points on the Oregon and Northwestern Railroad will ultimately place the Union Pacific in a position of needing to re-adjust downward the divisions which accrue to the Oregon and Northwestern Railroad.

[fol. 2167] The successful operation of the Edward Hines Lumber Company's Burns properties and of the Oregon and Northwestern Railroad is dependent in large measure upon a continuation of the present adequate service now provided by the Union Pacific. Curtailment of train service, switching service, higher rates, fewer cars, decreased maintenance of roadway and equipment and any similar forms of retrenchment which Union Pacific witnesses have indicated they might find it necessary to adopt if the complainant is successful, will adversely influence the conduct of our own business. Accordingly, Edward Hines Lumber Company and the Oregon and Northwestern Railroad are opposed to the complaint in this proceeding and respectfully request the Interstate Commerce Commission to give full and careful consideration to their position in the matter.

[fol. 2168] VERIFIED STATEMENT NO. 64

I.C.C. Docket No. 30297

Statement of E. G. McGovern, Minneapolis, Minnesota

My name is E. G. McGovern. I have been employed as General Traffic Manager for Gamble-Skogmo, Inc., for the past twenty years. Prior to that time, I was employed by the Minnesota Transfer Railroad Company in both the Operating Department and the Traffic Department. My job is to supervise, or to handle any transportation problems throughout our entire territory and also to supervise the expenditure of over eight million dollars annually in transportation.

In addition to my work in the Traffic Department, I am the Chairman of our Distribution Committee, which is made up of representatives of the following departments: hard lines, soft lines, pricing, warehousing, stock control and traffic. This committee has the responsibility of deciding the best and most economical method of distributing our merchandise. It also has the responsibility of properly pricing the merchandise.

Gamble-Skogmo, Inc., with its Home Office at 15 North 8th Street in Minneapolis, are wholesalers and retailers of general merchandise, such as electrical appliances; household goods; sporting goods; hard lines; soft lines; groceries; meats; paint; batteries; washing machines, etc. It is made up of four divisions, namely, the Eastern Division operating under the name of Gamble Stores and Gamble Authorized Dealer Stores; the Western Division operating under the names of Western Auto Stores of Los Angles and Western Dealer Stores; the Canadian Division [fol. 2169] operating under the name of MacLeod Stores; and the Manufacturing Division operating under the name of Solar Corporation.

Gamble-Skogmo, Inc., have ten warehouses, located in the following towns:

Chicago, Illinois	Billings, Montana
Minneapolis, Minnesota	Denver, Colorado
Moorhead, Minnesota	Ogden, Utah
Sioux Falls, South Dakota	Portland, Oregon
Fremont, Nebraska	Los Angeles, California

They also have over two thousand retail stores in twenty-six states, four Canadian Provinces, Mexico and Hawaii. Their sales amounted to over one hundred twenty-three million dollars in the year of 1949. The manufacturing division (the Solar Corporation) has battery manufacturing plants in Milwaukee, Wisconsin, and Ogden, Utah. They also have a paint manufacturing plant in Milwaukee, Wisconsin.

During the year 1949 we shipped via the Union Pacific Railroad 5 carloads of insulation from Denver, Colorado, to points on the Union Pacific north of Ogden, 10 carloads of furniture from Pendleton, Oregon, to Denver, Colorado, 14 carloads of batteries from Ogden, Utah, to Denver, and 119 carloads of other commodities moving to or from points in the territory north of Ogden.

During the same year, we also shipped via the Union Pacific Railroad the following carloads of freight to Denver, Colorado. The rate application is not involved on this movement but the service is definitely involved in this hearing. From Council Bluffs, 39 carloads of refrigerators, 28 carloads of washing machines, 3 carloads of dry batteries, [fol. 2170] 5 carloads of paint, 54 carloads of miscellaneous freight.

From Kansas City, 10 carloads of refrigerators and 35 carloads of miscellaneous freight; or, a total of 185 carloads. In the same year, we also shipped 22 carloads of refrigerators and 7 carloads of miscellaneous merchandise from Missouri River to Ogden, Utah, via the Union Pacific Railroad.

In our business we have never felt any need for the routes and the rates via the D&RGW sought in this case. We have never asked either the D&RGW or the Union Pacific Railroad for the establishment of such routes, nor would we derive any benefit from them in the form of transit at points on the D&RGW or reconsignments or diversions. Time is an important factor in our merchandising. A day's delay may result in a loss in sales, a loss of a customer, his friends and relatives. The Union Pacific Railroad Company's service has been entirely satisfactory and their facilities are adequate. We see no need of short-routing this railroad and opening up a longer route by the way of the D&RGW, which, of course, would require more time in transit.

We understand the purpose of this complaint is to divert to the D&RGW traffic now handled by the Union Pacific Railroad to and from points on its own line and to its connecting line. This would in no way increase the movement of freight in this territory, but the result would be that the Union Pacific Railroad would lose a substantial amount [fol. 2171] of its revenues. From our past experience we know that, following any reduction in traffic and revenue, the service of the railroads, including that of the Union Pacific, falls off in the form of less frequent train schedules and less frequent movements for spotting inbound and outbound cars.

In each one of our warehouses, located at Portland, Ogden, and Denver, we carry an inventory of approximately seven hundred thousand dollars, which is a sixty-day stock. A one-day increase in transportation time would force us to increase our inventory by one-sixtieth, which amounts to eleven thousand-six hundred sixty-six dollars for one warehouse. At all three warehouses we would be forced to increase our inventory thirty-four thousand, nine hundred ninety-eight dollars. Anything that would tend to slow up our train service would hurt us and for that reason we are opposed to the position of the D&RGW in this case.

[fol. 2172] VERIFIED STATEMENT No. 65

I.C.C. Docket No. 30297

Statement of M. E. Hollingsworth

My name is M. E. Hollingsworth and I reside at Council Bluffs, Iowa. I have been employed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company at the Council Bluffs, Iowa Yard for more than forty years, and I am the senior switchman.

I am local chairman of the Brotherhood of Railway Trainmen on the Milwaukee at Council Bluffs, and I am also vice-chairman of the General Grievance Committee of that organization on the Milwaukee Railroad.

I am appearing here on behalf of the organizations on the Milwaukee, representing the engineers, firemen and

engine men, conductors and trainmen, all of which organizations have intervened in this proceeding opposing the application of The Denver & Rio Grande Western Railroad Company. These intervening organizations represent the employes engaged in yard service as well as those in road service.

I have had long service in the Milwaukee's Council Bluffs Yard and have personal knowledge that a large amount of carload freight is interchanged daily between our railroad and the Union Pacific.

[fol. 2173] The number of Milwaukee freight trains operated in and out of the Council Bluffs, Iowa Yard is of great importance to the organizations which I represent for it is the number of trains operated which determines the number of employes who will be engaged by the Milwaukee in road and yard service on the line extending between Council Bluffs and Chicago. The cars interchanged by the line with the Union Pacific account for many of these trains during a year.

While I have no personal knowledge of the total number of cars interchanged between the two railroads, I do know it is a very large number, and I am sure that the eastbound loads interchanged at Council Bluffs exceed 30,000 cars per year and this means approximately the same number of loads and empties at Council Bluffs in the opposite direction. We know, of course, that only a part of this traffic is involved in this proceeding.

The Denver & Rio Grande Western Railroad Company is seeking routes and rates which will permit the diversion of traffic destined to and from points on the Union Pacific north of Ogden from the Union Pacific line and its connections to The D. & R. G. W. R. R. Co. and its connections. We do know there is very large amount of traffic involved as has been asserted by witnesses for both of these railroads.

The organizations which I represent feel very certain that any substantial diversion of this traffic from the Union Pacific at Ogden will mean fewer cars and fewer trains on the Milwaukee, with resulting reduction in employment of road and Yard employes.

[fol. 2174] The Milwaukee has no connection with The D.&R.G.W.R.R. Co., and unless the Union Pacific can handle

the traffic to and from Council Bluffs, the Milwaukee cannot hope to participate in the handling of the traffic.

The traffic that now comes into Council Bluffs from territory north of Ogden, destined to points east of Council Bluffs on the Milwaukee, or its connections, is available to the Milwaukee and we handle many thousands of cars of this traffic and this means a lot of jobs for our men.

[fol. 2175] VERIFIED STATEMENT NO. 66

Statement of Alfred M. Pence

I am an attorney engaged in the general practice of law at Laramie, Wyoming, which has been my home since 1924. I was reared on a ranch approximately forty-five miles northeast of Cheyenne, Wyoming, and have lived forty-three years in southern Wyoming. I am familiar with the ranching business and the problems of the rancher in this area. My family has shipped livestock over the Union Pacific for over thirty-five years. I have been familiar with the Union Pacific and its services all of my mature lifetime. I graduated from the University of Wyoming Law School and was admitted to practice in 1929. I have practiced at Laramie since that time except for four years during the recent war when I was an infantry officer in the United States Army. I belong to various civic organizations at Laramie, including the Laramie Chamber of Commerce. At the present time I am President of the Wyoming State Bar Association.

I appear as a witness in behalf of the Laramie Chamber of Commerce to protest the granting of the prayer of the complaint in this proceeding upon the grounds and for the reasons hereinafter stated.

My law practice brings me into direct contact with all the civic and business life of Laramie people and businesses; I am on the Board of Directors of five business corporations and am familiar with business and living conditions there. I am now City Attorney at Laramie and I have [fol. 2176] served as City Attorney or Assistant City Attorney at various times for a total period of eleven years.

The present estimated population of Laramie, Wyoming, is about 14,000, exclusive of the University of Wyoming population of more than 5,000. Albany County, of which Laramie is the county seat, is sparsely settled, being exclusively a livestock and timber country. With some variance as to industry and agriculture, this is true of all of the State of Wyoming.

The Union Pacific has always been an important element in the community and business life of Laramie and southern Wyoming. Through the years, it has constituted our most important individual industrial plant. It has been the life blood of this community. In 1868 Laramie was selected as a terminal site for the Union Pacific. When the railroad moved on, Laramie remained and has grown up with the Union Pacific. Our business, our municipal and school institutions and facilities, and our tax structure have all grown as the Union Pacific has grown. Anything which affects the Union Pacific employment and payrolls immediately and directly affects Laramie and business there. The railroad is the barometer of our business life.

A diversion of traffic from the Union Pacific which would displace 80 employees with an annual payroll of over $300,000 or any other substantial number of employees or annual payroll at Laramie would substantially and ad- [fol. 2177] versely affect our community. Should 80 employees be displaced, it is easy to see that with their families as many as 280 persons in the community would be affected.

As an illustration of the interdependence between the Union Pacific and our community, the water situation at Laramie is in point. For many years the Union Pacific and the City obtained their water from the city springs east of Laramie. This water supply was jointly owned by the railroad and the city but the railroad had a priority right. As the railroad and the city grew and their respective water requirements increased, the supply became inadequate. In this situation, the parties cooperated in obtaining an additional supply of water from the Laramie River, and the Union Pacific agreed to trade its right to water from city springs for river water, in order that the citizens of Laramie might enjoy the use of spring water for domestic purposes which they considered more desirable. Bonds in the

total amount of $750,000 were issued for the construction of this project. A large part of the cost of the improvement fell on the Union Pacific as it is our most substantial individual taxpayer. This is an example of future planning, geared to meet the requirements of a constantly growing railroad population.

The Union Pacific paid 24.1 per cent of all taxes paid in Albany County in 1949. Some of our school districts could not have survived without the tax revenue they have received from the Union Pacific. As examples, Districts 16 [fol. 2178] and 25 levy a full 13 mills special levy and are in terrible condition, whereas districts along the railroad have no special levy and are in fine condition. It is not unusual in this entire area to see a fine brick school building standing practically alone on the prairie along the line of the Union Pacific and serving a large surrounding area. Conversely, in districts removed from the railroad, it is not unusual to find schools housed in the ranch bunkhouse or the living room of a ranch home. The Union Pacific, its affiliates and employees constitute a large source of tax revenue to Wyoming, particularly in southern Wyoming.

The Union Pacific furnishes highly satisfactory rail transportation service, both freight and passenger, to and through our community and the State of Wyoming. The ranching experience of my own family is a good illustration of this. During all of the years my father has shipped livestock on the Union Pacific, I know of no instance in which he has had any substantial complaint with respect to Union Pacific service for the handling of his livestock. This has been generally true among my many rancher clients, and I have heard no complaints with respect to livestock transportation service from other than my clients which merited substantial consideration. During the last 18 months of the war, I had considerable experience with respect to the transportation of troops in my position as Assistant G-3 of the Replacement and School Command, Army Ground Forces. We moved more than a half million men every [fol. 2179] 17 weeks over the railroads of this country. The record of the railroads generally with respect to such transportation was good, but the record of the Union Pacific was outstanding. It is of considerable advantage to shippers

of livestock to have numerous freight train schedules available for shipment of his stock. Conditions frequently arise which delay transfer of livestock to the shipping point. The more train schedules available, the greater the opportunity the shipper has to get the livestock to market promptly. Prompt shipment is, of course, very important to livestock shippers to avoid shrinkage and to be on the market as planned. Anything which would result in reducing the number of train schedules would work hardships on livestock shippers.

Our community is too small to absorb reduced payrolls. Displacements would would be inevitable. Wyoming being a sparsely settled State, the ill effects of displacement of employees and the movement of populations from one place to another is more pronounced than in a more densely populated area. I have had personal experience in this regard with respect to legislative activities involving such displacement of persons and have observed the bad effects of such activities upon the persons involved. Such displacements are always destructive and not constructive, and should be avoided in the absence of some impelling reason therefor.

Many Union Pacific employees own their own homes in our community, and they and their families are in many [fol. 2180] instances deeply rooted here, three generations having served the railroad. Displacement of these people would cause irreparable hardship.

The University of Wyoming is located at Laramie. It is the only State institution of higher education. It is dependent upon the Union Pacific for support from tax revenue and student support from children of Union Pacific employees, including children of Union Pacific miners, and others dependent upon Union Pacific employment. I have been familiar with the University and its student personnel since 1924. In 1928-29 I was President of the student body and traveled throughout the state in the interests of future enrollment at the University, and I know that there has always been a larger number of students at the University who are children of the Union Pacific Railway of mine employees. Many of these have had distinguished careers at the University and in the State. The Union

Pacific has furnished employment for many students while attending the University of Wyoming. The University is another institution which has grown with the Union Pacific and in a substantial measure has grown to meet the educational requirements of Union Pacific personnel. The University is bound to be adversely affected by any substantial decrease in Union Pacific employment and payroll, which is illustrated by the following figures: Although the Union Pacific runs through only seven of Wyoming's twenty-three counties, yet those counties furnished in 1948-49 59.1 per [fol. 2181] cent of the Wyoming students attending the University, and at present furnish 58.5 per cent of the Wyoming students.

It seems clearly against the public interest:

1. To divert traffic from the Union Pacific which is rendering highly satisfactory service.

2. To displace employees who have become a part of our community.

3. To disrupt in any substantial way a community and its businesses and institutions and the tax structure upon which it depends, by diverting the business of an industry which the community was in large part built up to support.

4. To discourage the cooperative relationship which must necessarily exist between such a community as Laramie and an important industry such as the Union Pacific.

5. To undermine the potential support of an important institution like the University of Wyoming which was built to meet the requirements of a state-wide community of which the southern tier of counties are such an important part.

[fol. 2182] VERIFIED STATEMENT No. 67

Statement of Frederick W. Marble

I live at Cheyenne, Wyoming and have lived there a considerable portion of my life. I am a banker and at present am President of the Stock Growers National Bank at Cheyenne and have been an officer of this bank since 1936. I am also interested in the banking business at Billings, Montana being Vice-President of the Montana National

Bank at Billings where I lived for a number of years just prior to returning to Cheyenne. I am a director of the Federal Reserve Bank at Omaha, Nebraska and in 1942 was President of the Wyoming Bankers Association. I have also been extensively engaged in the livestock business on my own account and have handled the banking business of a great many livestock producers over a period of years. Through my own ranching operations and the handling of financial matters for many ranchers I am familiar with the livestock business in this area.

I am a member of various civic organizations in Cheyenne including the Chamber of Commerce and in the past have been President and director of that organization. I am a member of the Cheyenne Water Board. By reason of my banking connections and other relations in Cheyenne I am familiar with business and living conditions in this city.

[fol. 2183] The Wyoming Bankers Association is one of the intervenors in this case and the Executive Council of that Association has delegated me to make a statement on behalf of the Association. I am also speaking for the Cheyenne Chamber of Commerce and the business interests of Cheyenne.

The interest of the Wyoming Bankers Association, the Cheyenne Chamber of Commerce and the business men of Cheyenne arises from the fact that the Union Pacific Railroad and its coal mining subsidiary is the largest single employer in our state; its operations afford a living to more than 30,000 people of our state which is over 10 percent of our total population. It is estimated that about 40% of the total population of Wyoming, of over 100,000 people live in the six southern counties of the state directly served by the main lines of the Union Pacific Railroad and in this six county area about 30 percent of the population is directly dependent upon Union Pacific employment for its livelihood. In this same area the Union Pacific pays over 25 percent of the ad valorum general property taxes required for support of state, county, and municipal governments and schools.

These figures make it evident that the economic welfare of Wyoming is closely and directly tied in to the number of workers required by the Union Pacific Railroad to run its trains across our state. In the six county area where

40% of our people live Union Pacific is unquestionably the [fol. 2184] major factor in the economic life of the region—this section is prosperous when traffic and employment are high on the Union Pacific and conversely any decline in Union Pacific employment is immediately reflected by declining trade in the communities affected. When we take into consideration the number of people in service and distributing lines indirectly dependent upon Union Pacific payrolls for their livelihood it is apparent that a very substantial portion of the fixed urban investment in housing, business property, schools and municipal improvements has been built up on the basis of Union Pacific through traffic originated outside the State of Wyoming since Wyoming itself generates only a modest amount of traffic.

It is this phase of the problem that concerns us deeply. We have over a period of years built up a large part of our economy in southern Wyoming on the basis of this through Union Pacific rail traffic which originates outside our borders, workers have their homes, business buildings and schools have been erected to serve the workers. We have little or no industry of our own where rail workers and miners could find employment in the communities where they now live should they permanently lose their jobs as a result of traffic taken away from the Union Pacific. The loss of any substantial number of Union Pacific jobs brought about by a diversion of through rail traffic could only mean [fol. 2185] that the job holders and a proportionate number of other workers who serve the rail employees and miners would be required to move out of the state and find a means of livelihood elsewhere. Such a movement of any size would result in most unfortunate after effects on urban property and business values along the Union Pacific line in our state. Discharged employees would undoubtedly suffer immediately and direct financial loss on the homes they would be required to sell.

It is most important to our state that property values of Union Pacific itself be maintained. In the 6 counties traversed by the railroad's main lines the percentage of the total of all property taxes paid by Union Pacific runs from a minimum of 20 percent in Laramie County up to a maximum of 37½% in both Uinta and Sweetwater Counties. This is the most dependable and steadiest source of

tax revenue these counties have. Wyoming has a general state levy of 6 mills which is collected by the state on all property in the state and then distributed by the state to all public schools on the basis of need. The Union Pacific and its mines pay on this 6 mill levy alone approximately $360,000.00 annually while the total raised over the whole state is about $3,400,000.00. Thus Union Pacific is most important to our school system—especially so to the more needy rural schools all over the state.

[fol. 2186] Users of Transportation are interested only in rates, speed, adequacy, safety, convenience and dependability of service. If the users were to be substantially benefited in some of these respects by the diversion of traffic proposed in this case we in Wyoming would, I think, take our beating gracefully as one of the inevitable but unfortunate after effects of economic progress. Here though we cannot help feeling that the economy we have built up over a long period of years to adequately serve this traffic is now being put in jeopardy, not in the interest of savings of time or money or providing better service to users but rather to permit another carrier to share a part of the freight revenues now enjoyed by the Union Pacific. It seems to us that the loss we might suffer in Wyoming in jobs and property values would far exceed any possible benefits that might accrue to shippers of through freight if the proposed diversion is granted. It seems inequitable to us to expose our people to the risk of losing their jobs, moving away from their homes and suffering financial losses on their properties unless it can be clearly demonstrated that users of rail service will be substantially benefited by the proposed change.

[fol. 2187] VERIFIED STATEMENT No. 68

Statement of Rudolph Anselmi

I live in Rock Springs, Wyoming. I was born there on May 1, 1904 and have lived there all my life. I graduated from the University of Wyoming in 1925. I am part owner and operator of the Miners Mercantile Company—a retail department store. I belong to various civic organizations

in Rock Springs. I am president of the School Board there —School District No. 4—being a member since 1936. I am a Senator from Sweetwater County in the State Legislature where I have served for 13 years. I have been a member of the Ways and Means Committee of the Senate which considers the budgets of the various departments of state government. The work of the committee leads into consideration of all state revenue and of state expenditures. I appear as a witness for the Rock Springs Chamber of Commerce and in support of Chambers of Commerce and civic organizations which have intervened in this proceeding.

Rock Springs is primarily a coal mining community. It is also the center of a livestock industry with some farming and in recent years there has been oil and gas development. But the pulse of Rock Springs is the coal mining industry. Coal is mined in Rock Springs and in the surrounding coal mining camps. Ninety per cent of the coal mined in this area is mined by the Union Pacific Coal Company and is used by the Union Pacific Railroad in railroad operations. The importance of railroad use of coal to this community is therefore very clear.

We who are in business in Rock Springs are extremely [fol. 2188] sensitive to the ups and downs in the coal industry. Seasonal lay-offs, strikes and similar work stoppages in the coal mines are immediately felt in our business houses. If such stoppages involve substantial numbers of miners and continue for substantial periods of time, they affect the economy of our community in a critical way and may, and sometimes do, result in great distress. Such conditions are felt in the community not only in a material way but the psychological effects are detrimental to our business and the morale of the community. The population of Rock Springs—approximately 12,000. The population of Sweetwater County is approximately 22,500 with Rock Springs the trading center for the entire county; the area is approximately 11,520 square miles. The surrounding trade area is all very sparsely settled.

Any diversion of business from the railroad which would diminish the amount of coal requirements from the Rock Springs area would be immediately felt here. If such di-

version should result in the discontinuance of employment of as many as 250 miners, as Union Pacific witnesses have indicated it may—with the reduction of more than a million dollar payroll, it would have serious effects. From personal knowledge of Rock Springs miners and their families I know that they have large families. A family of five would, in my opinion, be the average. On this basis, therefore, 1,500 persons in the community would be affected. Many of the miners have lived there many years. Their families have been born and brought up there. They have built themselves into the community. The displacement [fol. 2189] of these persons would seriously affect their living conditions.

The principal development of Rock Springs has been in its coal mining industry. This has kept pace with the development of the Union Pacific Railroad. The railroad and the community have grown hand in hand, and the community has developed to support the Railroad and the miners who mine coal for the Railroad. All of the facilities of the community, its business, its schools, its private utilities, its sewer systems, and its bonded indebtedness have developed and grown for this purpose. If traffic is now to be deiverted away from the Union Pacific, this community and all of its facilities and property values are bound to suffer great loss.

We do not believe such a loss, brought about in such a way is in the public interest. If communities such as Rock Springs, and its business facilities, of which I have spoken, cannot be developed in reliance upon a continuance of the right of the railroad to transport the traffic it had developed, so long as it does a good job, then such communities will be discouraged in such development to the detriment of such railroads in the Union Pacific.

I know enough of the geography of Idaho and the northwest territory traversed by the Union Pacific to know that it has been the principal transportation factor in the development of that area. The complainant has no rail facilities in that area. Knowing from my personal knowledge that the rail lines and facilities of the Union Pacific operated through Rock Springs and across Wyoming are of [fol. 2190] first quality there can be no substantial complaint about them. The Union Pacific is doing an out-

standing transportation job through Wyoming. I have developed from my inquiries that the routes of the complainant, to which they seek to divert traffic from the Union Pacific, are no shorter than those of the Union Pacific.

I repeat then, that we of Rock Springs do not feel that it is in the public interest to tear down this community, developed to support the efficient transportation lines of the Union Pacific in order to divert traffic to the complainant which has no rail facilities in the territory from which they seek to solicit and divert such traffic.

I know from my personal knowledge, supplemented by my legislative experience, that the Union Pacific, with its subsidiaries, pays a substantial portion of the taxes and the Wyoming counties it passes through and only in lesser degree in the entire state. In Sweetwater County the Union Pacific pays a major part of all taxes. My inquiries develop that it paid about 50% of all taxes in the county for 1949. In some school districts in this county, it pays as high as 90% of all taxes. Its potential ability to continue such tax payments are bound to be lessened by the diversion of traffic in substantial amounts from its lines through this state. What I have said applies to the Union Pacific with its subsidiaries as a taxpayer. Loss of employment by Union Pacific miners in this county in substantial numbers would obviously have an additional serious effect from the point of view of tax revenue.

[fol. 2191] Union Pacific witnesses have testified that it may be necessary to abandon the Stansbury mining district. The importance of the Union Pacific as a taxpayer may be illustrated with respect to School District No. 7 in which Stansbury is located. Mr. Bayless has said that the loss in traffic subject to solicitation by the Rio Grande may result in elimination of the mining of 385,000 tons of coal. Coal production was assessed in 1949 at $2.15 a ton. This would represent $827,750 of valuation in School District No. 7. Valuation of Union Pacific mining facilities in this district were assessed at an additional amount of $2,129,872.00. Thus the total Union Pacific Coal Company valuation in the Stansbury district was $2,957,622.00. The total valuation of district No. 7 was $6,348,050.00. Therefore, the loss of tax valuation to District No. 7 would be 46%. Dis-

trict No. 7 includes schools in Reliance, Dines and Winton in addition to Stansbury.

Coal mining is very important as an industry in Wyoming. This state contains some of the greatest known coal deposits in the world. Rock Springs is the center of the coal mining industry in the state. The Union Pacific Railroad has consistently clung to the use of coal in this area in the face if the insistent appeals of competitive fuels. It is its declared policy to continue the use of coal in this area. These facts make it of additional importance to Rock Springs and to the entire state to retain the mining of coal threatened by the proposed diversion of traffic involved in this proceeding.

[fol. 2192] I have made no reference to loss of employment by railroad employees in this county. I understand from the statements of railroad witnesses that as many as 100 railroad employees, principally at Green River, may be displaced. Such displacement would affect the families of these men, perhaps between 350 to 500 persons as a total. Such a loss would have its effect not only upon Green River but also upon Rock Springs as the latter is in many respects a market center for all the population of Sweetwater County.

I should also refer to the secondary effect which would result from any such mass population displacement as may result from possible diversion of traffic. I do not have specific figures but it is obvious that the effect would reach out and effect an additional portion of the population primarily displaced.

For the foregoing reasons I wish to protest the granting of the relief sorght in this proceeding.

[fol. 2193] VERIFIED STATEMENT NO. 69

Thomas E. Rogers

I live at Green River, Wyoming, and have lived there about 45 years. I am in the banking business, the mercantile business and other businesses in Green River. I am familiar with the sheep business in the area. I am familiar with housing conditions in Green River. I am Vice-President of

the State Bank of Green River and am manager of the Green River Mercantile Company. I am auditor for the Big Sandy Live Stock Company and the Green River Live Stock Company. I belong to various civic organizations at Green River including the Green River Community Club. I appear here as a witness for the Green River Community Club and the Lion's Club and indirectly for the business interests in Wyoming which may be affected by this proceeding.

Green River is a division point on the Union Pacific Railroad. It is the county seat of Sweetwater County. The Union Pacific Railroad is the principal and practically the only industry in Green River. It has terminal facilities for trainmen operating both east and west, including the line thru Granger into Idaho, and also has extensive terminal facilities, including a large round house for power units operating in all such directions. There are extensive switching yards and switching facilities. The community has grown with the railroad, and it exists largely to accom-odate the railroad and its employees who live there. A large num-
[fol. 2194] ber of railroad employees own their own homes. The city and its businesses, its schools, its municipal facilities have all been built up along with the railroad.

Any fluctuation in employment on the Union Pacific is immediately felt in our banks and our business houses. Any diversion of traffic which would result in substantially reducing railroad employment in Green River would seriously affect the community. Green River has a population of about 3600. Assuming 100 employees were displaced, this would account for from 350 to 500 members of the community who would be affected. Such displacement would seriously affect the living conditions of these persons. The business of the community, municipal facilities and institutions and property values would suffer serious loss.

The taxpaying ability of the Union Pacific would be decreased. Taxes now realized from its employees who would be displaced would be lost. The level to which the community, its business and its institutions have been developed would be lowered in proportion to the loss of employment and of wage earnings in the community.

Lack of housing has at times been a serious problem in the course of the growth of railroad facilities at Green

River. Houses have been constructed by members of the community to meet this need. This illustrates the direct connection between growth and development of the railroad [fol. 2195] and that of the community. It does not seem to us in Green River that it is in the public interest to discourage such necessary cooperation between a transcontinental railroad and the communities thru which it passes, by diversion of traffic when the railroad is performing satisfactory service. I say satisfactory service, but by comparison with rail transportation service generally the service of the Union Pacific at and thru Green River from my experience and observation is well above average. The importance of protecting division points on the railroad like Green River from the effects of such diversions of traffic would seem particularly important.

I am a member of the School Board at Green River. It is School District Number 2. The Union Pacific Railroad and its subsidiaries paid about 56% of the taxes in that district in 1949. The importance of the Union Pacific as a taxpayer and of its continuing ability to pay taxes under such circumstances is clear. The importance of loss of tax revenue from any displaced Union Pacific employees is also obvious. As an illustration of the importance of the Union Pacific as a taxpayer in the District we have just sold an issue of building bonds at the low rate of 1.6%, which would be impossible in the absence of the long tax paying record of the Union Pacific. Our school facilities have been increased and modernized to meet the growing needs of the community as it now exists. Any substantial loss of em- [fol. 2196] ployment, wage earnings, or tax revenue would have a serious and detrimental effect on these schools.

I am also a member of the Board of Trustees of Memorial Hospital of Sweetwater County which is located at Rock Springs. This hospital serves the entire area, including Green River. The hospital cannot operate except at a deficit and the deficit is made up by taxation. Anything affecting the ability of the Union Pacific Railroad, its subsidiaries and its employees to continue paying their quota of these taxes would directly and adversely affect this institution which serves the human needs of the area; and would shift the burden of such taxation to others in the community who

might not be able to assume the burden in view of the effect upon them of any reduction in Union Pacific employment.

Reduction of number of trains operated in this area is not to the advantage of livestock shippers. It is to the interest of such shippers to have their livestock moved to market points as quickly as possible in order to avoid shrinkage and other results of delay. Loss of four trains per day would result in poorer service for these shippers.

[fol. 2197] VERIFIED STATEMENT No. 70

Statement of Timon A. Walter

I am a resident of Laramie, Wyoming. I am twenty-nine years old. My education has been as follows: I attended and graduated from North High School in Denver, Colorado. I then attended the University of Denver and received an A. B. Degree in 1947. I received a degree of Master of Business Administration from Denver University in 1948. During the war I was in service in the air corps as a glider co-pilot. I am at present employed as an instructor at the University of Wyoming in the Department of Statistics, College of Commerce and Industry.

At the request of various Chambers of Commerce and civic organizations in the State of Wyoming, headed by the Cheyenne Chamber of Commerce, I have made a statistical study of the possible effect of this proceeding upon the economy of the communities in Wyoming along the line of Union Pacific, that is Laramie County, Albany County, Carbon County, and Sweetwater County.

It is my understanding that the anticipated effect of the granting of the relief sought in this proceeding will be to divert certain traffic now moving from Idaho and northwest points across Wyoming via the Union Pacific from Green River eastward, to the lines of the Denver & Rio Grande via Ogden and thence through Colorado.

[fol. 2198] I have read a transcript of that part of the testimony of T. K. Earley, Assistant Freight Traffic Manager, The Denver and Rio Grande Western Railroad Company, at the hearing in this proceeding in Salt Lake City to the effect that the potential traffic subject to solicitation

of the Rio Grande for transportation over its lines if the through rates sought herein are granted is 101,476 cars east bound and 56,286 cars west bound, or a total of 157,762 cars per year.

I have read the statements of Union Pacific witnesses at this hearing, to the effect that the diversion of such an amount of traffic per year would result in a reduction of four trains each way per day over the lines of the Union Pacific in Wyoming through the counties which I have referred to, together with estimates of the number of employees whose services would be dispensed with as a result of such a loss of traffic in the areas involved in the State of Wyoming, including coal miners. I have assumed for the purposes of my testimony that if there is such a potential amount of traffic subject to Rio Grande solicitation as I have previously stated, that the Rio Grande can and will solicit such traffic away from the lines of the Union Pacific passing through Wyoming and through the areas referred to. I have taken the estimates by the Union Pacific witnesses as a basis for my testimony as to the effect of such loss of employment in the areas in Wyoming involved.

I have prepared an exhibit which I have with me. This [fol. 2199] has been marked Exhibit . Such Exhibit represents the results of my statistical studies and my conclusions with respect to the effect on the southern Wyoming counties involved of the loss of traffic represented by the potential traffic subject to solicitation by the Rio Grande as testified by their witness, Mr. T. K. Earley, and the resulting effect on railroad and railroad coal mine employment in such Wyoming counties as stated by the Union Pacific witnesses.

(Here follows 1 Paster, side folio 2200)

[fol. 2200]

I. C. C. Docket 30297
EXHIBIT ——
Witness: Timon Walther

Part I—The Loss of Sales in Four Counties in Wyoming Resulting from a Possible $3,340,000 Reduction of Railroad and Mine Payroll

Column	1	2	3	4	5	6	7	8	9	10	11
		Sweetwater County		Carbon County		Albany County		Laramie County		Total for Counties	
LINE	Classification of Business	Total Loss of Sales	Cost of Goods Sold	Total Loss of Sales	Cost of Goods Sold	Total Loss of Sales	Cost of Goods Sold	Total Loss of Sales	Cost of Goods Sold	Total Loss of Sales	Cost of Goods Sold
1	Restaurants	86,900.00	40,400.00	20,600.00	9,600.00	35,400.00	16,500.00	93,800.00	43,800.00	236,700.00	110,300.00
2	Food Stores	332,400.00	282,300.00	84,500.00	71,700.00	115,200.00	97,900.00	313,800.00	266,400.00	845,900.00	718,300.00
3	Apparel	117,300.00	73,600.00	27,600.00	17,300.00	52,300.00	32,800.00	142,400.00	89,400.00	339,600.00	213,100.00
4	Furniture and Appliances	54,700.00	35,600.00	8,900.00	5,800.00	20,300.00	13,200.00	96,600.00	62,900.00	180,500.00	117,500.00
5	New and Used Auto and Parts	214,300.00	178,300.00	62,000.00	51,600.00	81,500.00	67,800.00	248,600.00	206,700.00	607,400.00	504,400.00
6	Gasoline	142,100.00	106,200.00	59,900.00	44,800.00	50,800.00	37,900.00	132,700.00	99,200.00	385,500.00	288,100.00
7	Drug Store and Professional Supplies	62,000.00	41,500.00	13,500.00	9,100.00	13,000.00	8,700.00	40,200.00	26,900.00	128,700.00	86,200.00
8	Lumber, Hardware and Variety	171,700.00	117,400.00	49,400.00	35,600.00	51,700.00	37,500.00	131,400.00	95,100.00	404,200.00	285,600.00
9	Utilities	115,600.00	.....	23,300.00	.....	33,900.00	.....	103,400.00	.....	276,200.00	.....
10	Amusements and Miscl	225,600.00	156,600.00	39,500.00	27,400.00	43,600.00	30,300.00	172,800.00	119,900.00	481,500.00	334,200.00
11	Total	1,522,600.00	1,031,900.00	389,200.00	272,900.00	497,700.00	342,600.00	1,475,700.00	1,010,300.00	3,886,200.00	2,657,700.00

Part II—The Loss of Personal Income in Four Counties in Wyoming Resulting from a Possible $3,340,000 Reduction of Railroad and Mine Payroll

Column:		12	13	14	15	16
		Sweetwater County	Carbon County	Albany County	Laramie County	Total for Counties
	Workers Wage Loss:					
12	Miners and Railroad	1,500,100.00	302,700.00	416,700.00	1,120,500.00	3,340,000.00
13	Finance, Service & Wholesale	71,000.00	18,200.00	37,500.00	110,500.00	237,200.00
14	Education & Hospital	56,500.00	8,400.00	9,400.00	17,800.00	92,100.00
15	Clerks & Bookkeepers	234,600.00	53,600.00	68,600.00	219,000.00	575,800.00
16	Total	1,862,200.00	382,900.00	532,200.00	1,467,800.00	4,245,100.00
	Loss of Rent of Living Quarters:					
17	Miners and Railroad	185,500.00	34,800.00	60,300.00	170,300.00	450,900.00
18	Finance, Service & Wholesale	20,100.00	5,500.00	14,200.00	33,000.00	72,800.00
19	Education & Hospital	9,800.00	1,900.00	2,100.00	4,200.00	18,000.00
20	Clerks & Bookkeepers	53,000.00	13,600.00	20,900.00	60,200.00	147,700.00
21	Total	268,400.00	55,800.00	97,500.00	267,700.00	689,400.00
22	Proprietorship Income	125,900.00	32,200.00	42,400.00	105,100.00	305,600.00
23	Total Loss Of Personel Income	2,256,500.00	470,900.00	672,100.00	1,840,500.00	5,240,100.00

Part III—The Loss of Employment in Four Counties in Wyoming Resulting from a Possible Reduction of Railroad and Mine Employees and Their Payroll of $3,340,000

	Number of Workers Unemployed:					
24	Mine and Railroad	386	64	92	284	826
25	Service, Wholesale	42	10	21	55	128
26	Education & Hospital	21	4	3	7	35
27	Clerks & Bookkeepers	110	25	32	100	267
28	Total	559	103	148	446	1256

Exhibit is in three parts, as follows:

Part I: The *Loss of Sales* in Four Counties in Wyoming Resulting from a Possible $3,340,000 Reduction of Railroad and Mine Payroll.

Part II: The *Loss of Personal Income* in Four Counties in Wyoming Resulting from a Possible $3,340,000 Reduction of Railroad and Mine Payroll.

Part III: The *Loss of Employment* in Four Counties in Wyoming Resulting from a Possible Reduction of Railroad and Mine Employees and Their Payroll of $3,340,000.

Exhibit is broken down with respect to the several counties involved, that is, Sweetwater County, Carbon County, Laramie County and Albany County, and the total for each of such counties is shown.

In Sweetwater County there are two principal municipalities, that is, Rock Springs (Population, 12,000) and Green River (Population, 3600); in Carbon County there are likewise two principal municipalities, that is Rawlins (Population, 8500) and Hanna (Population, 1,127); in Laramie County there is one principal municipality, that [fol. 2201] is Cheyenne, (Population, 35,000); and in Albany County there is likewise but one principal municipality, that is, Laramie (Population, 14,000).

Referring to Part I of the Exhibit with respect to "Loss of Sales", I have included two columns, that is (1) Total Loss of Sales, and (2) Cost of Goods Sold. Cost of Goods sold would constitute an additional loss within Wyoming if the goods were manufactured in this State. However, with some exceptions, goods sold in Wyoming are purchased outside of the State.

Referring to Part I of the Exhibit, It will be noted that losses of sales are broken down with respect to: Restaurants; Food Stores; Apparel; Furniture and Appliances; New and Used Automobiles and Parts; Gasoline; Drug Stores and Professional Supplies; Lumber, Hardware, and Variety Stores; Utilities, Amusements and Miscellaneous. These classifications were followed because they are basicly those used by the Sales Tax Department of Wyoming,

subject to some modifications which I worked out for the purposes of this study. The classifications are also approximately the same as those used by the U.S. Department of Commerce in publishing statistical information in their *Survey of Current Business.*

Total losses of sales in the several classifications were calculated as follows:

I took first the total income for the county involved. Total income for the county was determined from figures [fol. 2202] available from several sources. Income with respect to the following groups, that is, mining, construction, manufacturing, transportation and public utilities, wholesale trade, retail trade, finance service and professional and miscellaneous, were obtained from the Social Security authorities. Figures for agricultural income were obtained from the U.S. Department of Agriculture. Figures for educational salaries were obtained from the Wyoming State Board of Education. Figures for the tourist trade were obtained from the Commerce and Industry Commission of the State of Wyoming. State salaries were obtained from the State Auditor. Figures for the Union Pacific Railroad were obtained from the Auditing Department of the Railroad. Proprietorship income was based upon an estimate which in turn was based upon sales tax figures obtained from the Sales Tax Department of the State of Wyoming and upon national studies of ratios of proprietorship income to such total sales. In Laramie County there was also personal income for Fort Warren and Frontier Days, figures for which were obtained from the Cheyenne Chamber of Commerce.

Ratios were then computed for each classification by taking the total income figure for each County and dividing it into the total sales in each of the several classifications as shown by figures obtained from the Sales Tax Department of Wyoming. I will call these consumption ratios. These ratios were then applied to the total payroll loss of [fol. 2203] Union Pacific employees (railroad and mine employees) as estimated by Union Pacific witnesses, by multiplying such payroll losses by such ratio figures with respect to each classification, that is, restaurants, etc. The result thus obtained constituted what may be called the

initial loss. To show succeeding losses resulting from loss of employment by employees other than railroad and railroad mine employees, further calculations were made. The basis for such calculations was a sample study made in Rock Springs in order to determine the average volume of sales per worker in each classification and their average salaries. The average volume per worker was divided into the total initial loss of sales in each classification in order to determine the number of workers displaced. The number of workers displaced as thus determined was multiplied by the average pay per worker in each classification. This determined the loss in wages of employees displaced in each classification. The total of such loss in wages for all of the classifications was then multiplied by the original ratios referred to above to determine the additional or secondary loss in sales for each classification. This process was repeated until I approached, in statistical terms an asymptote, that is a point where further loss was considered infinitesimal.

Therefore the first column in Part I of this Exhibit represents the total losses resulting from loss of employment by Union Pacific railroad and mine employees cal- [fol. 2204] culated in the manner previously described, together with losses so calculated with respect to salary losses of workers in wholesale trade, finance, service employments and education, who would be affected by the loss of business involved.

The second column of Part I of this Exhibit, that is "Cost of Goods Sold" will be referred to again in connection with Part II of the Exhibit covering "Loss of Personal Income". However the figures in this column 2 were calculated by applying to total loss of sales appearing in column one, certain ratios based upon studies made by nationally recognized trade associations and published by the Department of Commerce of the United States. These ratios are recognized and are generally used by statisticians.

Referring to Part II of this Exhibit entitled "Loss of Personal Income", the first genefal classification in the exhibit is entitled "Workers Wage Loss". The figures appearing under this first general classification in column

1 were calculated as follows: The figures appearing in column 1 after the sub-classification entitled "Miners' and Railroad" is the total of wage losses in railroad and mine employment as estimated in the testimony of Union Pacific witnesses, including the testimony of Mr. Bayless. The figures appearing after each of the succeeding sub-classifications in column 1 under the first general classification are calculated on the basis heretofore explained in explaining losses of sales resulting from loss of employment [fol. 2205] by employees other than Union Pacific Railroad and mine employees in Part I. Part II is also broken down with respect to the four counties covered by my study.

The next general classification in Part II is "Loss of Rent". This was calculated as follows. I made a personal investigation in each of the counties and from that investigation I conservatively estimated the average rent for all classes of labor. For the several counties such estimate was as follows: Sweetwater County, $40.00 per month; Carbon County, $45.00 per month; Laramie County, $50.00 per month; Albany County, $55.00 per month. Applying this rent factor to the number of employees shown in Part III the results shown were obtained.

The next general classification in Part II is "Proprietorship Income", which includes business rent, managerial salaries, profits. The figures shown were calculated as follows: ratios were used for each of the business classifications shown in Part I covering "Loss of Sales". These ratios were: the ratio of proprietorship income, that is business rents, managerial salaries and profits to per dollar of sales with respect to each business classification shown. The ratios were obtained from studies made by national associations in the various classifications as published by the Department of Commerce of the United States. Such ratios are considered to be reasonably accurate by statisticians generally, and I consider them to be so. These ratios were applied to total losses of sales shown in Part [fol. 2206] I above and totalled to equal the loss for each of the four counties.

Part III is entitled "Loss of Employment". The figures appearing in this Exhibit were calculated as follows: The number of workers appearing after the classification

"Miners and Railroad" is the number who will lose employment, including coal miners, as estimated by the witnesses for the Union Pacific. The numbers shown with respect to the other classifications of employment were calculated on the basis already explained under the explanation in Part I with respect to losses of sales arising from loss of employment by employees other than Union Pacific railroad and mine employees.

Exhibit shows these total losses: Loss of sales, about $3,900,000; loss of personal income, over $5,200,000; and loss of employment, over 1200 wage earners.

The cost of goods sold, which is over $2,600,000, was included to emphasize the fact that this loss in *no way* contributed to the other losses shown. It was assumed that these products were purchased outside the four counties involved and did not affect these counties. However, a portion of this sum will unquestionably affect other Wyoming areas, that is, those areas that produce meat, beet, sugar, poultry, eggs, and similar items.

In camparison with total sales and personal income of the entire United States these figures might seem unim- [fol. 2207] portant. But to those sparsely settled communities, the cumulative effect of the loss is a serious matter.

These facts are doubly significant in that the powers of absorption of these communities with respect to such a loss of population are negligible. These communities originated to service the Union Pacific Railroad and their employees and the largest portion of community income is still derived from that one source.

The State of Wyoming through its University and other organizations spends large sums of money on research and publicity to make feasible and to attract the settlement of industries within the States' boundaries. These organizations think in terms of considerably smaller payrolls than the $3,340,000 payroll involved in this case.

This study has only considered measurable consequences of this possible loss. It is my opinion that the actual loss would be much greater. For example, withdrawal of over 1200 living units from these communities would not only cause a cumulative reduction of all rents, but also might possibly stop completely the major portion of home con-

struction in the communities and add the loss involved in loss of construction employment.

These communities are struggling, as many in the United States, to compensate for loss of the high level of war-time activity. A further blow such as this would in all probability cancel the gains made in the last ten years.

[fol. 2208] VERIFIED STATEMENT NO. 71

Statement of Carleton A. Lathrop

I live at Cheyenne, Wyoming and have lived in that city since 1929. Previous to my residence in Cheyenne I lived at Kemmerer, Wyoming, for a short period. I am a practicing lawyer. I have belonged and belong now to various civic organizations. I have been a director of the Cheyenne Chamber of Commerce and I am now a director and President of that organization. I was City Attorney of the City of Cheyenne from 1940 to 1946. At the present time I am attorney for the Cheyenne Water Board. Such board is a branch or department of the city government which has exclusive control of its water facilities. As an attorney I come into contact with a representative cross section of the people and business of the city and I am familiar with business conditions in the community.

I appear here as a witness for the Cheyenne Chamber of Commerce, and indirectly for the other Chambers of Commerce in Wyoming who have intervened in this proceeding.

The present population of Cheyenne is estimated at from 30,000 to 35,000; 32,000 would be a conservative estimate of the population. This of course is a relatively small city. The Union Pacific constitutes one of the principal industries, if not the principal industry, of the city. This has always been true since I have lived in Cheyenne. The number of its employees living in the city has fluctuated from [fol. 2209] time to time but its employees always constituted a most important and substantial part of the population. I think it would be conservative to say that Union Pacific employees and their families constitute at least one-fourth of the population of Cheyenne.

As illustrative of the important position the Union Pacific occupies as an industry in Cheyenne, its water consumption is significant. On the Water Board we estimate that the use by the Union Pacific as an industry accounts for approximately one-third of the water consumption in the city. This does not take into account the very large amount of water used by Union Pacific employees.

In a city as small as Cheyenne a citizen actively engaged in business there, as I am, has an intimate and personal knowledge of the people and their affairs. I have Union Pacific employees as my clients and I know how Union Pacific employees live. I can say of my own knowledge that a very high percentage of the Union Pacific employees own their own homes and have lived here all of their lives.

As the Union Pacific develops and prospers so does Cheyenne, and of course the contrary is likewise true.

As the Union Pacific has developed and grown the city of Cheyenne has developed and grown with it. The requirements of the city have been developed to meet the requirements of the Union Pacific. This expansion and growth has applied with respect to all of the facilities of the city, that is public utilities facilities, including water, electric, gas [fol. 2210] and telephone; also school facilities; also all the facilities of city government such as street and alley construction, development and maintenance, sewer development and maintenance, police and fire service, etc. In connection with public facilities such as water facilities and schools, bonds have been issued from time to time in connection with the development of those facilities. These bonds are outstanding to the extent that they have not matured and been paid, and constitute a continuing obligation of the city and its taxpayers. At the present time a bond issue of over one million dollars for development of a sewage disposal plant has been voted by the citizens of Cheyenne.

Likewise the tax structure of the community has also developed in connection and commensurate with the growth and development of the Union Pacific.

I have heard the testimony of witnesses for the Union Pacific to the effect that success of the complainant in this proceeding may result in the discontinuance of as many as

four trains each way per day along the lines of the Union Pacific through Cheyenne; also that this may in turn result in the discontinuance of employment of over 250 employees in Cheyenne, representing wages of over a million dollars per year.

Such a loss of employment in the city would, of course, be only a beginning. Assuming that families of Union Pacific employees here average four persons, and I am inclined [fol. 2211] to think that the average may be higher, such loss of employment would affect a total of approximately 1,000 Cheyenne citizens. This of course represents only the persons directly involved with Union Pacific employees. It would be obvious that anything which affects such a great number of Cheyenne citizens would eventually affect others who are directly or indirectly involved in supplying the material and intangible requirements of such Union Pacific employees living in Cheyenne. It is easy to conceive that at least 1500 Cheyenne citizens might be affected, and I believe this would be a conservative estimate.

Loss of wage earnings of $1,000,000 in the city would also be a serious thing to the city. And here again this would only be a beginning of the loss of personal income within the city.

All of us who live and work in Cheyenne are conscious of the effect on the economy of the community of any shrinkage of Union Pacific employment in the city. As illustrative of this, any seasonal lay-off of Union Pacific employees directly affects the community not only in a material way but it also has a psychological reaction on the people and business of the city.

As President of the Chamber of Commerce and as a citizen of the community it is my opinion that there is no need for the service via Rio Grande lines which is involved in [fol. 2212] this proceeding, that is from Ogden and Salt Lake to Denver and thence to Cheyenne. Business concerns in Cheyenne are being adequately served by the railroads presently serving Wyoming. So far as Cheyenne is concerned I have heard no complaints as to the adequacy of Union Pacific service and it is my opinion that such service is not only adequate but that it constitutes rail transportation service of the best quality.

It is obvious that if traffic which the Union Pacific has built up to serve is now diverted to other rail lines which do not pass through Cheyenne, this city and the facilities which have been developed to serve the handling of such traffic will substantially suffer. The potential customers of stores and other businesses, and of our municipal and public utility facilities, will be adversely affected and decreased. The potential ability of the railroad, its employees and other affected taxpayers, to meet the tax requirements of the community will be decreased. The soundness of outstanding municipal bonds will be adversely affected. All of these things and other obvious examples which could be mentioned will have a serious and detrimental effect upon the economy of the city.

Since the railroad has been built up to adequately serve the traffic which it has developed, and since the City of Cheyenne has been built up and developed to meet the requirements of the railroad and its employees to handle such traffic, I wish to point out that it is not in the public interest [fol. 2213] to make the proposed diversion of traffic with its obvious adverse effects upon the Union Pacific as a transportation system, and upon Cheyenne as a community which supports it. Certainly this is contrary to the public interest of those who live in Cheyenne. A repetition of such an effect upon other communities similarly situated adversely affects public interest on a very broad basis. It is necessary to have some stability if communities are to meet their responsibilities in supporting rail lines which pass thru them.

Any weakening of the Union Pacific may result in attempts to abandon its subsidiary rail lines, the Laramie, North Park and Western and the Saratoga and Encampment Valley, as necessary retrenchments. This would adversely affect the territories affected with respect to which I have had some experience in my law practice.

[fol. 2214] VERIFIED STATEMENT No. 72

Statement of Glenn E. Sorensen

My name is Glenn E. Sorensen, and my address is Frontier, Wyoming.

I have been a resident of southwestern Wyoming for twenty-four years. I have been intimately connected with the coal industry in southwestern Wyoming for that entire period.

I am now:

President and a Director of the Lincoln Service Corporation, a Public Utility company operating in southern Lincoln County;

General Manager of the Kemmerer Coal Company, with operations in southern Lincoln County;

General Manager and a Director of the Gunn Quealy Coal Company, operating in Sweetwater County, Wyoming;

Affiliated with the Pinnacle-Kolorado Coal Company, Denver, Colorado;

Associated with the Continental Live Stock Company and with other livestock interests through land leasing agreements on grazing lands leased by The Kemmerer Coal Company;

Wyoming State Chairman of the Central Western Shippers Advisory Board.

I am appearing here representing the Lions Club and the South Lincoln Junior Chamber of Commerce and as a businessman, personally connected with and associated with the economy and industry of the area embraced in southwestern Wyoming, to state to this Commission the reasons why I believe the application of the Petitioner in this matter, the Denver & Rio Grande Railroad, should be denied.

As the Commission well knows, historically this area grew and its entire economy was developed by and around the railroad. This applies to the agricultural as well as the mineral development.

[fol. 2215] The coal industry of southwestern Wyoming is integrated with the operations of the railroad. The Kemmerer Coal Company is now the only major coal producer in southern Lincoln County; our companies' combined production is approximately one half million tons per year. All of this tonnage is moved by the Union Pacific Railroad and part of this tonnage is purchased by the Union Pacific Railroad for their consumption.

The Kemmerer Coal Company is one of the longest continuing commercial coal operating companies in the Intermountain area, and in fact it has grown and prospered with the Union Pacific Railroad. In a sense it may be said that this area, as much as any section in the United States has grown with, and is dependent on the railroad.

The livestock industry of this area is confined to cattle and sheep. Practically all of the livestock products of this area are moved out by rail. As the Commission well knows, adequate and prompt service by train crews, power, and equipment is most important in service to this industry, particularly in the movement of livestock in condition for marketing. Delays in movement of a comparatively short time may be disasterous. A less number of trains through Kemmerer, which I have noted from testimony of railroad witnesses, might be as many as four each way each day, should traffic from the Union Pacific be diverted through Ogden as proposed by the D&RG, would be considerably less freight train service. This would give less opportunity to move livestock without delays which is of extreme importance to the livestock shippers and it is also important to [fol. 2216] our business that coal move promptly to help us meet our already difficult competitive situation with the best possible rail service. From my experience shipping coal and my extensive acquaintance with other shippers including stockmen, I can state the service rendered by the Union Pacific has been good and that railroad has the reputation of giving the best in rail service. We are interested in having that service maintained.

As the Commission is further aware, this area consists of small communities made up of numerous small businesses which are founded upon the basic industries of livestock, mining, and the railroad. A reduction in rail traffic in this area would affect these businesses vitally in two

ways; first, a direct reduction in the payroll of the railroad company would materially reduce the source of income—this, in turn, would naturally cause a disruption in their own payrolls. Any reduction in payrolls will be accompanied by business casualties which will affect the general economy, income, and the tax revenues of the district. From my experience and work with our operating company in Sweetwater County, it is my opinion that these observations would apply to that area also.

I, along with other associates in Lincoln County, have a great fear that anything affecting the vigorous performance by the Union Pacific Railroad throughout this area will have a very serious affect upon the continuing prosperity of this district, as well as upon the operations of our own companies.

[fol. 2217] VERIFIED STATEMENT No. 73

Statement of R. J. Hofmann

I have been a resident of Cheyenne all of my life, having been born in that city over fifty-five years ago. At the present time I am President of the American National Bank of Cheyenne and owner of the Cheyenne Elevator and interested in various other business in Cheyenne. I have, for many years, been active in various civic organizations and am at present a director of the Chamber of Commerce. I feel that because of my long residence and business and civic activities I am familiar with the population of the city, its business and living conditions.

In my opinion, Cheyenne is essentially a Union Pacific city. Employees and their families probably represent conservatively 20% of the population of Cheyenne. Based on a population of 35,000, there are probably 7,000 dependent directly uopn the Union Pacific for their livelihood.

Over the years the Union Pacific employees in Cheyenne have been home owners. Many of them have lived here for years and have brought up their families in the community and consider themselves a part of the community.

Anything which might displace 250 employees in Cheyenne earning over a million dollars a year, or any other substan-

final displacement of such employees, is of vital importance to the city. Loss of employment by such persons in the city would be only a beginning of the final results. Other [fol. 2218] persons supporting such employees in one way or another would also lose their employment, and in the same manner loss of further personal income would result in the community.

Business of all kinds would be adversely affected by such loss of employment and personal income in the community. Private public utility service would be adversely affected. The municipal bonds will feel the effect. Our tax structure would be affected because the potential ability of taxpayers to pay their taxes would be involved. The Union Pacific itself is a taxpayer. Its employees are taxpayers and other taxpayers are likewise affected.

Since the war a number of new schools have been built in Cheyenne to take care of the increase in the number of children of school age. These schools were financed by means of bond issues. Should a number of Union Pacific employees be removed from Cheyenne due to diversion of traffic over the D&RGW we might be in a position of having difficulty in taking care of these bond issues because of the shrinkage in taxes. It would definitely be detrimental to the public interest to have such a shrinkage in values therefore in taxes.

No one in Wyoming questions that the Union Pacific furnishes transportation facilities of the highest quality. Such facilities are adequate and efficient. If they were not [fol. 2219] I would hear complaints and I do not hear complaints of any substantial character.

In my feed business I ship salt from Salt Lake City and the existing facilities are sufficient for that purpose and I do not need additional facilities over the complainant's lines. With my wide knowledge of shipping conditions in Cheyenne I am sure that other shippers here do not require service over the complainant's lines. My contacts with local railroad users as well as business acquaintances in other states have confirmed my views that the Union Pacific Railroad service is generally considered to be above average for railroads of the country. In our vicinity they have continually furnished adequate and efficient transportation service.

I appear as a witness in behalf of the Cheyenne Chamber of Commerce and in support of the business interests of Wyoming and the communities along the Union Pacific which would be adversely affected and I wish to protest the granting of the relief asked by the complainant.

[fol. 2220] VERIFIED STATEMENT No. 74

Statement of E. D. Crippa, Rock Springs Wyoming, Representative of Rock Springs Chamber of Commerce

At a recent meeting of the Rock Springs Chamber of Commerce I was selected as one of the witnesses to appear in behalf of the Rock Springs Chamber of Commerce in opposition to the opening of the Ogden Gateway to the Denver & Rio Grande Western.

My name is E. D. Crippa, I am fifty-one years of age, reside at Rock Springs, Wyoming. I was born in Rock Springs, Wyoming, and have spent my entire lifetime in Rock Springs, Wyoming. I have seen Rock Springs develop from a rough coal camp to a modern up-to-date city. I can remember when Rock Springs had dirt streets, a few wooden sidewalks, and all the plumbing was outside. Today we have many paved streets, storm sewers and sanitary sewers, cement sidewalks, and modern up-to-date stores and markets.

At the present time, I am a partner and manager of the Crippa Motor Company, which is a Ford dealership and general garage. I have been in the automobile and garage business for the past sixteen years. For thirteen years prior to that, I was manager of the Union Mercantile and Supply Company, a general merchandise store in Rock Springs, Wyoming. At this time, I am President of the North Side State Bank of Rock Springs, Wyoming, which is considered the working men's bank in Rock Springs.

The City of Rock Springs had an official population in 1940 of 9680 people, today it is estimated to have between 10,000 and 12,000 people. Rock Springs to-day as in the past 50 years or more is dependent in most part upon the coal mines in this area. There are five Union Pacific Coal

[fol. 2221] Company mining districts in Sweetwater County. The Rock Springs mines, located within the City; Reliance, approximately 8 miles from Rock Springs; Stansbury, approximately 10 miles from Rock Springs; Winton, approximately 14 miles from Rock Springs; and Superior, approximately 26 miles from Rock Springs. Although most of the 2400 men employed in these five mining districts are employed in the four districts outside of the city limits more than one-half of these employees and their families actually reside in Rock Springs and commute to the camps. Even though the Union Pacific Coal Company maintains a commissary in each of the camps, all of the people who reside in the camps do most of their trading in Rock Springs. There are no banks and no automobile dealers in any of the camps. There are no stores or other business establishments in any of the camps, other than the Coal Company commissaries, except in the Town of Superior, which does have a few small stores in an adjoining Town known as the Town of South Superior.

It can be readily seen that Rock Springs is very dependent upon the amount of employment in the coal mines and railroad. It has been my observation, during the time I have been in business in Rock Springs, that the prosperity of Rock Springs and all its people is directly based upon the volume of business of the Union Pacific Railroad Company, which is in turn reflected in the amount of coal produced by the Union Pacific Coal Company.

We have been informed that the opening of the Ogden Gateway to the Denver & Rio Grande Western would result [fol. 2222] in a decrease of the amount of business handled by the Union Pacific Railroad across the State of Wyoming and through the City of Rock Springs. It has been estimated this decrease might amount to 4 trains eastbound and 4 trains westbound per day. Such a reduction in number of trains would in turn result in the reduction of amount of coal that would be produced by the Union Pacific Coal Company for the operation of these trains. It has been estimated that this might result in a reduction of 400,000 tons of coal per year to be mined in the Rock Springs area. This would reduce the number of miners needed to mine the coal and the number of railroad people to transport the

coal, and would in turn reduce employment in other businesses in the community. It has been estimated that this would reduce employment between 300 to 400 men. Based upon the average working man's family in our community this would mean the displacement of between 1500 and 2000 people.

As previouly stated, the principal backbone of our community is the payroll of the Union Pacific Coal Company mines and the Union Pacific Railroad, and any reduction in their business, no matter how small, has a damaging effect upon the people of Rock Springs. A substantial reduction, as would result from the diverting of traffic from the Union Pacific Railroad Company by reason of the opening of the Ogden Gateway, would have a very serious effect on every workingman and every business man in Rock Springs. From my past experience, it is my belief that such a substantial reduction would result in a number of business failures in [fol. 2223] our community, and of course, a substantial loss in all property values and the general economy of our community would be seriously disrupted.

We have discussed this matter at many meetings of our Rock Springs Chamber of Commerce and we are unable to see where the public interest would be benefited by the opening of the Ogden Gateway to the Denver and Rio Grande Western thereby permitting the diversion of traffic from the Union Pacific Railroad Company with the result that the general economy of our community would be seriously disrupted.

We also wish to point out that although the amount of traffic diverted might represent only a small percentage of the overall traffic of the Union Pacific Railroad, insofar as Rock Springs is concerned it would be a very important part.

In view of the foregoing, in behalf of the Rock Springs Chamber of Commerce, and individually, I wish to protest against the opening of the Ogden Gateway to the Denver and Rio Grande Western, for the reason that the public interest would not be benefitted when the adverse effects upon Rock Springs, Sweetwater County and the State of Wyoming are considered.

[fol. 2224] VERIFIED STATEMENT No. 75

Statement of John W. Hay, Jr.

My name is John W. Hay, Jr. My home is in Rock Springs, Wyoming. I am President of the Rock Springs National Bank, President of the Rock Springs Grazing Association, and President of the Blair and Hay Land and Livestock Company. I was born and reared in Rock Springs and have spent my entire life there.

Rock Springs is a coal mining community. Most of the tonnage of coal is produced in mines operated by the Union Pacific Coal Company to furnish fuel for the Union Pacific Railroad Company.

I have seen a copy of the testimony of Mr. Earley, a witness for the Rio Grande at the Salt Lake hearing in this proceeding in which he testified that if the through rates through the Ogden Gateway were granted in this proceeding there would be over 157,000 carloads of freight per year available to the solicitation of the Rio Grande over their lines. I assume that the Rio Grande could solicit all, or a substantial portion, of this traffic. Union Pacific witnesses have testified at this hearing that if that amount of potential traffic were diverted to the Rio Grande it would have the following results in Sweetwater County: as many as 100 railroad workers in this county would be displaced; the amount of coal needed by the railroad would be reduced by approximately 400,000 tons annually, resulting in a reduction of as many as 260 Union Pacific Coal Company miners. Such a reduction or any substantial reduction in employment, would have a serious effect on the economic [fol. 2225] well being of Rock Springs and Sweetwater County.

Payrolls from the coal mining industry and the railroad industry in Sweetwater County constitutes a very substantial part of the total income of the county. I would say that the payroll income from those two industries constitutes over 60% of the total income in the county.

At the present time there are no industries in our area that would be capable of supplying work to these men laid off by the coal companies and the railroad, and the workers would find it necessary to go to other localities to find new

employment. The Union Pacific Coal Company pre-war production was about 3,000,000 tons of coal annually; this was doubled during the war years, we are now back on a 3,000,000 ton production schedule, and we have had assurance from the railroad management that they wish to retain the coal-burning power in the eastern territory of the railroad, so our merchants have felt the coal production should remain around the 3,000,000 ton annual figure. The proposal of the Denver and Rio Grande Railroad would reduce traffic and would cause permanent loss to the number of workers in this community, and I strongly oppose that.

I have been in the ranching business in Sweetwater County for some 25 years. Adequate, fast transportation is essential to the livestock industry to move cattle or sheep to the markets or feed lots with the least possible delay or the least possible shrinkage. The Rock Springs stockyards load from 550 to 700 carloads of livestock each year. [fol. 2226] Most of this stock is trucked or trailed to Rock Springs from the Jackson Hole Area in Teton County to the north some 186 miles, from the Pinedale area in Sublette County 100 miles to the north, or from that area along the Colorado-Utah-Wyoming line south of Rock Springs and Green River, to be shipped to market on the Union Pacific Railroad. This livestock arrives at the stockyards at various times of the day and night and it is to the advantage of the livestock people to have this loaded and moved as soon as possible.

It has been the practice of the Union Pacific Railroad to stop freights at Rock Springs in order to pull out the loaded cars of livestock and speed them on their way to the feed lots or packing plants as rapidly as possible. More trains operating means better service to the grower, less shrinkage, and more dollars per animal. The livestock growers in our section are opposed to any change that would result in fewer freight trains and less desirable livestock service.

I sincerely believe that the opening of the Ogden Gateway to the Denver and Rio Grande Western would result in a reduction of coal production in the Rock Springs area. It in turn would reduce the employment substantially and that such a reduction would seriously disrupt the economy of Rock Springs and Sweetwater County, Wyoming. In

addition, it would result in less service to the livestock shippers, therefore, as a business man, a livestock man and a citizen vitally interested in Rock Springs and Sweetwater County, Wyoming, I wish to protest against the opening of [fol. 2227] the Ogden Gateway to the Denver and Rio Grande Western, on the basis that the public interest would not be benefitted when the adverse effects upon the people of Rock Springs, Sweetwater County and State of Wyoming, are considered.

[fol. 2228] VERIFIED STATEMENT No. 76

Statement of John A. Reed

I live at Kemmerer, Wyoming. I have lived in Wyoming for thirty-eight years. I am engaged in the banking, livestock and coal business. At the present time I am President and Director of the First National Bank of Kemmerer and of the Bear River Mercantile Company of Cokeville, Wyoming, also of the Continental Live Stock Company of Cokeville, Wyoming. I am owner of the business known as J. A. Reed & Son Cattle Breeders, Cokeville, Wyoming. I am President and Director of the Pinnacle-Kolorado Coal Company of Denver, and Director of the State Bank of Big Piney, Wyoming. I am associated with the Kemmerer Coal Company and its associated interests in Lincoln County, Wyoming. I am Vice President and a member of the Executive Committee of the National Wool Growers Association; member of the American National Live Stock Association; Past President and a present member of the Finance Committee of the Wyoming Wool Growers Association; Banking Committee Chairman of the Central Western shippers Advisory Board and Past Chairman of that Board; Member of the National Live Stock Tax Committee representing Wyoming and the National Wool Growers Association and the Wyoming Stock Growers Association; Member of the Board of Trustees of the University of Wyoming. I was formerly State Examiner of the State of Wyoming.

My business interests keep me in contact with economic [fol. 2229] conditions in Wyoming in general, and in par-

ticular with the situation in the southern part of the State served by the Union Pacific railroad.

I have been greatly disturbed over the so-called Ogden Gateway case because of the testimony given by the Denver & Rio Grande Railroad at the Salt Lake hearing to the effect that there is a traffic potential of over 150,000 carloads of traffic per year which is subject to diversion to the Rio Grande. I understand such diversion could result in loss of employment of as many as 750 railroad and mine workers in Wyoming. This would have a serious effect upon the economy of the State and particularly the southern part of the State. The development of southern Wyoming has been linked through the years with the progress and development of the Union Pacific railroad. The diversion of any substantial amount of traffic to the Rio Grande as the result of this proceeding would necessarily have an adverse effect upon the general economy and the tax structure of Wyoming. If such diversion should result in the loss of four trains per day each way through Kemmerer, as it is anticipated it may, then such loss would affect railroad employment in Kemmerer where I live and have my business headquarters. Employees who might be displaced here would find it difficult to get other employment as there is limited industrial development in this area.

[fol. 2230] The range livestock business is dependent upon available and rapid transportation for shipment to market. Numerous train schedules are advantageous so that shipments can be made promptly when they are ready for loading and brought as quickly as possible to the market to avoid shrink and other loss. Reductions of train schedules are not conducive to the continuance of good livestock transportation service.

In general the granting of the relief sought in this proceeding would not be in the public interest for the following reasons:

(1) It is not to the public interest to divert business established in an area which has become dependent upon that business, to another area which is in nowise dependent upon it.

(2) It is contrary to the public interest in Wyoming to affect such a payroll loss as would be involved here.

(3) The industrial loss to Wyoming could not be replaced.

(4) The tax structure built up to support the business involved would be torn down or adversely affected.

For the foregoing reasons I protest the granting of the relief sought by the complainant in this proceeding.

[fol. 2231] BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

REPORT AND ORDER

Submitted October 16, 1952. Decided January 12, 1953.

1. Through routes and joint rates found necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with complainant, on certain commodities from and to points in the excluded territory in the northwest area as described in the report, to and from points in official, southern, and southwestern territories, including Missouri and a portion of Iowa.

2. Rates on the same commodities from and to the same points over complainant's routes via Ogden or Salt Lake City, found unreasonable and unduly prejudicial to and preferential of shippers and receivers.

3. Maintenance by defendants of joint rates between points in the northwest area, on one hand, and points on the Bamberger Railroad south of Ogden on the other hand, while refusing to participate in like rates to and from the same points on the line of complainant south of Ogden, found to subject complainant to unlawful discrimination.

4. Order entered requiring removal of unlawfulness found to exist and establishment of through routes and joint rates found reasonable.

[fol. 2232] Robert E. Quirk, Otis J. Gibson, and H. L. Mulliner for complainant.

Elmer B. Collins, L. H. Anderson, John B. Burchell, Robert H. Bierma, L. E. Clarahan, F. H. Cole, Jr., Eugene S. Davis, Lee S. Davis, P. H. Draver, F. G. Fitzpatrick, P. F. Gault, R. J. Hagman, L. W. Hobbs, Roland J. Lehman, B. P. Leverich, James E. Lyons, E. F. McGuire, F. J. Melia, Conrad Olson, W. R. Rouse, James S. Souby, Jr., Carson L. Taylor, and L. E. Torinus, Jr., for defendants.

C. A. Miller for American Short Line Railroad Association; Chas. B. Bowling, Carl R. Bullock, Henry A. Cockrum, and J. L. Pease for Secretary of Agriculture; Ralph C. Horton, John H. Winchell, Joseph W. Hawley, T. S. Wood, and Ralph Sargent, Jr., for Public Utilities Commission of the State of Colorado; W. B. Joy, H. N. Beamer, B. Auger and L. F. Purvis for Public Utilities Commission of Idaho; Byron M. Gray for State Corporation Commission of the State of Kansas; Edwin S. Booth and Sidney T. Smith for Board of Railroad Commissioners of the State of Montana; Clarence S. Beck, Harold A. Palmer, Bert L. Overcash, and Harry C. King for State of Nebraska and Nebraska State Railway Commission; John H. Carkin and Thomas W. Dench for Public Utilities Commissioners of Oregon; Smith Troy, Phil H. Gallagher, Joseph Starin, and Bartlett Burns for Washington Public Service Commission; Norman B. Gray and Jefferson C. Church for the State Board of Equalization and Public Service Commission of Wyoming; Hal S. Bennett, Donald Hacking, W. R. McEntire, and Chas. A. Root for Public Service Commission of Utah; and George F. Guy for the City of Cheyenne, Wyo., interveners.

Calvin L. Blaine, Chas. E. Blaine, Maurice H. Greene, Alden T. Hill, E. E. Kohlwes, Lowe P. Siddons, Reginald T. Titus, and Lee J. Quasey for other interveners.

[fol. 2233] REPORT OF THE COMMISSION

By the Commission:

Exceptions to the report proposed by the examiner were filed by the complainants, the defendants, and certain interveners, and the issues were twice argued orally. Our conclusions differ in part from those recommended. Ex-

ceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant, sometimes called the Rio Grande, a common carrier by railroad operating in interstate commerce within the States of Colorado, Utah, and New Mexico, requests us to order the Union Pacific Railroad Company, which with its leased lines is referred to as the Union Pacific System or the Union Pacific, and the other defendants, to establish and maintain for the future just, reasonable, and non-discriminatory competitive joint through rates [1] and charges for the transportation of freight in connection with the complainant through Lake Salt City or Ogden Utah, referred to as the Ogden gateway. More particularly, we are asked to require the defendants to establish such joint rates on freight traffic in connection with the complainant through its Colorado and Utah gateways, (1) between (a) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington, [2] and British Columbia, Canada, and (b) Colorado common points and points east thereof; and (2) between Utah common points and the northwest territory specified in 1(a).

[fol. 2234]. No evidence was submitted with respect to rates from or to British Columbia, and such rates will not be considered.

Interveners in support of the complaint include the Secretary of Agriculture of the United States, the public utility commissions of the States of Colorado and Utah, the American National Live Stock Association, other livestock and stock-feeder associations, various shippers' and producers' association , milling companies, farm bureaus, chambers of commerce, and certain groups of employees of the complainant.

Interveners in support of the defendants include the State

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[1] Rates and rate differences named herein are per 100 pounds and are those in effect at the time of the hearing herein.

[2] This area is referred to in this report as the northwest area or territory.

of Nebraska, City of Cheyenne, Wyo., the public utility commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska, and Kansas, various chambers of commerce and other associations, certain employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago and North Western Railway Company and the Wabash Railroad Company.

In its exceptions to the proposed report, the State Corporation Commission of the State of Kansas took the position that the recommended finding that joint rates should be established over the existing through routes by way of Ogden and the Rio Grande is amply sustained by the evidence with respect to the rates on wheat and livestock but not otherwise, and that the recommended findings as to commodities generally are too broad in scope.

The Public Utility Commission of the State of Idaho intervened but presented no evidence. It filed a brief in which it took the position that the relief sought by the complainant should be denied, except that joint through competitive rates should be required to be established via Ogden and the Rio Grande on livestock and fruits and vegetables.

[fol. 2235] We granted a petition for leave to intervene filed by the American Short Line Railroad Association. That association appeared in support of the complaint and was represented at the hearing and the oral argument, but offered no evidence. The defendants filed a petition for reconsideration of the order permitting intervention. The request was denied at the hearing, but it is renewed on brief. It appears that 44 of the defendants named in the complaint are members of the association and that 8 defendant members are subsidiaries under common control and management with other defendants. Additional facts were developed at the hearing with respect to the relation of certain members of the association as defendants and indicating that they, as well as some others, opposed the complaint. The association filed a brief from which it appears that it has a current membership of 314 common carriers by railroad and that the association as such and many of its members are interested in the issues presented in the complaint. The intervention sought and granted was by the association as such, and not by or in behalf of the respective members thereof named herein as defendants. The peti-

tion of intervention was properly granted, and the petition for reconsideration is denied.

Immediately prior to the oral argument, counsel for the defendants submitted a memorandum of additional authorities and discussion relating to certain exceptions filed by the Union Pacific to the proposed report of the examiner. The complainant and certain interveners objected to the receipt of the document. Our rules of practice do not permit the submission of such a document so late in the proceeding. Permission to file it was not requested in time to permit opposing parties to examine it and to make reply thereto prior to the oral argument when the proceeding was finally submitted. The objection to its receipt in the proceeding is sustained.

[fol. 2236] The complainant alleges that the defendants' failure and refusal to join with it in establishing joint rates to and from the territories described on transcontinental and other traffic through the gateways referred to result in violations of sections 1(4) and 3 of the Interstate Commerce Act, and is contrary to the national transportation policy as declared by the Congress. We are asked to prescribe just and reasonable rates over the Rio Grande routes to remove the alleged unlawfulnes

Transcontinental rates apply between points in the Pacific coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions of restrictions, the rates generally apply over all routes, but there are many exceptions. The principal ones of importance in this proceeding are those under which the Union Pacific for the most part restricts routing on traffic to and from points in Utah north of Ogden and in Idaho, Montana, Oregon, and Washington over its lines so that it may obtain the long haul from and to the Missouri River. On transcontinental traffic that moves over its lines to and from California, Nevada, and portions of Utah, the Union Pacific participates in through routes and joint rates with other lines, includ-

ing the Rio Grande. On that traffic interchange is made with the Rio Grande at Salt Lake City and Provo, Utah. [fol. 2237] As hereinafter explained, the Rio Grande participates in joint rates on transcontinental traffic with all of its connections at its Utah junctions, except the Union Pacific, from and to the western portions of the northwest area. Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect, close the Ogden gateway in a commercial sense. We are asked, to exercise our authority under section 15(3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest.

The power to establish through routes and joint rates is limited by the provisions of section 15(4), which declares that, except as provided in section 3 of the act, and except where one of the carriers is a water line, we may not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless we find that the through route proposed is needed in order to provide "adequate, and more efficient or more economic, transportation." The foregoing pro- [fol. 2238] visions are subject to the further proviso that in prescribing through routes, we shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. The section further provides that no through route and joint rates applicable thereto shall be established by us

for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15(4) are not applicable and need not be considered. It further contends that the principal task here is to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such through routes are unjust, unreasonable, or discriminatory, in violation of sections 1 and 3 of the act, and contrary to the national transportation policy. The complainant argues that there is public need for joint rates via the Ogden gateway equal to the joint rates now maintained by the defendants over the competitive routes, and that the public interest as well as the national transportation policy will be served by the establishment of such rates.

Through Routes

The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute "through routes" as that term is used in section 15(3) and (4) of the act. As above stated and [fol. 2239] as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.

In *Thompson* v. *United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the content of the term "through route" as used in the act, upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr.* v. *Missouri Pacific R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on

grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15(1) of the act. The Court held:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. * * * Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route.

[fol. 2240] The Court cited with approval *Beaman Elevator Co.* v. *Chicago & N. W. Ry Co.*, 155 I. C. C. 313, wherein the Comission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, "that one shipment was not representative of the carriers' course of business". It thus becomes necessary to determine whether the carriers in this proceeding "hold themselves out as offering through transportation service" from and to the points here concerned via the Ogden gateway as indicated by their "course of business" in respect of traffic over the routes in question.

The evidence shows that 37 carload shipments were made

in 1948, which may be accepted as a representative year, on through bills of lading from Origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment, paper bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that two carloads of canned salmon moved from Seattle, Wash., to Provo, two carloads of acid from Dupont, Wash., to Louviers, two carloads of canned goods from Logan, Utah, to Denver, two carloads of sheep from Bellevue, Idaho, to Pueblo, three [fol. 2241] carloads of lumber from McCall, Idaho, to Salt Lake City, three carloads of canned goods from Logan to Pueblo, and six carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

Westbound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two

of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destination so as to avoid paying the applicable combination rates on Ogden.

In that same year, 21 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly-used routes to the routes here sought to be opened commercially. For ex- [fol. 2242] ample, in February 1949, when the main line of the Union Pacific in Wyoming was blocked by snow storms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute "through routes" within the meaning of that term as used in the act.

So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so

by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is [fol. 2243] now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads eastbound, none to destinations east of Colorado common points, and 18 carloads westbound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co.* v. *Chicago & N. W. Ry Co., supra,* cited with approval by the Supreme Court in *Thompson* v. *United States, supra.* Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, as result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson* v. *United States, supra.*

We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic [3] here concerned, and that

[3] Except on eastbound shipments of sheep or goats, to which reference is made later in this report.

any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order [fol. 2244] to provide adequate, and more efficient or more economic transportation.

The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15(3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together.

Before proceeding to a discussion of the evidence relating to the foregoing issues, we shall give consideration to a procedural contention and a motion made by the defendants. The contention is that an allegation of undue prejudice and preference under section 3(1) of the act is not properly before us. As stated, the complaint embodies an allegation, among other things, of violation of section 3, without specifying any particular paragraph or paragraphs of that section. We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3(1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con, was received on this issue and we think it has been fairly tendered here for decision.

[fol. 2245] The motion is that the complaint be dismissed on the ground that the request of the complainant for joint rates over the Rio Grande via the Ogden gateway is for the purpose of assisting that carrier to meet its financial needs. As stated, section 15(4) of the act forbids us to require the establishment of any through route and joint rate applicable thereto for the purpose of assisting any car-

rier that would participate therein to meet its financial needs. Consistently throughout the proceeding, the complainant disclaimed any intent to prosecute the complaint with the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion is overruled.

[fol. 2246] Proponents' Testimony

Joint rates now apply via the Ogden gateway over the Rio Grande on traffic from and to Colorado common points and points east thereof to and from California and certain Pacific coast points in connection with the Union Pacific, the Southern Pacific Company, The Western Pacific Railroad Company, and The Great Northern Railway Company, as more particularly described later.

The Union Pacific with its leased lines has operated since January, 1936, as a single system. It consists of the Union Pacific Railroad Company operating from Omaha, Nebr., and Kansas City, Mo., to Ogden via Julesburg, Colo., Cheyenne and Granger, Wyo., and via Limon and Denver, Colo., and Cheyenne; the Oregon Short Line Railroad Company operating in Utah north of Ogden, and in Wyoming, Idaho, Oregon, Montana, and Nevada, extending from Salt Lake City to Butte, Mont., and Huntington, Oreg.; the Oregon-Washington Railroad and Navigation Company operating in Idaho, Oregon, and Washington north and west of Huntington to Spokane, Wash., Portland, Oreg., and Seattle, Wash.; the Los Angeles & Salt Lake Railroad Company from Salt Lake City to Los Angeles, Calif.; and the St. Joseph & Grand Island Railroad Company in Kansas, Nebraska, and Missouri from St. Joseph, Mo., and Grand Island, Nebr. Lease of the properties of the foregoing roads, which had been operated with the Union Pacific under common control and management, was considered and approved in *Union Pac. R. Co. Unification*, 189 I. C. C. 357 (1933) and 207 I. C. C. 543 (1935).

[fol. 2247] The railroad now operated by the complainant was originally the Denver, Rio Grande Railway organized in 1870 as a narrow-gauge line. After passing through

various hands and receiverships, the Denver and Rio Grande Railroad Company was organized in 1886 to operate the property. When the main line was converted to standard gauge in 1890, the railroad was opened for through traffic between Denver and Ogden by way of Pueblo, Rio Grande, and Tennessee Pass, Colo. Prior to that date, the Rio Grande could participate in transcontinental traffic only by transferring the lading to its narrow-gauge cars. In 1901, it acquired the Rio Grande Western Railroad Company operating between Grand Junction, Colo., and Ogden via Provo and Salt Lake City.

Although opened for through business, the line was handicapped by the fact, among others, that traffic originated at or destined to its Colorado gateways or east thereof could not be interchanged at joint through rates at Ogden or Salt Lake City with its connection, the Oregon Short Line, to or from points on that line in Utah north of Ogden and through southern Idaho to Butte and Huntington. Also, traffic from and to Oregon over the Southern Pacific, to or from Colorado common points and east, could not be transported over the Rio Grande at joint rates equal to those over competitive routes. In 1897, however, the Union Pacific and its controlled lines, the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company operating north and west of Huntington, were in separate receiverships. In that year the two lines last named established joint through rates to and from points in the northwest area with the Rio Grande via Ogden and thus opened that gateway at rates equal to the rates then in effect over the Wyoming line of the Union Pacific through [fol. 2248] Cheyenne and Granger. Those rates applied on traffic between the Pacific coast terminals, including Portland, Tacoma, and Seattle, and Missouri and Mississippi River points and numerous points east thereof.

In the same year, the Oregon-Washington Railroad and Navigation Company established joint through rates between its Oregon and Washington stations and points on, or reached by, the lines of the Great Northern and Northern Pacific Railway Company through Spokane and Wallula, Wash. Joint rates through those junctions from and to Union Pacific stations have been continued in effect.

Ogden remained as an open gateway through which joint rates over the Rio Grande applied until 1906, when such rates were canceled by the Union Pacific from and to Colorado common points and east, to and from points in Montana, Idaho, and Oregon on the Oregon Short Line and its connections. In 1912, transcontinental freight rates to and from points on the Oregon-Washington Railroad and Navigation Company (resulting from reorganizations in in the interval) over the Rio Grande and its Utah junctions were also canceled. During this period the Southern Pacific was controlled by the Union Pacific and that circumstance greatly influenced the routing of freight and passenger traffic over the Union Pacific to and from Oregon and California. As a result of competitive stresses, as well as for other reasons, the Rio Grande financed the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast. The Western Pacific was opened in July, 1911, and participates in through routes and joint rates on transcontinental traffic via Salt Lake City with the Rio Grande and the Union Pacific, its two connections at that point. In 1912, the Union Pacific was [fol. 2249] required to divest itself of control of the Southern Pacific. *United States* v. *Union Pacific R. Co.*, 226 U.S. 61.

Through passenger fares also were in effect over the lines of the Union Pacific and the Rio Grande via the latter's Colorado and Utah junctions from 1897 to 1915, when they were canceled by the Union Pacific. *The Ogden Gateway Case*, 35 I.C.C. 131.

In 1915, the Western Pacific, and in 1918, the Rio Grande, went into receivership. After various changes, the latter was reorganized on April 11, 1947, as The Denver and Rio Grande Western Railroad Company. *Denver & Rio Grande Western R. R. Reorganization*, 267 I.C.C. 862. As a part of its reorganization on that date, the Rio Grande merged with the Denver and Salt Lake Railway Company, and thereby acquired the Moffat Tunnel line of that carrier. By that line and the Dotsero cutoff, completed in 1934, from Orestod, Colo., on the Denver & Salt Lake to Dotsero, Colo., on its own line, the Rio Grande obtained a route from Denver to Ogden 175 miles shorter than its route through Pueblo.

The Rio Grande now operates between Denver and Ogden over the two routes. By way of the Moffat Tunnel the distance is 607 miles, and the other route through Pueblo is 782 miles. These two are the main lines and constitute 951 miles, or 51 percent, of the Rio Grande standard-gauge tracks. In addition, there are 1,452 miles of branch lines, of which 527 miles are narrow gauge serving western Colorado and northwestern New Mexico in areas of small population and light traffic. In all, it operates about 2,400 miles of road.

[fol. 2250] Eastern connections of the Rio Grande are in Colorado at Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad. At Denver, it connects and interchanges traffic with the Union Pacific, the Chicago, Burlington & Quincy Railroad Company, called the Burlington, the Chicago, Rock Island and Pacific Railroad Company, called the Rock Island, The Atchison, Topeka and Santa Fe Railway Company, called the Santa Fe, and The Colorado and Southern Railway Company, of the Burlington system. At Colorado Springs, 75 miles south of Denver, it interchanges with the Rock Island and the Santa Fe. At Pueblo, 119 miles south of Denver, it interchanges with the Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), the Santa Fe, and the Colorado & Southern. At Walsenburg, 51 miles farther south, it interchanges with the Colorado & Southern. At Trinidad, a short distance from the Colorado-New Mexico State line and 92 miles south of Pueblo, it interchanges with the Colorado & Southern and the Santa Fe.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City, and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City, 37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line.

Since 1890, when its standard-gauge line was completed between Denver and Ogden via Pueblo, the Rio Grande, through its eastern and western connections, has been a part of several transcontinental routes. It now participates in through routes and joint rates on equal terms with other

carriers on transcontinental traffic between (1) points in [fol. 2251] an area generally described as west of a line beginning at Vancouver, British Columbia, thence south, just east of Seattle and Portland, and southeasterly to a point west of Ogden and Salt Lake City, crossing the line of the Union Pacific at Lynndyl, Utah, 118 miles west of Salt Lake City, and thence southwesterly, east of the Union Pacific's Los Angeles line, to a point south of San Diego, Calif., and (2) all points in the United States east of a line beginning at the Canadian border and extending southward along the Montana-North Dakota State line and the western border of South Dakota, thence southwesterly through the extreme southeastern portion of Wyoming, west of Cheyenne, and the eastern part of Colorado just west of Denver, Pueblo, and Trinidad, thence southwest and south through the central or western part of New Mexico to a point just west of El Paso. However, joint rates generally do not apply in connection with the Rio Grande on transcontinental traffic originating at or destined to points in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington east of the line first described. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande such traffic would move at higher combinations of rates to and from Ogden or Salt Lake City.

The area in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington, to and from which joint rates generally do not apply in connection with the Union Pacific and the Rio Grande, will be referred to as the excluded territory. Transcontinental traffic to or from such territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than over the Rio Grande route, because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio [fol. 2252] Grande route. The Rio Grande desires to participate as a bridge line on such traffic via its Colorado gateways and Ogden at the joint through rates. This also would include traffic to or from points in the excluded territory on lines which join with the Union Pacific in joint rates.

Representative origins, destinations, commodities, rates, distances, average loadings per car, and revenues per car-

mile are shown in an appendix to this report, for eastbound and westbound movements, compiled from exhibits of record. The distances shown are those over existing routes over the Union Pacific and its connections by which joint through rates apply, and over the Rio Grande and its connections over which combination rates apply. Revenues per car-mile are computed for such rates and distances and, in addition, for the distances over the Rio Grande at joint rates on the same basis as those over the Union Pacific routes, as sought herein.

Traffic between the excluded territory and Colorado common-point territory (points in eastern Colorado from Denver south to Trinidad and west to Canon City) generally must move over the Union Pacific through Denver to get the lowest rate. Similarly, traffic between the excluded territory and Utah common-point territory (points in Utah from Ogden south to Provo and Payson) generally must move over the Union Pacific to get the lowest rate. There are some exceptions, however, with respect to rates between Utah common points on the Rio Grande and the northwest area on livestock, lumber, grain, and other commodities.

[fol. 2253] An analysis of distances from and to five representative points [4] on the Union Pacific in Utah north of Ogden, and in Idaho and Washington, to 14 destinations, Denver and east, over restricted routes of the Union Pacific for distances, computed over the short routes, ranging from 649 miles to Denver to 3,279 to Boston, Mass., shows that routes via Ogden and the Rio Grande to the same points are longer by from 1 percent (from Spokane to New Orleans, La.) to 16 percent (from Idaho Falls to Kansas City). To the same destinations from 9 other representative points [5] on the Union Pacific, from which through routes and joint rates are available in connection with the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, referred to as the Milwaukee, the Great Northern, the Northern Pacific, or the Southern Pacific, the routes via

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[4] Logan, Utah; Boise, Idaho Falls, and Twin Falls, Idaho; and Spokane, Wash.

[5] Hood River, Milton, Pendleton, Portland, Elgin, and Redmond, Oreg., and Yakima, Kent, and Seattle, Wash.

Ogden and the Rio Grande would be longer than the short workable and service routes by from 4 percent (from Seattle to Fort Worth, Tex., and Oklahoma City, Okla.) to 37.5 percent (from Yakima to Minneapolis, Minn.). To Minneapolis from 7 of the 9 origin points, the routes via the Great Northern form the short workable and service routes.

The Ogden gateway routes of the Union Pacific consist of two lines. The Los Angeles line runs southwesterly through Salt Lake City, Provo, and Delta, Utah, Caliente and Las Vegas, Nev., and Barstow, Calif., to Los Angeles. Through routes with joint rates are maintained over that route in connection with the Rio Grande, as hereinbefore [fol. 2254] described. The other line of the Union Pacific runs north from Ogden, 111 miles to McCammon in southeastern Idaho. At that point it meets the Wyoming line of the Union Pacific leading west 186 miles from Granger, the junction point with the main line through Cheyenne to Ogden from the east. From McCammon the line extends north to Pocatello, Idaho, 22 miles, and from that point the main line runs in a northwesterly direction across Idaho into Oregon and Washington. From Pocatello another line extends northerly to Butte. From Cheyenne, the main line extends east across Nebraska to Omaha, 507 miles, and south to Denver, 109 miles. From Ogden through Granger to Cheyenne the distance is 483 miles.

All shipments to or from points in Idaho, Montana, Oregon, and Washington north or west of McCammon over present Union Pacific routes, or over routes through Ogden and the Rio Grande, must pass through McCammon. That point, therefore, is used as the point of divergence in computing distances over the Union Pacific routes and the routes over the Rio Grande by way of Ogden. A shipment from McCammon over the Union Pacific to Cheyenne would move 529 miles; and to the Denver gateway, also over the Union Pacific, 623 miles. But over the Union Pacific to Ogden, thence the Rio Grande to the Denver gateway, the shipment would move 718 miles, or 198 miles farther than over the Union Pacific route to Cheyenne and 95 miles farther than over its route to Denver. On shipments carried through to the Missouri River and points east, the Union Pacific route through Cheyenne also has the advantage in distance.

[fol. 2255] From Cheyenne to Kansas City a shipment would move 624 miles, as compared with 636 miles for a movement off the Rio Grande from Denver to Kansas City over the Rock Island, its short-line connection. A through shipment, therefore, from McCammon to Kansas City over the direct line of the Union Pacific through Granger and Cheyenne would move 1,153 miles, as compared with 1,352 miles, 199 miles longer via Ogden and the Rio Grande to Denver, thence the Rock Island. The latter route on such a shipment would be 17.2 percent circuitous. To points east of Kansas City the maximum excess mileage from McCammon over the Rio Grande route is on a haul to Pittsburgh, Pa. Over the Union Pacific to Omaha, thence the Chicago & North Western to Chicago, Ill., and The Pennsylvania Railroad Company beyond, the haul would be 1,991 miles, and over the Union Pacific to Ogden, the Rio Grande to Denver, the Burlington to Chicago, thence the Pennsylvania, the haul would be 2,203 miles, 212 miles longer, or a circuity of 10.7 percent.

In the following table are shown representative destinations and the distances from McCammon over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming. Joint through rates apply over the latter routes. Over routes that include the Rio Grande higher combination rates apply. The table does not contain complete routing, except over the Union Pacific direct to Omaha and Kansas City. The last column of the table shows the percentages by which the Rio Grande routes are longer, or the circuity, from the point of divergence, McCammon, to the points shown.

[fol. 2256]

From McCammon, Idaho to—	Via Union Pacific	Distance Miles	Via Rio Grande	Distance Miles	Difference Miles	Circuity via Rio Grande Percent
Omaha, Nebr.	2	1,036	3	1,255	219	21.1
Kansas City, Mo.	1	1,153	3	1,352	199	17.2
Minneapolis, Minn.	1	1,396	3	1,593	197	14.1
St. Louis, Mo.	1	1,428	3	1,627	199	13.9
Chicago, Ill.	2	1,524	3	1,735	211	13.8
Pittsburgh, Pa.	2	1,991	3	2,203	212	10.7
Charleston, W. Va.	1	2,018	3	2,218	200	10.0
Columbia, S. C.	1	2,274	3	2,473	199	8.8
Baltimore, Md.	2	2,319	3	2,521	202	8.7
Norfolk, Va.	1	2,438	3	2,637	199	8.2
New York, N. Y.	2	2,477	3	2,674	197	8.0
Tulsa, Okla.	5	1,377	4	1,427	50	3.6
Dallas, Tex.	6	1,456	4	1,489	33	2.3
Fort Smith, Ark.	5	1,458	4	1,538	80	5.5
Memphis, Tenn.	1	1,593	4	1,786	193	12.1
New Orleans, La.	6	1,970	4	2,003	33	1.7
Atlanta, Ga.	1	2,044	4	2,204	160	7.8
Savannah, Ga.	1	2,327	4	2,486	159	6.8

1—Union Pacific through Wyoming to Kansas City.
2—Union Pacific through Wyoming to Omaha.
3—Union Pacific to Ogden, Rio Grande to Denver.
4—Union Pacific to Ogden, Rio Grande to Pueblo.
5—Union Pacific to Pacific Junction, Kans.
6—Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

The differences in the distances to destinations in the Southwest over routes including the Rio Grande from points in the excluded territory, as compared with the Union Pacific routes through Wyoming, are much less than they are to Missouri River crossings and points east and southeast. About 90 percent of the traffic upon which joint through rates are sought via Ogden and the Rio Grande moves to the latter areas, and about 10 percent to the Southwest.

Over its routes through Wyoming, the Union Pacific get its long haul from McCammon to Omaha, 1,036 miles, and to Kansas City, 1,153 miles. If joint rates were prescribed over the Union Pacific to Ogden and the Rio Grande to Denver, the Union Pacific's haul from McCammon to Ogden

on traffic to Omaha or Kansas City and beyond would be 111 miles. However, if such traffic were routed beyond Denver over the Union Pacific, the latter would get a fur- [fol. 2257] ther haul of 560 miles to Omaha via Julesburg, or 640 miles to Kansas City via Salina, Kans., a total haul from McCammon of 671 miles to Omaha or 751 miles to Kansas City. Joint through rates are in effect over that route on sheep from Union Pacific origins in southern Idaho and eastern Oregon, but are 19 cents higher to the Missouri River and east (20 cents to Chicago) than rates over more direct routes of the Union Pacific. That railroad would establish a similar basis on cattle if requested. Over the route in connection with the Rio Grande, it would lose its haul of 529 miles from McCammon to Cheyenne, or 623 miles to Denver. On traffic routed via Ogden, the Rio Grande, and Pueblo to destinations east thereof, the Union Pacific would not be in a position to get any additional haul.

All of the foregoing distances, as stated, are computed from McCammon as the point of divergence. The great bulk of the traffic, however, from the excluded territory in Idaho, Montana, Oregon, and Washington originates or terminates on the Union Pacific or its connections west and north of that junction. On such traffic the Union Pacific would have a substantial haul in addition to that of 111 miles from McCammon to Ogden.

The hauls to Ogden would be, for example, from Lewiston, Idaho, 847 miles; from Centralia, Wash., 937 miles; and from Seattle, 1,029 miles. Over the Union Pacific direct from those respective origins to Omaha, the hauls would be 1,772, 1,862, and 1,954 miles. Those figures show the extent to which the Union Pacific would lose its long haul, the loss in mileage being 925 miles in each instance. [fol. 2258] From and to points in the excluded territory in Oregon and Washington, and on the Burke and Headquarters branches of the Union Pacific in northern Idaho, the Union Pacific and certain other defendants have arrangements for the interchange of traffic in various commodities at junctions or gateways in Oregon, Washington, and Idaho, under joint rates. On traffic through such gateways moving under the joint rates, the Union Pacific in many instances foregoes its long haul. The gateways

through which the rates are in effect, with certain limitations upon their application specified in the tariff, are: Portland, in connection with the Southern Pacific, Marengo, Wash., and Plummer, Idaho, in connection with the Milwaukee; Spokane, in connection with the Great Northern; Wallula, Wash., and Spokane, in connection with the Northern Pacific; and Spokane, in connection with the Spokane International Railroad Company connecting with the Canadian Pacific Railway Company at Eastport, Idaho, at the Canadian border.

Illustrative of the hauls over the Union Pacific on traffic routed through these gateways are the following: From Lewiston, 132 miles via Marengo or 193 miles via Spokane; from Centralia, 393 miles on a route through Marengo; from Seattle, 184 miles through Portland; and from Pendleton, Oreg., 165 miles via Marengo, 227 miles via Spokane, or 70 miles via Wallula, Wash., on traffic routed over its connections at such points. If joint rates were established from the same origin points to Omaha and beyond via Ogden and the Rio Grande, the hauls of the Union Pacific to Ogden would be substantially greater than many of its hauls via other junctions with its connections, as illustrated.

[fol. 2259] For example, from Pendleton, a representative point, on traffic to Chicago the Union Pacific has a haul of 1,560 miles on its route through Omaha, but only 70 miles over an established through route via Wallula and the Northern Pacific and connections. The rates are the same over both routes. Over a route via Ogden and the Rio Grande to Denver, thence the Burlington, the distance is 2,257 miles, or 6.4 percent longer than the route via Wallula and 10.4 percent longer than the Union Pacific route through Omaha. The Union Pacific's haul over the Rio Grande route would be 633 miles. From Pendleton to St. Louis, the Rio Grande route sought would be shorter by 168 miles than a through route now available via Spokane and the Spokane International and its connections, and would be 201 miles, or 10.3 percent, longer than the Union Pacific route through Kansas City. To Oklahoma City, Okla., the haul of the Union Pacific would be increased from 227 miles, over the present route via Wallula and the Northern Pacific and connections, to 633 miles via Ogden and the Rio

Grande to Pueblo and the Santa Fe beyond. The distance over the latter route is 1,910 miles, or only 34 miles, 1.3 percent, longer than the route which gives the Union Pacific its long haul, and 692 miles, or 36.2 percent, shorter than the foregoing route through Wallula.

The foregoing are illustrative of numerous established through routes in which the Union Pacific participates from points in the excluded territory which short-haul that carrier. Many of such routes are longer than those here sought via Ogden and the Rio Grande, and this is true to all sections of the country east of the Rocky Mountains, except western trunk-line territory. To the latter territory the short-hauling routes are generally shorter than the [fol. 2260] routes by which the Union Pacific retains its long haul, and considerably shorter, for example, by 37.5 percent from Yakima to Minneapolis, than the routes sought via Ogden and the Rio Grande. As indicated, the portion of the excluded territory from and to which this short-hauling of the Union Pacific occurs does not include points in Utah nor points in Idaho, except on the Burke and Headquarters branches of the Union Pacific in the northern portion of that State.

These short-hauling routes have been in effect for many years. Most of them were established prior to the dates when the Union Pacific assumed control of the portions of its line west of Huntington and south of Salt Lake City. Joint rates with the Southern Pacific through Portland have been in effect since about 1910, with the Milwaukee through Marengo and Plummer since about 1902, with the Great Northern through Spokane since about 1894, with the Northern Pacific through Wallula since about 1883, and with the Spokane International through Spokane since about 1907.

On some of the traffic interchanged at these gateways the Union Pacific obtains a short haul, as compared with its connections, and on other traffic a long haul. Eastbound traffic through the specified Washington and Idaho gateways consists of apples, pears, lumber and other forest products, some steel products, and miscellaneous commodities. A large portion of the traffic, particularly lumber, moves to North and South Dakota, Minnesota, and Wis-

consist over the northern routes. Traffic over such routes moves also to midwestern States and to States east of the Mississippi River. Westbound traffic through the same gateways consists of manufactured products and miscellaneous commodities from the middle West and from eastern and southern territories.

[fol. 2261] These interchange arrangements are warranted and in the public interest, according to the defendants, because each carrier shares in long hauls on some traffic as well as short hauls on other traffic, and because the arrangements make it possible for the carriers to handle traffic over shorter routes in many instances. This latter statement, however, applies only, except to an insignificant extent, to such routes to and from points in western trunk-line territory.

As indicated, through routes and joint rates apply in connection with the Rio Grande through Provo on traffic to or from points on the Los Angeles line of the Union Pacific. Such routes generally are shorter than routes over the Union Pacific direct to or from Omaha, Kansas City, or Denver. The following is illustrative:

From Los Angeles, Calif., to—	Via Union Pacific	Distance Miles	Via Rio Grande	Distance Miles
Omaha, Nebr.	1	1,808	3	1,813
Minneapolis, Minn.	1	2,168	3	2,152
Kansas City, Mo.	2	1,925	3	1,911
St. Louis, Mo.	2	2,200	3	2,185
Denver, Colo.	4	1,395	3	1,276
Chicago, Ill.	1	2,296	3	2,293
Atlanta, Ga.	2	2,816	5	2,762
Little Rock, Ark.	2	2,430	5	2,272
Dallas, Tex.	4	2,226	5	2,045

1—Union Pacific to Omaha.
2—Union Pacific to Kansas City.
3—Union Pacific to Provo and Rio Grande to Denver.
4—Union Pacific to Denver.
5—Union Pacific to Provo and Rio Grande to Pueblo.

[fol. 2262] Other defendants also participate in through routes with joint rates on traffic moving to or from points on the Union Pacific in the excluded territory from and to eastern points and voluntarily forego their long hauls. For example, the Burlington, the Rock Island, the Santa Fe, and the Missouri Pacific participate in joint rates with the Union Pacific through Kansas City and Omaha. The rail-

roads named could haul the traffic for longer distances over their own rails to Pueblo, Denver, or Cheyenne, instead of permitting shippers to route through Kansas City and Omaha in connection with the Union Pacific.

The total amount of traffic moving between the four northwestern States and points east of the Colorado common points is substantial. According to figures computed by the Union Pacific, transcontinental carload traffic from the East in the year 1948 over the Union Pacific through Wyoming to those northwestern States totaled 55,631 cars. Of these, (1) 81.7 percent originated in eastern Colorado, Kansas, Missouri, Kentucky, Virginia and all States north thereof, (2) 10.8 percent in Texas, Oklahoma, Arkansas, and Louisiana, and (3) 7.5 percent in Tennessee, Mississippi, Alabama, Georgia, Florida, North Carolina, and South Carolina. About 62 percent of the total consisted of manufactures and miscellaneous traffic, most of which originated in group (1). Eastbound traffic from the four States to the same three groups in the same year totaled 116,278 carloads, of which 84.1 percent were to group (1), 10.5 percent to group (2), and 5.4 percent to group (3). About 75 percent of that total consisted of agricultural and forest products.

[fol. 2263] Of the total carloads, 171,909 in both directions, 121,909 originated or terminated in the excluded territory and the remainder, 50,000, originated or terminated at points in Oregon and Washington west of that territory. The Rio Grande is in a position to solicit movements of the latter traffic over its line at competitive joint through rates in connection with longer routes over the Southern Pacific from Portland to Ogden or over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City. These joint rates are the same as the rates which apply over the direct routes of the Union Pacific from Oregon, Washington, and British Columbia. For excluded territory. For example, from Seattle to Denver the distance is 1,538 miles over the Union Pacific direct and 1,894 miles over the Union Pacific to Portland, the Southern Pacific to Ogden, and the Rio Grande beyond. In addition to the joint rates sought via the Ogden gateway from the excluded territory, the complainant is also seek-

ing joint rates from the northwest area west of the excluded territory, the same as those in effect over the Union Pacific, Southern Pacific, and great Northern-Western Pacific routes, for application in connection with the Union Pacific via the Ogden gateway.

A substantial volume of traffic is handled by the Rio Grande in connection with the described routes over which it participates in competitive joint through rates to and from Oregon, Washington, and British Columbia. For example, in 1948 the Rio Grande handled 30,486 carloads in connection with the Southern Pacific and 7,152 carloads in connection with the Western Pacific-Great Northern. In 1947, the volume was 22,722 and 8,909 carloads over the respective routes. Most of this consisted of lumber from [fol. 2264] Southern Pacific origins south of Portland.[6]

The complainant's estimate of the traffic in carloads that would be potentially available to and from the excluded territory for solicitation by the Rio Grande, in the event competitive joint rates were established over its line via Ogden, from Idaho, Montana, Oregon, and Washington is about 29 percent greater than the volume of traffic, according to the Union Pacific, that moved in 1948 over its Wyoming lines. The estimate was based upon the total carload traffic originated and terminated by the Union Pacific in the years 1944 to 1948, inclusive. It included commodities within the description of products of agriculture, animals and animal products, products of mines, products of forests, and manufactures and miscellaneous commodities. The total carloads estimated as originated by the Union Pacific annually in the area specified was 101,476

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[6] Prior to February 1, 1949, joint rates applied over the Bieber route in connection with the Rio Grande to competitive territory in Colorado and east thereof on lumber from certain origins in Oregon and Washington on the Oregon Trunk Railway and the Spokane, Portland and Seattle Railway Company (subsidiaries of the Great Northern and Northern Pacific). Those rates were canceled on February 1, 1949, in connection with the Rio Grande; there is no indication that the cancellation was protested.

and the number terminated 56,286, a total "potential" of 157,762 carloads.

This estimate did not include any shipments that might originate or terminate off the line of the Union Pacific and move over that carrier as part of a longer haul. Although stated to be a conservative estimate of potential traffic, it was computed from a substantial number of reliable [fol. 2265] sources, and represents the complainant's best analysis of the traffic considered available for solicitation. No attempt was made to estimate the amount of traffic that the Rio Grande might actually obtain from these potential sources other than a statement that there was no probability that it would get more than 10 percent and that the amount probably would be less than 10 percent because of the vigorous competition of the Union Pacific. This figure of 10 percent as a maximum was derived from the experience of the Rio Grande in obtaining other transcontinental traffic now moving at joint rates in competition with the Santa Fe, Southern Pacific, Union Pacific, Great Northern, Northern Pacific, and Milwaukee. If the Ogden gateway were opened to traffic to and from the four States named, there would be active competition with the Union Pacific, the Wabash, the Chicago & North Western and the Missouri River connections that favor Union Pacific routing. At the present time the Rio Grande gets less than 5 percent of the traffic to and from California over the available through routes, with joint rates in connection with its line, because of competition with other routes.

A transportation specialist of the United States Department of Agriculture testified that the Rio Grande would be doing well if it obtained 1,000 cars additional annually from this traffic, an amount that is less than 1 percent of the estimated potential total traffic.

Whatever the amount, it would be the result mainly of (a) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (b) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that

[fol. 2266] line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it.

Since 1934, when the Dotsero cutoff was constructed, affording a shorter route by the Rio Grande between Denver and the Utah gateways, there has been a marked increase in the traffic carried over that railroad. For the two years prior thereto, the total tons carried were less than 6,000,000, although the tons carried exceeded that figure in each year before that, back to 1924. Beginning in 1934, the traffic gradually increased and reached a maximum of 18,517,000 tons in the war year of 1944.

[fol. 2267] In 1945 it dropped to 14,213,000 tons, but increased in 1947 to 18,331,000 tons and in 1948 to 18,473,000 tons. This tonnage has shown a considerable increase percentagewise in traffic received from connecting lines and a decrease in traffic originated. In 1924, 23.2 percent was received from connections and 76.8 percent originated. In 1934, the respective percentages were 39.3 and 60.7. In 1947, they were 49.8 and 50.2, and in 1948 they were 52.3 and 47.7 percent. This traffic in 1948 did not differ markedly from the traffic handled in the four war years, 1942-1945, when the percentages of traffic received from connections ranged from 52.6 percent in 1942 to 58.2 percent in 1945.

Of the traffic received from connections in the 15-year period 1934 to 1948, inclusive, the percentage terminated on the line of the Rio Grande has ranged from 16.4 percent in 1941 to 20.7 percent in 1948. In the war years the percentages were 16.7 to 19.9 percent. In the same 15-year period, of the traffic received from connections, the amount delivered to connections; that is, bridge traffic, ranged from 20.7 percent in 1935 to 39.6 percent in the war year of 1945. Excluding the war years, the percentage of traffic received from connections that was delivered to connections was

30.1 percent in 1947 and 31.6 percent in 1948. In 1934, the corresponding percentage was 21.7 percent and in 1924 it was 9 percent. These percentages show the increasing importance of the Rio Grande as a bridge line. In tons of freight carried in 1947, such traffic accounted for 5,519,239 tons out of a total of 18,331,176 tons, and in 1948 accounted for 5,846,793 tons of a total of 18,473,356 tons carried. In revenue, the Rio Grande received in 1947 from its bridge traffic $22,894,412, which was 43.3 percent of its total revenue of $52,883,339; and in 1948, $27,654,086 [fol. 2268] or 44.2 percent of its total revenue of $62,505,951.

Although the percentage relation of the traffic originated on the Rio Grande to the total traffic of that carrier has decreased, such traffic both in tonnage and revenue has increased in the same 15-year period. In 1934, the tons originated were 3,826,049 and the revenue received therefrom was $8,311,254; in 1947, the tons originated were 9,202,867 and the revenue therefrom $20,190,318; and in 1948, the corresponding figures were 8,804,334 tons and $22,018,519. The 1947 and 1948 figures exceeded those of the war years. The volume of strictly local traffic; that is, traffic both originated and terminated on the line, also increased; this traffic in 1934, for example, accounted for 2,048,544 tons and $4,351,807 in revenue, and in 1948, for 3,307,374 tons and $7,630,587. Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

The reasons given for the decline or lack of proportionate growth in traffic originated are, (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many saw mills; and (4) loss of local traffic to other forms of transportation.

[fol. 2269] The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from con-

necting lines and terminated. Such traffic affords a measure of the increasing importance of the Rio Grande to the shippers and receivers of freight in the localities and areas in the States of Colorado and Utah served by it. Although percentagewise, bridge traffic in relation to the total was greater in 1948 than in 1934, and increased by over 326 percent in the 15-year period, traffic originated or terminated also increased by substantial amounts, or over 155 percent. In terms of revenue, however, less was received from bridge traffic than from the other traffic. In 1934, for example, the Rio Grande received from bridge traffic $5,648,981, and in 1948 it received $27,654,086; from the other traffic, it received $11,519,335 in 1934 and $34,851,865 in 1948.

The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled "20 Questions" as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representatives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as [fol. 2270] representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimulated in any questionable manner.

Transit.—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and dis-

tributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic [fol. 2271] from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. Westbound traffic to that territory is made up for the most part of manufacturers and partially manufactured articles, some of which are stopped for storage, partial unloading at a number of points, and fabrication in transit.

On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the stoppage-in-transit arrangements offered by that railroad at such Rio Grande points. Pueblo has a population of about 75,000; Colorado Springs, 50,000; Grand Junction, 17,500; and Price, 5,000. All of these are distributing points for surrounding areas. A shipper at Chicago, for example, may have a carload containing shipments for consignees at Pueblo and Boise, Idaho. If the car is partially unloaded at Pueblo, it cannot be reshipped over the Rio Grande to Boise at a joint through rate; but the car can be moved to Boise via Pueblo and Denver, thence the Union Pacific, at a joint through rate. If stops are desired on the Rio Grande at Grand Junction, Price, or Provo, for example, joint through rates would not be available.

[fol. 2272] A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows.

Building materials.—A dealer in and distributor of gen-

eral building materials in Salt Lake City, who handles from 400 to 500 carloads annually, obtains from 150 to 200 cars from points east of Colorado common points, including celotex from Marrero, La., roofing from Cincinnati, Ohio, doors from Louisville, Ky., hardwoods and plywoods from Algoma, Wis., and Orangeburg, N. C., asbestos products from St. Louis, and asphalt siding from Minneapolis. Distribution is made in carloads, from pool cars, and from warehouses to customers located on the Rio Grande on the western slope of Colorado, such as Glenwood Springs and Grand Junction, Colo., and in Utah, such as Price, Helper, Ephraim, and Manti; and also on the Union Pacific in northern Utah; in Wyoming, Rock Springs and west; and in southern Idaho northward to and including Ashton on the West Yellowstone branch and westward to and including Magic, Shoshone, and Buhl. This dealer cannot now serve these customers from shipments made in through cars at joint rates over the Rio Grande when such cars also carry shipments for points on the Union Pacific beyond Ogden. Ephraim and Manti are on a branch line about 52 and 59 miles, respectively, south of Thistle, Utah.

In some instances this shipper has had to forego business east of Salt Lake City at points as far as Glenwood Springs because of the rate situation. If joint through rates were established this distributor could give customers at a number of intermediate points on the Rio Grande, who generally are small dealers and can take only less-than-carload quantities, better service through partial unloading in transit and more efficient service by frequent deliveries under more flexible schedules, instead of being limited, as at present, to furnishing service in connection with pool cars consigned to Salt Lake City as the ultimate desti-
[fol. 2273] nation. Pool cars with partial loads for that point or Ogden and points on the Union Pacific beyond do not now move over the Rio Grande, but are routed over the Union Pacific to get the benefit of joint rates.

Of the 150 or more cars annually from the east, this distributor estimated that he would have stopped for partial unloading about 25 percent. Witness made no mention of commercial competition, but indicated that his chief concern was better service to his customers and a saving in cost to his company if such carloads could be stopped for par-

tial unloading at intermediate points on the Rio Grande while moving at the through rates to Union Pacific destinations in the area served by him.

Farm machinery.—A distributor of farm machinery and equipment at Salt Lake City receives carloads of these commodities from eastern origins, including farm tractors from Detroit, Mich., and distributes them by his own motor vehicles to points in Utah and Idaho. This business was established in 1947, at which time the production of these commodities was insufficient to meet all demands, and a system of allocations based on prior needs was introduced. While the system of allocations was in effect, it was found to be more convenient and efficient to bring all shipments to Salt Lake City and distribute them by truck. This distributor is located on the Rio Grande at Salt Lake City and all shipments move over that line. He expressed a desire for joint through rates from eastern origins to points in Utah and Idaho in connection with the Rio Grande, but admitted that no attempt was being made to partially unload shipments at points on the Rio Grande south of Salt Lake City when carloads are consigned to the latter point, or to ship over the Union Pacific to Salt Lake City where carloads could be partially unloaded or stored and later shipped to Union Pacific destinations in Utah and Idaho at joint through rates. The witness for this distributor [fol. 2274] stated that he preferred to ship inbound over the Rio Grande and forego the stopping-in-transit provisions that are now in effect at Salt Lake City and other points on the Union Pacific when traffic is routed over that line.

A factory branch of a large manufacturer of farm machinery and equipment which distributes in the intermountain area is located on the Rio Grande at Salt Lake City. In 1949 it received 369 carloads from its eastern manufacturing points. Of these, 70 percent were sold at points north of Salt Lake City, mostly at points served by the Union Pacific as far as Ontario, Oreg., and the remainder in Utah and western Colorado. About one-half of the shipments to Salt Lake City moved over the Rio Grande route and one-half over the Union Pacific. Shipments which move in over the Union Pacific may be stopped at Salt Lake City for partial unloading or storage in transit at

the joint through rates when the ultimate destinations are on the lines of that carrier, but combinations of rates to and from Salt Lake City apply when such shipments move into that point over the Rio Grande. The manager of this branch testified that it would be desirable to establish joint through rates over the Rio Grande so that shipments moving over that line could be stored in transit at Salt Lake City and later reshipped, or partially unloaded thereat and the remainder forwarded, to points on the Union Pacific at charges no greater than apply on similar shipments moving over the Union Pacific. However, he did not know what effect this would have on the parent company, as some shipments have been routed over the Rio Grande when Union Pacific routing was requested. To indicate a need for joint through rates, reference was made to a shipment of tractors which were routed over the Rio Grande to Salt Lake City. At that time a customer at Ontario needed [fol. 2275] two tractors, and it cost about $50 each to ship them from Salt Lake City by motor carrier. If joint through rates had been in effect, the car could have been partially unloaded at Salt Lake City and the two tractors could have been forwarded to Ontario at the joint rate from origin to Ontario. The record fails to show the difference in the joint rates to Salt Lake City and to Ontario. On a 34,000-pound shipment of tractors from Chicago, the joint through rate is $2.68 to Ogden and $2.98 to Boise, which is southeast of Ontario, representing a difference of $102 in charges.

Monuments.—A fabricator and wholesaler of granite and marble monuments at Brigham City, Utah, on the Union Pacific 21 miles north of Ogden, obtains his stone from Vermont, Georgia, Wisconsin, and Minnesota and sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington. This dealer has keen competition with dealers in like articles in Salt Lake City. Its business is such that straight carloads rarely can be shipped to retailers. If joint through rates were established over the Rio Grande through Ogden, cars could be stopped in transit at Colorado points, such as Grand Junction. A retailer at the latter point testified that he finds it impracticable, except in unusual instances, to purchase the various kinds of monuments needed in the trade in carloads, and that the keen

competition cannot be met when shipments are made in less than carloads. There is thus an urgent need for the establishment of joint through rates on this traffic to destinations in the excluded territory with stop-off privileges at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

[fol. 2276] *Livestock.*—Large volumes of traffic are involved in connection with the livestock industry and with the processing and marketing of agricultural products. With respect to livestock, evidence was submitted by producers, feeders, and marketers. A number of producers in the northwest area, particularly in Idaho at such points as Pocatello, Burley, Soda Springs, and Blackfoot, desire joint rates via Ogden and the Rio Grande to markets in Denver, Pueblo, and east thereof on the same basis that applies on shipments moved over the Union Pacific through Cheyenne. Much of the evidence dealt with the advantages from such joint rates when applied on livestock shipped to grazing and feeding areas in Utah and Colorado on the Rio Grande for reshipment beyond under transit arrangements. In the areas in Utah and Colorado served by the Rio Grande are good pasture lands for grazing livestock. In addition to livestock produced locally in those areas, substantial quantities are shipped in the summer season from other sections in Colorado, Utah, and surrounding States, both for feeding in feed lots and pastures and for grazing on the livestock ranges. Movements of livestock, both sheep and cattle, into and out of Colorado are substantial in volume.

Evidence as to the needs of raisers of livestock and operators engaged in fattening livestock for markets was submitted by persons engaged in those pursuits, individually and as representatives of livestock and feeder associations. These came from several representative points or districts served by the Rio Grande, such as Heber City and La Sal, Utah, and Burns, Lamar, and Las Animas, Colo. Those served only by the Rio Grande generally buy from areas [fol. 2277] from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit on feeder stock when the fattened animals are shipped to Denver or markets east thereof. The

evidence shows that such operators have to absorb the difference in transportation cost and are not able to purchase cattle or sheep economically in the northwest area in competition with buyers from Iowa, Wyoming, Nebraska, Colorado, and Kansas that have the benefit of competitive joint rates from the excluded territory over Union Pacific routes with grazing or feeding in transit arrangements.

Due to the curtailment of the use of grazing lands in national forests in Colorado, as part of a general policy for all such forest lands, livestock raisers in Colorado have curtailed their operations in raising livestock, and have engaged more in fattening stock by grazing in private pastures or feeding in feed lots. They purchase most of their feeder stock in Colorado and surrounding areas, but for supply, quality, and price reasons they have been seeking some feeder stock from more distant origins, and the need for doing so, particularly by reason of the curtailment of the pasture area, has been increasing. Livestock produced in the northwest area, particularly in Idaho, Montana, and Oregon, is of excellent grade, does well on the range, and is considered very desirable for feeding and breeding purposes. About 90 percent of the sheep produced in Colorado are produced in the area served by the Rio Grande, and [fol. 2278] the operators in this territory purchase replacement or breeding ewes in the excluded territory for summer grazing and the production of white-faced or mutton-type lambs. One witness indicated that inbound billing on breeding ewes is used under the feeding-in-transit arrangements, when available, at points on the Rio Grande when the new-born, fattened lambs are shipped to markets, but the feeding-in-transit arrangements apparently do not apply for breeding in transit.

Operators on the Rio Grande in western Colorado and those in the eastern Arkansas Valley sections (in southeastern Colorado east of Pueblo and in southwestern Kansas) feel that they cannot now profitably purchase stock in the excluded territory for feeding in transit in competition with similar operators on the Union Pacific in Wyoming, Colorado, Nebraska, and Kansas, due to the rate situation. For example, from Dillon, Mont., to Kansas City the rate on sheep or goats in double-deck cars is $1.21

over the Union Pacific direct and $1.40 over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond, a difference of 19 cents. The 19-cent differential over the latter route applies generally on sheep and goats from Union Pacific origins in the excluded territory to Missouri River markets and points east thereof. These rates are published as joint rates over through routes via Ogden and the Rio Grande. On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to all of the territory Colorado common points and east thereof, via Ogden and the Rio Grande, the rates are on a combination basis. Cattle and sheep may be shipped from the excluded territory over the Union Pacific to Denver and connecting lines beyond to points in the Arkansas Valley, such as Lamar, for feeding [fol. 2279] in transit and subsequent reshipment to Missouri River markets, or markets east thereof, at the rates applicable over the Union Pacific direct to the Missouri River markets, plus an arbitrary of 8.5 cents per 100 pounds. Feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are now able to overbid the Arkansas Valley feeders on northwest stock when destined to the Missouri River and east thereof, and the latter are thus unable to compete successfully because of their unfavorable rate situation. The northern Colorado-Nebraska operators feed a majority of the lambs fattened for market in the United States.

A packing plant at Pueblo purchases lambs at the Ogden market, some of which originate at points on the Union Pacific in Idaho and Oregon. These shipments are routed over the Rio Grande from Ogden even though it costs from $70 to $80 per car more than the total charges would be if the shipments were routed over the Union Pacific to Denver at the transit balance of the through rate. The Rio Grande is used from Ogden because shipments do not have to be stopped for feed and water en route to Pueblo, whereas shipments routed from Ogden over the Union Pacific usually require feed and water at Denver. There is less shrinkage on shipments moved over the Rio Grande, but not enough to off-set the additional freight charges.

The rates on live stock in western territory were prescribed in *Livestock-Western District Rates*, 176 I. C. C. 1,

190 I. C. C. 175, 190 I. C. C. 641, 200 I. C. C. 535. Generally, the rates are predicated on the shortest routes over which carload traffic can be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short-hauling within the meaning of section 15(4) of the act. The rates on stocker or feeder livestock were prescribed on a basis not in excess of 85 percent of the rates prescribed on the same kind of stock when fit for slaughter, and the carriers were authorized to establish tariff provi- [fol. 2280] sions which allow stock moving toward a market to be fed in transit at intermediate points on the basis of the through rates plus a reasonable charge for such privilege. On December 6, 1932, the Rio Grande was authorized (190 I. C. C. 175) to add certain arbitraries to the rates prescribed for mountain-Pacific territory for hauls over its standard-gauge lines between Pueblo and Walsenburg on the east, and Provo on the west, including branch lines connecting with the main lines between those points. For hauls of 500 miles or more, the arbitrary authorized at that time was 6 cents on cattle and on hogs and sheep, double deck. Later, these same arbitraries were authorized for application between Denver and Provo over the Dotsero cut-off (200 I. C. C. 535).

In establishing the prescribed rates on livestock, the carriers appear to have limited their application over routes which do not result in short-hauling, and over other and longer routes to have provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. As indicated, operators in the Arkansas Valley may now obtain cattle and sheep in the excluded territory for feeding in transit at an arbitrary of 8.5 cents, and this same arbitrary applies when the stock originates on the Burlington in Montana and Wyoming. On the other hand, such operators may obtain feeder stock in other areas, such as Texas and New Mexico, for feeding in transit and reshipment to the Missouri River markets, or markets east thereof, at lower rates than would apply if the same stock were fed in transit by operators on the Union Pacific in Colorado, Nebraska, or Kansas. For example, the rate on cattle from Las Vegas, N. Mex.,

[fol. 2281] to Chicago is $1.13 when stopped for feeding at Lamar, but if the same cattle were fed at Barton, Nebr., just east of Julesburg on the Union Pacific, the rate would be $1.26, or 13 cents higher. On cattle from Raton, N. Mex., fed in transit at Lamar, the rates are $1.07 to Chicago and 76 cents to Kansas City, but if the same cattle were fed in transit at Barton the rates would be $1.21 and 89 cents, respectively. Many other examples of a similar nature are shown.

The arbitrary of 19 cents, originally 13 cents, applicable on lambs from the northwest area and moving over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond was established prior to the opening of the Dotsero cut-off, and was based in part on the mileage over the Rio Grande via Pueblo. The evidence indicates that this arbitrary was based on the difference between the prescribed scale rates for the average distance from 12 representative origins, on the line of the Union Pacific from Pocatello north to Butte and west to Pendleton, to the several Missouri River markets over the Union Pacific direct and over that road to Ogden, the Rio Grande to Denver via Pueblo, and the Union Pacific beyond. Using the same formula, but giving consideration to the shorter distance over the Rio Grande's Dotsero cut-off, the Union Pacific states that the arbitraries on traffic routed over the Rio Grande should be 5 cents to Denver and Pueblo and 15 cents to the Missouri River markets, and it is willing to establish these arbitraries and make them applicable to cattle as well as sheep. The arbitrary of 8.5 cents on cattle and sheep from origins on the Union Pacific and the Burlington when fed in transit at points in the Arkansas Valley and reshipped to the Missouri River and beyond apparently is based on a similar formula. Reasonable [fol. 2282] groupings were authorized in *Livestock-Western District Rates, supra.*

In seeking to have the rates on livestock which apply over the Union Pacific made applicable over its lines from Ogden, the Rio Grande indicates a desire to waive the arbitraries which were authorized over its line from Provo to Denver and Pueblo and, in addition, to have established over its routes lower rates than would result from the application of the prescribed scales for the distances over its

routes. On shipments moving over the Union Pacific-Ogden-Rio Grande route, this would result in short-hauling the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City, which are the differences in the Union Pacific distances from McCammon to Ogden and from McCammon to Denver and Kansas City.

Reference is made to *Crouch v. Nevada N. Ry. Co.*, 208 I. C. C. 586, which concerned the rates on feeder cattle moved from East Ely, Nev., to Davis, Calif., over the lines of the Nevada Northern Railway Company to Shafter, Nev., thence the Western Pacific to Sacramento, Calif., and the Southern Pacific beyond, 760.4 miles. A rate of 47.5 cents was applicable over the Nevada Northern to Shafter and the Southern Pacific beyond, 705 miles. This rate was collected, but the defendants later sought to collect a rate of 58 cents, which was the combination rate based on Sacramento. Division 4 found that the combination rate was applicable but unreasonable to the extent that it exceeded 49.5 cents, which was the prescribed scale rate for distances of 775 miles and over 750 miles. See also *Routing Livestock to and from Oregon Points*, 209 I. C. C. 349. We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden gateway.

[fol. 2283] *Agricultural commodities.*—Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific, and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.

In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination

of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.

The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the central, southwestern, and southeastern States. Carloads moved over the Union Pacific to the central States can be diverted to the southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on ship- [fol. 2284] ments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

Wichita and Liberal, Kans., are described as pocket markets on potatoes and other vegetables originating in Idaho because they cannot be diverted or reconsigned therefrom to points east of the Missouri River at joint through rates. However, the record indicates that shipments refused at these two points may be diverted or reconsigned to destinations in the Southwest at the joint through rates. Wichita is not located on the direct line of any carrier operating between the Colorado common points and the Missouri River gateways, and Liberal is located in the southwestern part of Kansas near the Oklahoma border. Shipments to Kansas City and east thereof would require an out-of-line haul via Wichita and a substantial back haul via Liberal.

Storage facilities are available at Pueblo for the storage of perishables, including potatoes, onions, apples, pears, frozen poultry, frozen foods, butter, and eggs. Joint through rates are applicable from the excluded territory via Pueblo on shipments routed over the Union Pacific to Denver and connecting lines beyond to destinations in the Southwest and to points west of the Missouri River. The

route of the Rio Grande from Ogden would be used if joint through rates were available over that route to additional destinations with storage in transit at Pueblo. Storage operators at Pueblo are now handicapped, in relation to two competitors at Denver, because the through rates do not apply via Pueblo to Denver and other northern destinations where a back haul would be required on shipments routed to Pueblo via Denver, whereas the competitors can ship at the through rates in all directions, except westward. The application of the through rates via Ogden and the Rio Grande is sought so that these shippers may have avail- [fol. 2285] able the same distribution markets as their competitors.

A shipper who deals in dried beans from Idaho and other western States is located at Colorado Springs. His principal markets are in southeastern territory. Beans which originate in California, Colorado, and Wyoming may be stopped at Colorado Springs for cleaning and packaging and reshipped at the balance of the joint through rates. Beans which originate in Idaho may be shipped over the Union Pacific to Denver and the Rio Grande or other connections to Pueblo and reshipped therefrom at the balance of the through rates, except to points east of the Missouri River. The route of the Rio Grande from Ogden would be used on Idaho beans if it would result in the application of joint through rates to points east of the Missouri River on the same competitive basis as is now applicable when such beans are transited at points on the Union Pacific. Another bean dealer at Fruita, Colo., on the Rio Grande about 10 miles west of Grand Junction, would like to transit Idaho beans on the same competitive basis as is applicable at Union Pacific points. This dealer is now engaged primarily in buying pinto beans from growers in the vicinity of Fruita and shipping them in carload lots to others, including the shipper at Colorado Springs. These dealers in dried beans are in competition with like dealers at points on the Union Pacific who have the benefit of transit at the through rates to destinations, among others, east of the Missouri River.

A company which is engaged in the purchase and sale of dried beans and peas maintains plants in Nebraska at Morrill on the Burlington and at Gering on the Union Pacific.

Carloads of dried beans and peas originating in California, Utah, Oregon, Washington, Idaho, Colorado, Wyoming, Montana, and Nebraska are shipped to Morrill and Gering where they are cleaned, sorted, and packaged, and reshipped generally eastward and to Oklahoma and Texas. This company can obtain Idaho beans and reship them from Gering to eastern and southern destinations at the joint through rates. It was stated, however, that a substan- [fol. 2286] tial amount of pinto beans (about 6,000,000 pounds per year) are obtained from Colorado, mostly on the Rio Grande, on which an out-of-line charge of 7 cents per 100 pounds is applicable in addition to the joint through rates over direct routes when such beans are processed at Gering and reshipped to the Missouri River and points east thereof; also that when such beans are processed at Gering and reshipped to destinations west of the Missouri River combinations of rates to and from Gering are applicable.

The Utah Growers' Cooperative operates throughout Utah in the production and shipment of vegetables, including potatoes and onions. It has two branches on the Union Pacific and three on the Rio Grande in Utah, the latter at Midvale, American Fork, and Springville, all south of Salt Lake City. These three points are served by the Union Pacific and the Rio Grande, but track connections exist only at Midvale. Shipments of box shooks and of seed potatoes from Idaho and of fertilizer from Montana may move into American Fork and Springville over the Union Pacific at lower rates than when they are interchanged with the Rio Grande at Ogden or Salt Lake City, but when they are received over the Union Pacific they must be trucked to the plants on the Rio Grande. The differences in the rates are not shown.

Various flour mills at southern Kansas points, such as Moundridge and Wichita, support the complaint because they cannot at present purchase wheat at points on the Union Pacific in Idaho, Oregon, and Washington, mill it in transit, and reship to the Missouri River and points east thereof at the same rates that are applicable when similar wheat is milled at points on the Union Pacific. A specific instance was shown where 9 carloads of wheat moved from Ogden to Moundridge on which the Ogden shipper applied

[fol. 2287] inbound transit billing on wheat originating at Idaho Falls. The shipments moved from Ogden over the Union Pacific to Denver, the Rio Grande to Pueblo, and the Missouri Pacific beyond. Moundridge is a local point on a branch line of the latter carrier north of Eldorado, Kansas. After the wheat was milled at Moundridge the inbound billing thereon was applied against an outbound movement of flour to New Cumberland, Pa. The rate on flour from Idaho Falls to New Cumberland over the route of movement through Denver and Moundridge was $1.35.5, or 12.5 cents higher than the rate would have been if the same wheat had been milled at a point on the Union Pacific. The distances over the route of movement through Denver and Moundridge and the more direct route of the Union Pacific are not shown.

The rate restrictions complained of by shippers of and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from the excluded territory to Colorado common points and east thereof have placed these shippers and dealers at a serious disadvantage in marketing their products, as compared with competing shippers and dealers located on the Union Pacific and having the benefit of the lower joint through rates from and to the same points. Some of these restrictions complained of, such as those by operators of flour mills in southern Kansas, could be remedied by the establishment of additional joint through rates from the excluded territory over routes of the Union Pacific to Denver and connecting lines beyond. From McCammon and points north thereof such routes would in all instances be shorter than the routes over the Union Pacific to Ogden, the Rio Grande to Denver or Pueblo, and connecting lines beyond. The Union Pacific states that it has not been requested to establish additional joint through rates via Denver. Its position with respect [fol. 2288] thereto is that the rates on agricultural commodities are on a low basis and, therefore, the carriers should be permitted to limit their application to more direct routes, thereby maintaining their long hauls and preventing undue circuity. For example, it believes that if competitive joint through rates were established on grain for milling at Wichita and other southern Kansas points and reshipment beyond to the Missouri River and east, other

and longer routes probably would be demanded on the same basis at points in Oklahoma and Texas where competing mills are located.

The establishment of additional routes and rates by way of the Union Pacific, however, would not remedy the disadvantage complained of by the shippers of and dealers in those products in the excluded territory who are compelled to pay combination rates on shipments diverted or reconsigned at intermediate points on the Rio Grande, including those stored at Pueblo or Colorado Springs on that road, and reshipped to Colorado common points and east thereof. The only effective remedy in those instances would appear to be the establishment of through rates, the same as those over the Union Pacific routes, over Rio Grande routes via Ogden or Salt Lake City.

Lumber.—A number of lumber dealers and lumber mills are located at Grand Junction and other points, and a wood-treatment or preserving plant is located at Salida, Colo., all on the Rio Grande. Generally, the complaints of these parties relate to their inability to ship lumber and millwork from the excluded territory on competitive joint rates via Ogden and the Rio Grande with stoppage in transit for partial unloading, storage, milling, or treatment and reshipment beyond to Colorado common points and east thereof at the balance of the joint rates. Mention also was [fol. 2289] made of a handicap in diverting or reconsigning at the joint rates to such points carloads originally shipped to local stations on the Rio Grande via Ogden. As previously indicated, joint through rates apply on lumber and millwork from points in California and in Oregon and Washington west of the excluded territory, including areas around Seattle, Tacoma, and Portland, over the Southern Pacific or the Western Pacific and the Rio Grande through the Utah gateways to points on the Rio Grande and east thereof, with storage, milling, and treatment under transit arrangements. Lumber may also be shipped at joint through rates from the excluded territory when the final destinations are local points on the Rio Grande, but such rates are not applicable from that territory over the Union Pacific to Ogden and the Rio Grande when the final destinations are Colorado common points or points east thereof,

whether the shipments move direct or are stopped for milling or other transit purposes.

A lumber company with a wholesale yard, a box factory, a mill, and a storage and drying yard is located at Grand Junction. This company buys most of its lumber, both rough and dressed, and plywood and doors at points west of the excluded territory and sells in Colorado and points east and south thereof. This company also has a financial interest in a wholesale lumber company at Colorado Springs. It has purchased some lumber at points in the excluded territory, such as Cascade and Winchester, Idaho, Burns, Oreg., and Metaline Falls, Wash. Lumber shipped from Cascade, Winchester, and other points in the excluded territory over the Union Pacific to Ogden and the Rio Grande to Grand Junction could not be stored in transit at the latter point and later reshipped to Colorado common points or points east thereof at the joint through rates as those rates apply only over the Union Pacific [fol. 2290] routes.

Another lumber company on the Rio Grande at Military Junction, Colo., about 10 miles south of Denver, purchases lumber in California and Oregon; also a small amount in Washington, for milling in transit and reshipment beyond. Lumber from the excluded territory can now be milled in transit at Military Junction and reshipped to Colorado points south thereof and to points in the Southwest at the joint through rates to final destination, but this is not true to other destinations east of the Rocky Mountains. Military Junction is about 1 mile outside of the Rio Grande's switching limits at Denver.

The wood-treatment plant at Salida purchases some lumber, poles, piling, and cross ties in Colorado, Utah, and New Mexico, but most is obtained from points in Oregon and Washington west of the excluded territory. This plant has a contract for treating cross ties for the Rio Grande, but about 60 percent of the forest products which it treats are reshipped to points outside of Colorado. It has not purchased products in the excluded territory, but probably would do so if the joint through rates to eastern and southern destinations were made applicable over the Union Pacific to Ogden and the Rio Grande through Salida. The company which owns the plant at Salida has a similar plant

at Denver and 22 others scattered throughout the country. The plant at Denver can perform treatment in transit at the joint through rates from the excluded territory to final destinations in the East, South, and Southwest, and apparently joint through rates apply on about 40 percent of the business at Salida which does not move outside of Colorado.

[fol. 2291] Opposition Testimony

The Union Pacific operates about 9,724 miles of railroad serving over 1,700 points in 13 States.[7] It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte, Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. Eastbound on the Union Pacific the maximum grade at any point is 1.52 percent and westbound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union

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[7] Iowa, Nebraska, Wyoming, Idaho, Oregon, Washington, Missouri, Kansas, Colorado, Montana, Utah, New Mexico, and California.

[fol. 2292] Pacific. The total rise and fall in feet on the Rio Grande is 66.3 percent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services.

The Union Pacific objects to the establishment of joint through rates to points beyond Denver or Pueblo via Salt Lake City or Ogden over the Rio Grande upon the principal grounds that such routes would short haul the Union Pacific and that the diversion of traffic over such route from the Union Pacific routes now available would curtail the service and growth of the Union Pacific in the territories it alone serves and in which it pioneered in railroad construction. Such diversion, it fears, would adversely affect the operation of its numerous branch lines in Idaho, Montana, Oregon, and Washington, which are feeders for its main line and are not self-sustaining. In those States the Union Pacific operates a total of 5,606 miles of railroad, with 2,913 miles of branch lines upon which about 46 percent of the total traffic in that territory originates or terminates. It contends that unless it has a substantial main-line haul on branch-line traffic, the operation of many, if not most, of such branches would not long be justified.

[fol. 2293] Another objection is that yard facilities of the Ogden Union Railway and Depot Company, referred to as the Depot Company, jointly owned by the Southern Pacific and the Union Pacific, at Ogden terminal are inadequate to interchange any additional volume of traffic with the Rio Grande that may be routed to or from the northwest area through Ogden, and that expansion of facilities there is not possible. Several instances of delays to trains, particularly in the fall when traffic is heavy, are shown. The record describes in detail the yard and track layout at this terminal and interchange point. At present the Union Pacific finds it necessary to bypass the Ogden terminal as much as possible by taking its trains for Pocatello, Salt Lake City, or Green River over an outside wye track

which avoids the terminal proper. In addition to these deficiencies, icing facilities now maintained at Ogden for eastbound and westbound traffic are not considered adequate for icing perishable commodities from Idaho and the Pacific northwest for delivery to the Rio Grande. The Depot Company estimated that the cost of interchanging cars between the Rio Grande and the Union Pacific and Southern Pacific is at least twice the average cost of cars in the terminal because of the additional handling required.

The largest volume of traffic was moved through the Ogden terminal in the war year 1945, when a total of 2,847,277 cars were handled. In July, the peak month in that year, the total was 284,711 cars in 2,966 trains, an average of 96 trains daily, which required an average of 70 switching shifts a day. Of that number in July, 894 were solid trains that moved through the terminal without switching. The handling of such a large volume caused considerable congestion and delays to trains. In 1949, the [fol. 2294] total number of cars handled was 1,955,219. In the peak month of that year, 2,359 trains were handled, an average of 76 trains per day, requiring about 59 switching shifts daily. These figures show that 892,058 fewer cars were handled in 1949 than in the peak year of 1945.

To show that the Union Pacific cannot afford to lose any part of its haul on traffic, attention is directed to the large deficits which the Union Pacific incurred in its passenger service. In 1948, that deficit amounted to $28,462,000, equivalent to $4,291 per mile of road operated, as compared with a passenger deficit incurred by the Rio Grande of $4,954,000, equivalent to $3,127 per mile of road. In the last 20 years the Union Pacific in only 6 years, principally in the war years, has had railway operating income sufficient to pay fixed charges plus declared dividends, and in 1949 it had a net railway operating income of $21,707,437, which was not sufficient by $10,269,865 to pay declared dividends and interest on funded debt. This is contrasted with the results on the Rio Grande, which in 1948 had a net railway operating income of $12,156,284, out of which it provided for all fixed charges, paid a declared dividend, provided for sinking-fund requirements, and had left for its surplus account $5,167,148.

The Wabash and the Chicago & North Western, important eastern connections of the Union Pacific, furnished estimates of the possible loss of traffic to those roads, and its effect upon train service and employment on their lines in the event that the volume of traffic embraced in the Rio Grand estimate of potential traffic were diverted over the Rio Grande route.

[fol. 2295] The Wabash in 1948 participated in 9.07 percent of the total traffic handled by the Union Pacific from the northwest and about one-half of that on westbound traffic to that area. It estimates the value to it of the potential traffic which it might lose at $1,602,000.

The revenue derived by the Chicago & North Western from the traffic to and from the northwest territory handled in connection with the Union Pacific in 1948 was about $4,000,000. Based on the loss of the potential traffic as estimated by the Rio Grande, it urges that it will lose that amount of revenue if the joint through rates sought in this proceeding are established.

The Great Northern, Northern Pacific, Santa Fe, and Milwaukee oppose granting the Rio Grand's request for the establishment of competitive joint through rates via Ogden. Neither of these defendants, except the Santa Fe, connects with the Rio Grande. They participate, however, in joint rates with the Union Pacific on traffic between the northwest area and eastern points, but there are numerous exceptions. For example, from origins on the Great Northern joint rates are not applicable via Spokane and the Union Pacific on wool, livestock, ores, concentrates, or smelter products, and the joint rates eastbound on fruits and vegetables over that route are limited to destinations reached by the Union Pacific. These restrictions became effective on September 15, 1932, although they were protested by various shipping interests. On lumber from origins on the Great Northern, joint rates apply over that line to Spokane and the Union Pacific only when the traffic is destined to points on and west of the Missouri River, Council Bluffs to Kansas City, thence the line of The Kansas City Southern Railway Company to the Gulf of Mexico. Reference is made also to *Transcontinental Traffic Routed via Bieber, Calif.*, 213 I. C. C. 487, wherein the Great Northern was permitted to cancel joint rates via Bieber

and Salt Lake City on transcontinental traffic originating at or destined to various points on the Great Northern in Idaho and Washington.

[fol. 2296] The Milwaukee, the Santa Fe, and the Wabash, in a joint brief, contend, as does the Great Northern, that upon the evidence submitted the establishment of joint rates which would short-haul the defendants is not warranted.

A large number of shippers and representatives of communities served by the Union Pacific, and traffic associations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas Commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock.

It is not practicable to deal with all of this evidence in detail, but the testimony and position of the parties have been considered. Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four northwestern States, a total of 157,762, that number was used [fol. 2297] as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to $49,880,000 yearly.

Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (a) the discontinuance of four trains daily eastbound and four trains daily westbound between Pocatello and North Platte; (b) three trains eastbound and three westbound daily between North Platte and Council Bluffs; and (c) one train eastbound and one westbound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of $5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300. Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed as 5,144, with a total loss of wages of $21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain [fol. 2298] lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect

such employees from loss, as conditions upon the establishment of the joint rates and through routes.

There is no specific provision in section 15(3) or (4) requiring that such conditions be imposed, but it is argued that in finding joint rates and through routes necessary and desirable in the public interest, as required by section 15(3), the interests of employees must be considered as they are in proceedings involving consolidations, mergers, and abandonments. Reference is made to the decision in *Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183. In that proceeding certain carriers sought to cancel their joint rates over through routes with specified short lines. It was found that cancellation of the rates and routes would result in abandonment of the short lines with resulting inconvenience and loss to shippers and to carrier employees. Permission to cancel certain of the routes was denied.

[fol. 2299] Upon the record before us it is impossible to find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made. Shippers have a right to route their own traffic, and where traffic is not routed by the shipper, the originating carrier has the right to control the routing within certain limitations.

General Discussion and Ultimate Fact Findings

In support of its contention that the assailed rates over its line are unreasonable, the Rio Grande submitted a large number of comparisons showing the differences in such rates and the competitive joint through rates on various commodities, together with the car-mile and ton-mile revenue under the respective rates and what the revenue would be if the lower joint rates were made applicable over its line. Neither factor of the combination rates is assailed, but the aggregates of such factors are alleged to be unreasonable to the extent that they exceed the competitive joint rates.

Many of the present joint rates on the transcontinental

traffic here affected are commodity rates which were established originally on particular commodities to meet water [fol. 2300] competition. Others, such as those applicable on agricultural commodities, were established from producing areas in the excluded territory to enable growers and shippers to market such commodities in eastern and midwestern territories. For these reasons, and others, the defendants contend that it would be unreasonable to require the application of the joint rates over the Rio Grande, as it would result in depleting their revenues and in wasteful transportation over circuitous routes, as well as in short-hauling the defendants, especially the Union Pacific. For example, the rates on potatoes to Chicago are 96 cents from Monte Vista and Greeley, Colo., and $1.14 from Idaho Falls, Idaho, a difference of 18 cents, although the distance from Idaho Falls to Chicago, 1,597 miles, is 315 miles greater than from Monte Vista and 590 miles greater than from Greeley. Computations were submitted which indicate that on a carload of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of $1.14 would yield a net profit of $1.97 per car when moved over the Union Pacific to Omaha and the Chicago & North Western beyond, and a net loss of $62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington beyond, 1,809 miles. The computed costs were based on general cost scales compiled by our Bureau of Accounts and Cost Finding and were not based on studies [fol. 2301] of particular movements of traffic over the respective routes. Many other examples of this nature were submitted.

With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within

the zone of reasonableness and must be regarded as reasonable rates.

With respect to the issue under section 15, the facts before us here are in some respects similar to those considered in *United States* v. *Union Pac. R. Co.*, 28 I. C. C. 518, and *Western Pac. R. Co.* v. *Northwestern Pac. R. Co., supra*, in both of which the complaints were dismissed. In the first, the complainant sought through routes and joint rates over the Rio Grande, among others, in connection with the Santa Fe at Pueblo or Denver on the east and the Oregon Short [fol. 2302] Line at Salt Lake City or Ogden on the west, on traffic moving between Chicago and certain Mississippi and Missouri River points, on the one hand, and stations on the Oregon Short Line, on the other. The joint rates sought were the same as those then in effect over generally shorter routes of the Union Pacific and other defendants. The short-hauling provision of the statute was held to be a bar to the establishment of the routes and rates sought.

In the second proceeding, the Western Pacific alleged that the failure of the defendants to join with it in the establishment and maintenance of joint rates between points in California on the Northwestern Pacific Railroad Company, controlled by the Southern Pacific, on the one hand, and eastern defined groups, on the other hand, over routes in which the Western Pacific would be an intermediate participating carrier, was discriminatory and prejudicial, and that the combination rates between such points over such routes were unreasonable. Therein, division 2 said, at pages 136 and 137:

> In requesting the application of the joint rates over its line complainant is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic which, under the act, belongs, in the absence of emergency, to the Northwestern Pacific and Southern Pacific.

The instant complainant likewise is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul. In that proceeding, the distance over the Southern Pacific route to Ogden was about 200

miles shorter than the route sought, which is substantially the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves. Again, the short-hauling provision was held to be a bar to the relief sought.

[fol. 2303] Since the two decisions last above referred to, section 15(4) has been amended (in 1940), so that now the prohibition against short-hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons, Inc.* v. *Alton R. Co., supra*, the Supreme Court said that the expressions "more efficient or more economic" transportation, as used in section 15(4), "may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found." These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.

[fol. 2304] In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

There is no contention here by complainant that the present routes of the defendants are not adequate for the traffic hauled and no finding is sought by complainant to that effect. The absence of such a request may well be due to complainant's contention, not sustained herein except as to sheep and goats to points on the Missouri River and

east thereof, that through routes via Ogden and the Rio Grande already exist within the meaning of section 15(3) of the act. Testimony on behalf of shippers, however, does raise a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities.

In order properly to evaluate the testimony of shippers it is necessary to consider the nature, extent and functioning of our intricate and far-flung commodity marketing system. The growth of our population and the development of the country have required a constantly expanding flow of diverse commodities. Great consuming areas in many instances are far distant from the points of production of the necessities of every-day life, particularly articles of food. Movements of transcontinental proportions are involved in important instances. That is true here. A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and over as many routes as possible. This requires that many [fol. 2305] routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semi-perishable commodities. *Southeastern Vegetable Case*, 200 I. C. C. 273, and *Routing Lumber and Fruits, South to C. F. A.*, 256 I. C. C. 223.

While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effec-

tive participation in the wide-spread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stop-off for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes.

[fol. 2306] In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established.

The situation as to the commodities above named, as to which the defendants' routes are inadequate, is largely similar to that considered in *D. A. Stickell & Sons, Inc.* v. *Alton R. Co., supra.* There is one point of difference. There, the operating conditions, mile for mile, on the respective routes were substantially similar. Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recognized by the Commission in prior proceedings. See *Livestock—Western District* [fol. 2307] *Rates, supra, and W. H. Bintz Co.* v. *Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486. There is before us no data from which the exact differences in the costs over the Union Pacific routes and the Rio Grande routes can be determined. Several estimates were made by witnesses for both the Rio Grande and the defendants, but the estimates vary so widely and are so obviously incomplete as to be practically useless. The record is sufficiently complete, however, to enable us to make a rough approximation of the differences in the operating conditions and to appraise the weight which should be given to those differences, as well as to the differences in the distances over the respective routes, in determining the issues before us.

The differences in the distances between the Union Pacific routes through Wyoming on the one hand, and the Rio Grande routes sought on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles, or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the North-[fol. 2308] ern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and ranging up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls between the excluded territory on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general, spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

[fol. 2309] As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments westbound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs eastbound, who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3(1) of the act.

As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short-haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short-haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

[fol. 2310] There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3(4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred. No such a showing has here been made.

The situation is different with respect to traffic between Utah common points on the one hand, and the northwest area on the other. On such traffic the Union Pacific interchanges with the Bamberger Railroad Company at Ogden

at joint through rates to and from points on that line, including Salt Lake City. There is no apparent reason why similar arrangements should not apply on like traffic interchanged with the Rio Grande. The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande.

The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points, embraced within the findings of unlawfulness herein made.

The testimony dealing with the terminal facilities at Ogden has been carefully considered. We are persuaded that the additional traffic over the Rio Grande routes which will result under the findings herein made can be interchanged at that point or at Salt Lake City by the use of the present facilities and without serious detriment to the operating efficiency of the railroads concerned.

[fol. 2311]. CONCLUSIONS

We conclude:

1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pa-

cific and the Chicago & North Western from Omaha to Chicago, including destinations in the lower peninsula of Michigan and in Oklahoma and Texas.

2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

[fol. 2312] 3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act.

4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

An appropriate order will be entered.

ARPAIA, *Commissioner*, concurring:

In my opinion there are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of section 15(4) of the Interstate Commerce Act is not required.

The evidence of record shows that these routes presently are open and available to shippers on combination rates. The history of the relationship between these carriers leaves no doubt as to that fact.

When joint rates over these routes, which were in effect from 1897 to 1906 and 1912, were canceled by the Union Pacific, no specific cancelation was made of the through routes over which the joint rates applied. To my mind it would be necessary for the Union Pacific to have shown affirmatively that it refused traffic on through billing over the Ogden Gateway in order to negative the existence of

such through routes. Instead, the record shows information elicited from an official of the Union Pacific to the [fol. 2313] effect that routes via Ogden were available subject to the application of combinations of local rates.

The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.

We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires.

LEE, *Commissioner*, concurring in part:

I concur in the conclusions of the majority that joint rates the same as apply over the Union Pacific and its connecting lines should be established via Ogden or Salt Lake City, in connection with the Rio Grande, on the commodities and from and to the origins and destinations specified by the majority; that the rates assailed on such commodities from and to such origins and destinations are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes; and that the maintenance by the Union Pacific and other defendants of joint rates from and to points on the Bamberger Railroad south of Ogden, while refusing to participate in like rates [fol. 2314] from and to the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act. The decision in this case will correct in part, a long-standing, unlawful rate adjustment, an adjustment which has discriminated against the industries and people of Washington, Oregon, Idaho, Montana, and Utah, the area from and to which such unlawful adjustment applies being referred to in the report as the "excluded territory." However, I am of the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment. On

the facts shown in the record the act requires that the rates on all commodities, between points in the excluded territory and Colorado common points and points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes. The act contemplates that there shall be no excluded territory with respect to any commodity or persons.

Transcontinental joint rates on freight traffic were established in 1897, from and to the territory here considered, applicable over the Rio Grande routes via Ogden. These joint rates were in effect for many years, until 1906 from and to some points and until 1912 from and to other points, when they were cancelled by the Union Pacific and higher combination rates became effective. However, the through routes were not closed. Numerous shippers testified that these routes are open and available and that they can route traffic over them. This testimony was not challenged or contradicted. On the contrary, a responsible traffic official of the Union Pacific testified that the Rio Grande routes are "actually available today on traffic to or from [fol. 2315] points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon, and Washington." That these routes are open and used is proved by evidence in the record (1) of eastbound shipments of various commodities made in 1948 from points on the Union Pacific in the excluded territory to Colorado common points, and which moved over the Rio Grande routes, including the entire length of the Rio Grande line, on through bills of lading issued by the Union Pacific, (2) of westbound shipments of various commodities made in the same year from various eastern points to points in the so-called excluded territory, and which moved on through bills of lading over carriers east of Colorado junctions to the Rio Grande at such junctions and thence over the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond, and (3) of numerous shipments moved over the Rio Grande routes between eastern points and the excluded territory during World War II and in 1949 when the Union Pacific main line in Wyoming was blocked by snow. The year 1948, the calendar year immediately preceding the hearing, was selected as typical of the situation which

prevailed in the prior years and which continued up to the time of the hearing.

I am unable to agree with the majority that the shipments referred to above must be regarded as of an isolated nature and as falling in the same category as the single shipment considered in the *Beaman Elevator case*, 155 I. C. C. 313, referred to in a footnote to the opinion of the United States Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. In the *Beaman case* a single carload shipment of grain moved over the lines of two connecting railroads from Beaman, Iowa, via Clinton, Iowa, to St. [fol. 2316] Louis, Mo. The evidence plainly showed that the bill of lading covering this shipment was issued and recognized by these railroads through error. There was no evidence "of any like movement before or since." Adequate service was available over nine other routes. A wholly different situation is before us in this proceeding. Numerous shipments of a variety of commodities have been transported in both directions over the Rio Grande routes on through bills of lading deliberately issued and recognized by the Union Pacific and the other participating carriers. The situation here before us is similar to that considered by the Supreme Court in *Virginia Ry.* v. *United States*, 272 U. S. 658, also referred to in a footnote to the decision in *Thompson* v. *United States, supra*, in which, in referring to the route over which the Commission there prescribed reasonable and non-discriminatory rates, the court stated that "that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive." The court held however, that even though the route was closed commercially, open through routes to the West were in existence.

In the *Thompson case* the court pointed out that "there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line" or that the carriers have ever offered through service over the Missouri Pacific-Burlington route. Thus, the facts before the court in that case likewise were wholly different from those be-

fore us in this proceeding. I think that the court's opinion in that case supports the conclusion that through routes on [fol. 2317] freight traffic over the Rio Grande routes have existed for many years and now exist and that the short-hauling provision of section 15(4) is not applicable.

If, however, the Rio Grande routes were actually closed, the short-hauling provision of Section 15(4) of the act would not be a bar to the correction in full of the present discriminatory rate adjustment. The discrimination in violation of Section 3 of the act, shown by the evidence, makes that provision of Section 15(4) inapplicable. In any event, the Rio Grande routes are shown to be needed in order to provide adequate, and more efficient and more economic transportation, and, if they were not already open through routes, we could and should require that they be opened.

As stated in the report of the majority, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments, livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, who reconsign shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific. The evidence is equally impressive with respect to the disadvantage or handicap to shippers or receivers of lumber, building materials, farm machinery, and other commodities. For instance, the lumber company at Military Junction, Colo., referred to in the majority report, is handicapped in its efforts to compete with mills at Denver and Kansas City because it cannot obtain lumber from the excluded territory for milling in transit on the same basis as these competing [fol. 2318] mills. A representative of that company testified that it would purchase several million feet of lumber annually from points in the excluded territory if it had available reasonable and non-prejudicial joint rates over the Rio Grande routes. By reason of the rate situation complained of, the lumber dealer at Grand Junction, Colo., who is also referred to in the majority report, has lost business to competitors who have the benefit of transit at the

joint rates applicable over the Union Pacific routes. This evidence is only typical; it was presented as representative of the prevailing situation.

Shippers and receivers of freight at points in eastern Oregon and southern Idaho, on the line of the Union Pacific, have been, and are, excluded from additional markets that would be available to them if reasonable and non-prejudicial joint rates were in effect over the Rio Grande routes. Some of these shippers express the belief that the establishment of such joint rates would provide them with a better car supply in that the Rio Grande would furnish additional cars to move out shipments routed over its line. It is common knowledge that a better supply of cars is available to shippers who have competitive routes to the consuming markets. The record clearly establishes that the present rate adjustment results in a substantial disadvantage to the industries, shippers, and receivers located in the considered territory, and in undue prejudice to them.

Likewise, the evidence establishes that the defendant railroads discriminate against the Rio Grande in that from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short-haul themselves by maintaining joint rates, [fol. 2319] the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections, its long-haul, while refusing to establish the same joint rates over the Rio Grande routes. The routes by which defendants short-haul themselves are generally as long as, and in many instances substantially longer than, the Rio Grande routes, and the hauls of the Union Pacific and of other defendants are shorter over such established routes than over the Rio Grande. The evidence does not establish that transportation conditions are more favorable over these routes than over the Rio Grande routes which are discriminated against by defendants. On the contrary, the record, in my opinion, warrants finding that the transportation conditions over such routes are, in general, no more favorable than over the Rio Grande routes. The Union Pacific and the other defendants are, and for

the future will be, violating Section 3(4) of the act by failing and refusing to participate in joint rates with the Rio Grande, from and to points in the excluded territory, to and from points in official, southern and southwestern territories, while participating with each other in joint rates from and to the same points, over routes over which the Union Pacific and other defendants short-haul themselves.

The joint rates on freight traffic which are now in effect over the Union Pacific routes are shown by the record to be reasonable for application over the Rio Grande routes. We should require that such rates be established and maintained over such routes.

[fol. 2320] The Union Pacific is a strong and progressive railroad. It is ably managed and efficiently and economically operated. Being the only railroad in southern Idaho, every shipper in that area is dependent on it for rail service. I am persuaded that, instead of being allowed to continue to maintain an "excluded territory", it should be required to provide these shippers with joint rates which will enable them to buy and sell in all markets on an equality with other shippers, and that such joint rates will not result in any substantial diversion of the traffic now moved over its lines. The joint rates now in effect on freight traffic over its routes are shown by the record to be reasonable for application over the Rio Grande routes. We should require that these rates be maintained over the latter routes.

PATTERSON, *Commissioner*, concurring in part:

I concur in the relief granted to the Rio Grande and transit operators thereon who are handicapped by the lack of through routes and joint rates the same as those over the Union Pacific routes. It seems to me, however, that the findings of unlawfulness are inconsistent in that they fail to include lumber and articles taking lumber rates in the relief granted.

The showing made of a need for such through routes and joint rates, in my opinion, is more persuasive as to lumber and articles taking lumber rates than as to any of the commodities included in the foregoing findings, with the possible exception of livestock. The record shows that at least one lumber dealer at Grand Junction, another at Mili-

tary Junction, near Denver, and a wood-treatment plant [fol. 2321] at Salida, all on the Rio Grande, are handicapped in their efforts to compete with like dealers on the Union Pacific routes, and that at least the dealer at Grand Junction has lost business, by reason of the rate situation complained of, to competitors who have the benefit of transit at the joint rates over the Union Pacific routes. I believe this evidence is adequate support for the inclusion of this commodity group in the findings of unlawfulness made.

The order entered in connection with this report requires the establishment on particular commodities, in connection with the Rio Grande, of through routes and joint rates the same as those now in effect over the Union Pacific routes. The formation of those through routes is appropriately left, in large measure, to the carriers. I want to make it clear that in my view, on traffic to or from the area east of the Colorado common points, where the provisions of the order so permit, these new routes should be formed in such a manner as to short-haul the Union Pacific only to the extent necessary to afford the Rio Grande its line haul and avoid unduly circuitous routes.

MAHAFFIE, *Commissioner*, dissenting in part:

I dissent from the majority report insofar as it fails to find that the existing routes to and from the northwest territory, described in the report, via the Rio Grande through the Ogden Gateway are effective through routes and that the failure of the Union Pacific and other defendant railroads to establish joint rates with the Rio Grande via Ogden unjustly discriminates against that carrier. I disagree also because the report does not find that it is [fol. 2322] necessary and desirable in the public interest that joint rates on commodities generally, in addition to those specified, should be established over such through routes.

We are not called upon in this proceeding to exercise our authority, under section 15(4) of the Interstate Commerce Act, to establish new through routes via that gateway. Therefore, the conditions in that paragraph are not applicabl. We are free to exercise our power under section 15(3) to establish joint rates unhampered by those restrictions.

A finding that these routes are open and freely available to shippers today is fully supported by the evidence. It was acknowledged by a freight traffic official of the Union Pacific that a shipper has the right under the Act, (section 15(8)), to specify such routes for the carriage of his shipments. That right, it should be noted, can be availed of only when two or more through routes and through rates are actually established and in existence.

The record shows that some joint through rates, as distinguished from combination rates, are in fact now published in a Union Pacific tariff for application through Ogden over the entire length of the Rio Grande to Denver and the Union Pacific beyond. These apply on shipments of sheep or goats originating on the Union Pacific in southern Idaho and eastern Oregon, billed to destinations on the Missouri and Mississippi rivers and to Chicago and other points. The joint rates are higher than rates on like livestock moved over the direct route of the Union Pacific and, therefore, retard use of the Rio Grand- route. But the publication of such joint rates in connection with transportation over the whole length of the Rio Grande is proof of the consent of the Union Pacific for the use of that rail [fol. 2323] line as part of a through route at joint rates. And it was further stated by the same witness that the Union Pacific has no objection to publishing the same joint rate arrangement on shipments of cattle.

In 1941-1942 mixed military trains with troops in passenger cars and military supplies in freight service were transported over this route on through billing. Four examples of such trains are described in the record. These moved from Fort Still, Okla., and Camp Claiborne, La., to Fort Lewis, Wash., in December 1941 and February 1942. The trains were routed and moved to Colorado junctions of the Rio Grande, thence over that railroad to Ogden and the Union Pacific beyond. Unlike certain other movements to and from the northwest area via Ogden in the war period in connection with these two lines, the military trains were not routed under service orders issued by us or the Office of Defense Transportation. Arrangements for the through movements were made with the railroads and the rates charged were settled on the basis of the joint rates applicable in connection with the Union Pacific routes through Wyoming.

The existence of the route as an established through route was undoubtedly an important consideration for its use in February 1949, when the line of the Union Pacific was blocked by snow. In that emergency, freight cars, passenger cars, express and mail were promptly diverted by the Union Pacific through Denver over the Rio Grande to Salt Lake City and to Ogden for movement beyond. Of the freight cars diverted, 1,493 were for destinations in Idaho on the Union Pacific and in the northwest area.

Actual and continuous use of the Rio Grande route at through rates made by combinations of separate rate factors via Ogden to and from the northwest without opposi- [fol. 2324] tion or objection by the Union Pacific or other participating railroads is amply shown by the evidence of typical movements of numerous commodities. The calendar year 1948 was used by the Rio Grande as a representative year. In that year 16 carloads of various commodities were shipped from the northwest territory over the Union Pacific to Ogden and the Rio Grande beyond to Denver, Louviers, Pueblo and Trinidad, Colo., over the entire length of the Rio Grande. They originated on the Union Pacific and moved on through bills of lading. Some of the cars were partly unloaded at Rio Grande points and then continued through to their destinations. Seventeen carloads of various commodities moved, from late in December 1947, and in the year 1948, from various eastern points on through bills of lading at through combinations of rates over rail lines east of the Colorado junctions to the Rio Grande at such junctions thence over that line to Salt Lake City or Ogden and the Union Pacific beyond. Some of the cars were stopped for partial unloading at stations on the Rio Grande or the Union Pacific.

The same kinds of movements as those exhibited in 1948 prevailed to about the same extent in years prior to 1948 and continued into 1949 at the time of the hearings.

All of this evidence clearly supports a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for

a finding that they are established through routes announced by the United States Supreme Court in *Thompson v. United States*, 343 U. S. 549. In that case, the court said [fol. 2325] "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit, and therefore, no through routes existed between those points.

The situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole inevitably leads to that conclusion. To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.

Even if a finding that no through routes exist over this line be sustained, there is substantial evidence that the rate situation results in undue prejudice and undue disadvantage to shippers and to districts and localities in Utah and Colorado dependent upon the Rio Grande for rail serv-[fol. 2326] ice, in violation of section 3(1) of the Act. Such violation removes the restrictions imposed in section 15(4) upon our authority to establish through routes. That undue prejudice and undue disadvantage exist is fully supported by the testimony of numerous witnesses. Briefly, the testimony shows that livestock producers in Utah and

Colorado, in areas served by the Rio Grande, are not able, due to the combination through rates via Ogden, to buy on a reasonably competitive basis, cattle and sheep in Idaho, Montana, Oregon and Washington for grazing and feeding in transit on the ranges in Utah and Colorado, in competition with buyers and stock feeders in northern Colorado, Nebraska and northern Kansas. The same undue prejudice and undue disadvantage is experienced by buyers and feeders in southeastern Colorado east of Pueblo, Colo., and in southwestern Kansas served by the Santa Fe and the Missouri Pacific railroads. Their failure to obtain joint through rates from the producing areas in the northwest over the Union Pacific to Ogden, Rio Grande to Pueblo and its connections beyond places them at an undue disadvantage.

The record contains convincing evidence by representatives of large groups of shippers that there is undue prejudice and undue disadvantage to wool producers, as well as to livestock operators in Colorado served by the Rio Grande; also to lumber dealers and processors; dealers in farm machinery and other commodities, and to a cold storage warehouse operator in Pueblo. There is substantial evidence from producers and shippers of agricultural commodities in the northwest, particularly in Idaho, to support findings that the refusal of the defendant railroads to join in joint through rates via Ogden and the Rio Grande to and from points beyond the Colorado gateways of that [fol. 2327] carrier exclude them from additional markets needed for their products. All of that evidence sustains and fully supports the finding that there is a violation of section 3(1) of the Act and justifies a general finding that joint through rates via the Ogden Gateway should be established on commodities generally. The findings should not be limited, as are the findings of the majority, to particular commodities as to which evidence was offered but should be broadened to include all commodities.

We are fully warranted in dealing with this situation broadly, in considering what is necessary and desirable in the public interest, with respect to joint rates over these established through routes. We are not limited to consideration of proof as to every rates on every commodity from every origin to every destination. Such a view of our

authority is too narrow and is not justified by the law or the evidence.

In other types of proceedings where we found it necessary to deal generally with a comprehensive rate situation the Supreme Court has held that we may properly make general findings upon typical evidence representative of the situation as a whole.

In exercising authority under section 13(4) as to the lawfulness of rail rates on intrastate traffic in a State and under section 15(6) as to divisions of joint rates of rail carriers we may make general findings when the evidence is shown in numerous and representative instances that are typical of the rate situation as a whole. Similarly we need not attempt the impracticable, if not impossible, task of examining every rate on every commodity and class of commodities, from every origin to every destination in the large areas and territories under scrutiny here. We can adjust the remedy to the evil and make our order as broad as the discrimination and undue prejudice. See *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, 507. In *Wisconsin R. R. Comm.* v. *Chicago, B. & Q.* [fol. 2328] *R. R. Co.*, 257 U. S. 563, 579, a proceeding dealing with intrastate rates on a state-wide basis, the Court stated that "any rule which would require specific prooof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute." In *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 774, the Court said that "when an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings." That case also arose under section 13(4) of the Act with respect to intrastate rates. There the order related to a few commodities but the rates prescribed were state-wide in operation and applied to shipments between hundreds of points of origin and destination. Under those circumstances the Court held that "To require specific evidence and separate adjudication in respect of each would be tantamount to denying the possibility of granting relief."

To the same effect is the holding of the Court in *New England Divisions Case*, 261 U. S. 184, 197. There the Court had under consideration contentions with respect to

the nature of the evidence in support of our order as to divisions of joint rates between groups of rail carriers. The Court pointed out that our order was based on evidence which we assumed was "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." That method of proof was found to be our common practice in adjudicating comprehensively upon substantially all rates in a large territory, and that the actual necessities of procedure and administration had led to the adoption of that method also in passing upon the reasonableness of proposed rate increases. That method was found equally appropriate in [fol. 2329] passing upon multitudes of divisions of joint rates. That it has similar application in a comprehensive case such as we have here where we are called upon to establish joint rates via a gateway through which substantially all joint rates have been refused, is equally clear. In the case cited, the Court said that there was no constitutional obstacle to the adoption of the method pursued and that only in that way could the task be performed.

The same rule should be applied in the instant case, in order to carry out effectively our authority to prescribe, in the public interest, joint rates by way of the Ogden Gateway. The report of the majority finds it necessary in the public interest that joint rates via that gateway be established on particular commodities as specified in the report. The same evidence is, and should be concluded to be, typical of the rate situation as a whole. In accordance with our practice in other types of comprehensive proceedings which has been found lawful and necesary under principles announced in the Supreme Court cases cited, that evidence should be found adequate to support an order that joint rates be established via that gateway on commodities generally.

I am authorized to state that *Commissioners* SPLAWN and CROSS join in this expression.

Commissioner KNUDSON did not participate in the disposition of this proceeding.

[fol. 2330]

APPENDIX

From	To	Commodity	Rates[1]		Distances[2]		Revenues per car-mile[3]			
			Via Union Pacific routes	Via D&RGW routes	Via Union Pacific routes	Via D&RGW routes	Via U. P. Joint rates	Via D&RGW Combination rates	Via D&RGW Joint rates	Average Carload Weight
			Cents	Cents	Miles	Miles	Cents	Cents	Cents	Pounds
Pendleton, Oreg.	North Salt Lake, Utah	Cattle	58	90	342	342	37.99	58.95	37.99	22,400
Logan, Utah	Denver, Colo.	do	83	111	649	679	28.65	36.62	27.38	do
Huntington, Oreg.	Chicago, Ill.	do	168	213	1,872	2,083	20.10	22.91	18.07	do
Idaho Falls, Idaho	Oklahoma City, Okla.	Potatoes	90	128	1,428	1,462	28.44	39.50	27.78	45,120
Redmond, Oreg.	Atlanta, Ga.	do	163	203	2,808	3,008	26.19	30.45	24.45	do
Armstead, Mont.	Oklahoma City, Okla.	Dry beans and peas	93	203	1,550	1,584	50.89	108.70	49.80	84,820
Twin Falls, Idaho	Atlanta, Ga.	do	148	187	2,172	2,372	57.80	66.87	59.92	do
Nampa, Idaho	Detroit, Mich.	Lettuce	175	217	2,074	2,286	20.96	23.58	19.02	24,840
Hood River, Oreg.	Pittsburgh, Pa.	Apples	192	252	2,666	2,877	29.99	36.47	27.79	41,640
Spokane, Wash.	Kansas City, Mo.	Wheat	86.5	132	1,901	2,101	47.40	65.45	42.89	104,180
Pocatello, Idaho	Wichita, Kans.	do	68.5	96	1,206	1,240	59.17	80.66	57.55	do
Spokane, Wash.	Omaha, Nebr.	Lumber	92	143.5	1,784	2,003	35.76	49.68	31.85	69,340
Kellogg-Wardner, Idaho	Fort Worth, Tex.	do	164	143.5	2,237	2,271	32.24	43.81	31.75	do
Portland, Oreg.	Provo, Utah	Canned goods	84	116	943	930	53.82	75.36	54.57	60,420
Portland, Oreg.	New Orleans, La.	do	143	209	2,762	2,728	31.28	46.29	31.67	do
St. Louis, Mo.	Logan, Utah	Roofing	153	196	1,453	1,588	64.76	75.91	59.25	61,500
Chicago, Ill.	Spokane, Wash.	do	161	250	2,272	2,483	43.58	61.92	39.88	do
Geneva, Utah	Boise, Idaho	Iron and steel articles	63	78.55	447	440	109.76	139.03	111.51	77,880
Geneva, Utah	Portland, Oreg.	do	63	78.55	928	921	52.87	66.42	53.27	do
Pittsburgh, Pa.	do	do	167	205	2,729	2,941	47.50	54.10	44.08	do

[fol. 2331]

APPENDIX—Cont.

From	To	Commodity	Rates[1]		Distances[2]		Revenues per car-mile			
			Via Union Pacific routes	Via D&RGW routes	Via Union Pacific routes	Via D&RGW routes	Via U. P. Joint rates	Via D&RGW Combination rates	Via[3] D&RGW Joint rates	Average Carload Weight
			Cents	Cents	Miles	Miles	Cents	Cents	Cents	Pounds
Salt Lake City, Utah	Butte, Mont.	Agricultural implements	141	173	433	434	98.67	120.78	98.44	30,300
Detroit, Mich.	Malad, Idaho	do	295	333	1,836	1,982	49.17	51.41	45.54	do
Denver, Colo.	Spokane, Wash.	Vehicle parts	251	370	1,371	1,466	79.16	109.13	74.03	43,240
Fort Worth, Tex.	Seattle, Wash.	Animal and Poultry feed	119	278	2,338	2,372	31.48	72.48	31.02	61,840
Denver, Colo.	Butte, Mont.	Tires and tubes	179	294	908	1,004	73.41	109.05	66.39	37,240
Atlanta, Ga.	do	Furniture	396	596	2,318	2,518	28.63	39.67	26.36	16,760
Kansas City, Mo.	Seattle, Wash.	Paper	151	373	2,069	2,289	31.72	70.06	28.93	42,620
Oklahoma City, Okla.	Boise, Idaho	Petroleum and petroleum products	141	188	1,612	1,645	48.09	62.83	47.13	54,980
Kansas City, Mo.	Portland, Oreg.	Paint and paint material	170	364	1,891	2,091	52.84	102.32	47.79	58,780

[1] In cents per 100 pounds; in effect September 1, 1949.
[2] Over existing routes of Union Pacific and connections; and over Denver & Rio Grande Western routes.
[3] At joints rates applicable over competitive routes of Union Pacific and connections.

[fol. 2332] At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ORDER—January 12, 1953

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination:

It is ordered, That the defendant named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from

practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately [fol. 2333] west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the

undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

George W. Laird, Acting Secretary.

(Seal)

[fols. 2334-2338] INTERSTATE COMMERCE COMMISSION

No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ORDER MODIFYING FORMER ORDER—February 13, 1953

In the matter of a letter request on behalf of defendants for (1) postponement of the effective date of the order and (2) extension of time in which to file petitions for reconsideration.

Present: Charles D. Mahaffie, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

The Commission, on January 12, 1953, made and filed its report in the above-entitled proceeding containing its findings of facts and conclusions, and entered its order requiring the defendants to take certain action on or before April 7, 1953.

A letter request, dated February 9, 1953, has been made on behalf of defendants, pursuant to Rule 101(e) of the Commission's General Rules of Practice, for (1) postponement of the effective date of the order of January 12, 1953, and (2) extension of time in which to file petitions for reconsideration. The complainant does not oppose postponement of the effective date. Upon consideration of the matters presented, and for good cause appearing:

It is ordered, That the order entered in this proceeding on January 12, 1953, which required defendants to take

certain action on or before April 7, 1953, on 30-days' notice, be, and it is hereby, modified to become effective June 8, 1953, without change in the notice requirement.

It is further ordered, That the time for filing petitions for reconsideration in said proceeding be, and it is hereby, extended to April 15, 1953.

Dated at Washington, D. C., this 13th day of February, A. D. 1953.

By the Commission, Commissioner Mahaffie.

George W. Laird, Acting Secretary. (Seal.)

[fol. 2339] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD, COMPANY, Complainant,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL., Defendants

PETITION OF COMPLAINANT FOR RECONSIDERATION AND OTHER RELIEF—Filed April 15, 1953

Comes now The Denver and Rio Grande Western Railroad Company, complainant in the above-entitled proceeding, and petitions the Commission to reconsider, expand and modify its findings, conclusions and order of January 12, 1953, released January 26, 1953, in the respects hereinafter stated.

The Decision and Order

The report of the Commission indicates that ten of its members participated in the disposition of the case. The minutes of the Commission show that the entire membership of the Commission were present at the time the case was considered and decided but that Commissioner Knudson did not participate in its disposition.

[fol. 2340] After reciting that exceptions were filed to the report of the examiner and that the case was twice argued

orally, the report states that its conclusions "differ in part" from those recommended by the examiner. That is certainly an understatement since the examiner recommended that the relief sought by complainants be granted and since the report of the Commission grants relief on but a few selected commodities and imposes an intermediate territorial restriction which, as a practical matter, will prevent or minimize the use of the joint rates prescribed for eastbound application on the selected commodities.

For convenience in considering this petition, there follows a reproduction of the "CONCLUSIONS", in which six members of the Commission agreed on certain of the issues and but five members on certain other issues, and which sets out the maximum relief granted the complainant and intervening complainants.

> 1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago; including destinations in the lower peninsula of Michigan and in Oklahoma and Texas.
>
> [fol. 2341] 2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust

and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes, and unduly preferential of shippers and receivers using the Union Pacific routes in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the

4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

General C nments

In dealing with the scope and the authority of the Commission, the Supreme Court said in *Interstate Commerce Com.* v. *Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 30 S. Ct. 651, 656—

> "The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided."

In the instant case, the majority, who appear to have approved the report and order of the Commission did not take the broad view referred to by the Supreme Court. On the contrary, they adopted a narrow legalistic conception of the powers of the Commission and of the signifi- [fol. 2342] cance of the issues and the facts involved in this case. Nor is there anything in the report of the Commission to indicate that any consideration was given to

the evidence of record by an economist of the University of Utah (230-250) which showed the extraordinary growth and industrial development of the Northwest territory during the past 12 years. Since the Commission must look to the future as well as the present in deciding cases of this character, those facts should have been considered.

The Commission should also have considered that by the provisions of the Interstate Commerce Act and other laws, the policy of Congress is to encourage competition in trade and commerce, and that the restrictive rate policy of the defendants, and especially the Union Pacific, not only discourages competition but actually hampers and restrains it. In *United States* v. *Union Pacific Railroad Company*, 226 U. S. 61 and 226 U. S. 470, the Union Pacific was required to divest itself of the control of the Southern Pacific Company, because that control restrained commerce in violation of the Federal antitrust acts. The Supreme Court has held in recent years that administrative agencies such as this commission, while not charged with the duty of enforcing the anti-trust laws, are charged with the duty of administering their regulatory powers "* * * in the light of the purpose which the Sherman Act was designed to achieve." *National Broadcasting Company* v. *United States*, 319 U. S. 190, 223; *McLean Trucking Company* v. *United States*, 321 U. S. 67, 80. In *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, at page 47, the court stated that the National Labor Relations Board should not administer its act "* * * so single mindedly that it may wholly ignore other and equally important congressional objectives."

While the minutes of the Commission indicate that six commissioners approved and adopted the report and order as made, the report itself shows that Commissioner Arpaia does not concur in the view of the other five commissioners [fol. 2343] that through routes do not exist via the Rio Grande and the Union Pacific through Ogden on the traffic and between the territories involved. On the contrary, on page 66 of the report Commissioner Arpaia affirmatively stated that in his opinion through routes as claimed do exist via the Rio Grande the Union Pacific and the Ogden Gateway, etc., and therefore that "a finding under

the provisions of Section 15 (4) of the Interstate Commerce Act is not required." Commissioner Patterson, who concurred in part, said that the findings made are inconsistent and incomplete in that they failed to "include lumber and articles taking lumber rates in the relief granted." Since Commissioners Lee, Mahaffie, Splawn and Cross, by separate opinions, found that through routes exist and that the Rio Grande is entitled to the competitive joint rates sought via its route on all of the traffic and between all of the territories involved, it will be seen that on the question of the existence of through routes and of the inclusion of lumber, there is an even division of views among the ten commissioners who participated in the disposition of the case. These issues should have been resolved by the participation and vote of Commissioner Knudson, who was present at the time the proceeding was considered but, as already stated, did not participate in its disposition.

On sheet 6 of the report, the statement is made that routes via the Rio Grande are available to and from the points involved via the Union Pacific, Ogden, and the eastern connections of the Rio Grande, but that, except as to eastbound shipments of sheep and goats, shippers must pay charges at combination rates when they use that route. Sheet 7 of the report recites that should the route be opened to shippers on a commercial basis on other traffic by establishing the competitive joint rates sought, the existing routes would become effective through routes, a character they do not now possess. On sheet 9 of the report, the finding is made that the existing through routes are not through routes as that phrase is used in the Interstate Commerce Act, except as to the eastbound movement [fol. 2344] of sheep and goats, and therefore that any order which requires the establishment of such through routes and joint rates must be grounded upon findings specified in Section 15 (3) and (4) that the routes sought are necessary or desirable in the public interest and are needed in order to provide adequate and more efficient and more economic transportation.

The reach and scope of the rates and traffic involved in the instant proceeding requires a broader outlook than the majority has adopted. In proceedings of this type, the Supreme Court has held that as a practical matter the

Commission has the right and the duty to make general findings upon typical evidence representative of the situation as a whole. The parties are not required to pin point every factor with specific evidence. The Commission is not required to attempt the impractical, if not impossible, task of examining every rate on every commodity from every origin to every destination in the large territories involved in the instant case. The Commission has the right to enter an order as broad as may be necessary to correct the violations of the law found to exist. The cases cited in the separate opinion of Commissioner Mehaffie, in which Commissioners Splawn and Cross concurred, are apropos. They are *Illinois Central* v. *Public Utilities Commission*; 245 U. S. 493, 507; *Wisconsin R. Comm.* v. *Chicago, B. & Q.*, 257 U. S. 563, 579. The latter proceeding dealt with intrastate rates on a state-wide basis, and the court held that any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purposes of the law. To the same effect is *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 774; *United States* v. *Abilene and W. Ry. Co.*, 265 U. S. 274, 190-291, and the *New England Divisions case*, 261 U. S. 184, 197.

In the two latter cases, the court dealt with typical evidence as to representative divisions where hundreds of rates and divisions were involved. The claim is made by [fol. 2345] the Union Pacific and appears to be sustained by the views of the majority of the Commission except as to a few commodities that there is not a sufficient basis for a finding of a violation of Section 3 (1) or 3 (4) because the evidence does not show in pin point detail that the transportation conditions over the route of the Rio Grande are substantially similar to the transportation conditions over the numerous routes via which the joint rates sought are applied. We shall deal with this question more comprehensively elsewhere in this petition. It is sufficient to say at this point that if the Union Pacific and the majority are right it would be impossible for any complainant at any time to obtain relief under Section 3 or other sections of the Act in a case of this scope and character.

The Union Pacific says that the burden of proof is upon the complainant. That may be conceded to exist to a

limited extent without conceding that there is no burden upon the defendants. Sections 1, 2, 3, 4, 6 and 7 of the Interstate Commerce Act affirmatively impose statutory duties and prohibitions upon railroads and other carriers which must be met by the carriers independently of the exercise of any authority by the Commission to compel such compliance. Generally speaking, the power of the Commission to compel compliance is as broad as the duties imposed. Since under Section 13 (1) of the Act every complaint is an investigation, it follows that railroads may not in a particular investigation escape the duties imposed upon them to establish and maintain just, reasonable, non-discriminatory and non-prejudicial rates, rules, routes and practices on any such tenuous ground as the burden of proof. In *Burson Knitting Co.* v. *C. M. & G. Ry. Co.*, 42 I. C. C. 739, at page 741, the Commission held that "The burden is on the defendants to justify not only the intrinsic reasonableness of the increased rate, but to show that it is free from the alleged unjust discrimination." To the same general effect is the recent decision of the Commission in *Continental Steel Corp.* v. *N. Y. C. & St. L.*, 256 I. C. C. [fol. 2346] 167. At page 174 of that decision the Commission held that "The burden is not on the shipper to show similarity of carrier competition from the alleged prejudiced and preferred points, but is on defendants to show by satisfactory and convincing evidence that a sufficient dissimilarity exists to justify the different treatment." Moreover, it is well settled that while the burden of proof when it exists does not shift, the burden of evidence in a case does shift to the party who has material facts which are not available to others. In *Warn* v. *Davis Oil Co.*, 61 Fed. 631, 632, the court said:

> "He who has peculiarly within his power the means of producing evidence * * * shall be required to produce it."

And, in the case of *Emma F. Angell*, 217 Fed. 311, the court, in referring to this rule, stated that the defendant there came

> "within the principle that the litigant who has control of the proofs must produce them."

See also *Williams* v. *Casabeer*, 126 Cal. 77; *Barter* v. *Camp*, 71 Conn. 245; and other cases cited in Sec. 190, Chamberlayne on Evidence and 27 Corpus Juris, Sec. 21.

We will presently show in greater detail that in prescribing joint rates and through routes applicable to the eastbound movement of a few selected commodities shown in the CONCLUSIONS, the majority excluded from their application an intermediate territory composed of all Colorado common points and practically all points in Nebraska, Kansas, Northern Iowa, Wisconsin, Northern Michigan, Minnesota and the Dakotas, which also creates numerous fourth section violations and operates to defeat the usefulness of the very rates which were prescribed on the selected commodities to destinations in the territories east and southeast of the excluded intermediate territory. As stated, Colorado common points are embraced within the [fol. 2347] excluded territory, which means that the prescribed joint rates on the selected commodities would not be applicable from points in the closed door territory on the Union Pacific or its connections via Ogden and the Rio Grande, etc., to such Colorado common points as Denver, Colorado Springs, Pueblo and Trinidad, which are served by the Rio Grande. In other words, the restriction imposed in a large sense deprives the shippers of the commodities selected by the majority to the relief and the benefits of transit, etc., which the majority purported to give them.

At pages 44a and 59-60, the report of the Commission affirmatively recognizes the necessity of flexibility of routing and of the wide range of joint rate and transit arrangements which are necessary fully to sound out or exploit the marketing system of the country. Appendix 1 is a map which graphically depicts the excluded intermediate territory. That territory is shown in the cross-hatched section of the map. For instance, no experienced shipper of potatoes or other perishables embraced within the selected list of commodities would consign a car to Denver or Pueblo via the Ogden Gateway if at the time of the consignment he seriously intended to dispose of the car at such points. The same reluctance would exist in connection with shipments initially consigned to Wichita, Topeka, and Lincoln, Nebr., and other points in the excluded intermediate

territory. Most of the selected commodities are the type which need and use transit to a substantial degree. The facts of record reveal that shippers in Idaho and Oregon, etc., in the closed door territory naturally look to such nearby points as Denever, Pueblo and points in Kansas, etc., to feel out the market before deciding whether to reconsign the shipments to more easterly destinations. The territorial restriction imposed in the report of the Commission will deprive the shippers of such necessary experimentation in the sale of their commodities.

[fol. 2348] The transit tariffs generally applicable to the selected commodities contain what is known as the minimum rate rule. A typical rule will be found in Item 162 of Western Trunk Line Tariff I. C. C. No. A-3862. That rule provides that the through rate to be applied shall be the rate:

1. From original point of shipment to the final destination, or

2. From original point of shipment to the stop-off point or points, or

3. From stop-off point or points to the final destination,

whichever is highest, in effect on date of initial shipment from original shipping point, plus the prescribed transit charge.

A few practical examples will show that by virtue of the proscribed territory and the minimum rate rule applicable to shipments accorded transit will, as a practical matter prevent or substantially reduce the use of the joint rates to the very territory to which they are prescribed.

A shipment of dried beans originating on the Union Pacific at Rexburg, Ida., could not be transited at Colorado Springs, Colo., and thence re-shipped to Kansas City or St. Louis, Mo., Chicago, Ill., Minneapolis, Minn., Ft. Worth, Tex., or Oklahoma City, Okla., at the joint thru rate from origin, because the combination rates via the Union Pacific and the Rio Grande through Ogden to Colorado Springs aggregate $1.19 per 100 pounds whereas the prescribed joint through rates on dried beans from Rexburg to the destinations named range from 82 cents per 100 pounds to Kansas City to $1.13 per 100 pounds to Chicago and

are in every instance lower than the aggregate of the combination rates on dried beans from Rexburg to Colorado Springs. Appendix 2 attached hereto gives other examples of the restrictive effect of the proscribed intermediate ter-[fol. 2349] ritory by virtue of the transit rule already referred to in connection with livestock, frozen fruits, apples and potatoes from various points in Idaho, Oregon and Washington to Colorado common points and to Kansas City and other eastern points beyond the proscribed territory.

The Rio Grande and other railroads in the west publish a wide variety of transit arrangements and rules; but such transit arrangements are ineffective and useless unless the transit can be used at joint competitive rates which are applicable through the transit point from the origin of the shipment to its ultimate destination. Under the minimum rate transit rule already referred to, the joint rates approved would not be applicable in many instances to points in the territory beyond the proscribed territory to which the joint rates are intended to apply. We have already shown why this is so. Moreover, it will be difficult, if not impossible, for the Rio Grande or any other railroad to persuade a shipper of any of the selected commodities which need transit to forward the shipment via Ogden and the Rio Grand with the knowledge that if the market at the original destination selected is unfavorable the shipment could not in all instances be reconsigned to a more favorable market at the joint competitive rates from the origin point to the new destination.

The self defeating effect of joint rates which are applicable on certain traffic to an unrestricted territory but not applicable to a restricted territory was pointedly illustrated and recognized by the entire Commission in its decision in *Quanah, Acme & Pacific* v. *A. T. & S. F.*, 226 I. C. C. 201, at page 207. When in 1928 the Quanah, Acme & Pacific extended its line of Floydada, Tex., and made interchange connections with the Santa Fe, the joint rates generally applicable were established via the Quanah on transcontinental and other traffic without restrictions. However, when the transcontinental railroads canceled these joint rates in May and June 1933, they left point rates in [fol. 2350] effect on perishable commodities to a limited territory in Oklahoma, etc., served by the Quanah and the

Frisco railroads. As shown in the report of the Commission at page 207 the need of transit and the inapplicability of joint rates if shipment were reconsigned beyond the nonrestricted area resulted in the movement of but one car of perishable freight via the Quanah to the unrestricted territory during the period from July 1, 1933, to August 1, 1936, despite the fact that competitive rates applied to that territory.

Another objection to the proscribed intermediate territory is that it will create numerous fourth section violations. Take, for example, a shipment of apples from Payette, Ida., to Kansas City, Mo., as to which the joint rate is $1.32 per 100 pounds. If that shipment should be originally consigned to Pueblo via the route of the Rio Grande through Ogden, the combination rate would aggregate $1.68 per 100 pounds, which is greater than the joint rate to Kansas City, a point beyond Pueblo. Appendix 2 attached hereto refers to other examples of similar fourth section violations.

The Issues

The Rio Grande is a common carrier by railroad which is engaged in the transportation of persons and property in intrastate, interstate and foreign commerce, and operates approximately 2,400 miles of railroad in Colorado, New Mexico and Utah. The Rio Grande has interchange track connections and interchanges traffic with the Union Pacific at Denver, Colo., and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and with the Western Pacific at Salt Lake City. The Rio Grande also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern, which is a part of the Burlington System. At Colorado Springs the Rio Grande interchanges traffic with the Santa Fe and the Rock Island. At Pueblo, Colo., it interchanges traffic with the Santa Fe, the Colorado and Southern, and the Missouri Pacific. At [fol. 2351] Walsenburg, Colo., it interchanges traffic with the Colorado and Southern, and at Trinidad, Colo., with the Santa Fe and the Colorado and Southern.

The Rio Grande and the intervening complainants seek an order from the Commission which will require the Union

Pacific and the other defendants to establish competitive joint rates on freight traffic in interstate domestic or foreign commerce between points served by the Union Pacific or its railroad connections in the "closed door" territory northwest of Ogden, in Utah, Idaho, Montana, Oregon and Washington, on the one hand, and Utah common points and Colorado common points and points east thereof, on the other hand, via the existing routes via the Ogden and Salt Lake City, Utah, gateways, the Rio Grande and its eastern rail connections. The complaint of the Rio Grande alleges that the failure and refusal of the Union Pacific and the other defendants to establish via the gateways mentioned and the Rio Grande the joint competitive rates which are applicable via numerous other routes in which the Union Pacific and the other defendants participate result in through rates via the Rio Grande which are excessive, unjust, unreasonable and discriminatory in violation of section 1 and section 3 of the Interstate Commerce Act and are contrary to section 15 and the national transportation policy.

Between 1897 and 1906 and 1912, during a part of which period the Oregon Short Line, the Oregon-Washington Railroad and Navigation Company, and the Union Pacific were in separate receiverships, competitive joint rates with the Rio Grande via Ogden and Salt Lake City on the traffic already described were in effect. In 1906 and 1912 the joint competitive rates via the Rio Grande were cancelled, but no action was taken then or later to cancel the through routes. This was conceded by counsel for the Union Pacific at the second oral argument. (2368, 2369).

[fol. 2352] The Rio Grande now participates in joint competitive rates on traffic which moves between points on the Union Pacific, the Southern Pacific, the Western Pacific, and the Great Northern in California, Western Oregon and Western Washington through Salt Lake City and the Ogden gateways and Colorado common points and points east thereof.

Hearings were held before Chief Examiner Mullen at Salt Lake City, Utah, Boise, Ida., and Cheyenne, Wyo. The findings of the Chief Examiner, if adopted by the Commission, would grant the relief sought by the complainant and the intervening complainants.

The issues in the instant case are substantially similar to the issues decided by the Commission in *Quanah, Acme & Pacific* v. *A. T. & S. F. Ry. Co.*, 226 I .C. C. 201, and *Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183. The reach and principles of these decisions were ignored by the majority. They should not have been, since the rates on practically all commodities that move by rail were involved in those cases and since the territorial scope in each case was practically nationwide. The range of the commodities and the territorial reach did not deter the Commission in those cases from condemning the restrictive rate policies which were there assailed. When the line of the Quanah, Acme & Pacific was extended to Floydada, Texas, in 1928 and connected with the Santa Fe at that point, joint transcontinental and other rates on practically all commodities were established eastbound and westbound. In May and June 1933, the joint rates were canceled. However, at page 208 of the *Quanah* case, the Commission held that the cancellation of the joint rates did not cancel the through routes via the Quanah. A similar finding should be made in the instant case.

[fol. 2353] Assignment of Errors and Grounds for Reconsideration

The majority of the Commission erred in the following respects, among others:

I. In failing to grant the joint competitive rates and relief sought by the complainant and intervening complainants;

II. In failing to find through routes exist via the Union Pacific through Ogden and the Rio Grande between Colorado common points and points east thereof, on the one hand, and points in the closed door territory in northern Utah, Idaho, Montana, Oregon and Washington, on the other hand; and in finding that because such routes are not open on a commercial basis at competitive joint rates, they may not be considered through routes under the Interstate Commerce

Act because that would give them "a character which they do not now possess";

III. In failing to find that the refusal of the Union Pacific and the other defendants to establish joint competitive rates on the traffic and between the territories involved in this case via the Ogden Gateway and the Rio Grande on the same level that are now maintained by the defendants via numerous other routes via which the distance is as great, and in some instances substantially greater, than are the distances via the Ogden Gateway and the Rio Grande constitutes a violation of Section 3(4) of the Interstate Commerce Act.

IV. In finding that a violation of Section 3(4) exists by virtue of the maintenance by the defendants of joint rates between points in the closed door territory on the traffic involved and points on the Bamberger Railroad south of Ogden, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, the Commission erred in restricting that finding to and from points between Salt Lake City and Ogden since the Rio Grande serves many other shippers in Utah south of Salt Lake City, at such points as American Fork, Springville and Mid-[fol. 2354] vale, which are vitally interested in the competitive rates sought.

V. In failing to recognize and find that the testimony concerning the need of joint rates on various commodities should be regarded as typical of all commodities and in limiting the number of eastbound commodities selected and the territorial application of the rates approved, as well as in limiting the approval of westbound joint rates to granite and marble monuments from Vermont and Georgia.

VI. In finding on pages 60a-64 of the report that the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants and to support that finding in relying on *Livestock-Western District Rates*, 176 I. C. C. 1, decided in June 1931, and 190 I. C. C. 175, decided in December 1932 and in *W. H. Bintz Co.* v. *A. & S. Ry. Co.*, 216 I. C. C. 481, 486, de-

cided in June 1936, which merely relied on the older cases cited, as the record shows that the operating conditions, including distances of the Rio Grande, have been substantially improved since the date of the decisions cited. In fact, the record shows that the main line of the Rio Grande which would be used in connection with the traffic involved has been practically rebuilt since the period covered by the decisions cited.

VII. In failing to find that the rate situation maintained by defendants results in undue and unreasonable prejudice and disadvantage to shippers, districts and localities dependent upon the Rio Grande for service in violation of Section 3(1) of the Act, thereby removing the restrictions imposed by Section 15(4) upon the Commission's authority to grant the relief requested by complainant.

VIII. In imposing an intermediate territorial restriction which, as a practical matter, will nullify or minimize the limited relief granted by the Commission insofar as eastbound application of the prescribed joint rates is concerned.

[fol. 2355] IX. In failing to find that the through rates based on the combination of intermediate rates via Ogden and the Rio Grande on the traffic and between the territories involved are unjust and unreasonable to the extent they exceed the joint competitive rates of the defendants and the Union Pacific which apply via routes other than the Rio Grande generally on transcontinental traffic and other traffic, and which also apply via the route of the Rio Grande through Salt Lake and Ogden on traffic to and from points in California and certain western Pacific coast points in Oregon and Washington.

Argument

Point I

The majority erred in failing to grant the joint competitive rates and other relief sought by the complainant and intervening complainants.

The majority not only misconceived the underlying policy of the Interstate Commerce Act with respect to joint rates and through routes, but were influenced by a misconception of the recent decision of the Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. That decision should not be given any broader scope than the limited facts, issues and findings of the Commission in the *Omaha Grain Exchange* case, 278 I. C. C. 519, which gave rise to the decision. In that case the complainant alleged and the Commission found that through routes were in effect on grain from Lenora, Kans., and other points west of Concordia, Kans., on the Missouri Pacific to Omaha, Nebr., in connection with the Burlington via Concordia because (a) physical interchange facilities existed at Concordia between the Missouri Pacific and the Burlington, and (b) there were joint rates on grain from Lenora and other points on the Missouri Pacific via Concordia, Kans., to local or non-competitive points on the Burlington intermediate to Omaha.

After pointing out that there was no evidence in that case to show that any through transportation service has [fol. 2356] ever been offered or performed from Lenora to Omaha via the Burlington the court said that the Commission erred in finding that through routes existed. However, the court referred with approval to its decision in *Virginia Ry. Co.* v. *United States*, 272 U. S. 658, and *Atchison, T. & S. F. R. Co.* v. *United States*, 279 U. S. 768, which clearly recognized that a through route is nonetheless a through route, as that phrase is used in the Interstate Commerce Act, even though commercially closed by virtue of excessive through rates based on combination of local rates or otherwise.

The decisions of the Commission will be searched in vain to find any in which it predicated a finding that through routes exist on the limited facts which were before it in

the *Omaha Grain Exchange* case. A proper reading of the decision of the court in the *Thompson* case, which overruled the decision of this Commission in the *Omaha Grain Exchange* case, does not justify the view that it over-ruled or modified the doctrine of the *Virginian Railway* case, the *Atchison, Topeka and Santa Fe* case, or any other decision of the Commission. The power of the Commission to prescribe joint rates and through routes under the Interstate Commerce Act is as broad at least as the duties imposed on carriers by that act to maintain reasonable through routes and non-discriminatory and reasonable through rates. This is so despite the limitations on the power of the Commission to prescribe through routes in Section 15 (4) of the Interstate Commerce Act. The Commission has frequently stated that Section 15 (3) and (4) do not stand alone. They are not in a vacuum. They must be considered in the light of other provisions of the act, including Sections 1 and 3 (4). *Routing via Quanah, Acme & Pacific Ry Co.*, 220 I. C. C. 137, 139, sustained in *Thompson* v. *United States*, 20 F. Supp. 827.

Section 1 (4) of the Interstate Commerce Act imposes upon railroads the duty, *inter alia*, to establish reasonable through routes with other such carriers and just and reasonable rates. That section also imposes upon railroads [fol. 2357] the duty to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to their operations, and also to provide reasonable compensation to those entitled thereto. In the *Missouri and Illinois Coal* case, 22 I. C. C. 39, at page 46, the policy of the Interstate Commerce Act as it then existed with special reference to Section 1 (4) and Section 3 (4) was cogently stated by former Commissioner Lane in these words:

> "* * *. Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

The policy of the Interstate Commerce Act, so well stated by Commissioner Lane in November 1911 and the provisions of the act have been greatly expanded since that time. The general aim of the act and its policy is to establish a national system of transportation, so that the commerce of the country may freely move between all points in the United States over available rail routes at rates that are neither unreasonable nor discriminatory as between shippers and railroads, or as between connecting railroads.

The policy of the act, as amended since the decision of the Commission in the *Missouri and Illinois Coal* case, was pointedly stated by the Commission in its recent decision in *Borough of Edgewater, N. J.* v. *Railroads*, 280 I. C. C. 121, sustained in *Baltimore & Ohio* v. *United States*, 100 F. Supp. 1002. At page 134 of its decision, the entire Commission on reconsideration made the following statement as to the present policy of Congress under the existing law:

> "Ever since the Transportation Act, 1920, it has been the purpose or policy of Congress that rates be adjusted and other steps taken to ensure adequate, ef- [fol. 2358] ficient, and economical transportation for the country. That policy has never been regarded as intending that we should accept as the guide transportation service which is just barely adequate, or adequate only if needed or desirable improvements in service are lost sight of. See *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 78, 81. Rather, that policy seeks affirmatively to build up a transportation system prepared to handle promptly all the traffic of the country. *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478."

In the instant case, the majority of the Commission appear to have been governed by the notion that the policy of the Interstate Commerce Act contemplates the maintenance of transportation service "which is just barely adequate," a proposition squarely rejected by the statement of policy in the *Borough of Edgewater* case. The majority appear to have accepted the doctrine that the limitations on the power of the Commission to prescribe routes rather than its broad affirmative power to prescribe joint rates

and through routes should control the category. This is putting the cart before the horse, and is a doctrine not required or justified by the decision of the Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. Moreover, that view is contrary to the well settled canon of construction that exceptions to the general policy of a law such as section 15(4) should be construed strictly, whereas remedial statutes such as section 15(1) and (3) should be construed broadly. *Spokane and Inland Empire* v. *United States*, 241 U. S. 344.

Although the proposed report in this case was by an examiner of long and large experience and of outstanding ability, the majority appears to have given little or no consideration to his findings and recommendations. As this Commission knows, in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, the Supreme Court had occasion to consider the significance of the reports and findings of examiners of administrative agencies under the Administrative Procedure Act. The court there [fol. 2359] said that by the enactment of the Administrative Procedure Act Congress showed a definite "purpose to increase the importance of the role of examiners in the administrative process." While the Commission is not bound to adopt the conclusions or decisions of an examiner, there is no gainsaying the fact that under the Administrative Procedure Act the Commission is required to give the findings of an examiner who is the only officer of the Commission that saw all witnesses and heard all of the testimony in the case more weight than was given in the instant case.

In *Helix Milling Company* v. *Great Northern*, 287 I. C. C. 77, the Commission, Division 2, was asked to prescribe joint rates on wheat and wheat products, in carloads, from certain origins in Montana to Helix and Portland, Ore., with transit at Helix. In that case the defendants made contentions substantially similar to those made in the instant case. Among others, the contention was made that the interchange between the Great Northern and the Northern Pacific were inadequate. At page 85 of its report, the Division squarely held that the fact that interchange facilities are inadequate for convenient operation is not of itself a defense if through routes are shown to be necessary or

desirable in the public interest, citing *Manufacturers Association of York, Pa.* v. *Pennsylvania R. Co.*, 107 I. C. C. 219, 239.

Division 2 made another finding of more significance as applied to the instant case. At page 87 it held that "The establishment of through routes by way of Helix would not deprive the Great Northern of any greater portion of its haul from the triangle (in Montana) than it now forgoes voluntarily through the maintenance of joint rates with the Union Pacific." That language could be paraphrased to read as applied to the instant case that since the Union Pacific and the other defendants in cooperation and collaboration with each other voluntarily participate in joint rates under which they take less than their respective long hauls the establishment of the joint rates sought [fol. 2369] would not deprive the Union Pacific, in particular, or the other defendants of any greater part of their respective long hauls than they now voluntarily forego through the maintenance of joint rates with each other. On the contrary, it has already been shown that if the joint rates through Ogden in connection with the Rio Grande should be established, the Union Pacific would obtain substantially longer hauls through Ogden and the Rio Grande than it now voluntarily foregoes in connection with the traffic that moves between its line and many of the defendants.

Point II

The majority erred in failing to find that through routes exist via the Union Pacific through Ogden and the Rio Grande between Colorado common points and points east thereof, on the one hand, and points in the closed door territory in northern Utah, Idaho, Montana, Oregon and Washington, on the other hand; and in finding that because such routes are not open on a commercial basis at competitive joint rates, they may not be considered through routes under the Interstate Commerce Act because that would give them "a character which they do not now possess";

The finding by a bare majority as recorded by the minutes of the Commission, but by an equal division of views

as recorded in the report not only adopts a legalistic and narrow conception of what constitutes a through route, but ignores and disregards the historical background and the substantial relevant facts which show that through routes now exist, are used and have existed over the Rio Grande on the traffic and between the territories involved since 1897. The following evidence, *inter alia*, which establishes that through routes exist, is summarized:

1. That joint competitive rates and through routes existed on the traffic and between the territories involved via the Ogden Gateway, the Rio Grande and its eastern connections from 1897 to 1906 and 1912;

[fol. 2361] 2. That the record shows and counsel for the Union Pacific concede that when the joint rates in question were canceled in 1906 and 1912, neither the Union Pacific nor any of the other defendants took any action, then or later, to cancel or close the through routes;

3. That during the period from November 1942 to August 17, 1945, the Rio Grande handled approximately 19,000 carloads of traffic from points on its line and from eastern points destined to points in Oregon and Washington which had been routed via the Rio Grande and the Western Pacific or the Rio Grande and the Southern Pacific, but were diverted to the Union Pacific at Ogden and Salt Lake City. (Hogue—66, 67.) During January and February 1949 when blizzards and snow storms blocked the Union Pacific main line between Cheyenne and Ogden, 4,208 carloads of freight eastbound and westbound were diverted to the Rio Grande for movement via its line between Denver and Utah junction points and thence via the Union Pacific. Of that number about 1,400 carloads originated or were destined to Union Pacific points in the closed door territory at which competitive joint rates were not applicable. During that same blizzard period, the Rio Grande handled 210 carloads of express and 276 carloads of mail between Denver and Salt Lake City for the Union Pacific. In addition, it handled 44 Union Pacific passenger trains, consisting of from 10 to 16 cars each, between Denver and Salt Lake City.

(69) The carload traffic just described was diverted under service orders of this Commission, none of which purported to establish or did establish temporary through routes as authorized in Section 15(4) of the Act. The traffic was diverted by the Commission to the Rio Grande under Section 1(15) on the obvious assumption that through routes and the facilities for operating such routes existed.

In addition to the traffic that was diverted to the route of the Rio Grande on service orders, a large volume of traffic was initially routed via the Rio Grande on bills of lading via Ogden and the Union Pacific between points in the closed door territory and eastern points. For example, there were several special trains, consisting of troops and military supplies [fol. 2362] in freight cars, which were handled on freight billing and which consisted of from 30 to 50 cars per train. One train, consisting of 24 cars of military supplies and six passenger cars, moved from Ft. Sill, Okla., in December 1941 to Ft. Lewis, Wash., via eastern connections, the Rio Grande through Ogden and the Union Pacific. Another special train, consisting of 50 cars of military supplies and some troops, moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February 1942 via different eastern railroads in connection with the Rio Grande through Ogden and the Union Pacific. Another special train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February 1942 via different eastern railroads, the Rio Grande through Ogden and the Union Pacific. Still another train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., in February 1942 to Ft. Lewis, Wash., via the Rio Grande through Ogden and the Union Pacific. Joint rates were applied on this traffic and the through charges among the railroads were divided on a satisfactory basis of interline settlements. (67, 68)

In March, 1942 the Rio Grande handled 524 carloads of war material from eastern points which were originally consigned to Ogden and Clearfield, Utah, for the purpose of being stored. These cars were diverted to

points in the northwest via the route of the Union Pacific and Ogden without ever having been unloaded at the original destinations named. Joint competitive rates were applied on this traffic, and the through charges were divided among the interested railroads on a satisfactory basis of interline settlement. (67, 68)

Thirty-nine carloads of freight moved in 1948 eastbound from points in the closed door territory on bills of lading issued by the Union Pacific or its connections consigned to Colorado common points, some of which may have been diverted to points east thereof. An equal number of carloads of a variety of commodities, such as tractors, canned goods, agricultural implements, furniture, soap, castings, feed, rubber, iron and steel, and other commodities from numerous eastern points, such as Springfield and Chicago, Ill., Menominee, [fol. 2363] Mich., Lewisburg, Pa., Jeffersonville, Ind., Forest City, Ark., Sedalia, Mo., Indianapolis, Inc., Wichita, Kans., and other points on bills of lading issued by eastern railroads routing the traffic via the Rio Grande through Ogden and the Union Pacific to points in the closed door territory; that charges were assessed on the basis of the aggregate of the combination of intermediate rates. (67-70, Ex. 1)

4. A. J. Stilling, the principal traffic witness of the Union Pacific, at page 1160 of the transcript of the hearing at Boise, Ida., unequivocally stated that the route via the Ogden Gateway and the Rio Grande is available and open to shippers as follows:

> "The Interstate Commerce Act gives all shippers the right to specify the lines over which their shipments shall move so the Ogden gateway and route via the Rio Grande is actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington. However, most of that traffic originates or terminates at points on the Union Pacific, and it ordinarily moves via the Union Pacific through Wyoming because the joint through rates to and from that territory are restricted so

that they will not apply when traffic is interchanged with the Rio Grande at junction points in Utah."

5. In addition to the affirmative testimony and concession that through routes exist, by witness Stilling, counsel for the Union Pacific made a like concession at the oral argument of this proceeding before the entire Commission on October 16, 1952, in the following colloquy with Chairman Alldredge at pages 2368 and 2369 of the transcript of the argument:

"Chairman Alldredge: Before you start, Mr. Collins, may I ask you a question? I assume there is no dispute about the fact that from a physical standpoint these routes are open; that is, business physically can be interchanged between the Denver & Rio Grande and the Union Pacific.

[fol. 2364] Mr. Collins: Yes, sir; exactly. As was the case in the Western Pacific case.

Chairman Alldredge: You contend, however, that you have closed this route on the traffic here in question.

Mr. Collins: That is right.

Chairman Alldredge: Now, will you tell this Commission exactly how you closed the routes?

Mr. Collins: We canceled the joint through rate billing. We provided by tariff publication that the joint rates would not apply via Ogden with the D. & R. G. W.

Chairman Alldredge: You provided in the tariff that the joint rates would not apply?

Mr. Collins: A restriction in the route.

Chairman Alldredge: That is the joint rate?

Mr. Collins: Yes, sir.

Chairman Alldredge: Do you think that closes this route for this traffic?

Mr. Collins: No, I don't think so, if they want to pay more, if they want a route via the Rio Grande and pay the price."

With due respect to those Commissioners who concluded otherwise, we submit that judged by previous decisions by

this Commission and applicable court decisions on the subject, the foregoing summary of evidence clearly shows that through routes to and from the territories involved in connection with the Rio Grande are already in existence. We shall presently discuss such errors as the Commission's reliance on the *Beaman Elevator Company case*, 155 I. C. C. 313, the Commission's failure to attach significant weight to the testimony of defendant's witness Stilling on the existence of through routes, the failure of the Commission to discuss and evaluate its issuance of service orders diverting traffic to the routes in question without establishing or purporting to establish temporary through routes, and the Commission's misconception of the Supreme Court's holding in *Thompson* v. *United States*, 343 U. S. 549.

First, it is important to direct attention to a statement in the report which discloses a basic error inherent in the [fol. 2365] conclusion that through routes do not exist. At Sheets 6-7 the report states:

> "As above stated and as testified by numerous shippers in this proceeding, the Ogden Gateway routes are not considered as open or through routes *commercially*, but as routes that are closed to shippers *because of the higher rates applicable*. Plainly, a finding that such routes should be opened to shippers *on a commercial basis* by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess." (Emphasis supplied.)

By this statement the Commission adopts the position that because routes are not open on a commercial basis they cannot be regarded as through routes within the meaning of the Act. Although such a holding finds some support in *Western Pacific R. Co.* v. *Northwestern Pacific R. Co.*, 191 I. C. C. 127, decided by Division 2 in February, 1933, such a position clashes irreconcilably with the ruling of the Supreme Court in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658. In that case the Court rejected as "without legal significance" the contention of a railroad that routes which were "commercially closed" as a result of excessive and prohibitive combination rates are not through routes

within the meaning of the Interstate Commerce Act. In reaching that conclusion, Mr. Justice Brandeis first pointed out (pp. 660-661) that of 99 mines located on the Virginian Railway, 54 were denied the opportunity of reaching the western markets, even though accessibility to such markets was physically possible through a junction of the Virginian and the Chesapeake & Ohio. In this con-ection Mr. Justice Brandeis said (p. 661):

> "But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these fifty-four mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's [fol. 2366] rates from the junction to the West, results in charges so high as to be prohibitive. The complainants contended before the Commission that the existing rate schedule to the West subjects them to unjust discrimination, and, also, that the combination rates are unreasonable."

Precisely the same situation exists here except that despite the prohibitive character of the combination rates in effect over complainant's through routes, some traffic has moved over such routes as shown by the foregoing summary of evidence.

It was also contended in the *Virginian Railway* case that the routes were commercially closed and, therefore, the Commission erred in finding the combination rates unreasonable and in prescribing reasonable rates. The court rejected that contention.

The holding, in the *Virginian Railway* case, that a through route does not cease to *legally* exist because *through traffic* over it is commercially restricted or precluded because of excessive and uncompetitive combination rates was expressly cited with approval by the Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. At Footnote 18 of its decision in that case, Chief Justice Vinson said this in distinguishing the facts in the *Omaha Grain* case from those in the *Virginian* case:

> "Virginian R. Co. v. United States, 272 U. S. 658, is inapposite since through routes were there found to

> be in existence but commercially closed solely because of the unreasonable and discriminatory rates charged by the Virginian over its portion of the route."

The position we take is that the test of whether or not through routes exist is not dependent upon whether they are open to shippers "on a commercial basis" is not only the express holding in the *Virginian* case but is also the position which the Commission itself took in 1947 when it [fol. 2367] decided *General Mills, Inc.* v. *Great Northern Railway Co.*, 269 I. C. C. 457. In that case Division 3 held that the Great Nothern's failure to establish transit arrangements at Great Falls, Montana, in connection with wheat and wheat products shipped from points on its line in central Montana to points in California and Nevada via routes through Butte constituted an unreasonable and undue prejudice. In answer to a contention by the Great Northern that no through route existed via Butte because the route was "commercially closed" by reason of excessive combination rates in effect for those desiring transit privileges to Great Falls, the Commission said (pp. 466-7):

> "As far as the tariffs of defendant are concerned, the Butte routes are offered to the shippers as available routes but high combination rates on traffic transited at Great Falls keep them closed commercially for such traffic. In *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, the Supreme Court held that existing through rates, although they are combination rates, can be found unlawful under sections 1 and 3 of the act without a special finding of public interest essential to the validity of an order establishing through routes under section 15 (3)."

When the Commission's decision was appealed to the courts, the principal argument by the Great Northern that no through route via Butte existed because the route was "commercially closed" was rejected by the United States District Court for the District of Delaware. *Great Northern Railway Co.* v. *United States*, 81 F. Supp. 921, aff'd. 336 U. S. 933. In dealing with the precise point here relied upon by the majority in support of its conclusion that through routes do not exist, counsel for the Commission in

the *Great Northern* case, after quoting from the Commission's report as above set forth (pp. 466-7), proceeded further to support his argument by reference to the Court's holding in the *Virginian* case. In the reply brief filed for [fol. 2368] the Commission in the District Court, dated October 27, 1948, it is stated (pp. 6-7):

> "From this finding it is evident that today wheat may move from the Triangle to Great Falls, and after milling or storing, reshipped as wheat or wheat products to California or Nevada but only at the high combination on Great Falls. With the ordered transit privilege in effect, the same traffic, physically handled in precisely the same manner, will move at the joint through rate from the Triangle origin to the destination which is much lower than the combination. The fact that the combination is very high keeps the routes through Butte closed commercially, that is to say, the routes have not been and will not be used as long as the present high rates over them are in effect; nevertheless, they are open *legally.* The situation here is similar to that in the *Virginian* case, *supra,* reviewed in our earlier brief, pp. 11-12. There the Supreme Court found that the route from the 54 complaining mines on the Virginian to the western destinations was closed *commercially,* because the applicable combination rate was so high as to be prohibitive, and yet this route was open *legally.* The Court said, p. 661:
>
> 'For most of these 54 mines access to these markets was and is physically possible through a junction of the Virginian and the Chesapeake & Ohio. But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive.'

The position of the Union Pacific and of five Commissioners in this case when analyzed amounts merely to a claim that because the routes are commercially closed due

to the non-competitive combination rates in effect, they do not constitute through routes within the meaning of the Interstate Commerce Act. That through routes exist is shown not only by the unequivocal testimony of witness [fol. 2369] Stilling of the Union Pacific, which has been previously quoted, but also by the admission by counsel for the Union Pacific at the time of oral argument on October 16, 1952, at pages 2368 and 2369 of the transcript.

It is our contention that the reliance of the Commission and its counsel on the decision of the *Virginian* case to support the order of the Commission in the *General Mills* case was legally correct and that the majority's position that through routes do not here exist is legally incorrect.

In the light of the historical background, the facts of record which have just been summarized, and of the concessions made by Witness Stilling and by the counsel for the Union Pacific, it is inconceivable that the report of the Commission should find that through routes via the Rio Grande on the traffic involved do not exist.

It is equally inconceivable that the report would recite that the substantial volume of traffic which has moved over the route of the Rio Grande during the past 12 years "must be regarded as of an isolated nature and as falling in the same category as the one lone shipment held insufficient to show the existence of a through route in *Beaman Elevator Company* v. *Chicago and North Western Railway Company, supra* (155 I. C. C. 313), cited with approval by the Supreme Court in *Thompson* v. *United States*, 343 U. S. 549." In the first place, it is a distortion of the opinion of the Supreme Court in the *Thompson* case to say, as the majority did, that it cited the *Beaman* case with approval. The *Beaman* case was referred to by the court in a footnote in connection with its statement that, "In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington." In the case at bar there is substantial evidence that a large volume of traffic moved eastbound and westbound via the Rio Grande and the Ogden Gateway under bills of lading issued by the Union Pacific and other defendants [fol. 2370] to shippers which designated the route, and where service orders were issued by this Commission they did not purport to establish temporary through routes, but

simply diverted the traffic upon the assumption that through rates existed.

The footnote which cited the decision of the Commission in the *Beaman* case stated merely that the Commission there held "that proof of one shipment on a through bill of lading over a certain route was not sufficient to establish the existence of a through route because one shipment is not representative of the carriers course of business." In dealing with the *Beaman* case, the five Commissioners disregarded the uncontradicted facts of record which show that when the joint rates were canceled in 1906 and 1912 at the instance of the Union Pacific, no steps were taken then or later to cancel the through routes.

It is too well settled to require argument that the cancellation of a joint rate does not of itself cancel a through route. *Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183, 185; *Quanah, A. & P.* v. *Atchison, T. & S. F. Ry. Co.*, 226 I. C. C. 201, 208; *Routing via Quanah, A. & P. Ry. Co.*, 220 I. C. C. 137, 139, sustained in *Thompson* v. *United States*, 20 F. Supp. 827; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, and *Virginian Railway Co.* v. *United States*, 272 U. S. 658. It is equally well settled that whatever other facts or incidents may serve to prove the existence of a through route that "A through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of a through route." *Through Routes and Through Rates*, 12 I. C. C. 163, 166. The five Commissioners ignored the testimony of Witness Stilling of the Union Pacific. They also ignored and failed to recognize the obvious fact that there is a striking difference between the movement of a single carload shipment, as in the *Beaman* case, and the large volume of traffic handled via the Rio Grande in recent years. To hold, as the report does, that the single shipment in the *Beaman* case is enough to [fol. 2371] put the large volume of shipments which moved via the Rio Grande in the same isolated category is unsound and irrational.

The report recites that any other view would constitute "an open invitation to any shipper to set aside the provisions of Section 15 (3) and (4) of the Act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not

intended by the Congress, as evidenced by the amendments to Section 15 (4) made in 1940 * * *"

The quoted statement clearly misconceives the conditions under which a shipper may select a route. Section 15 (8) provides that at the time of the delivery of property to a common carrier railroad for transportation, the shipper may designate in writing the route via which the shipment should move where "two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party * * *." Section 6 (1) provides that every common carrier subject to Part I shall file tariffs with the Commission, etc., which show all rates, fares and charges for transportation

> "between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipeline, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers *in such through route* shall file, print and keep open to public inspection as aforesaid, the separately established rates * * * applied to the through transportation."

It will thus be seen that unless there is a choice of two or more established routes the shipper is not authorized by section 15 (8) to select a particular route since that section plainly says he may do so only when

> "* * * two or more through routes and through rates shall have been established as in this part provided * * *."

[fol. 2372] In the circumstances, the majority clearly erred and misconceived the right of shippers to route traffic. In other words, unless a route is an "established through route", no shipper has the right to use it, and, therefore, the acceptance by a railroad of a shipment, as in the *Beaman* case, could not properly be used as a means of setting aside the provisions of Section 15 (3) and (4).

On the other hand, where as here, the through routes in question have existed without challenge since 1897, have

not been cancelled and have been used in the transportation of a large volume of traffic with the knowledge and acquiescence of defendants and where the principal traffic witness of the Union Pacific unequivocally stated on the witness stand that the routes in question are available and can be used by shippers at combination rates, it follows that the routes in question are established routes as that term is used in the Interstate Commerce Act.

The facts of the *Beaman* case and of the instant case are as different as night is from day. That difference should control the category. Five commissioners found that the through routes via Ogden and the Rio Grande exist. The five Commissioners who adopted a contrary view were certainly hard put to be forced to support their tenuous position by leaning on the footnote reference to the *Beaman* case by the Supreme Court and by shadow boxing with the danger that a shipper could set aside the provisions of Section 15 (3) and (4) by routing a car or two over a particular route and thereby establish a through route.

At page 8a of the report, the extraordinary statement is made that there is no indication that any of the defendants has ever solicited any traffic from and to the areas concerned for routing via the Rio Grande at the higher combination rates, or has ever used such Rio Grande route, except where called upon to do so, by routing specified by the shipper or by a prior connecting carrier. The report reasons from that statement that so far as the record shows, the "carrier's course of business" has been and is [fol. 2373] to use the Union Pacific route, except where called upon to use the Rio Grande route, by force of shippers or connecting line routing. That reasoning certainly rests upon a thin reed. It apparently did not occur to the five Commissioners that even if the joint rates should be established it is unlikely that the Union Pacific would solicit traffic for movement via Ogden and the Rio Grande.

The Rio Grande now participates in joint competitive rates with the Union Pacific on transcontinental and other traffic which moves to and from points in California. The Union Pacific does not solicit the routing of that traffic via the Rio Grande despite the existence of the joint rates and the through route. In these circumstances, are we to

assume that the five Commissioners mean that the fact that the Union Pacific does not solicit traffic via the existing through route of the Rio Grande under the existing competitive joint rates constitutes a justification for the view that that route is not "in the carriers (Union Pacific) course of business?" Certainly not. The presence or absence of solicitation for traffic over a particular route is not a conclusive or necessary test as to whether that route is a through route. Since a large volume of traffic moves via rail routes without solicitation, a better test is whether traffic has been accepted for transportation from time to time over the route. Such a test is especially appropriate if the route in question is sought to be established as a new route.

The facts of record establish beyond peradventure of doubt that an arrangement between the Union Pacific, the Rio Grande, and the other defendants, express or implied, has existed and exists for the through transportation of traffic.

In *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, Mr. Justice Brandeis described a through route as follows:

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point [fol. 2374] on the line of one carrier—to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation."

On page 7 of the report of the Commission, the statement is made that a finding by the Commission that the existing routes via the Rio Grande should be open to shippers on a commercial basis at the competitive joint rates sought "would result in the establishment of such routes as ef-

fective through routes, a character which they do not now possess." That statement reasons in a circle. It says in effect that while through routes exist, they are not commercially available because competitive rates are not applicable in connection with them, and that if the Commission prescribed competitive rates which would make the routes commercially available, it would give the routes a character they do not now possess and therefore the Commission should not exercise its power to prescribe rates. With due deference we submit that such reasoning is not valid and is not justified by any provision of the Interstate Commerce Act or by the decided cases.

In *United States* v. *Great Northern*, 343 U. S. 562, the court sustained an order of this Commission in the *Montana Western Railway* case, 275 I. C. C. 512, in which the Commission prescribed joint rates on grain, in carloads, from points on the Montana Western at the same level as the then existing combination rates to points on the Great Northern because such joint rates were necessary and desirable in the public interest for the purpose of fixing divisions. Although a through route and rate existed in that case the prescription of the joint rate and divisions to increase the revenue of the Montana Western certainly gave the route a character it did not theretofore possess, [fol. 2375] but that fact did not deter the Commission from prescribing the joint rate or the Supreme Court from sustaining that action. As we have shown, the *Virginian Railway* case, is clear authority for the proposition that a through route as such does not cease to exist because it is "commercially closed."

In the *Great Northern* case, 343 U. S. 562, a companion case to the *Thompson* case, the court made it cogently clear at page 572 and 573 that through routes may exist whether the through rates applicable thereto are joint rates or combination rates in the following statement:

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this Court expressly has approved Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately

established rates. As a result, the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes."

The most extraordinary omission in the report as to the non-existant through routes via Ogden and the Rio Grande is the total disregard of the important affirmative and unequivocal testimony of witness Stilling of the Union Pacific, at page 1160 of the transcript of the hearing, already quoted and the admission by counsel for the Union Pacific that through routes exist. (2368-2369). The fact that the first line of the testimony refers to the Interstate Commerce Act and in that sense might be said to be a conclusion of law does not in any manner impair the legal significance of the facts and concessions made by Stilling for defendants, which have never been disclaimed by the Union Pacific or any of the other defendants.

The Stilling testimony establishes several important points in this case. First, it confirms the other testimony of record that through routes via Ogden and the Rio Grande now exist and have existed since 1897. Second, that the [fol. 2376] Union Pacific and the other defendants hold themselves out to accept all freight traffic, westbound and eastbound, via the route of the Rio Grande through Ogden at less than their respective long hauls, provided the shippers are willing to pay charges based upon the combination rates via that route. That constitutes a "consent" by the Union Pacific and the other defendants to accept less than their respective long hauls, which in and of itself means that the provisions of Section 15 (4) of the Act are inapplicable since the limitations in that section on the power of the Commission to estabilsh through routes do not apply if the interested railroad gives its consent to accept less than its long haul. And thirdly, the testimony proves that routes via the Rio Grande are established through routes within the contemplation of Sections 1 (4), 6 (1) and 15 (8) of the Act.

In *United States* v. *Capital Transit Co.*, 325 U. S. 357, 363, the court sustained an order of this Commission which held that through routes existed between bus companies in Virginia and the Capital Transit Company in the movement of passengers between points in Virginia and points

in the District of Columbia, even though no arrangement of any kind existed for the through transportation of the passengers, such as coordination of bus schedules, the issuance of transfers, the sale of joint tickets, etc. The decision was based on the ground that there was a substantial movement of passengers between Virginia and the District of Columbia.

[fol. 2377] Point III

The majority erred in failing to find that the refusal of the Union Pacific and the other defendants to establish joint competitive rates on the traffic and between the territories involved in this case via the Ogden Gateway and the Rio Grande on the same level that are now maintained by the defendants via numerous other routes via which the distance is as great, and in some instances substantially greater, than are the distances via the Ogden Gateway and the Rio Grande constitutes a violation of Section 3 (4) of the Interstate Commerce Act.

The attitude of the Union Pacific as to the closed door territory in Northern Utah, Idaho, Montana, Oregon and Washington served by the Union Pacific might appropriately be characterized as Custer's last stand. It is the only important territory in the west to and from which the Rio Grande is excluded as a participating railroad at joint competitive rates. The Rio Grande participates in joint competitive rates on the whole range of transcontinental and other traffic which moves between points on the Union Pacific, Southern Pacific, Western Pacific and the great Northern in southern and northern California, western Oregon, western Washington through Salt Lake City and Ogden and Colorado common points and points east thereof. The complaint and the intervening complaints seek from this Commission an order which will require the Union Pacific and the other defendants to maintain with the Rio Grande the same level of rates on the traffic involved that is now generally maintained on the same class of traffic between all other points in the west and Colorado common points and points east thereof. The restrictive and discriminatory rate policy of the Union

Pacific, aided and abetted by the other defendants who are in *pari delicto* with the Union Pacific, is archaic and out of step with the existing needs and requirements of commerce and of the railroads as a whole and should be condemned by the Commission as in violation of Section 3 (4), as well as on the other grounds heretofore urged by complainants.

[fol. 2378] The range of commodities and the territorial scope of the issues raised in the instant proceeding are no broader than were the range of commodities, the territorial scope, and the issues in *Quanah, A. & P.* v. *A. T. & S. F.*, 226 I. C. C. 201, or in *Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183. An examination of the decisions in those cases will reveal that the contentions there made by the respondents as to lack of similarity in transportation conditions over the routes alleged to be preferred as compared with the routes alleged to be prejudiced were substantially the same as the contentions made by the Union Pacific and a few of the other defendants in the instant case. In both the *Quanah* case and the *Cancellation of Rates and Routes* case, the principal defense of the respondents was that the complaining parties did not establish by detailed pin point evidence that the transportation conditions via the various routes involved were substantially similar. The Commission rejected those contentions as unsound, and relied upon typical examples as sufficient evidence to justify a finding that Section 3 (4) had been violated. It should do likewise here.

Commencing on page 117, to and including page 128, of our brief in the instant case, we undertook to show, and we feel that we have shown, that the failure and the refusal of the Union Pacific and of the other defendants to participate with the Rio Grande on the same level of joint rates which are generally in effect on the traffic involved on the same basis in which they participate with each other constitutes a violation of Section 3 (4) of the Act against the Rio Grande and a violation of Section 3 (1) of the Act against the intervening complainants.

The provisions of Section 3 (4) here pertinent have remained unchanged since the original enactment of the Act to Regulate Commerce in February 1887. Those provisions were intended to prevent discriminations of all

kinds between connecting carriers. The provisions say that the carriers "shall not discriminate in their rates, [fob 2379] fares and charges between connecting lines."

The meaning and scope of that section was dealt with in a comprehensive manner by the entire Commission at page 80 of its report in *Western Pacific R. Co.* v. *Southern Pacific Co., et al.*, 55 I. C. C. 71. The Commission there stated that Section 3 (4), which was then Section 3 (2), is a connected comprehensive provision of statutory law which imposes on railroads an affirmative duty to interchange and forward traffic between connecting lines without discrimination in their rates and charges. Apropos of this, the Commission said:

> "There is no escape from the plain intent of these enactments. Reasonable, proper, and equal facilities must be afforded for the affirmative duty, and there must be no partiality or injustice in the terms and conditions upon which the duty is performed—in other words, no discrimination in rates and charges. All parts of this provision are of equal authority and obligation. They are the mandate of the same source of power, and it must be assumed that they are intended to have full and complete effect. * * *"

The meaning of Section 3 (4) was cogently stated by Chairman Cooley in *New York and Northern Ry. Co.* v. *New York and N. E. RR. Co.*, 3 I. C. C. R. 542, 550, in the following words:

> "When, therefore, the statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the statute it is only a meaningless enactment, * * *"

[fol. 2380] Section (F) of Exhibit 3, introduced by witness Earley, Freight Traffic Manager of the Rio Grande, as well as his testimony on pages 113 to 128 of the transcript, shows typical examples of existing joint rates and distances via routes which the Union Pacific and other defendants in cooperation with each other take less than their representative long hauls. Appendix 3 attached to the original brief of the Rio Grande dated August 15, 1950, summarizes some of the outstanding examples of this character. To avoid repetition and printing expense, we ask that the Commission examine the appendix to our brief. Although Appendix 3 is self-explanatory, there follows a reference to some of the examples dealt with.

Between the Seattle, Wash., and Chicago, Ill., via the Union Pacific, Council Bluffs, and the Chicago and North Western, the distance is 2,439 miles and the haul of the Union Pacific is 1,954 miles. However, the Union Pacific participates in joint rates through Portland with the Southern Pacific on traffic moving through Arizona and New Mexico, thence Rock Island, where the total distance is 3,541 miles. In that movement, the Union Pacific receives a haul of 184 miles. If the Union Pacific established the rates sought with the Rio Grande through Ogden, it would receive a haul from Seattle to Ogden of 1,027 miles out of a total distance of 2,651 miles instead of 184 miles between Seattle and Portland when the traffic moves either via the Southern Pacific from Portland through Arizona and New Mexico or via the Southern Pacific to Ogden, thence via the Rio Grande to Denver or Pueblo, and via the Burlington or any of the so-called prairie lines.

Between Pendleton, Ore., and St. Louis, Mo., the long haul of the Union Pacific is from Pendleton to Kansas City, a distance of 1,674 miles. The Union Pacific participates in joint rates on transcontinental traffic between Pendleton and St. Louis via the route through Spokane made up of the Spokane International, Canadian Pacific and Soo Line to Minneapolis and the Rock Island and the Wabash to St. Louis. The distance via this route is 2,317 miles, [fol. 2381] and the haul of the Union Pacific is 227 miles. If the joint rates sought via Ogden were established via

the Rio Grande to Denver, the Rock Island and the Wabash to St. Louis, the distance would be 2,149 miles and the Union Pacific haul would be 633 miles.

Between Pendleton, Ore., and Oklahoma City, Okla., the long haul of the Union Pacific would be via Kansas City. However, it participates in joint rates with the Santa Fe through Denver via which route its haul is 1,144 miles, and it participates with the Northern Pacific through Wallula, Wash., and various connections through Kansas City in which the total haul is 2,602 miles, and the haul of the Union Pacific is only 70 miles. If the joint rates sought via Ogden and the Rio Grande and its connections were established, the haul of the Union Pacific would be 633 miles, and the total distance via available routes would be 1,910 miles. The Union Pacific also participates in joint rates between Pendleton and Oklahoma City via the Great Northern through Spokane and eastern connections in which the haul of the Union Pacific is 227 miles.

Between Colfax, Wash., and Chicago, Ill., the long haul of the Union Pacific is 1,756 miles through Council Bluffs, Iowa. But the Union Pacific participates with the Milwaukee Railroad via Plummer, Ida., in which the haul of the Union Pacific is 54 miles and the total distance 1,888 miles. If the joint rates sought through Ogden and the Rio Grande are established, the haul of the Union Pacific to Ogden would be 829 miles.

It should be understood that while the examples shown on Appendix 3 of our brief are representative, that appendix does not include all of the routes via which the Union Pacific and other railroads take less than their long haul. As we have already indicated, a more comprehensive list of examples will be found in Section F of Exhibit No. 3.

In dealing with joint rates and routes on transcontinental traffic from and to points in the Northwest served by the Union Pacific and the other defendants in which the [fol. 2382] Union Pacific and the other defendants respectively take less than their long hauls, witness Stilling, of the Union Pacific, summarizes the interchange arrange-

ments referred to on pages 1185-1187 of the transcript. At page 1186 he stated:

> "All such arrangements have been in effect over a long period of years and were for the most part established at a time when railroad construction in that area was at its peak, and some of the lines were under different management and control than at present.
>
> "Actual movement of traffic via these routes shows that they are in the public interest, and so far as the carriers are concerned, each shares in the long-haul as well as the short-haul. The existence of these routes via Oregon and Washington gateways makes it possible to handle traffic via shorter routes than if the terminal line in the northwest received its long-haul."

The testimony of Stilling as to the history and use of the gateways at Wallula, Spokane, Marengo and Portland is apparently designed to show that "the entire arrangement redounds to the benefit of the Union Pacific and is of benefit to the public." (1171) Despite his statement that "there is no reciprocal arrangement. The arrangement is very unbalanced" (1174), the interchange between the Northern Pacific and the Union Pacific at Wallula during two months of 1948, April and October, shows that the Union Pacific was short hauled on 52 cars and the Northern Pacific on 42 cars. This exchange of traffic does not appear to be much out of balance. During the same two months the Spokane interchange with the Great Northern shows 76 short haul cars for the Union Pacific and 118 for the Great Northern. This is more unbalanced than the Wallula interchange, but the Union Pacific was favored in the balance during those months. At Spokane the Union Pacific was short hauled in connection with Canadian Pacific route on 228 cars and the Canadian Pacific was short hauled on 118 cars. At Marengo the Milwaukee short hauled the Union Pacific on 1,093 cars, [fol. 2383] and the Union Pacific short hauled the Milwaukee on 13 cars.

During the same two months the Union Pacific was short hauled on 252 cars at Portland in connection with the

Southern Pacific, and the Southern Pacific was short hauled on 389 cars.

Stilling selected the car interchange figures for a two month period in connection with the junctions mentioned. This might give the impression that the interchange of carload traffic was comparatively light. However, by expanding the figures into an estimated annual basis, as is shown below, the traffic in which the Union Pacific is short hauled under the joint transcontinental rates is substantial.

Traffic Study of All Trans-Continental Carload Shipments Interchanged by Union Pacific With Northern Pacific, Great Northern, Spokane International, CMStP&P and Southern Pacific Railroads During the Months of April and October, 1948, Showing Number of Cars on Which Union Pacific Took Short-Hauls During the Two Months Named, Also Estimated Annual Basis (2-Month Figures Multiplied by 6). (1176–1185)

		Eastbound		Westbound		Total EB and WB	
Railroad	Interchange Junction Point	Apr. & Oct. 1948 Carloads	12 Months Basis Carloads	Apr. & Oct. 1948 Carloads	12 Months Basis Carloads	Apr. & Oct. 1948 Carloads	12 Months Basis Carloads
NP	Wallula	48	288	4	24	52	312
GN	Spokane	56	336	20	120	76	456
SI-CP-Soo	Spokane	211	1266	17	102	228	1368
CMStP&P	Marengo	300	1800	793	4758	1093	6558
SP	Portland	219	1314	33	198	252	1512
	TOTALS	834	5004	867	5202	1701	10206

Stilling undertakes to justify the participation by the Union Pacific with the Great Northern, Northern Pacific, Milwaukee, Canadian Pacific, Southern Pacific and their connections in joint rates through Wallula, Spokane, Marengo and Portland, in which the Union Pacific and the other defendants take less than their respective long hauls principally upon two grounds: (1) that the arrangements have been in effect over a long period of time, and (2) that the arrangements are mutually beneficial in the sense that the railroads participating in these routes share in the long hauls as well as the short hauls. The fact, if it be a fact, that the arrangements at the time they were established may have been justified by the conditions [fol. 2384] then existing is not sufficient to excuse the Union Pacific and the other defendants from the charge of discrimination in refusing to participate in like manner with the Rio Grande through Ogden. Nor are the defendants excused from discrimination merely because

the arrangements are mutually satisfactory to them and that they share in the long hauls as well as in the short hauls.

In *Pennsylvania Co.* v. *United States*, 236 U. S. 351, where the validity of an order of the Commission was availed, the defendants before the Commission contended that there was no unjust discrimination because of the lack of similar reciprocal interchange arrangements with the complaining railroad. In dealing with this question, the Supreme Court said:

> "We agree with the Commission and the court below that the alleged reciprocal shipping arrangements do not remove the discriminatory character of the treatment of the Rochester road."

The decision of the Supreme Court in *Chicago, I. and L. Ry. Co.* v. *United States*, 270 U. S. 287, is to the same effect and deals with a situation substantially similar to the contentions made by witness Stilling.

In addition to the examples already referred to, Section F of Exhibit No. 3 shows numerous other situations in which the Union Pacific participates with other defendants in which they and the Union Pacific take less than their respective long hauls in connection with particular traffic. On lumber moving from points on the Union Pacific and its connections in Idaho, Washington and Oregon, etc., to points east of Colorado common points, the Union Pacific participates in joint rates and routes through Denver and Cheyenne in which it takes less than its long haul. This situation is shown more comprehensively in Section G of Exhibit No. 3. On the eastbound movement of fruits, vegetables, grain and certain other commodities from Idaho, Washington and Oregon, etc., the Union Pacific participates in joint rates and routes which apply via Denver to destinations in Missouri River terri- [fol. 2385] tory and the Southwest. The long haul of the Union Pacific to most of the destination territory just mentioned would be the entire distance to some of the points, or to junctions on its line in Kansas or Nebraska.

We have already shown that the Chicago Burlington and Quincy, the Rock Island, the Santa Fe and the Mis-

souri Pacific reach with their own rails such Colorado common points as Cheyenne, Denver and Pueblo. Despite that fact, these defendants participate in joint rates on traffic moving from eastern points to points served by the Union Pacific in the closed door territory in which the joint rates apply only in connection with the Union Pacific at such points as Kansas City and Omaha. In this manner the railroads mentioned short haul themselves.

The Union Pacific participates in joint rates on transcontinental traffic from and to points in Southern California in connection with the Rio Grande via Provo and Salt Lake City. The Union Pacific likewise participates in joint rates on transcontinental traffic in connection with the Santa Fe and Southern Pacific via interior California junctions in which the Union Pacific accepts short hauls. The Santa Fe and the Southern Pacific reciprocate with the Union Pacific in this respect by interchanging traffic with the Union Pacific at the same interior California junctions.

In dealing with the volume of interchange with respect to California traffic, Stilling used the months of April and October 1948. The figures for those months show that the Union Pacific was short hauled on 985 cars and that the Santa Fe, Southern Pacific and Pacific Electric were short hauled on 3,033 cars. If these figures be expanded to an annual basis, they would indicate that the Union Pacific would be short hauled on 5,910 cars, and the other railroads would be short hauled on 18,198 cars. These figures indicate that the Union Pacific is in better position to protect its long hauls as compared with the Southern Pacific and Santa Fe on Southern California traffic than it is in competing with other railroads on traffic to [fol. 2386] and from the Northwest. (1190)

The arbitrary and discriminatory policy of the Union Pacific in dealing with the Rio Grande exists in a most pointed manner with respect to the routing on traffic between Colorado common points in Colorado and points on the Union Pacific in the closed door territory. Page 1 of Section E of Exhibit No. 3 is a colored map which shows the points in the so-called Colorado common point territory. It includes such points as Denver, Pueblo, Minnequa, Colorado Springs, Canon City, Walsenburg and

Trinidad. Any shipment to or from points in the closed door territory which originates or terminates at such points as Canon City, Pueblo or any other point in the Colorado common point territory served by the Rio Grande must be interchanged with the Union Pacific at Denver if the joint competitive rates apply. The Rio Grande originates and terminates considerable traffic at the Colorado common points, which moves from and to points via the Union Pacific in the closed door territory. The long haul of the Rio Grande is through Ogden. If such traffic is routed through Ogden, it is subject to combination rates, which are excessive and prohibitive.

In this proceeding the Union Pacific has stressed what it terms as the right of the originating railroad to its long haul; but in dealing with the Rio Grande in respect to the traffic we are here discussing, the Union Pacific insists that the traffic originated or terminated by the Rio Grande at Colorado common points be interchanged with it at Denver, as well as the traffic originated by the Union Pacific in the closed door territory. For example, the traffic originating on the Rio Grande at Canon City, which is about 40 miles west of Pueblo and 160 miles south of Denver, must be interchanged with the Union Pacific at Denver if it is moving to the closed door territory. Not only does such a restrictive policy in connection with the joint rates and routes require a substantial back haul from Canon City, but it also deprives the Rio Grande of a haul of over 600 miles through Ogden. The fact that [fol. 2387] the Santa Fe and Colorado and Southern likewise serve Colorado common point territory south of Denver does not excuse or justify the discriminatory character of the restrictive rate policy imposed by the Union Pacific in so far as the Rio Grande is concerned.

We have already shown that the Denver and Salt Lake Railway was merged with the Rio Grande on April 11, 1947. The territory which was served by that railroad is shown in yellow on the colored map on page 1 of Section E of Exhibit No. 3. It operated between Denver and Craig, Colo., a distance of 232 miles. Before the Dotsero cutoff was established, which connected the Denver and Salt Lake with the Rio Grande, between Orestod and Dotsero, the only outlet the Denver and Salt Lake had was through

Denver. When the Denver and Salt Lake Railway was merged with the Rio Grande in April 1947, competitive through rates via Denver with its connections on transcontinental traffic to or from former Denver and Salt Lake Railway points were not cancelled. In other words, shipments to or from points on the former Denver and Salt Lake Railway to or from points on the Union Pacific in the closed door territory can be interchanged with the Union Pacific at either Ogden or Denver.

Point IV

In finding that a violation of Section 3 (4) exists by virtue of the maintenance by the defendants of joint rates between points in the closed door territory on the traffic involved and points on the Bamberger Railroad south of Ogden while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, the Commission erred in restricting that finding to and from points between Salt Lake City and Ogden since the Rio Grande serves many other points in Utah south of Salt Lake City, such as Provo, American Fork, Springville and Midvale, which are vitally interested in the competitive rates sought.

At page 66 of the report, the finding is made that the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the [fol. 2388] one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates on like traffic from the same points on the Rio Grande south of Ogden subjects the Rio Grande to discrimination in violation of Section 3 (4) of the Act. The Bamberger Railroad operates between Salt Lake City and Ogden. The Rio Grande serves Ogden, Salt Lake City and other points served by the Bamberger Railroad, and also serves Provo, American Fork, Springville and Midvale, Utah, which are south of Salt Lake City. We claim that it also violates Section 3 (4) of the Act for the Union Pacific to maintain joint rates with the Bamberger Railroad between Salt Lake and the points intermediate to Salt Lake and Ogden and the closed door territory, while refusing to maintain similar joint rates with the Rio

Grande at points served by the Rio Grande south of Salt Lake, even though many of those points are also served by the Union Pacific.

Discrimination under Section 3 (4) is not confined to different treatment in rates and charges by one railroad of another at a single interchange point. That question was settled by the Supreme Court in *Atlantic Coast Line v. United States*, 284 U. S. 288, 293, in which it sustained an order of the Commission in *Restrictions in Routing between Greenwood and Augusta*, 165 I. C. C. 3. In that case the Atlantic Coast Line sought by cancelling joint rates to eliminate the Georgia and Florida Railroad in the route there involved because, *inter alia*, it did not connect with the Clinchfield Railroad. The court rejected that view on the ground that there is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection with the Clinchfield.

Therefore, the Union Pacific is not excused from a violation of Section 3 (4) because the Bamberger Railroad does not serve points south of Salt Lake City which are served by the Rio Grande. In *Quanah, A. & P. v. A. T. & S. F.*, 226 I. C. C. 201, and in *Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183, the Commission [fol. 2389] found that the respondent railroads violated Section 3 (4) even though in each case the interchange points of many of the trunk line routes which were unduly preferred by the rate adjustment assailed were substantial distances from the interchange points of the complaining short line railroads involved in those cases.

The evidence of record shows that there is a definite need for the competitive rates sought on the traffic involved between Utah common points on the Rio Grande south of Ogden and Salt Lake City. A brief reference to the testimony of John W. Gerber which appears at pages 655 to and including 662 of the transcript of the hearing shows that need. Gerber is Executive Secretary and General Manager of the Utah Growers Cooperative, which has about 450 members. The Cooperative operates two branches on the Union Pacific and three on the Rio Grande. The branches on the Rio Grande are at American Fork, Springville and Midvale, Utah, all located south of Salt Lake City. Gerber needs box crate material at the Co-

operative sheds at American Fork and Springville. This material is produced in Idaho, but the lowest competitive rate does not apply via the Union Pacific and the Rio Grande. (655, 656) At the Midvale shed the Cooperative absorbs a switching charge on that traffic which arrives by the Union Pacific.

On manufactured fertilizer purchased for Cooperative Growers at Pocatello, Ida., and Anaconda, Mont., involves the payment of combination rates at Ogden or Salt Lake, or the trucking of the fertilizer across town at the two main operations at American Fork and Springville. (656) The same situation exists as to seed potatoes obtained in Idaho and Montana. Gerber testified that on seed potatoes obtained in the Red River Valley of North Dakota he would like to unload part of carload shipments at Springville, American Fork and Midvale served by the Rio Grande and then forward the cars to points north of Ogden. (657) This can not be done under the rates now maintained with-[fol. 2390] out subjecting the traffic to the excessive combination charges.

The markets east of the Mississippi River have been greatly limited because of post-war rate increases and because of increases in estimated weights on celery and carrots. (657, 664) This necessitated going into smaller markets in Idaho, Montana, Wyoming, Nebraska, by truck. (657, 657) Gerber can not at present move his vegetables from American Fork, Springville and Midvale on the Rio Grande to Idaho and Montana at competitive joint rates. (658) He closed his Cofinne operation in 1949 and moved the celery produced in that area to Midvale by truck "so that we would not get into the so-called 'pocket markets' of the Southwest that we would be bound to reach moving via UP to Denver, and transferring on to other lines." (658).

Gerber has 100 members in the district north of Ogden, and they would like to be able to load their onions and potatoes, ungraded, and move them to packing sheds at American Fork and Springville and process in transit and thence move them east which they can not presently do at competitive rates. (658). His outbound business ranges from 600 to 1100 cars per year. (660) In bringing in perishable freight via Union Pacific to Springville

or American Fork he could haul the traffic across town, but because of lack of icing facilities in summer and of the danger of freezing in winter, he does not do so. (660, 661)

The arguments made in connection with Point III apply with equal force to the situation here involved. The finding that the Rio Grande is discriminated against by the Union Pacific in connection with traffic which may move between Salt Lake and points between Salt Lake and Ogden and the closed door territory should be expanded so as to include traffic that moves between points on the Rio Grande in Utah south of Ogden and Salt Lake on the one hand and the closed door territory on the other hand.

[fol. 2391] Point V

The majority erred in failing to recognize that the testimony concerning the need of joint rates on various commodities should be regarded as typical of all commodities and in limiting the number of eastbound commodities selected and the territorial application of the rates approved, as well as in limiting the approval of westbound rates to granite and marble monuments from Vermont and Georgia.

As has already been shown, the report of the Commission limits the joint rates approved on eastbound commodities to ordinary live stock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, and butter and eggs. That action does not include rates on grain and grain products and lumber and other commodities, despite the volume of evidence, typical in character, which shows the need of joint rates between the closed door territory and Colorado common points and points east thereof on all commodities. The joint rates approved on westbound traffic is limited to granite and marble monuments from Vermont and Georgia. The testimony in support of the joint rates sought by the complainant and intervening complainants is typical in character. It is also typical of the eastbound and westbound movement of traffic. The testimony covers the classes and descriptions of commodities used in the statistical statements published by the Commission.

Errors of the Commission in dealing with the point

here under consideration was discussed under General Comments. The decisions cited in that chapter and in particular the *New England Divisions* case, 261 U. S. 184, 197, clearly recognize that Congress intended that a method may be pursued by the Commission in administering the provisions of the Interstate Commerce Act which would enable it as a practical matter to perform its functions in cases of this character. The decisions cited also recognize that where a large number of carriers and a large number of rates and routes and other factual matters are involved, it is entirely proper and appropriate [fol. 2392] that the Commission base its findings and decisions upon evidence of typical rates, routes, and other factors that are relevant in the case. In the *New England Division* case, the court stated that "To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also, that the Commission had been confronted with similar situations in the past and how it had dealt with them."

The organizations representing shippers which intervened and participated in this proceeding have a membership of more than 300,000 persons. In addition to the testimony and evidence of the Rio Grande, the testimony of interveners and witnesses supporting the complaint is summarized on pages 59 to and including 94 of the brief of the Rio Grande. Since the report of the Commission justifies the belief that this evidence was not given the consideration or the weight to which it is entitled, we ask that at least the summary of the evidence be reexamined by the Commission in considering this petition.

We have already shown that the majority not only erred in confining the joint rates approved for eastbound application to a few commodities, but in imposing an intermediate territorial limitation which will prevent or seriously impair the usefulness of these rates, or any other rates if prescribed with the same limitation. Incidentally, the report of the Commission does not reveal why even under the narrow approach assumed grain and lumber were not included among the list of commodities selected.

The action of the majority in limiting the prescription

of joint rates on traffic moving westbound to granite and marble monuments from points in Vermont and Georgia is in the light of the evidence of record astounding and inexplicable. The evidence of record as to the need of joint rates westbound covers a wide range of commodities and illustrates in a pointed manner the injurious effect on the [fol. 2393] Rio Grande and its patrons of the restrictive rate policy maintained by the Union Pacific in cooperation with the other defendants. This evidence shows that the policy has not only prevented the movement of the freight via the Rio Grande to industries served by it at Salt Lake City and other points in Utah, but has operated against the interest of the Union Pacific itself by forcing the movement of some of the traffic by truck that would otherwise move by the Union Pacific.

In this connection, the attention of the Commission is invited to the testimony of J. Arthur Knudsen, which commences at page 271 of the transcript and is summarized at pages 88 and 89 of our brief. This testimony shows that Knudsen Builders Supply Company receives between 400 to 500 carloads of freight per year, and from 150 to 200 of these cars move from eastern points. Some of these cars are pool cars. The testimony of this witness clearly shows the injurious effect of the restrictive rate policy here assailed. The testimony of M. S. Rosenblatt, President of the Structural Steel and Forging Company, Salt Lake City, Utah, which commences at page 298 of the transcript and is summarized on pages 89 and 90 of our brief, the testimony of Kenneth G. Self, Inter-Mountain Tractor Sales Corporation, Salt Lake City, Utah, which commences at page 645 of the transcript and is summarized on pages 91 and 92 of our brief, and the testimony of D. G. Adams, Branch Manager of the branch of the J. I. Case Company, Salt Lake City, Utah, which commences at page 773 of the transcript and is summarized on pages 92-94 of our brief, also show the injurious effect of the restrictive rate policy of the defendants on the business concerns represented by these witnesses, as well as the Rio Grande. The testimony of these and other witnesses covers a wide range of commodities which move from various points in the east to Salt Lake City and other Utah points, a substantial

part of which is re-shipped to points on the Union Pacific and its connections in the closed door territory.

[fol. 2394] That and other testimony also shows that although the Rio Grande is a party to joint rates on all commodities from eastern points to Salt Lake City and other Utah common points, industries such as the J. I. Case Company, which has a plant served by the tracks of the Rio Grande at Salt Lake City, are reluctant to route the traffic from the east via the Rio Grande to Salt Lake City because in the event a part of the shipment or all of it should be re shipped to points on the Union Pacific in the closed door territory, it would be subject to the combination rates from point of origin to the ultimate destination. Testimony shows that on the average about 70 per cent of the traffic consigned to the industries in question at Salt Lake City is re-shipped to points on the Union Pacific in the closed door territory. In these circumstances, there is a natural disposition to play safe and use the route of the Union Pacific on the inbound movement of the shipments from the east to the other Utah common points. It will thus be seen that, for the reasons stated, the restrictive rate policy here assailed actually operates to prevent the Rio Grande from participating in competitive joint rates to Salt Lake City and other Utah common points which it serves.

An examination of the evidence in this proceeding will demonstrate that the recommendations of the examiner should have been sustained and that there is no justification for the limitations which the majority of the Commission appears to have approved, with certain reservations, in prescribing eastbound and westbound joint rates.

[fol. 2395] Point VI

The majority erred in finding on pages 60a-63 of the report that the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants and to support that finding in relying on Livestock-Western District Rates, 176 I. C. C. 1, decided in June 1931, and 190 I. C. C. 175, decided in December 1932, and in W. H. Bintz Co. v. A. & S. Ry. Co., 216 I. C. C. 481, 486, decided

in June 1936, which relied on the older cases cited, as the record shows that the operating conditions, including distances of the Rio Grande, have been substantially improved since the date of the decisions cited. In fact, the record shows that the main line of the Rio Grande which has been and would be used in connection with the traffic involved has been practically rebuilt since the period covered by the decisions cited.

At pages 60a-63 of the report of the Commission, statements are made that the operating conditions on the Rio Grande are more onerous than the operating conditions on the Union Pacific or any of the other transcontinental defendants. There are no facts of record which support that statement. The majority were apparently mindful of the absence of such facts since it cited in support of the statements *Livestock-Western District Rates*, 176 I. C. C. 1, decided in June 1931, and 190 I. C. C. 175, decided in December 1932, as well as *W. H. Bintz Co.* v. *A. & S. Ry. Co.*, 216 I. C. C. 481, 486, decided in June 1936. The finding in the *Bintz* case that operating conditions on the Rio Grande were unusually severe is based not on an original examination or consideration of that question, but upon the older cases cited and other still older cases, such as the *Commercial Club of Salt Lake* case, 19 I. C. C. 218. Included in the statement about comparable operating conditions on the Rio Grande, the Union Pacific and other defendants, the Commission was apparently influenced by the fact that the hauls between certain important points are somewhat longer via the route of the Rio Grande in some instances than via the direct route of the Union Pacific.

[fol. 2396] The majority made an inexcusable and serious mistake in relying on old decisions of the Commission to support a statement to the effect that operating conditions on the Rio Grande are more onerous than they are on the Union Pacific or any other transcontinental railroad. In making that statement, the majority ignored the evidence in this case by the Rio Grande and by the defendants which shows that since the establishment in June 1934 of the new through route of the Rio Grande between Denever, Colo., Salt Lake City and Ogden via Dotsero, Colo., frequently called the Moffat Tunnel route, the main line of the Rio Grande via which the traffic here involved would move

has been practically re-built. The distance between Denver and Ogden via Dotsero is 175 miles shorter than the distance via the Rio Grand- through Pueblo and the Royal Gorge route, and is 43 miles shorter than the route of any other railroad between Denver and Salt Lake City.

Prior to April 11, 1947, the property of the Rio Grande was in the hands of trustees. On that date complainant acquired the property from the trustees under appropriate court order, at which time the Denver and Salt Lake Railway Company was merged with the Rio Grande. During the trusteeship approximately $73,000,000 were expended to improve the property of the complainant. These improvements included large sums for additions and betterments, the acquisition of Diesel power and of other modernization of equipment, as well as the establishment of centralized traffic control, automatic signaling, new rails, ballast and other ph. sical improvements. Large sums of money have been spent for improvements since the property of the Rio Grande was acquired from the trustees on April 11, 1947. As the result of these large expenditures of money and improvements, the Rio Grande has shown proportionately greater gains in recent years than other Class I railroads in the Western district as a group.

[fol. 2397] The Union Pacific not only concedes that operating conditions on the Rio Grande have substantially improved in the last 15 years, but went to considerable pains to prove that fact. At page 190 of the original brief of the Union Pacific, the statement is made that witness Lynch, whos is Vice President in charge of operations on the Union Pacific, called attention to the fact that although the net railway operating income per mile of road from freight train operations of the Union Pacific in 1948 was slightly larger than the Rio Grande, the net railway operating income for total transportation service per mile of road operated was $4,374.36 for the Union Pacific and $4,976.82 for the Rio Grande. At page 191 of the brief of the Union Pacific, the statement is made that Exhibit 28 by witness Webb, an accountant of the Union Pacific, shows that during the period from 1930 to and including 1949, the Rio Grande made greater financial progress than all Class I railroads in the Western district. The exhibit

shows, *inter alia*, the percentage ratio that the respective operating revenues of certain railroads for each of the years 1931 to 1949 bear to the revenues of the same railroads for the year 1930. The railroads dealt with are Class I railroads in the Western district in one group, and the Milwaukee, the Great Northern, the Northern Pacific, the Union Pacific and the Rio Grande in another group. Summarized, Exhibit 28 shows the percentage ratio of operating revenues of the groups of railroads dealt with 1949 compared with 1930 to be as follows:

Class I Railroads in Western District (combined)	178.31
Four transcontinental lines, including U. P. (combined)	191.62
D&RGW (including D&SL for 1949 but not for 1930)	220.82

There follows certain operating and other ratios of the Rio Grande compared with the Union Pacific for the years 1949, 1950 and 1951. These figures are taken from Union [fol. 2398] Pacific Revenue and Expense Report to this Commission and from the income account of the Rio Grande.

	1949	1950	1951
Union Pacific Railroad			
Operating Ratio	79.7	70.3	74.3
Total Maintenance Ratio	34.3	30.1	31.2
Transportation Ratio	37.4	33.4	36.0
Rio Grande Railroad			
Operating Ratio	76.9	71.3	67.3
Total Maintenance Ratio	32.4	30.1	28.5
Transportation Ratio	36.2	34.0	32.0

The testimony of witness Earley and his Exhibit 35 has a bearing on the question here discussed. The exhibit contains a comparison of car-mile and ton-mile earnings on various representative commodities from or to representative points in transcontinental territory via routes over which through competitive rates are now, and for many years have been, applicable via the Rio Grande with car-mile and ton-mile earnings on the same commodities from and to representative points on the Union Pacific in the closed door territory. (1661) The exhibit shows, *inter*

alia, that the per-car mile and per-ton mile earnings on representative shipments of various commodities via the existing routes of the Rio Grande via which joint rates apply compare favorably with the car-mile and ton-mile earnings that would apply on the same commodities under the joint rates sought. In many instances, the per car and per ton mile earnings will be greater on the traffic involved under the rates sought than they are now under existing joint rates in which the Rio Grande participates and under comparable conditions as to distance, etc.

The report of the Commission indicates that its statements concerning operating conditions were influenced substantially by the differences in distances. The Commission has repeatedly held that while distance is a factor to be considered in prescribing rates, it is by no means a controlling factor. Moreover, since most of the traffic involved is long haul traffic, the difference in the distances over the route of the Rio Grande and the route of the [fol. 2399] Union Pacific are relatively small. In addition, it certainly is true that the transportation conditions via the route of the Rio Grande here involved compare favorably with the transportation conditions via the route of the Union Pacific from Seattle through Portland, Southern Pacific through Arizona and New Mexico, and thence the Rock Island to Kansas City, Chicago or other eastern points as well as with numerous other routes. As Appendix 3 attached to our original brief will readily reveal, the distance via many routes of the Rio Grande between many points is substantially the same as the distance via other routes and much shorter than the distance via many routes via which the competitive rates sought apply.

On page 5 of Exhibit 25, introduced by witness Stilling of the Union Pacific, distance comparisons are made from McCammon, Ida., to Denver and Pueblo and 41 additional points east thereof via the route of the Union Pacific through Wyoming and via the route of the Union Pacific through Ogden in connection with the Rio Grande. This exhibit shows that the difference in the distance via the two routes from McCammon, Ida., to the various destinations in favor of the Union Pacific is relatively negligible.

In 11 examples out of 43 destinations selected by Stilling, the excess in the distance via Ogden and the Rio Grande in favor of the Union Pacific is 95 miles or less. In no instance shown does the distance via the Ogden Gateway and the Rio Grande exceed the distance via the Union Pacific through Wyoming by more than 212 miles, and in 27 instances the difference is less than 200 miles.

On pages 161 to 166 of the transcript and in Section K of his Exhibit 3, witness Earley, for the Rio Grande, sets forth numerous comparisons of distances via various routes. Pages 2 to 6 of Section K of Exhibit 3 show the distances from representative points in Utah and Idaho and from Spokane, Wash., to various points in the United States between which points competitive rates ap- [fol. 2400] ply only via the Union Pacific routes through Wyoming. The distances via the Rio Grande route to the representative points shown range from 102 to 116 per cent of the distances via the Union Pacific through Wyoming. Numerous other comparisons will be found in Section K of the Earley Exhibit 3.

On page 62 of the report of the Commission, the following statement is made:

> "From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska except Omaha, the short route distances are less than 1,000 miles."

That statement seems to be true as to distances from McCammon, Ida., to points west of the Missouri River. It is not true as to distances from points located in western Idaho, Oregon or Washington to the same destination points. It is not entirely clear what is meant by the quoted statement. It probably influenced the Commission to establish the proscribed intermediate territory in connection with the joint rates on the few selected east-bound commodities which it approved.

The sub-joined table sets forth a comparison of distances from McCammon and Boise, Ida., and from Portland, Ore., to Grand Island and Lincoln, Nebr., and Salina, Topeka and Wichita, Kans., via the Union Pacific and the

Rio Grande. It will be observed that the distance via the Rio Grande from such points as Boise, Ida., and Portland, Ore., from which points more traffic is originated than at McCammon, exceeds the distance via the route of the Union Pacific to a relatively small degree. The average percentage excess via the Rio Grande route on traffic from Boise to the destinations named is 13.3 per cent, while the average percentage excess on traffic from Portland to the same destinations is only 9.7 per cent.

[fol. 2401]

From		Via UP		Via D&RGW		
McCammon	Ida.					Percent
To		Miles	Route	Miles	Route	of Circuity
Grand Island	Neb.	892	One	1151	Three	29.0
Lincoln	Neb.	1009	One	1201	Three	19.0
Salina	Kan.	1072	One	1172	Four	9.3
Topeka	Kan.	1085	One	1285	Five	18.4
Wichita	Kan.	1142	Two	1234	Six	8.1
					Avg.	16.8
From						
Boise	Ida.					
To						
Grand Island	Neb.	1149	One	1408	Three	22.5
Lincoln	Neb.	1266	One	1458	Three	15.2
Salina	Kan.	1329	One	1429	Four	7.5
Topeka	Kan.	1342	One	1542	Five	14.9
Wichita	Kan.	1400	Two	1491	Six	6.5
					Avg.	13.3
From						
Portland	Ore.					
To						
Grand Island	Neb.	1629	One	1889	Three	16.0
Lincoln	Neb.	1747	One	1939	Three	11.0
Salina	Kan.	1809	One	1910	Four	5.6
Topeka	Kan.	1822	One	2023	Five	11.0
Wichita	Kan.	1880	Two	1972	Six	4.9
					Avg.	9.7

One UP —Direct.
Two UP —Kanopolis, Kan., MP.
Three UP—Ogden, Utah, D&RGW-Denver, Colo., CB&Q.
Four UP —Ogden, Utah, D&RGW-Denver, Colo., UP.
Five UP —Ogden, Utah, D&RGW-Denver, Colo., CRI&P.
Six UP —Ogden, Utah, D&RGW-Pueblo, Colo., MP.

On pages 22a and 23 of the report of the Commission, there is a discussion of distances via various routes. The report states that many of the routes are longer than the routes via Ogden and the Rio Grande via which joint rates are sought and that this is true to all sections of the country east of the Rocky Mountains, except western trunk

line territory. The report also states that the routes via which the Union Pacific consents to being short hauled are generally of less distance than the routes via which the Union Pacific retains its long haul and considerably shorter, 37½ per cent for example, from Yakima, Washington, to Minneapolis than the routes sought via Ogden and the Rio Grande.

The generalization recited by the Commission in connection with distances from the closed door territory via [fol. 2402] routes to points in western trunk line territory is misleading and, like most generalizations, is likely to result in incorrect conclusions. All of the Colorado common points, such as Pueblo, Denver, Colorado Springs, Trinidad, etc., are included in western trunk line territory as are all points in the States of Nebraska and Kansas. The statement in the report of the Commission that to the western trunk line points "the short hauling routes are generally shorter than the routes by which the Union Pacific retains its long haul" is incorrect insofar as Colorado common points, and points in Nebraska and Kansas are concerned. Appendix 5, attached hereto, portrays the situation much more accurately than do the statements by the Commission. Denver, Minneapolis and Kansas City are selected on that Appendix as representative points in the western, northern and southern areas of western trunk line territory.

From and to Group B points, from and to which the Union Pacific, as a general rule, joins it connections, the Great Northern, Milwaukee and Northern Pacific, in routes which give the U. P. a short haul, the G. N. route is the shortest from and to Minneapolis. Via the route of the U. P. through Wyoming the average circuity is 118 percent—that of the Rio Grande through Colorado is 130 percent. In many of its Fourth Section orders, such as F. S. O. 11135 of January 10, 1933, as amended, the Commission has allowed a maximum circuity of 133⅓ percent where distances involved exceed 1125 miles. It should be borne in mind that this Fourth Section order, which was issued in connection with rates prescribed in *Western District Livestock* rates (176 I. C. C. 1) (and Fourth Section orders of a similar nature), was patterned to fit a scheme

of distance rates, and naturally could be considered as being narrower in its restrictions than it would be if it were fashioned to fit such a widespread and unrestricted adjustment as Trans-Continental rates on all commodities, which give lesser consideration to distance.

[fol. 2403] Only two of the examples shown from and to Minneapolis via the Rio Grande exceed the 133⅓ percent limitation (Milton, Oregon 134 percent; Yakima, Washington 137 percent)—the average distances via the Rio Grande for the seven points in Group B is 130 percent, but the average for the U. P. routes through Wyoming is 118 percent. To Denver, the average circuity of the Rio Grande routes is only 108 percent of the U. P. routes. To and from Kansas City the Union Pacific route is the short route in all instances shown. The average for the Rio Grande is 111 percent longer, but the averages via the northern routes (through Montana) range from 118 percent to 131 percent longer than the Union Pacific. This points up the contention we have made throughout this case, that Trans-Continental and Mountain Pacific traffic generally moves via routes which afford the traffic practically unrestricted freedom of movement, except via the Ogden Gateway. From and to points listed in Group A, Appendix 5, which points are not on the short-haul territory of the Union Pacific, the Rio Grande routes are only longer by an average of 10 percent to and from Denver and 13 percent to and from Minneapolis and Kansas City.

In its general discussion and ultimate fact findings (at Sheet 62) the Commission deals with this phase of the order, and, in expressing a view with respect to differences in transportation conditions due in part to "lengths of hauls" concludes that Colorado Common Points, Eastern Colorado, Kansas and Nebraska (except Missouri River cities) should be excluded from the benefits of the order. While we realize that Kansas City is in "open" territory, the distances involved via the compared routes to and from that point are fairly representative of the situation in Kansas and Nebraska west of the Missouri River, and the conclusion reached is not justified.

We have shown that the Rio Grande now participates in joint rates and through routes on transcontinental traf-

[fol. 2404] fic generally via Ogden and Salt Lake City, between points in California on the Union Pacific and other transcontinental railroads serving California, the western areas of Oregon and Washington, and Colorado common points and points east thereof. The traffic to and from the closed door territory in northern Utah, Idaho, Montana, Oregon and Washington served by the Union Pacific and its connections is not subject to the same basis of joint competitive rates in connection with the Rio Grande. There are no facts of record which show any important dissimilarity of transportation conditions in connection with the movement of traffic via the Rio Grande between the points and territories where joint competitive rates via the Rio Grande now apply, and between the points in the territories where joint rates are sought. Nor is there evidence in this case which shows or justifies the belief that there is any important dissimilarity in the transportation conditions over the Rio Grande in connection with the traffic on which joint rates are sought and the transportation conditions over the Union Pacific and the routes of other railroads with which it now participates in joint rates via routes in which it and the other defendants accept less than their respective long hauls. It is difficult to understand why the Commission ignored the evidence of record, which shows the remarkable change and improvement in the transportation conditions over the Rio Grande which have occurred during the past 15 years. It is more difficult to understand why the Commission sought to supports its unjustified finding about the onerous transportation conditions on the Rio Grande by referring to decisions which were made more than 15 years ago. At all events, there is no justification for the statement made by the Commission as applied to the present transportation conditions on the Rio Grande.

[fol. 2405] Point VII

The majority erred in failing to find that the rate situation maintained by defendants results in undue and unreasonable prejudice and disadvantage to shippers, districts and localities depending upon the Rio Grande for service in violation of Section 3 (1) of the Act, thereby removing the restrictions imposed by Section 15 (4) from the Commission's authority to grant the relief requested by complainant.

The majority report recognizes the existence of an issue in this proceeding arising under Section 3 (1) of the Act. After stating that the paramount issue in the proceeding is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the territories involved, the majority observes that "Evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes." (Sheet 9a). The report then proceeds to dispose of defendants' contention that an allegation of undue prejudice and preference under Section 3 (1) was not properly before the Commission by stating that although it agreed that such an issue could not be raised by the Rio Grande in its own behalf, the intervening shippers did have the right to raise the issue and had introduced evidence in support of their claim of undue prejudice and disadvantage.

Upon analysis of the testimony on this issue the majority report concluded (Sheet 63):

> "As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments westbound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs eastbound, who [fol. 2406] reconsign such shipments or take advantage of transit arrangements at intermediate points

on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3 (1) of the act."

For reasons which have been previously discussed in detail and need not be repeated here, particularly our discussion in Point III, the error in the majority's above-quoted conclusion is its restriction to a few selected commodities. As stated by Commissioner Lee in his separate expression (Sheet 71), in discussing the issue arising under Section 3 (1), "The evidence is equally impressive with respect to the disadvantage or handicap to shippers or receivers of lumber, building materials, farm machinery, and other commodities." Similarly, Commissioners Mahaffie, Splawn, and Cross point out in their separate opinion (Sheets 80-81) that not only does the record contain convincing evidence of undue prejudice and disadvantage to shippers, districts, and localities with respect to the limited commodities specified in the majority's report, but also with respect to wool producers, livestock operators, lumber dealers and processors, dealers in farm machinery, and other commodities. Moreover, the latter opinion emphasizes the extremely important point that in any event the evidence which the majority report regards as sufficient to justify a finding of undue prejudice and disadvantage is merely typical of a generally prevailing prejudicial rate situation with respect to all commodities. In this connection, Commissioner Mahaffie's expression bears repeating that where the Commission has found it necessary "to deal generally with a comprehensive rate situation the Supreme Court has held that we may properly make general findings upon typical evidence representative of the situation as a whole." To do otherwise would present not only an impossible burden to complainants before the Commission but [fol. 2407] an impracticable, if not impossible, burden upon the Commission itself to examine every rate on every date from every origin to every destination in the comprehensive territories under consideration here.

Furthermore, examination of the majority report dis-

closes that its restriction of its finding of undue prejudice and disadvantage to shippers in violation of Section 3 (1) to a limited number of commodities was based entirely upon its previous findings pursuant to Section 15 (4) concerning the adequacy of defendants' routes. This is clearly shown by the two following statements from the majority's report. At Sheet 59 the majority states:

> "Testimony on behalf of shippers, however, does raise a question as to the need for *more adequate and economic service* than afforded by existing routes *with respect to some commodities.*" (Emphasis supplied.)

At Sheet 60 it is also said:

> "While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated."

Thus, it will be seen that the failure of the majority to include all commodities in its finding of undue prejudice and preference as to shippers and receivers appears to be directly attributable to its application of the limitations in Section 15 (4) of the Act. But, as pointed out by Commissioner Lee (Sheet 71) and Commissioners Mahaffie, Splawn and Cross (Sheet 80), and as is obvious from the law itself, the discrimination found to be in violation of Section 3 (1) of the Act makes the limitations in Section 15 (4) inapplicable. There is no recognition of this in the majority report, despite the fact that Section 15 (4) of the Act expressly provides that the limitations therein [fol. 2408] on the power of the Commission to prescribe through routes are inapplicable where Section 3 of the Act is involved. It follows that were the Commisison to resolve the present equal division of views of its members and find that through routes exist, the limitations in Section 15 (4) would also be inapplicable on that account.

For the foregoing reasons, as well as those previously urged in other sections of this petition, the Commission should modify and expand its findings and conclusions un-

der Section 3 (1) of the Act so as to include all commodities, and thereby accord the full relief sought by complainants herein irrespective of what its ultimate findings and conclusions may be on the issue of whether through routes exist or must be established.

In view of the decisions of the Supreme Court in *State of New York* v. *United States*, 331 U. S. 284, 341, 344, 345, and *Ayrshire Collieries Corporation* v. *United States*, 335 U. S. 573, 593, which modify and distinguish the decision in *Texas and Pacific* v. *United States*, 289 U. S. 627, it can no longer be validly claimed that an order by the Commission under Section 3 of the Act must be in the alternative.

Point VIII

The majority erred in imposing an intermediate territorial restriction which, as a practical matter, will nullify or minimize the limited relief granted by the Commission insofar as eastbound application of the prescribed joint rates is concerned.

The subject here dealt with has been discussed at considerable length under General Comments. In these circumstances, it will not be necessary to deal with it here, except in the most sketchy manner. The majority of the Commission, with Commissioner Patterson differing as to lumber, prescribed joint competitive rates from the closed door territory on selected commodities, consisting principally of livestock and perishable freight which move eastbound from the closed door territory. [fol. 2409] For reasons which the report does not make clear, the majority set up an intermediate territory the practical equivalent to the western trunk line territory (see Appendix 4 attached hereto), including Colorado common points such as Denver, Colorado Springs, Pueblo, Trinidad, etc., to which the joint rates on the selected commodities do not apply. In the light of the evidence of record, this was indeed an extraordinary thing to do, since as we have already pointed out, it not only creates Fourth Section violations but is practically self-defeating insofar as the limited relief granted is concerned. The proscribed territory actually prevents shippers of perishable freight in the closed door

territory from forwarding freight at the prescribed joint rates to points served by the Rio Grande itself, such as Pueblo, Colorado Springs, Denver, and other Colorado common points. If any shipper in the closed door territory should route a shipment of perishable freight via Ogden and the Rio Grande destined to the Colorado common points on the Rio Grande or points east thereof in the proscribed territory, the charges would have to be assessed on the basis of the combination rates which, in many instances, are higher to such destinations than are the joint through competitive rates from points in the closed door territory to points east and south of the proscribed territory, such as Chicago and St. Louis, etc. The imposition of the proscribed territory is not justified by the facts or the law, and no such territorial limitation should be applied to any joint competitive rates that may be prescribed in this proceeding.

[fol. 2410] Point IX

The majority erred in failing to find that the through rates based on the combination of intermediate rates via Ogden and the Rio Grande on the traffic and between the territories involved are unjust and unreasonable to the extent they exceed the joint competitive rates of the defendants and the Union Pacific which apply via routes other than the Rio Grande generally on transcontinental traffic and other traffic, and which also apply via the route of the Rio Grande through Salt Lake and Ogden on traffic to and from points in California and certain western Pacific coast points in Oregon and Washington. The report of the Commission indicates that it gave the question of the reasonableness of the rates little or no consideration except as to the selected commodities. Exhibits 3 and 35 of witness Earley and other testimony of record show that the existing rates on transcontinental and other traffic that apply generally in the territories involved is a proper standard for measuring the justness and reasonablenes of the rates assailed in this proceeding. The evidence bearing on this question is summarized on pages 98 to 117, inclusive, of the Rio Grande brief. Examiner

Mullen, who heard the evidence in this case, found, *inter alia*, that the joint competitive rates now in effect over the routes of the Union Pacific and the other defendants from and to the territories involved are just and reasonable rates for application from and to the same origin and destination territories via the Union Pacific, Ogden or Salt Lake and the Rio Grande and the routes of the other defendants.

Appendix 2 attached to our brief shows the average weight, the revenue per car at the competitive rates sought, and at the combination rates which now apply via the Rio Grande on the traffic involved. That appendix is based upon rate comparisons in Section J of Earley Exhibit No. 3. The appendix shows that the per car charges at the combination rate exceed the per car charges at the joint competitive rates by from $62.72 to $867.69 per car.

[fol. 2411] This Commission has on several occasions held that, irrespective of the question whether particular rates may have been established as the result of competitive forces, where such rates have the sanction of time and apply generally to particular traffic or to all traffic in particular territories, such rates may be used as the standard of reasonableness. The position of the Commission with respect to that question is cogently stated in *Hormel and Company* v. *A. T. & S. F. Ry. Co.*, 263 I. C. C. 9, at page 43, where the entire Commission said in answer to the contention that the rates there assailed were depressed.

> "Defendants criticise the mountain-Pacific comparisons of complainants by labeling them depressed rates, usually truck compelled. It is noted, however, that these so-called low mountain-Pacific rates instanced by complainants apply between practically all points between which the traffic moves. They, therefore, represent the normal rate structure in that territory and afford a proper guide for determining a just and reasonable rate level for the future from the Midwest to mountain-Pacific territory."

While the Commission found that the rates on the selected commodities are unjust and unreasonable, as well as unduly prejudicial, it erred in failing to find that the rates

on all of the traffic involved were unjust and unreasonable since the evidence of record is as probative and persuasive on all of the traffic as it is on the selected commodities.

Since, as we have already shown, the evidence which supports the claim that the combination rates are unjust and unreasonable is discussed and analyzed in our brief, we ask that the Commission re-examine that analysis and discussion.

[fol. 2412] Conclusion

For the reasons stated, the Commission should grant this petition for reconsideration and should expand, modify and reverse its report and order of January 12, 1953, in the respects hereinbefore described. The Commission should grant the relief sought.

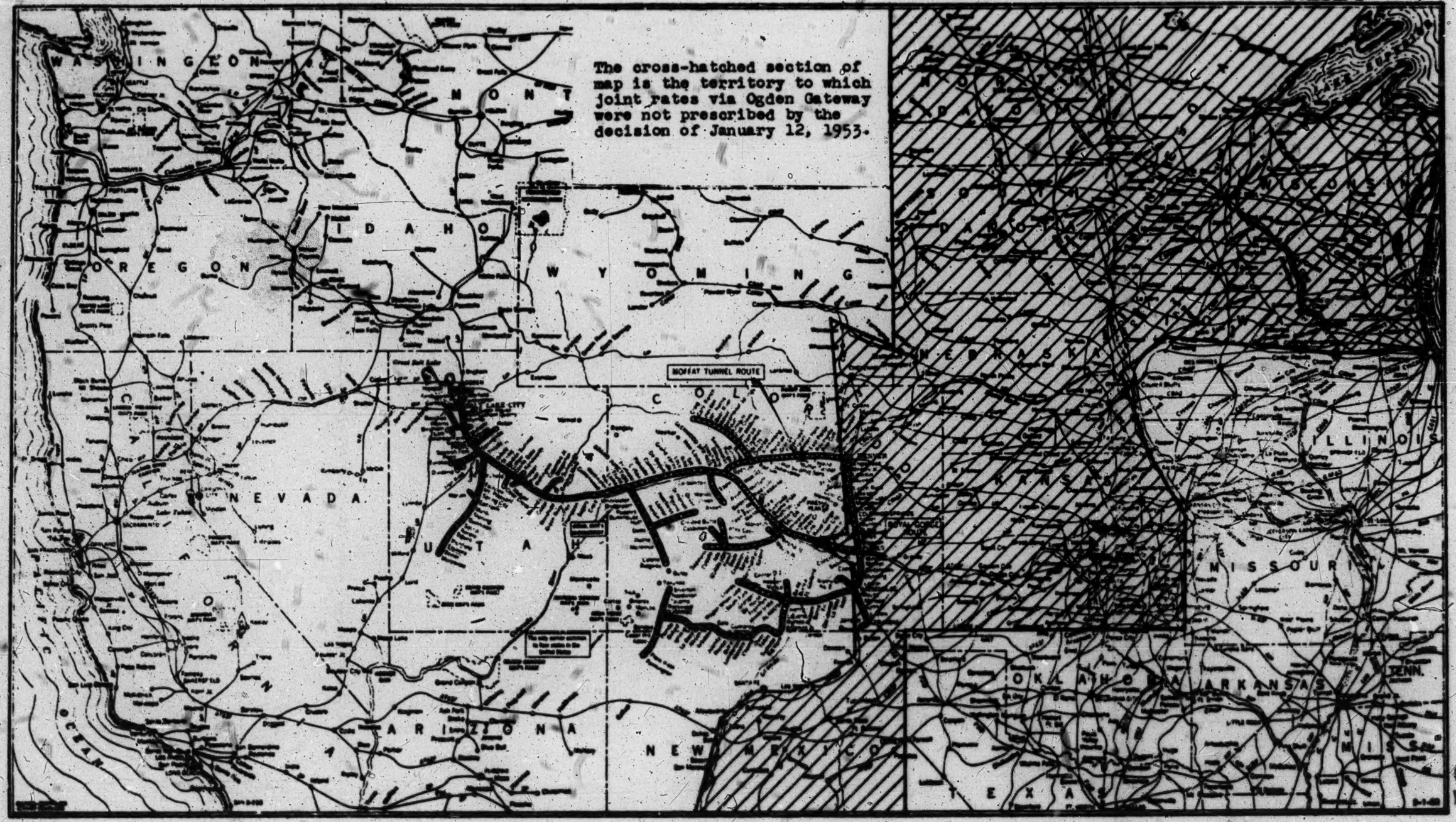
Respectfully submitted, Edward J. Hickey, Jr., 620 Tower Building, Washington, D. C. (s) Robert E. Quirk, 1116 Investment Building, Washington 5, D. C., Attorneys for Complainant.

April 15, 1953

Certificate of Service

I hereby certify that I have this 15th day of April, 1953, served the foregoing document upon all parties of record in this proceeding, by mailing, by first-class mail, a copy thereof, properly addressed, to each party.

(s) Robert E. Quirk.


The cross-hatched section of map is the territory to which joint rates via Ogden Gateway were not prescribed by the decision of January 12, 1953.
WASHINGTON
MONT
IDAHO
OREGON
WYOMING
NEVADA
UTAH
COLO
ARIZONA
NEW MEXICO
MISSOURI
ILLINOIS
OKLAHOMA
ARKANSAS
TEXA
PACIFIC OCEAN
MOFFAT TUNNEL ROUTE

APPENDIX 2

LINE NO.	COMMODITY	FROM	TO	RATES IN CENTS PER 100 POUNDS	TARIFF AUTHORITY
1	Cattle & Sheep,	Caldwell.....Ida.	Ogden.....Utah	66	(1)
2	double-deck	Ogden.....Utah	Brush.....Colo.	80	(2)
3				146	
4		Caldwell.....Ida.	(Omaha.....Neb.	130	(3)
5			(Kansas City..Mo.	130	(3)
6			(St. Louis....Mo.	145	(3)
7			(Minneapolis.Minn.	143	(3)
8	Cattle & Sheep,	Victor.....Ida.	Ogden.....Utah	56	(1)
9	double-deck	Ogden.....Utah	Hastings....Neb.	97	(2)
10				153	
11		Victor.....Ida.	(Omaha.....Neb.	122	(3)
12			(Kansas City..Mo.	122	(3)
13			(St. Louis....Mo.	137	(3)
14			(Minneapolis.Minn.	130	(3)
15	Cattle & Sheep,	Huntington...Ore.	Ogden.....Utah	70	(1)
16	double-deck	Ogden.....Utah	Pueblo.....Colo.	80	(2)
17				150	
18		Huntington...Ore.	(Denver.....Colo.	105	(3)
19			(Kansas City..Mo.	135	(3)
20			(Minneapolis .Minn.	143	(3)
21	Cattle	Pendleton....Ore.	Ogden.....Utah	85	(4)
22		Ogden.....Utah	Lamar.....Colo.	93	(5)
23				178	
24		Pendleton....Ore.	(Kansas City..Mo.	148	(6)
25			(St. Louis....Mo.	162	(6)
26			(Chicago.....Ill.	169	(6)
27			(Minneapolis.Minn.	136	(6)
28	Sheep,	Ketchum.....Ida.	Ogden.....Utah	58	(1)
29	double-deck	Ogden.....Utah	Las Animas.Colo.	90½	(5)
30				148½	
31		Ketchum.....Ida.	(Kansas City..Mo.	123	(3)
32			(St. Louis....Mo.	138	(3)
33			(Minneapolis.Minn.	137	(3)
34	Cattle & Sheep,	Ketchum.....Ida.	Ogden.....Utah	58	(1)
35	double-deck	Ogden.....Utah	Topeka.....Kan.	110	(2)
36				168	
37		Ketchum.....Ida.	(Kansas City..Mo.	123	(3)
38			(St. Louis....Mo.	138	(3)
39			(Chicago.....Ill.	157	(3)
40			(Minneapolis.Minn.	137	(3)
41	Dried Beans	Rexburg.....Ida.	Ogden.....Utah	41	(7)
42		Ogden.....Utah	Colorado		
43			Springs...Colo.	78	(8)
44				119	
45		Rexburg.....Ida.	(Kansas City..Mo.	82	(9)
46			(St. Louis....Mo.	99	(9)
47			(Chicago.....Ill.	113	(9)
48			(Minneapolis.Minn.	110	(9)
49			(Fort Worth..Tex.	98	(10)
50			(Oklahoma		
51			(City.....Okla.	93	(9)

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LINE NO.	COMMODITY	FROM	TO	RATES IN CENTS PER 100 POUNDS	TARIFF AUTHORITY
1	Dried Beans	Twin Falls...Ida.	Ogden.....Utah	39	(7)
2		Ogden.....Utah	Fruita.....Colo.	78	(8)
3				117	
4		Twin Falls...Ida.	(Kansas City..Mo.	82	(9)
5			(St. Louis....Mo.	99	(9)
6			(Chicago.....Ill.	113	(9)
7			(MinneapolisMinn.	110	(9)
8			(Fort Worth..Tex.	98	(10)
9			(Oklahoma		
10			(City.....Okla.	93	(9)
11	Frozen Fruits	Seattle.....Wash.	Ogden.....Utah	(F)152	(11)
12		Ogden.....Utah	Delta.....Colo.	(F) 50	(12)
13				202	
14		Seattle.....Wash.	(Denver.....Colo.	167	(13)
15			(Kansas City..Mo.	167	(13)
16			(St. Louis....Mo.	167	(13)
17			(Chicago.....Ill.	175	(13)
18			(Detroit....Mich.	175	(13)
19			(New York		
20			(City.....N.Y.	175	(13)
21			(Atlanta.....Ga.	175	(13)
22			(New Orleans..La.	167	(13)
23			(Fort Worth..Tex.	167	(13)
24	Frozen Fruits	Seattle.....Wash.	Ogden.....Utah	(F)152	(11)
25		Ogden.....Utah	Pueblo.....Colo.	(F)102	(14)
26				254	
27		Seattle.....Wash.	(Denver.....Colo.	167	(13)
28			(Kansas City..Mo.	167	(13)
29			(St. Louis....Mo.	167	(13)
30			(Chicago.....Ill.	175	(13)
31			(Detroit....Mich.	175	(13)
32			(New York		
33			(City.....N.Y.	175	(13)
34			(Atlanta.....Ga.	175	(13)
35			(New Orleans..La.	167	(13)
36			(Fort Worth..Tex.	167	(13)
37	Apples	Payette.....Ida.	Ogden.....Utah	72	(15)
38		Ogden.....Utah	Pueblo.....Colo.	96	(14)
39				168	
40		Payette.....Ida.	(Denver.....Colo.	112	(16)
41			(Kansas City..Mo.	132	(16)
42			(St. Louis....Mo.	141	(16)
43			(Chicago.....Ill.	141	(16)
44			(MinneapolisMinn.	141	(16)
45			(New Orleans..La.	154	(16)
46			(Fort Worth..Tex.	141	(10)
47			(Oklahoma		
48			(City.....Okla.	141	(16)

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(F) Fresh fruit rate.

LINE NO.	COMMODITY	FROM	TO	RATES IN CENTS PER 100 POUNDS	TARIFF AUTHORITY
1	Apples	Yakima.....Wash.	Ogden.....Utah	93	(11)
2		Ogden.....Utah	Pueblo.....Colo.	96	(14)
3				189	
4		Yakima.....Wash.	(Denver.....Colo.	137	(17)
5			(Kansas City..Mo.	152	(17)
6			(St. Louis....Mo.	157	(17)
7			(Chicago.....Ill.	157	(17)
8			(MinneapolisMinn.	152	(17)
9			(Atlanta.....Ga.	182	(17)
10			(New Orleans..La.	157	(17)
11			(Fort Worth..Tex.	157	(17)
12			(Oklahoma		
13			(City.....Okla.	157	(17)
14	Potatoes	Idaho Falls..Ida.	Ogden.....Utah	39	(18)
15		Ogden.....Utah	Pueblo.....Colo.	69	(8)
16				108	
17		Idaho Falls..Ida.	(Denver.....Colo.	63	(19)
18			(Kansas City..Mo.	82	(20)
19			(St. Louis...Mo.	102	(20)
20			(Fort Worth..Tex.	102	(21)
21			(Oklahoma		
22			(City.....Okla.	90	(22)
23	Potatoes	Redmond.....Ore.	Ogden.....Utah	89	(23)
24		Ogden.....Utah	Pueblo.....Colo.	69	(8)
25				158	
26		Redmond.....Ore.	(Denver.....Colo.	105	(17)
27			(Kansas City..Mo.	111	(17)
28			(St. Louis....Mo.	128	(17)
29			(Chicago.....Ill.	134	(17)
30			(MinneapolisMinn.	131	(17)
31			(Detroit....Mich.	147	(17)
32			(Pittsburgh...Pa.	154	(17)
33			(New Orleans..La.	134	(17)
34			(Fort Worth..Tex.	128	(17)
35			(Oklahoma		
36			(City.....Okla.	128	(17)

NB - All rates include Ex Parte 162, 166 and 168 increases.

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EXPLANATION OF TARIFF AUTHORITIES

SYMBOL	TARIFF No.	I.C.C. No.	AGENT
(1)	PSCFB.....220-D	1514	J. P. Haynes
(2)	D&RGW.....6776-F	951	...
(3)	UP.....6085-C	5323	...
(4)	UP.....6013-D	5230	...
(5)	WTL.....240-J	A-3855	C. J. Heunings
(6)	TCFB.....52-H	1534	C. J. Hennings
(7)	UP.....4100	5194	...
(8)	CUFB.....4-F	24	W. M. Carey
(9)	WTL.....265-F	A-3885	C. J. Hennings
(10)	SWL.....270-C	4046	F. C. Kratzmeir
(11)	UP.....6055-E	5253	...
(12)	D&RGW.....6853-E	904	...
(13)	TCFB.....2-S	1552	C. J. Hennings
(14)	D&RGW.....4925-M	947	...
(15)	UP.....2048-H	5258	...
(16)	UP.....6050-I	5306	...
(17)	TCFB.....43-K	1522	C. J. Hennings
(18)	UP.....7063-D	5249	...
(19)	UP.....6030-D	5220	...
(20)	WTL.....297-B	A-3511	C. J. Hennings
(21)	SWL.....18-F	3722	F. C. Kratzmeir
(22)	UP.....6070-C	5225	...

2417 1671

APPENDIX 3

Appendix 3 referred to in this Petition for Reconsideration is the Appendix 3 attached to and made a part of the Brief of the Rio Grande of August 15, 1950. That appendix sets forth the distances via various routes in which the Union Pacific and other defendants join with each other in accepting less than their respective long hauls. In the circumstances, it is deemed unnecessary to reprint it here.

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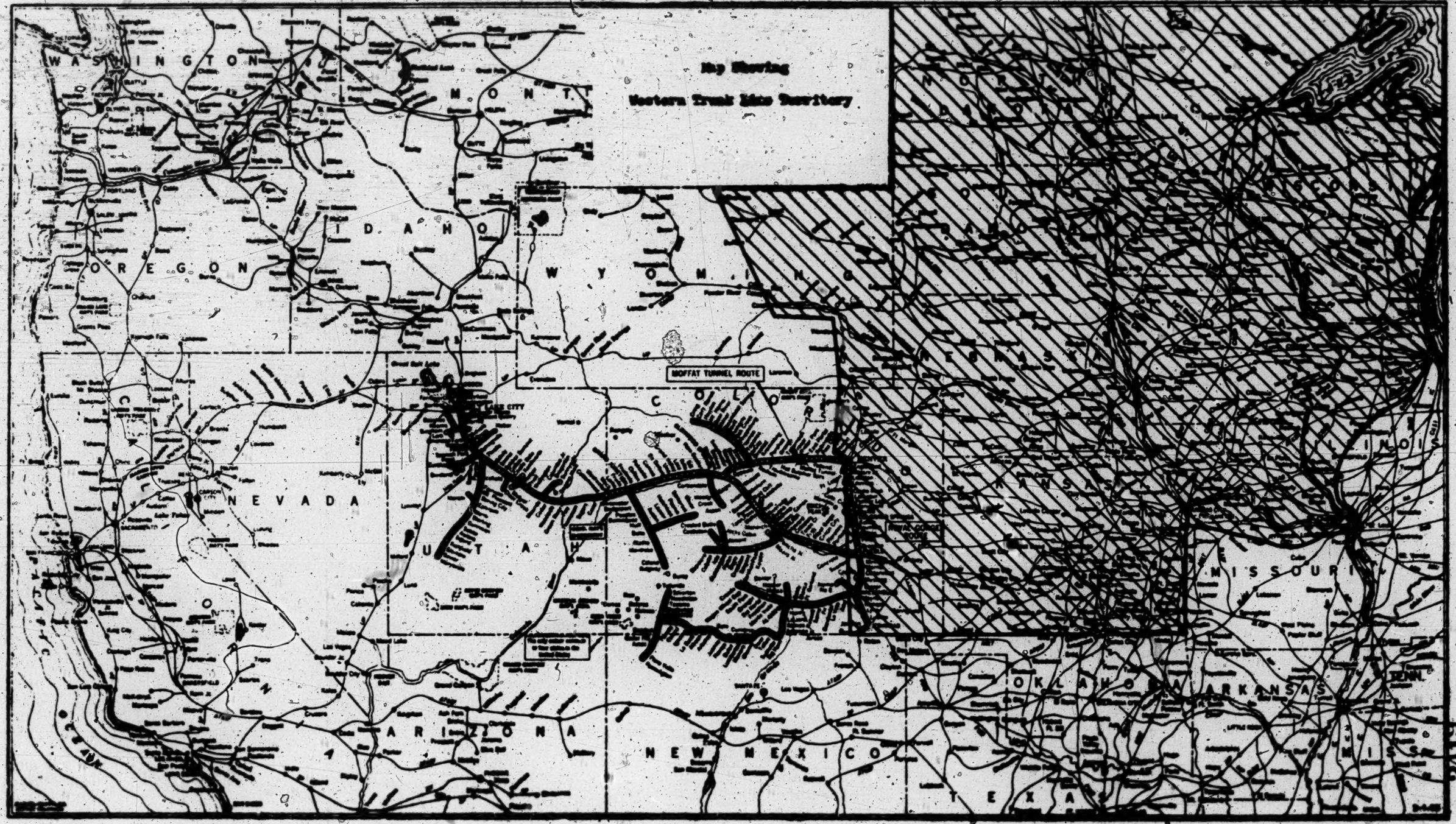
APPENDIX 5

STATEMENT SHOWING DISTANCES FROM AND TO REPRESENTATIVE POINTS ON UNION PACIFIC WEST OF OGDEN, UTAH, VIA SELECTED TARIFF ROUTES (SEE SECTION K OF EXHIBIT NO. 3) INCLUDING ROUTE OF D&RGW THROUGH OGDEN, UTAH, AND THE PERCENT THE LONGER ROUTES ARE OF THE SHORT ROUTE

BETWEEN / AND		Denver, Colo.		Minneapolis, Minn.			Kansas City, Mo.				
		UP	RG	UP	RG	GN	UP	RG	CMStP&P	GN	NP
GROUP A	Boise.....Ida.	880	975	1653	1872		880	975			
		Short	111%	Short	113%		Short	111%			
	Idaho Falls.....Ida.	696	792	1469	1689		1226	1427			
		Short	114%	Short	115%		Short	116%			
	Logan.....Utah	649	679	1422	1576		1179	1314			
		Short	105%	Short	111%		Short	111%			
	Spokane.....Wash.	1371	1466	2144	2363		1901	2101			
		Short	107%	Short	110%		Short	111%			
	Twin Falls.....Ida.	763	858	1536	1755		1293	1493			
		Short	112%	Short	114%		Short	115%			
	AVERAGE.....		110%		113%			113%			
GROUP B	Hood River.....Ore.	1297	1392	2070	2289	1730	1827	2027	2100	2168	2336
		Short	107%	120%	132%	Short	Short	111%	115%	119%	128%
	Milton.....Ore.	1179	1275	1953	2172	1623	1710	1910	1993	2061	2229
		Short	108%	120%	134%	Short	Short	112%	117%	121%	130%
	Pendleton.....Ore.	1144	1240	1917	2137	1652	1674	1875	2021	2090	2258
		Short	108%	116%	129%	Short	Short	112%	121%	125%	135%
	Portland.....Ore.	1360	1456	2133	2353	1793	1891	2091	2163	2231	2399
		Short	107%	119%	131%	Short	Short	111%	114%	118%	127%
	Redmond.....Ore.	1399	1494	2172	2391	1832	1929	2129	2202	2270	2438
		Short	107%	119%	131%	Short	Short	110%	114%	118%	126%
	Yakima.....Wash.	1314	1410	2088	2307	1678	1845	2045	2048	2116	2289
		Short	107%	124%	137%	Short	Short	111%	111%	115%	124%
	Elgin.....Ore.	1091	1186	1864	2083	1747	1621	1821	2117	2185	2353
		Short	109%	107%	119%	Short	Short	112%	131%	135%	145%
	AVERAGE.....		108%	118%	130%			111%	118%	122%	131%

GROUP A - Representative points in Utah and Idaho, also Spokane, Washington, from and to which Union Pacific does not generally operate routes which short-haul itself.

GROUP B - Representative points in Oregon and Washington from and to which Union Pacific participates in routes which short-haul itself.


Ex Hearing
Western Trunk Line Territory
WASHINGTON
OREGON
IDAHO
MONTANA
WYOMING
NEVADA
UTAH
COLORADO
ARIZONA
NEW MEXICO
TEXAS
OKLAHOMA
ARKANSAS
MISSOURI
ILLINOIS
MOFFAT TUNNEL ROUTE
SALT LAKE CITY
DENVER
DENVER & RIO GRANDE ROUTE

[fol. 2430] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL., Defendants.

PETITION OF

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
WABASH RAILROAD COMPANY,
GREAT NORTHERN RAILWAY COMPANY,
NORTHERN PACIFIC RAILWAY COMPANY,
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
UNION PACIFIC RAILROAD COMPANY,

FOR REOPENING, REARGUEMENT, RECONSIDERATION AND POSTPONEMENT OF EFFECTIVE DATE OF ORDER—Filed April 13, 1953.

The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Wabash Railroad Company; Great Northern Railway Company; Northern Pacific Railway Company; Chicago and North Western Railway Company; Chicago, St. [fol. 2431] Paul, Minneapolis & Omaha Railway Company; and Union Pacific Railroad Company, defendants herein, respectfully petition the Commission for an order reopening for reconsideration, reargument and reversal of the findings and conclusions hereinafter specified and set forth in its report, decision and order dated January 12, 1953, and pending consideration hereof, for postponement of the effective date of the outstanding order. The report and order are dated January 12, 1953, and the order, as modified by the Commission's order of February 13, 1953,

is now required to become effective June 8, 1953, on 30 days' notice.

Statement

The report and order require establishment of through routes and joint rates via Ogden or Salt Lake City, Utah, in connection with the line of the Rio Grande for interstate transportation in carloads—

> "* * * of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern bound-ry of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula [fol. 2432] of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming."

As pointed out in the report, the existing routes over the Union Pacific and its connections are generally shorter than routes that would be established via the Rio Grande, some of which would be as much as 37 per cent longer than some existing routes. Nevertheless, the order requires routes via the Rio Grande which would short haul the Union Pacific approximately 1,000 miles on traffic which it originates and terminates and would deprive the Great Northern, Northern Pacific and Milwaukee railroads of their entire haul on traffic originated by the Union Pacific and interchanged to those lines at northwest junctions.

The routes ordered would require participation by at least one more carrier, necessitating two or more additional interchanges of traffic that would move via the Rio Grande. Between the points where the traffic could be handled by either the Union Pacific or the Rio Grande with its connections at Denver, the route via the Rio Grande is about 200 miles longer than the Union Pacific and would require at least 24 hours longer transit time.

No shipper or receiver has ever filed a complaint demanding the through routes and joint rates required by the order.* No shipper, receiver or ultimate consumer at [fol. 2433] destinations in the southern and eastern part of the country has requested routes via the Rio Grande, and while a few shippers procured by the Rio Grande along its line and in Idaho pretended a desire for through routes and joint rates via that line for transit and reconsignment purposes, an overwhelming number of shippers and representatives of state commissions and commercial and labor organizations testified that the through routes and joint rates sought via the Rio Grande were not necessary or desirable in the public interest nor needed to provide adequate and more efficient or more economic transportation and that existing routes via Union Pacific are adequate, shorter, more efficient, economic and satisfactory.

The report adopts the pattern of the complaint in conglomerating and intermingling the Rio Grande's rights with those of private shippers and the public. It finds that the higher combination rates via the Rio Grande are unreasonable, unduly prejudicial of shippers (including those located on and using the Union Pacific) using or desiring to use the Rio Grande and unduly preferential of shippers and receivers using the Union Pacific routes. That finding is limited to the longer hauls over the greater distances to the southern and eastern part of the United States, thus leaving the combination rates approved as reasonable for the shorter hauls to and from points north and west of the southern Kansas border, the Missouri River and the line of the Chicago and North Western from Omaha to Chicago.

---

* United States vs. U. P. R. Co., et al., 28 I. C. C. 518, was an effort to obtain greater benefit of land-grant deductions on government traffic.

Under the Supreme Court's decision in *Thompson* v. *U. S.*, 343 U. S. 549, neither the finding of unreasonableness [fol. 2434] nor of undue prejudice and preference is relevant, and neither could be made the basis of the order prescribing the through routes and joint rates. Those findings are likewise irrelevant under the Commission's own holding at Sheet 9 of the report—

> "* * * that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation."

Under the *Thompson* decision, a finding of unreasonableness will not sustain an order which "in effect" establishes a new through route; nor may through routes and joint rates be required upon a finding of undue prejudice and preference between shippers, for in such case the carriers must be given an alternative. *Central R. Co. of New Jersey* v. *United States*, 257 U. S. 247, and *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627. The Commission has no power to prescribe through routes and joint rates except upon findings required by section 15(3) and (4).

The report is "long and discursive" and lacks "the simplicity and clearness" necessary to enable the reader to grasp the meaning and purpose of much of the discussion or to understand just what purpose or reason the Commission had in making the findings of unreasonableness and undue prejudice and preference, or in fact upon what precise ground the order is based. *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499. However, we will endeavor to specify herein the more important of the particular respects in which we inisist that the Commission has erred [fol. 2435] and which we urge it to reconsider and reverse and thereupon to dismiss the complaint.

I.

The Commission Erred in Rejecting Union Pacific's "Memorandum of Additional Authorities," etc., of October 5, 1951, and in Refusing to Find, Upon Decisions Cited and Quoted Therein, That the Rio Grande's Admitted Solicitation and Procurement of Shipper Testimony to Help It Win Its Case Vitiated and Nullified the Proceeding Requiring Its Dismissal.

At Sheet 5 of its report, the Commission rejects the Union Pacific's "Memorandum of Additional Authorities" etc., saying that its Rules of Practice "do not permit the submission of such a document so late in the proceeding" and that the memorandum was not filed "in time to permit opposing parties to examine it and to make reply thereto prior to the oral argument when the proceeding was finally submitted." No other reason is given for rejecting the memorandum except that complainant and certain interveners objected to its receipt.

The memorandum served October 5, 1951, was filed with the Commission prior to the original oral argument on October 11 and 12, 1951, and *more than a year before the reargument* on October 15 and 16, 1952. Moreover, the Commission's Rules of Practice *do not prohibit* the filing of such a document and it is obvious that its receipt is within the Commission's discretion.

No doubt the Commission wanted to avoid discussion in its report of the principle laid down in the decisions cited in the memorandum and preferred to accomplish this by rejecting the memorandum itself. The fundamental [fol. 2436] point, however, was raised in Exception No. III of Union Pacific's Exceptions and Brief filed March 1, 1951, and we ask the Commission to reconsider its rejection of the memorandum, to receive it and to hold upon the authorities therein cited and quoted, and upon the Rio Grande's admission (R. 52) that it solicited and procured shipper witnesses to testify so as to help it win its case, that such action and activities vitiated and nullified the whole proceeding and requires its dismissal.

In Union Pacific's Exception No. II to the proposed report, it was shown from the record that no shipper had filed any complaint demanding the through routes and joint

rates sought by the Rio Grande in this case, that a review of Union Pacific's files for a 9-year period disclosed no such shipper demand, that in over 4,000,000 personal contacts during that period by 241 Union Pacific traffic representatives throughout the country no shipper had ever requested or demanded the through routes and joint rates sought by the Rio Grande, and that in a canvass of 1,194 shippers only 24 shippers favored the Rio Grande's complaint, but none of them has ever requested or demanded through routes and joint rates via the Rio Grande. Further, it was there shown that no such request or demand has ever been made upon the Montana Commission, the Washington Public Service Commission, the Public Utilities Commissioner of Oregon, the Public Service Commission of Wyoming, or the Nebraska State Railway Commission. Even the state commissions of Colorado and Utah, which favored the complaint, and the Idaho commission which was against the complaint except as to fruit and vegetables and livestock, made no assertion that any [fol. 2437] such request or demand had ever been made upon them.

In these circumstances, coupled with the statement in the Commission's report (Sheet 16) that what the Rio Grande wants in this case is "to participate as a bridge line" in traffic now handled by the Union Pacific and other defendants, "to improve the financial condition of our railroad" as explained by its President, the conduct of the Rio Grande in soliciting and procuring shipper witnesses to testify so as to help it win its case becomes particularly significant and acute in its relationship to the efficacy and easy evasion of the "financial needs" prohibition of section 15(4), to the credibility of such shipper witnesses and to the conduct of litigation before and the administration of justice by the Commission. Upon reconsideration, we believe the Commission will speak out in protection of the conduct of litigation before it by condemning such practices and by dismissing the complaint. The very results of the Commission's decision in this case calls for such condemnation and dismissal for, although the Commission clearly concludes that the Rio Grande has no case of its own, it nevertheless does accomplish what it seeks on the

commodities specified in the findings and order, and this by the indirect resort to section 3(1) and the shipper testimony which the Rio Grande solicited and procured to help it win its case. In other words, the Rio Grande has lost its own case but has succeeded in partly gaining its ultimate purpose to divert traffic from the defendants because it persuaded a few shippers to pretend a desire or need for transit and reconsigning privileges at points on its line. By this method the Rio Grande has "made" a case where [fol. 2438] it had none. A plain perversion of justice has been accomplished by methods which the courts condemn and the Commission should not sanction, condone or tolerate.

II.

The Commission Erred in Overruling Defendants' Motion to Dismiss the Complaint on the Ground That the Granting of Anything Sought by the Complaint Is Prohibited by the "Financial Needs" Prohibition of Section 15(4).

In our Exception No. IV to the proposed report, we pointed out that the sole purpose of this case is to enhance the Rio Grande's financial condition; that for many years the president of the Rio Grande has sought to take an ever increasing quantity of "bridge traffic" from other lines because there is less expense and consequently more money in handling such traffic (R. 35, 43); that the Rio Grande's Vice President of Traffic and its Freight Traffic Manager testified with particular emphasis in support of their president's testimony that its financial needs have forced the Rio Grande to turn its efforts to bridge traffic and that such is the objective of the complaint in this case (R. 64, 84). The report (Sheet 9b) states that complainant has consistently disclaimed any intent to prosecute the complaint with the object of assisting it in meeting its financial needs. The Commission seems content to escape the "financial needs" prohibition of section 15(4) on such disclaimer, and by the simple expedient of saying that in reaching its conclusions "no consideration has been given to the financial needs of the complainant."

[fol. 2439] The insistence that this is not a financial needs case was by Rio Grande counsel and not by any of its

officers or witnesses. Such insistence by counsel can have no force or effect, particularly in the face of the following testimony given under oath by President McCarthy of the Rio Grande (R. 32-33):

> "Q. That is, from the standpoint of what I will say the treasury of the Rio Grande and the stockholders, that would be the purpose?
>
> "A. Yes, we hope to improve our condition if we can get these through rates.
>
> "Q. Insofar as the corporate management and the stockholders of the Rio Grande are concerned, that would really be the only immediate purpose to them, would it not?
>
> "A. Yes—that they would want to improve the financial condition of our railroad."

It is futile to deny that this is a "financial needs" case, and we insist that the Commission cannot respond affirmatively to the complaint by granting through routes and joint rates without colliding head on with the provision in section 15(4) that the Commission shall not establish any through route and joint rates applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs. The Commission cannot, by simply saying that it gave no consideration to the Rio Grande's financial needs, dissever its purpose from that of the Rio Grande or from the allegations and objectives of the complaint.

Moreover, the whole theme of the report is "bridge traffic" regardless of whether or not the traffic is transited [fol. 2440] at points on the Rio Grande. The only possible purpose the Commission or a railroad could have in diverting "bridge traffic" from one railroad to another would be to help the latter financially, especially where, as here, the traffic presently moves over other available shorter and more direct routes. The president of the Rio Grande testified that his reason for seeking to divert more "bridge traffic" from other lines is that "there is more money in it" (R. 35), and its vice president of traffic testified that with loss of other tonnage, the Rio Grande was "forced to turn their thoughts and efforts to main line through freight traffic" and that in no other way could it

have survived (R. 64). Thus, the Commission's denial that it gave any consideration to the Rio Grande's financial needs is the equivalent of saying that in reaching its conclusions and issuing the order it gave no consideration to the case which the complainant called upon it to decide.

There can be no public interest in diverting "bridge traffic" from the Union Pacific to the Rio Grande. *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127. In other words, "bridge traffic" is "financial needs traffic."

The emphasis upon "bridge traffic" throughout the report contradicts the assertion that in reaching its conclusions the Commission gave no consideration to the Rio Grande's financial needs. On sheet 11 it is stated that in 1890 the Rio Grande was opened for "through traffic between Denver and Ogden" but was "handicapped" because it did not have joint through rates with the Oregon Short Line on traffic between the northwest and points or east of its Colorado gateways. On Sheet 16 the report [fol. 2441] states that the Rio Grande wants to participate as a "bridge line" on such traffic via its Colorado gateways and Ogden at joint through rates. At Sheets 20-22a the report speculates on rearrangement of portions of the Union Pacific lines with that of the Rio Grande to enable the latter to obtain its full main-line haul on the involved traffic and yet leave the Union Pacific a "substantial" haul west of Ogden and possibly east of Denver on the involved "bridge traffic." At Sheets 28 and 29 the report says that the amount of traffic the Rio Grande would gain from the Union Pacific cannot be determined but would depend on solicitation and persuasion by the Rio Grande to induce shippers to use its line as "an overhead or bridge route" and to take advantage of transit facilities on that line on traffic "for subsequent reshipment beyond." The growth of traffic "over" the Rio Grande in the period 1934-1948 is there emphasized. On Sheets 30-32 the position of the Rio Grande "as a bridge line" is discussed and emphasized by showing that its "bridge traffic" increased 326 per cent in the period 1934-1948 and that revenue from "bridge traffic" increased from $5,648,981 to $27,654,086 during that period. On Sheet 32a the importance of transit privileges on the Rio Grande to attract "bridge traffic"

to that line is again emphasized. All of the traffic involved in the long and detailed recitals at Sheets 33-45a of the report is "bridge traffic" some of which might either be transited or stopped to partly unload at points on the Rio Grande and subsequent movement beyond Ogden or Denver. The complaint does not involve traffic originated or terminated at intermediate points on the Rio Grande for joint rates now apply to that traffic.

[fol. 2442] The complaint is that of the Rio Grande seeking to divert bridge traffic from the Union Pacific and other defendants to its line in order to improve its financial condition, as stated in the above testimony of its president, and the Commission cannot by mere words transform the complaint into something which it is not, nor may it read into the complaint an issue under section 3(1) which it plainly does not present. *Lasker & Bernstein v. Director General,* 98 I. C. C. 624; *Barschi & Son v. Baltimore & O. R. Co.,* 155 I. C. C. 350.

The attempt to transform the complaint from a case of one carrier seeking to meet its financial needs by diverting traffic and revenues from another, into a complaint or case of undue preference and prejudice among shippers immediately encounters the following forbidding language of the Supreme Court in *Thompson v. U. S.,* 343 U. S. 549, 559-560:

> "The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4), before the Court in *United States v. Great Northern R. Co.,* 343 U. S. 562 (decided this day)."

The Commission is without authority, under the guise of prescribing the method for removing alleged undue preference and prejudice between shippers who testified in this case, to accomplish the end sought by the complaint of diverting traffic from the Union Pacific to the Rio Grande. Being prohibited from diverting traffic and revenues directly to the Rio Grande to improve its financial situation,

the Commission may not escape the impact of that prohibi-
[fol. 2443] tion by resorting to an indirect and different "form of regulation." Its order in this case would accomplish such diversion of traffic and revenues to the Rio Grande just as effectively as if it did not mention undue preference and prejudice between shippers, but had instead directly ordered through routes and joint rates on the specified commodities via the Rio Grande to enable that line to enhance its financial position. In *U. S. v. Great Northern R. Co.*, 343 U. S. 562, the Court said at pp. 574-575:

> "It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially but can also at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas. Congress amended Section 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs. But the provisions of Section 15(4)—the restrictions against short hauling, the financial-needs prohibition and emergency route provision—all deal with the Commission's power to establish through routes."

The complaint asked the Commission to indulge in "tinkering" with through routes and "through joint rates" which it alleged to be "necessary and desirable in the public interest," in order that, according to its own president's testimony, the Rio Grande could improve its financial position. In ordering through routes and joint
[fol. 2444] rates on the specified commodities, the Commission has affirmatively responded to the complaint to that extent and in so doing it has "tinkered" with through routes and joint rates inescapably to improve the Rio Grande's financial position. It is clear from the language of the decision just quoted that the prohibition against what the Commission has accomplished by its order in this

case cannot be evaded or defeated by indirection or by the form of the Commission's order. For these reasons the Commission should grant the motion to dismiss.

III.

The Commission Erred in Assuming the Power to Grant Relief to the Rio Grande on the Specified Commodities on the Theory That Because Certain Shippers Intervened and Testified, the Rio Grande's Complaint Became a Shipper Complaint Presenting Issues Under Section 3(1) of the Act.

At Sheet 9a of the report the Commission holds that the Rio Grande could not raise the question of undue preference and prejudice between shippers under section 3(1) in this case, but that this question is properly tendered for decision because of the presence of testimony by intervening shippers who, as we have shown, were solicited and procured by the Rio Grande to help it win its case. The intervention of shippers and others in this case was allowed upon the express condition that such interventions would not broaden the issues raised by the Rio Grande's complaint in violation of Rule 72(c) of the Commission's General Rules of Practice. Therefore, the finding of the Commission on Sheet 65, of undue prejudice and preference between shippers is not only beyond the issues which the Commission holds that the Rio [fol. 2445] Grande could raise against other railroads, but is also clearly beyond the issues which were permitted and to which the interveners were restricted. In other words, the interventions were limited and restricted to the issues which the Rio Grande could raise against the railroad defendants. Having found against the Rio Grande on the issues it could raise (except as to points on the Bamberger Railroad) the Commission's finding of a violation of section 3(1) is clearly a finding upon an issue which could not be raised in this case. In treating the case as involving section 3(1) the Commission has given the Rio Grande at least a part of what it seeks and what the Commission holds it is not entitled to receive within the issues it could raise and the evidence it submitted in support of them.

Moreover, even if the issue of undue preference and prejudice among shippers were properly in the case and if the finding made by the Commission were justified, then the remedy would be an alternative order directing the removal of the undue preference and prejudice, *Texas & Pac. Ry. Co. v. U. S.*, 285 U. S. 627. But instead of prescribing the alternative remedy for removal of the undue preference and prejudice, the Commission abandons the idea that this is a shipper case and resorts to its powers under section 1 by finding that the combination rates of the Rio Grande are unjust and unreasonable, and to its power under section 15(3) by requiring that through rates applicable thereto "the same" as those applicable on defendants' routes. Thus, for the purpose of making a finding under section 3(1) the Commission treats the case as a shippers' complaint, but for the purpose of pre-
[fol. 2446] scribing a remedy the Commission treats the case as a "public interest" case. In the end, by this confusing and intermingling by the Rio Grande of its solicited and procured shipper support, it gains so much of its purpose to divert traffic and revenues from the Union Pacific and other defendants as might result from the routing of the specified commodities via that line. In this devious manner the Union Pacific is severely short-hauled and deprived of the protection which it has under section 15(4) of the Act.

The Commission's effort to limit the impact of the short-hauling restriction "by using the form of order employed in this case" to divert traffic from one route to another is thoroughly condemned by the Supreme Court's decision in *Thompson v. U. S.*, 343 U. S. 549, 559-560. Such "tinkering with through routes" by the Commission is prohibited, *U. S. v. Great Northern R. Co.*, 343 U. S. 562, 575.

IV.

There Is No Evidence to Justify or Support the Findings That Combination Rates Via the Rio Grande Are Unjust and Unreasonable and That Joint Rates Now Applicable Via the Union Pacific Are Reasonable for Application Via the Rio Grande, and, in Fact the Latter Finding Is Contrary to the Evidence.

On Sheets 54 and 56, the Commission correctly admits that *the only evidence* submitted concerning the reasonableness of the combination rates and the joint rates is a showing of differences in the rates and car-mile and ton-mile revenue produced by them. In other words, the evidence on which the Commission finds that the combination rates via the Rio Grande are unjust and unreasonable is the mere fact that they are higher than the joint rates via Union Pacific, and the evidence on which the Commission [fol. 2447] finds the joint rates to be reasonable for application via the Rio Grande is the fact that they are lower than the combination rates, that they are the "going rates," that they have been there many years and the Commission's erroneous assertion that no one claims they are below a minimum reasonable level.

Although the Commission finds the joint rates to be reasonable because they are the "going rates," the report does not suggest any reason why the Commission thinks the combination rates are unreasonable. We are entitled, however, to presume that it is solely because they are higher than the joint rates via Union Pacific's shorter routes. The fact is, the Commission has not "adjudicated" the reasonableness of either of the rates. Admittedly, it has no evidence on which it could determine whether the combination rates are unreasonable, and the only evidence concerning reasonableness of the depressed subnormal joint rates compels a finding that they are less than minimum reasonable rates for application via the Rio Grande's longer route which the report admits to be "less favorably situated," (Sheet 47,) inferior physically and beset by conditions which make its operations "more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein" (Sheet 60a)—facts which the Commission admits it has recognized for many years (Sheet 60a) in granting the Rio Grande higher rates than those of the other lines. But here, the Commission ignores all of these difficulties and says the combination rates via the "onerous" Rio Grande route are unreasonable to the extent they exceed joint rates via Union Pacific's shorter route which is more favorably situated, without [fol. 2448] onerous operating conditions and with at least

a 24-hour shorter time in transit and one or two fewer interchanges.

Thus, the Commission has arbitrarily endeavored to flatten out and level off the admitted dissimilarities in the two routes by requiring the same rates over both.

In finding the combination rates via the Rio Grande unreasonable to the extent they exceed the joint rates applicable to the Union Pacific, the Commission has entirely disregarded the "more onerous" operating conditions on the Rio Grande which, as expressly found in the report (Sheet 62), result in "differences in transportation conditions" that are "substantial." Yet in *Laclede-Christy Co. v. Akron, C. & Y. R. Co.*, 276 I. C. C. 519, wherein the complainant, as in the instant case, sought to equalize aggregate "charges for transit and transportation" with those available via another railroad and paid by its "competitors for transit and for transportation from and to the same points of origin and destination," the Commission held at page 525 that it could not—

> "* * * disregard transportation conditions and require an adjustment of rates and charges merely for the purpose of equalizing or minimizing the advantages and disadvantages of competing shippers growing out of the geographical locations of plants for the manufacture of processing of materials in transit."

The Commission has so often, so long and so consistently held that bare comparison of the earnings of one rate with another does not afford evidence upon which to base a finding under section 1, that it seems hardly [fol. 2449] necessary to cite cases. However, we refer to a few of them, particularly because the Commission in this case seems to have forgotten its own ancient guides and principles. In dismissing a complaint alleging violations of sections 1, 2, 3, the Commission said in *McHenry-Millhouse Mfg. Co. v. N. Y. O. & W. Ry. Co.*, 151 I. C. C. 501, at page 502 that:

> "Value, volume of movement, average loading weights, and other transportation characteristics of the commodities herein considered are not shown of

record. Complainant apparently rests its case on the fact that defendants contemporaneously maintained a 20.5-cent rate on asphalt shingles and prepared roofing from and to points under consideration over shorter routes and also upon the additional circumstance of defendant's expressed willingness to establish the rate sought over the Oswego route. We have repeatedly said that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate. There is no other evidence of unreasonableness or unjust discrimination in the rate charged, nor is there any evidence that complainants' competitors have been given any undue preference."

In *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 192 I. C. C. 192, where the sole issue was the reasonableness of combination rates charged, the Commission said at page 195 that:

"A lower rate over other recognized routes and established junctions is not in itself proof that combination rates over the route of movement were unreasonable."

After observing at page 195 of the report that the complainant "did not adduce any evidence, other than the [fol. 2450] rates, distances, and average lading of the shipments embraced in its complaint," to show the unreasonableness of the assailed rates, the Commission said (p. 196):

"The main contention is that it must pay these rates in excess of the joint rates accorded its competitors on similar traffic moving over open, and for the most part more direct, routes at applicable joint through rates, which are not assailed as unreasonable as group rates. We cannot require the establishment of these joint rates to destinations on the Erie over the Hagerstown-Greycourt route; neither can we condemn on the evidence of record the combination rates or either factor as unreasonable when applied to the shipments."

In *El Paso Chamber of Commerce v. A., T. & S. F. Ry. Co.*, 92 I. C. C. 75, 78, wherein revenue results of combination rates were compared with those of joint rates via other routes was the only evidence submitted on the question of unreasonableness, and in fact the comparison was made for the same purpose that the Rio Grande makes a similar comparison here, namely, to show that "present joint rates would not be unduly low" if applied by the Rio Grande, the Commission conceded that the combination rates there assailed "are on a high level, but the record affords no basis for a finding as to what level should be if, in fact, it demands the establishment of joint rates." In that case the Commission observed that dissimilarity in transportation conditions affecting the respective rates made the rate testimony of little value, while here the Commission has recognized (Sheet 60a) that transportation conditions on the Rio Grande are so much more onerous than and dissimilar from those on other western lines as to require and justify higher rates for its line than [fol. 2451] would be justified for other western lines, but, nevertheless, holds that combination rates via the Rio Grande should be no higher than the joint rates via the defendants' routes.

The Commission's consistent dismissal of cases alleging, as does the Rio Grande here, that combination rates via one route are unreasonable to the extent that they exceed joint rates via another route and seeking establishment of such joint rates via the first route, is sharply illustrated in *W. H. Mouser & Co. v. New York Central R. Co.* 211 I. C. C. 123, in which the Commission pointed to the fact that it had on such scant testimony refused to condemn a combination rate as unreasonable even though it was 49 per cent higher than the joint rate used for comparison.

The fact that the joint rates via the Union Pacific are somewhat lower than the combination of rates via the longer Rio Grande line with its dissimilar and costly transportation conditions, conforms to the rule rather than

presenting an exception. In *Coal to Minnesota Points*, 88 I. C. C. 631, the Commission said at page 639:

> "We have several times taken the position that a through rate, particularly for such long hauls as those here involved from the mines to the Twin Cities, might well be somewhat lower than the aggregate of the intermediate rates."

That view was reiterated in *Fargo Commercial Club v. A. & W. Ry. Co.*, 98 I. C. C. 691, in which the Commission said at pages 723-724:

> "We have consistently adhered to the view in recent years that joint rates should be somewhat lower than the aggregates of the intermediate rates because of [fol. 2452] the facts that ton-mile earnings should decrease as distance increases and that, as a general rule, a through movement entails less terminal expense than two local movements to and from the intermediate points."

In *Quanah, A. & P. Ry. Co., v. Atchison, T. & S. F. Ry. Co.*, 205 I. C. C. 253, upon the bare comparison of "various joint rates over the direct routes with higher combinations resulting if the traffic moved through the Floydada gateway," the Commission held at page 260:

> "Usually the combination is higher than the joint rate, and the mere showing of the difference in amount between them is not sufficient to condemn the combination as unreasonable."

The decision was affirmed on reargument and reconsideration, 211 I. C. C. 389. Later the case was reheard and additional evidence taken, as shown by the Commission's report on rehearing, 226 I. C. C. 201, but the holding just quoted with respect to the insufficiency of testimony offered in condemnation of the combination rates was affirmed in the following language on page 218:

> "However, the evidence with respect to the allegation of unreasonableness of the existing combination rates via the Floydada gateway is still limited to a

comparison of those rates with joint through single-factor rates maintained over other routes. In the circumstances it must be concluded that the extent to which the combination rates assailed in this proceeding may be unreasonable is not susceptible of accurate determination on the present record."

In *Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183, at page 187, the Commission said:

[fol. 2453] " * * * the combination rates over a route that short-hauls a carrier may justifiably be higher than the joint rates remaining in effect over other routes. *Routing Grain and Grain Products via Chicago, R. I. & P. Ry., supra; Routing via Quanah, A. & P. Ry. Co., supra; Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127; *Routing of Ores via Southwest Missouri R.*, 220 I. C. C. 110."

See also *Routing Livestock to and From Oregon Points*, 209 I. C. C. 349, 351.

In *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127, a case identical to the Rio Grande's case here, the Western Pacific contended that the aggregate of separately established rates was unreasonable to the extent that it exceeded joint rates maintained by the defendants and because of the difference in the two sets of rates, the aggregate of locals was relatively unreasonable. It sought establishment of rates via its line equal to the joint rates maintained by the defendant. Rejecting the mere rate comparisons as insufficient to prove unreasonableness and dismissing the complaint, the Commission held at page 137:

"There is no proof of the unreasonableness of either factor of the combination rates, nor has it been established that the aggregate of those rates results in an unreasonable through charge. If we establish the joint rates demanded or accomplish the same result by establishing proportional or local rates to and from San Francisco, the aggregates of which would equal the present joint rates over the Southern Pacific's Ogden route, the result would be that the latter would be

short hauled, in disregard of its rights under the statute as construed by the Supreme Court."

[fol. 2454] In *Lehigh Portland Cement Co. v. Lehigh Valley R. Co.*, 238 I. C. C. 199, the Commission held at page 201:

> "Defendants also assert that an award of reparation herein would be, in effect, a retroactive establishment of joint through rates for which there is no public need and that section 15 (4) of the Interstate Commerce Act would be nullified. The statute makes it the duty of common carriers subject to the act to establish through routes and just and reasonable rates applicable thereto. Where this duty has been fully met and discharged and there exists both such reasonable through routes and joint rates, and other routes by combination over which no joint through rates apply, the carriers in our opinion are not required to maintain a parity of rates over both such routes, but may properly maintain through joint rates over joint through routes that are somewhat less than the combination of locals used to make the through rates applicable over the combination through routes, provided that neither rate, under all the facts and circumstances, is more than just and reasonable for the service performed. In this connection the fact that there are several available through routes, with reasonable joint through rates, and the fact that the effect of establishing a parity of rates over all routes would deprive a carrier of its legitimate claim to the long haul are matters which must be considered and given weight in determining whether the assailed rates are reasonable. See *Blue Grass Flooring Co. v. Louisiana & R. Ry. Co.*, 161 I. C. C. 574."

As Union Pacific's routes are some 200 miles shorter and are more direct and efficient than the longer routes via the Rio Grande, and shippers procured by the Rio Grande would use its route for transit only, the following language [fol. 2455] from the Commission's decision in *Kansas City Hay Dealers Asso. v. C., G. W. R. R. Co.*, 49 I. C. C. 372, should govern here:

"To compel the application of short-line rate over indirect and longer routes, merely as a means of providing a channel of doubtful benefit to comparatively few shippers, would lay an unnecessary expense upon the railroads against the interest of the public as a whole. When joint rates that are neither unreasonable nor unduly prejudicial are maintained over direct routes adequate response is made to the reasonable requirements of the public, and carriers should not be required to perform wasteful transportation by maintaining the same rates over indirect and more circuitous routes."

If, as found by the Commission, the combination rates via the Rio Grande are unreasonable merely because they exceed the single-factor through rates applying via the route of the Union Pacific through Wyoming, then the many hundreds of thousands of other combination rates applying elsewhere in the United States by reason of specific routes or individual lines' exceptions in any tariff are also unreasonable. If a combination rate via one route becomes unreasonable and unlawful simply because it is higher than a joint rate between the same points via some other and in this instance a much shorter route, the only remedy lies in wide-open interchange between all lines via every available junction point, regardless of carriers' rights under section 15(4) not to be short-hauled, regardless of the Commission's consistent holdings that joint through rates should generally be somewhat lower than the combination of rates between the same points, re-[fol. 2456] gardless of increased terminal and interchange costs by including additional carriers, and regardless of the fact that the result would be to wipe out many basic rate-making principles on which the rate structure has been built.

Despite its admission (Sheets 54-55) that the joint rates are depressed and subnormal, the Commission uses them merely because they are the "going rates" as the measure by which to condemn the combination rates and to determine reasonable rates for application via the longer Rio Grande line through Ogden. This is "not a full discharge

by the Commission" of its duty to adjudicate and determine the reasonableness of rates, *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510. It is not an adjudication or determination at all. It is simply an arbitrary requirement that the lowest rates charged by carriers shall be the maximum rates they may charge over routes they are forced to establish, regardless of whether the rates are subnormal and depressed or even confiscatory.

This cannot be justified in the face of the fact that the Commission has always condemned the use of depressed rates as a standard of reasonableness for maximum rates, and for measuring the reasonableness of other rates. *Merchants' Exc. of St. Louis v. Missouri Pac. R. Co.*, 248 I. C. C. 683, 689; *Mississippi Vegetable Shippers Bureau v. A. & R. R. Co.*, 248 I. C. C. 365, 366; *Patten-Blinn Lbr. Co. v. Tucson, C. & G. B. R. Co.*, 255 I. C. C. 757, 762; *Foye v. Atchison, T. & S. F. Ry. Co.*, 255 I. C. C. 466, 468.

In *Geo. A. Hormel & Co. v. Atchison T. & S. F. Ry. Co.*, 263 I. C. C. 9, 43, the Commission said that rates apply-[fol. 2457] ing between practically all points between which the traffic moved even though competitively compelled, afforded a "guide for determining" the reasonable level of rates for the future. The Commission did not hold in that case that the truck-compelled rates would be the reasonable rates for application in the future, but merely that their existence was a factor in "determining" reasonable rates. Here, the Commission holds that the exact present subnormal and depressed joint rates via the Union Pacific are reasonable for application via the Rio Grande for the sole reason that they are the "going" rates.

In the *Hormel case, supra,* there was, as shown in the 54-page decision, a huge volume of evidence of all types before the Commission relating to the history of rates, volume of traffic, competitive conditions, transportation characteristics, a cost study and every other conceivable type of testimony. Moreover, in that case the Commission did not prescribe the "going" truck-compelled rates, but instead prescribed other and different rates.

The Commission well knows that the rates on the commodities specified in the order, like rates on agricultural

products throughout the country, are generally on a subnormal and depressed level and have been held down by the Commission itself through allowing smaller increases in rates than allowed on other commodities in the various general rate increases. Potato rates from Idaho to the east have always been on a very low basis for the express purpose of assisting the growers in marketing their crops in the large consuming areas in competition with production in Maine, New York, Michigan, Wisconsin, Minne-
[fol. 2458] sota, the Dakotas, Nebraska and Colorado (R. 1201). The Commission has recognized the low level of those rates but at the same time holding that the potato traffic could not bear normal, full, reasonable rates because of conditions in the industry and the great distance of Idaho from the eastern consuming markets. *Commercial Club of Greeley v. C. & S. Ry. Co.*, 53 I. C. C. 66; *Potatoes and Vegetables From West and Northwest*, 210 I. C. C. 753; *Idaho Public Utilities Comm.* v. *Alton R. Co.*, 251 I. C. C. 93. In the latter case, the Commission said at page 105 that the Idaho potato rates were even "upon relatively lower levels than rates in effect generally on similar agricultural products" which, as we have just observed, are and have been on a depressed and subnormal level for many decades.

Rates on dry onions are similarly depressed and subnormal as are the rates on potatoes and for the same reasons, as recognized by the Commission in the cases just cited (R. 1207).

In *Lettuce from Idaho, Montana, Nevada, and Oregon*, 229 I. C. C. 572, the Commission said at page 577 that the rates from the Idaho-Oregon district to eastern destinations "are considerably less than reasonable maximum," but the Commission, nevertheless, after reciting the then poor financial condition of producers, the great distances from consuming markets and the relationship of the rates to the depressed rates on potatoes and other commodities, refused to permit the carriers to increase the subnormal lettuce rates. For the same reasons again in *Fresh Green Vegetables from Idaho and Oregon*, 253 I. C. C. 143, the Commission refused to permit the carriers to increase the
[fol. 2459] depressed and subnormal rates on lettuce and

other fresh green vegetables from Idaho and Oregon producing points, stressing particularly the poor conditions of the industry and, at page 158, the assertion by producers that any increase in the vegetable rates would "probably put an end to the commercial production of lettuce in this territory" and concluded that "the proposed rates are higher than the traffic will bear."

We ask the Commission to reconsider and give weight and effect to the following table (Ex. 26) which shows that while the revenues produced by rates on some of the commodities are insufficient to show a net profit even when the traffic moves via the shorter Union Pacific route, on other commodities it leaves a small net profit which would be turned into a considerable loss when spread over the longer mileage of the Rio Grande:

[fol. 2460]

Commodity	From	To	Mileage Via UP	Mileage Via D&RGW	Net Profit or Loss — Per Car — Via UP	Net Profit or Loss — Per Car — Via D&RGW	Net Profit or Loss — Per Car Mile (Cents) — Via UP	Net Profit or Loss — Per Car Mile (Cents) — Via D&RGW
Apples	Boise, Ida.	St. Louis, Mo.	1684	1884	$ 79.14	$ 24.15	4.69	1.28
Apples	Boise, Ida.	Chicago, Ill.	1781	1992	41.58	20.91(L)	2.34	1.05(L)
Apples	Payette, Ida.	Atlanta, Ga.	2343	2544	39.56	15.68(L)	1.69	0.62(L)
Prunes and Plums	Milton, Ire.	St. Louis, Mo.	1984	2184	27.81	20.86(L)	1.40	.95(L)
Lettuce	Nyssa, Ore.	Kansas City, Mo.	1450	1650	88.73(L)	136.12(L)	6.12(L)	8.24(L)
Cattle	Logan, Utah	Denver, Colo.	649	679	.64	5.75(L)	.10	.85(L)
Potatoes	Idaho Falls, Ida.	Chicago, Ill.	1597	1809	1.97	62.93(L)	.12	3.48(L)
Wheat	Spokane, Wash.	Kansas City, Mo.	1901	2101	95.96	18.23	5.04	.87
Flour	Logan, Utah	Kansas City, Mo.	1179	1314	80.45	38.82	6.82	2.95
Lead	Kellogg, Ida.	New York, N. Y.	3248	3460	138.23(L)	225.31(L)	4.26(L)	6.51(L)
Copper	Butte, Mont.	New York, N. Y.	2720	2931	3.64	85.19(L)	.13	2.91(L)
Zinc, Ore, etc.	Hailey, Ida.	De Pue, Ill.	1692	1912	119.46	32.80	7.06	1.71

(L) Denotes loss.

[fol. 2461] Not only would the meager revenue from these abnormally low rates be diluted by the cost of transporting the involved traffic over the 200-mile longer Rio Grande route, but also by $20.44 or $40.88 per car because of the necessity of one and sometimes two additional interchanges when moved via the Rio Grande (R. 1269). Since there is no evidence on which the reasonableness of the rates could be determined, the Commission's order would compel application of the joint rates via the Rio Grande irrespective of whether those rates would be reasonable, compensatory or even confiscatory when spread out over the additional 200 miles of transportation via that line.

V.

Refusal of the Union Pacific to Equalize Shippers in the Matter of Transit Privileges Offered by the Rio Grande Is Not, in Law, a Violation of Section 3(1) of the Act, Regardless of Whether Such Equalization Is Sought Through Establishment of Transit Privileges or Reduction in Rates.

The findings in the report make it definite and certain that the undue prejudice found therein against shippers and receivers using the Rio Grande results wholly and solely from the fact that they cannot take advantage of transit privileges on that line at rates as low as those available on the Union Pacific under which similar transit privileges are available. Also, that the asserted undue preference of shippers using the Union Pacific is due solely to the fact that they have the same transit privileges that shippers have on the Rio Grande, but at lower rates. This is made clear at Sheet 60, and by the following language on Sheet 63 of the report:

> [fol. 2462] "As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments westbound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs eastbound, *who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and tran-*

sit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3(1) of the act." (Emphasis supplied.)

Thus, the order is that defendants establish through routes and joint rates with the Rio Grande so as to equalize shippers on that line with shippers on Union Pacific routes in the matter of transit privileges.

Present Rio Grande combination rates *with* transit privileges, its shippers, and the Rio Grande say, are useless, for shippers have lower rates with transit via the Union Pacific. Joint rates *without* transit privileges via the Rio Grande would also be useless, since the use of transit privileges is found by the Commission to be the only purpose the joint rates would serve on that line. It would not satisfy the Rio Grande's purpose or the shippers' pretended desire if the Union Pacific and other defendants withdraw transit privileges on their lines.

The Rio Grande could give its shipper witnesses what they say they want by merely reducing its local rates so as to off-set the difference between them and the rates of the defendants, and since it declines in that manner to [fol. 2463] satisfy the desire of its shipper witnesses, it becomes even clearer that all the Rio Grande seeks is a division of the revenues earned by the defendants. The Rio Grande says it is in competition with the Union Pacific, and it is here asking the Commission to compel joint rates forcing the Union Pacific to meet its own competition with the Rio Grande.

In *Adrian Grain Co. v. Ann Arbor R. R. Co.,* 276 I. C. C. 331, the Commission *refused to require the establishment of joint rates for transit privileges* via through routes that would short haul the Ann Arbor Railroad. All of the new routes sought in that case were longer than those in effect, which is the identical situation in this case. The Commission there expressed the view that the publication of the sought routes would encourage wasteful and uneconomic transportation and would not give reasonable preference to the originating carrier as required by section 15(4) of the Act. Granting the Rio Grande's de-

mands in this case would likewise encourage 200 extra miles of wasteful and uneconomic transportation in addition to short hauling the Union Pacific 1,000 miles on traffic it originates.

The situation of shippers supporting the Rio Grande in the instant case is identical to that of the complainant in *Laclede-Christy Co. v. Akron, C. & Y. R. Co.*, 276 I. C. C. 519, in which the Commission dismissed a complaint seeking—

> "* * * the *same through charge* on the clay in and the brick out with transit at St. Louis as its competitors pay with transit at Mexico, East Mexico, Farber, and Vandalia." (p. 525) (Emphasis supplied)

[fol. 2464] The complainant's disadvantage in transportation costs in that case ranged from $47 to $83 per carload more than those of its competitors who had transit privileges at lower rates published by the Gulf, Mobile & Ohio in order "to attract and hold traffic" (p. 524). Finding that longer mileage and greater operating costs—both of which are involved on the Rio Grande—created dissimilarity in transportation conditions with respect to complainant's shipments compared to those of its competitors, the Commission held at page 525:

> "It is not within the province of the Commission to disregard transportation conditions and require an adjustment of rates and charges merely for the purpose of equalizing or minimizing the advantages and disadvantages of competing shippers growing out of the geographical locations of plants for the manufacture of processing of materials in transit. *Magor Car Corp. v. Delaware, L. & W. R. Co.*, 144 I. C. C. 135, 138. There is no indication that the through charges on shipments to and from the competing transit points are lower than reasonable minimum charges, nor that the differences between such charges and the through charges on shipments to and from St. Louis are greater than warranted by the differences in the transportation conditions. In the circumstances here shown, we can find no basis for a finding of unlawful-

ness as alleged under the first three sections of the act."

The ultimate finding of the Commission was—

> "We find that the assailed rates and transit arrangements are not shown to have been or to be unreasonable, unjustly discriminatory, unduly prejudicial, or in violation of section 4 of the act. The complaint will be dismissed." (p. 526)

The Commission holds that transit privileges are purely local to the railroad on which the transit point is located, [fol. 2465] *Concentration of Cotton at New Orleans,* 83 I. C. C. 18, 20, and it held in *Transit Arrangement on Lumber,* 129 I. C. C. 518, at page 520, that:

> "Connecting lines can not dictate to the road that alone serves the transit point the manner in which joint rates through that point shall be applied in conjunction with the transit arrangements, so long as they are not deprived of their long haul. *Concentration of Cotton at New Orleans,* 83 I. C. C. 18; *Transit Privileges on Cotton,* 83 I. C. C. 60."

In *Grain From Mobile and New Orleans Transited in South,* 218 I. C. C. 437, at page 440, the Commission said:

> "It is a well-settled principle, however, that the granting or withholding of transit is a matter which may be determined solely by the carrier that serves the transit point. *Transit Privileges on Cotton,* 83 I. C. C. 60; *Transit Privileges on Lumber,* 132 I. C. C. 53; and *Sugar Stored in Transit,* 146 I. C. C. 382. It is clear also that a carrier may not be found guilty of undue prejudice for failing to maintain a transit privilege at points on its line merely because like privileges are in effect at points on the lines of other carriers. *Central R. Co. of New Jersey v. United States,* 257 U. S. 247. In such instances an order requiring the removal of undue prejudice would not permit the carrier an alternative in the method of such removal."

As neither the Rio Grande nor the Union Pacific may dictate to the other with respect to transit privileges, it is clear that the Union Pacific would have the right to refuse to join in the rates if in connection with them the transit privileges were established by the Rio Grande on its line. Certainly, Union Pacific would have that right [fol. 2466] in this case where it would be so thoroughly short hauled.

As the Union Pacific and other defendants do not and cannot control either the establishment or cancellation of transit privileges on the Rio Grande or the manner in which rates shall be applied to such privileges, we confidently assert that the Union Pacific and other defendants have no such legal responsibility or connection with the alleged disadvantage of shippers using the Rio Grande and its transit privileges as could make out a case of undue prejudice to those shippers or of undue preference of shippers on the Union Pacific within the meaning of section 3(1).

The situation of the Rio Grande's shipper witnesses is like that of the shipper on whose behalf the Commission issued a section 3 order which was enjoined and annulled by the Supreme Court in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247. In that case, the Commission ordered 23 railroads to remove undue prejudice caused by the refusal of the Central of New Jersey and the Pennsylvania to establish a creosoting in transit privilege on their lines at Newark, New Jersey, for American Creosoting Company while at the same time participating in through routes and joint rates with other carriers in the middlewest and south which other carriers had established that transit privilege on their lines. The Court pointed out that the shipper's plant at Newark was not reached by any of the 23 railroads except the Central and the Pennsylvania, neither of which accorded the transit privilege at points on their lines and no competitor of the shipper had a plant on the lines of either of those two roads.

[fol. 2467] The purpose of the complaint and of the order there, as here, was to *equalize* shippers on *different* railroads in the matter of transit privileges. There the

railroads had equal rates but the Central and Pennsylvania refused to grant transit privileges available on the other railroads. Here, the defendants have the same transit privileges offered by the Rio Grande, but refuse to join in equal rates to equalize transit opportunities of Rio Grande shippers.

At pages 255-256, the Court said:

> "The appellants did not participate in any way in establishing the transit privileges enjoyed by competitors of the Newark concern on lines of the Southern and Midwestern carriers; and none of those carriers is controlled by any of the appellants. But appellants did join with those Southern and Midwest railroads in establishing joint rates on forest products over routes which pass through the points at which this privilege prevails and also through Newark."

At pages 259-260, the Court further said:

> "It is urged that, while the undue prejudice found results directly from the individual acts of Southern and Midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. * * * If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of section 3. What Congress sought to prevent by that section as originally enacted was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them *by the same car-*
> [fol. 2468] *rier or carriers.* Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of section 3." (Emphasis supplied)

In *H. H. Robertson Co. v. Pennsylvania R. Co.*, 268 I. C. C. 37, the Commission dismissed the complaint, saying at pages 42 and 43:

> "* * * a carrier is not guilty of undue prejudice for failing to maintain a transit arrangement at points on its line merely because like arrangements are in effect at points on the lines of other carriers. *Central R. Co. of New Jersey v. United States*, 257 U. S. 247 (1921).
>
> * * * * *
>
> "Complainant's argument that the decision in *Central R. Co. of New Jersey v. United States, supra,* is vitiated is untenable. The Commission has adhered to the principles enunciated therein in such recent proceedings as *Allowances on Cottonseed at C. & G. Ry. Points*, 238 I. C. C. 309 (1940); *Livestock—Western District Rates*, 238 I. C. C. 425, 472 (1940), and *Traffic Bureau, Lynchburg C. of C. v. Norfolk & W. Ry. Co.*, 237 I. C. C. 408, 410 (1940)."

In *Wool Rates Investigation, 1923*, 91 I. C. C. 235, the Commission rejected the contention that eastern lines unduly prejudiced Boston shippers in refusing to equalize them in the matter of transit privileges with shippers on western lines. At pages 284-285, the Commission held:

> "It is shown that the eastern lines participate with the western carriers in joint rates on the eastbound wool, which include transit if authorized by the tariffs of the individual carriers, but transit is [fol. 2469] accorded only on the rails of the western and midwestern lines, and it does not appear that the carriers serving Boston grant transit on wool at any point on their lines. The Boston Wool Trade Association, however, contends that the transportation act, 1920, contemplates that the railroads of the country should be considered as one national system of transportation, and that the eastern carriers, forming a part of such national system and participating in joint rates, are unduly discriminating against Boston in refusing to grant transit at that point while permitting

it at Portland and the Middle West points. It will suffice to say that a finding to that effect would be contrary to the conclusion of the Supreme Court of the United States in *Central R. R. Co. v. United States*, 257 U.S. 247."

The Commission did find, page 288, that the Pennsylvania and the Baltimore & Ohio unduly prejudiced Philadelphia shippers in refusing them transit privileges while according them to other shippers at other points *on their own lines.*

We submit that refusal of the Union Pacific and other defendants to join in rates with the Rio Grande for the purpose of equalizing shippers on their lines with those on the Rio Grande in the matter of transit may not be made the basis of an order under section 3(1), regardless of whether such equalization is sought through establishment of transit or reduction in rates.

[fol. 2470]

VI.

Even if a Lack of Equality With Respect to Transit Privileges of Shippers Served by the Rio Grande and Shippers Served by Union Pacific Could Amount to Undue Prejudice and Preference Under Section 3(1), the Facts and Evidence of Record Do Not Support or Justify the Finding That the Combination Rates Via the Rio Grande Are Unduly Prejudicial of Shippers and Receivers of Monuments, Westbound, Livestock, Fresh Fruits and Vegetables, Dried Beans, Frozen Poultry, Frozen Foods, Butter and Eggs, Eastbound, Who Desire to Reconsign or Transit Shipments at Intermediate Points on the Rio Grande, and Unduly Preferential of Shippers and Receivers Using the Union Pacific.

It is clear from statements and findings in the report and from the ultimate conclusions that although granting part of the Rio Grande's demands to improve its financial position, the order purports to be essentially for the benefit of shippers and receivers located in the so-called "excluded territory in the Northwest Area." The traffic sought by the Rio Grande is either originated or received by shippers in that area. For example, on Sheet 44 of

the report it is stated that shippers and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, "from the excluded territory" are at a serious disadvantage in marketing their products compared with "competing shippers and dealers located on the Union Pacific," and on Sheet 60 the report says "The shippers in the originating area" are debarred from effective participation in the marketing system developed for the specified commodities. Again, under "Conclusions" on Sheet 65 the westbound monuments are from shippers in Vermont and Georgia to receivers at "destinations in the excluded territory in the Northwest area" and the eastbound commodities specified are from shippers at "origins in the excluded territory to destinations" in eastern and [fol. 2471] southern United States. The undue prejudice and undue preference of shippers found in the second conclusion is with respect to the specified commodities "from and to the points described in the foregoing finding," that is, the first finding or conclusion.

The shippers and receivers in the "excluded territory" include the few who supported the complaint and the far greater number who opposed it. They are *all located on the Union Pacific* or its connections in the Northwest and all of them have available *the same* Union Pacific routes with *the same* joint rates and *the same* transit privileges.

We submit that the situation thus presented cannot serve as a basis for a lawful finding of undue prejudice and preference within the meaning of section 3(1) because the same identical shippers and receivers are claimed by the report to be unduly prejudiced when they route their traffic over the Rio Grande and unduly preferred when they route their traffic over Union Pacific routes. Those shippers have the choice, under the Commission's finding, of unduly prejudicing themselves by routing over the Rio Grande or unduly preferring themselves by routing over the Union Pacific. The undue prejudice found against them in the report when they ship over the Rio Grande is due to the claimed undue preference they receive when they ship via Union Pacific routes at lower joint rates. In other words, those shippers and receivers

may alternatively prejudice or prefer themselves as and when they choose. Where shippers have such choice of becoming at once the prejudiced and the preferred, we sub- [fol. 2472] mit that their election to become "prejudiced" shippers by routing over the Rio Grande when they have the choice of being the "preferred" shippers by routing over the Union Pacific, does not present a case within the meaning of section 3(1). It requires two different shippers to make a case under section 3(1)—one who is prejudiced and another who is preferred. The same shipper cannot be prejudiced by his own preference. In short, the Commission cannot make a case of undue prejudice against these shippers when they route via the Rio Grande by pointing to their own preferred status when they route over the Union Pacific.

In *Routing Cottonseed to Kansas and Missouri*, 231 I. C. C. 775, the Commission approved routing restrictions giving certain carriers their long haul in connection with "lower cut-back rates in lieu of the higher gross local rates" and rejected the contention that a discriminatory situation would result if one mill shipped out over a route which entitled it to the cutback rates while another did not. At page 779, the Commission said:

> "Protestants also state that the effect of the suspended schedules would be to create a discriminatory situation, because mills located upon other lines would not be subject to the same restrictions as those located upon the lines of respondents. However, *a carrier cannot be charged with unlawful prejudice against a community which it does not serve.* Protestants further contend that when there are two mills located at the same point on respondents' lines an unlawful situation would be created if one mill shipped out over a route which entitled it to the cut-back rates while the other did not. Apparently the same situation prevails today. *This is simply a matter of a mill availing itself of the cut-back rates, with their limita-* [fol. 2473] *tions, or not doing so.* Differing circumstances and conditions may justify differences in charges. In the present situation the fact that respondents are accorded their long haul on the out-

bound-products movement is a sufficient difference in circumstances and conditions to justify assessing, in connection with such movements, the lower cut-back rates in lieu of the higher gross local rates." (Emphasis supplied)

We have been unable to find, and in fact we have never heard of any case until the instant decision by the Commission, in which a shipper has been permitted to make out a case of undue prejudice against himself by pointing to his own undue preference, nor have we heard of a case, except the instant one, where a carrier has been held guilty of undue prejudice against shippers located on its line because it offered lower rates over its route than the *same shippers* had over another route. We repeat that these shippers and receivers in the Northwest area cannot make out a case of undue prejudice against themselves when routing over the Rio Grande by pointing to their own preferential status when routing over the Union Pacific.

Moreover, the finding of undue prejudice and preference is contrary to the evidence and to the fact correctly found by the Commission on Sheet 62 that there are substantial differences in transportation conditions over the Union Pacific routes and over the Rio Grande routes via Ogden. These substantial differences in operating and transportation conditions cannot be eliminated, erased or ignored, as the Commission attempts to do, by "spreading" them over longer hauls. The substantial differences in transportation conditions are due, as the report correctly finds, [fol. 2474] to the less favorable location of and the onerous operating conditions on the Rio Grande between Ogden and Denver, and they exist regardless of the distance the traffic moves beyond the termini of the Rio Grande. The only tenable comparison of transportation conditions is of conditions on the Rio Grande route between Ogden and Denver and those on the Union Pacific route between McCammon, Idaho, and Cheyenne and Denver. The only evidence of record concerning transportation conditions is confined to the comparison of the two railroads between those points. There is not a word of evidence concerning transportation conditions on routes south of the southern

Kansas border and east of the Missouri River and south of the line of the Chicago and North Western between Omaha and Chicago.

The complaint does not allege or bring in issue the question whether any shippers are unduly prejudiced, and the Commission has held that it is not at liberty to read into a complaint an issue which it plainly does not present. *Lasker & Bernstein v. Director General*, 98 I. C. C. 624; *Barschi & Son v. Baltimore & O. R. Co.*, 155 I. C. C. 350.

The Commission agrees (Sheet 9a) that the Rio Grande may not plead an issue of preference and prejudice between shippers under section 3(1), but it erroneously says that the issue is raised by intervening shippers and is "fairly tendered here for decision." All of the shipper interventions were permitted on the specific condition that they would not unduly broaden the issues properly raised by the Rio Grande's complaint. The Commission's ruling now that a section 3(1) issue is properly here for decision [fol. 2475] sanctions a clear violation of or departure from Rule 72 of its own General Rules of Practice, and reads into the complaint an issue which the Commission holds, the Rio Grande could not plead. The finding under section 3(1) and whatever recitals that relate to it should therefore be stricken from the report.

Moreover, even if an issue under section 3(1) has been tendered by shipper testimony, it must, under the Commission's own settled practice and precedents, be treated as withdrawn and no finding should be made on it because the complaint and the shippers supporting it do not seek an alternative order but instead demand exact parity only, by reduction of the combination rates via the Rio Grande.

In *Boise Payette Lumber Co. v. Abilene & S. R. Co.*, 146 I. C. C. 457, 462, it held:

> "Moreover, complainant states that it does not seek an alternative order which could be complied with by increasing the rates from the Truckee-Hawley group. It asks only that we require the desired parity by reductions. In the previous case we regarded a similar statement as practically a withdrawal of the allegation of undue prejudice and made no finding with

respect to that issue. The same course should be followed here."

And in *Sewerage Commission of Milwaukee v. Aberdeen & R. R. Co.*, 190 I. C. C. 601, 604-605, it stated:

"Fundamentally, undue prejudice cannot exist unless the resulting injury will cease upon removal of the prejudice regardless of the manner of its removal. *Duluth Chamber of Commerce v. Chicago, St. P., M. & O. Ry. Co.*, 122 I. C. C. 739, 742. In cases where [fol. 2476] parity has been sought only by reductions, we have regarded the allegation of undue prejudice as withdrawn. *Boise Payette Lumber Co. v. Abilene & S. Ry. Co.*, 146 I. C. C. 457, 462. No finding will be made on the allegation of prejudice and preference."

See also *Lone Star Asphalt & Petroleum Corp. v. A. & S. R. R. Co.*, 196 I. C. C. 65, 68, and *Brown v. Union Pac. R. Co.*, 225 I. C. C. 309, 312.

The record contains no evidence whatever to conform to the Commission's repeated holding that prejudice to be undue and unlawful must ordinarily be such that the prejudice suffered by one is a source of positive advantage to another and that a competitive relationship must exist between the persons or commodities affected. *Hayes Pump & Planter Co. v. Atchison, T. & S. F. Ry. Co.*, 171 I. C. C. 13; *Archer-Daniels-Midland Co. v. Great Northern Ry. Co.*, 171 I. C. C. 192; *Dewey Portland Cement Co. v. Alton & E. R. Co.*, 176 I. C. C. 671, 685; *Evansville Cham. of Com. v. Atchison, T. & S. F. Ry. Co.*, 196 I. C. C. 349.

There is no evidence of specific shipments, damage or actual injury, or concerning the particular shippers who have the advantage that must be shown to establish undue prejudice. *Kistler Leather Co. v. Baltimore & O. R. Co.*, 171 I. C. C. 669, 673; *Alpena Leather Corp. v Pennsylvania R. Co.*, 185 I. C. C. 106; *Alpha Lux Co. v. Reading Co.*, 178 I. C. C. 16; *City of Moorhead v. Gt. Nor. Ry.*, 172 I. C. C. 38, 43; and *Knoxville Freight Bureau v. Southern Ry. Co.*, 156 I. C. C. 315, 319.

The mere fact that the Union Pacific accords transit on its lines and joins in rates with other lines that accord

[fol. 2477] it, while refusing to make joint rates with the Rio Grande so shippers via its line may avail themselves of that line's transit privileges at rates lower than the Rio Grande's combination rates will not support a finding against the Union Pacific of undue prejudice against shippers, particularly in the absence of probative evidence relating to competitive conditions or relative disadvantage due to the lack of such joint rates via the Rio Grande and the record contains no such evidence. *Nutrena Feed Mills v. Missouri Pac. R. Co.*, 169 I. C. C. 673. A general declaration as to competition or injury not supported by evidentiary facts, and a mere showing of disparity in rates are not sufficient to support a finding of undue preference and prejudice. *Barrett Co. v. A., T. & S. F. Ry. Co.*, 172 I. C. C. 319, 333; *Anson, Gilkey & Hurd Co. v. Gt. Nor. Ry.*, 182 I. C. C. 102, 116; *Corporation Comm. of N. C. v. Aberdeen & R. R. Co.*, 200 I. C. C. 571, 589; and *E. Cohn & Son v. Cedar Rapids & I. C. Ry.*, 209 I. C. C. 417, 419.

A showing of origins and distances of actual shipments in addition to other facts concerning both the preferred and the prejudiced competitors is essential to a finding of undue prejudice and the record here makes no such showing. *Abrasive Co. v. Erie R. Co.*, 183 I. C. C. 103.

Granting or withholding transit is a matter to be determined "solely by the carrier that serves the transit point," and since a carrier is not guilty of undue prejudice for failing to maintain transit privileges at points on its line merely because like privileges are available on lines of other carriers, it necessarily follows that the Union Pa-[fol. 2478] cific and other defendants could not be guilty of undue prejudice for failing to join with the Rio Grande in rates that would induce shippers to use existing transit privileges on that line. *Grain from Mobile and New Orleans Transited in South*, 218 I. C. C. 437, 440; *Wool Rates Investigation, 1923*, 91 I. C. C. 235, 284.

Even if there were evidence, which there is not, of the necessary elements and probative force to support a finding of undue prejudice against shippers with respect to the commodities discussed in the report "the carriers should be required to go no further than may be necessary in order to remove that discrimination," *Anderson*

Lumber Co. v. N. P. Ry. Co., 87 I. C. C. 425, 436. Certainly, a finding of undue prejudice against shippers in violation of section 3(1) could not be a lawful basis for an order to relieve the Rio Grande from alleged violations of sections 1(4) and 3(4), or for compelling through routes and joint rates for the financial benefit of the Rio Grande.

While the report strives to make it appear that shippers and receivers in the "excluded territory" may not have made sales of their products at some points in the southwest because of so-called "pocket" markets claimed to result from routing restrictions the report does not even attempt to suggest that any shipper located either in the "excluded territory" or on the Rio Grande has ever lost a sale or any business to any alleged competitor located on the Union Pacific. There is not one word of evidence in the record to prove that shippers located on the Rio Grande or in the "excluded territory" have ever suffered the slightest injury inflicted upon them by com- [fol. 2479] petitors located on the Union Pacific, and in fact shippers and receivers in the "excluded territory," being themselves located on the Union Pacific, could not make such contention, for their rates and privileges are the identical rates and privileges available to whatever competitors, if any, they may have on the Union Pacific.

There is no evidence to show that the lower joint rates available to shippers and receivers located on the Union Pacific have been in any instance the source of undue prejudice or disadvantage to any shipper or receiver located on the Rio Grande, and in fact, while there is testimony to the effect that some shippers and receivers located on the two railroads are engaged in the same business, there is no evidence to prove actual competition between shippers or receivers on the Rio Grande and those located on the Union Pacific. At most the alleged competitive relationship rests upon mere general self-serving declarations by shippers who support the Rio Grande's complaint. All that is proved by the evidence of record is that shippers on the Union Pacific have lower rates than shippers located on the Rio Grande, but as shown above, the Commission has always held that a mere disparity in rates will not justify a finding of undue prejudice and preference.

Neither can the Commission's finding that through routes and joint rates via the Rio Grande are necessary and desirable in the public interest, lend any support to a finding of undue preference and prejudice between shippers for it is settled that to constitute a violation of section 3(1) a competitive relationship must exist in which it must be shown that prejudice suffered by one shipper is a source of positive advantage to another, and in such case [fol. 2480] the carrier or carriers must be left an alternative in removing the prejudice. *Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, 650. Therefore, the remedy for undue prejudice cannot be found in the prescription of through routes and joint rates under section 15(3).

We will now discuss the testimony concerning the specified commodities with respect to which the report erroneously states on Sheet 63 a finding of undue prejudice and preference under section 3(1) of the Act is justified:

Monuments Westbound: The report states on Sheets 36a and 60a that a "fabricator and wholesaler" of monuments at Brigham City, Utah, *on the Union Pacific*, 21 miles north of Ogden, has "a special need" for through routes and joint rates on granite and marble monuments from Georgia and Vermont "to destinations in the excluded area" and that the need is "urgent" to enable the Brigham City dealer to fabricate stone at that point and ship in less-than-carload quantities to a retailer at Grand Junction on the Rio Grande and to stop to partly unload at intermediate points on the Rio Grande. On such fabricated stone the shipments would move from Vermont or Georgia to Brigham City and under the Commission's order would move in less-than-carload quantities, presumably at the balance of joint through rates, in a *back-haul* of 332 miles from Brigham City to Grand Junction.

The fabricator and wholesaler at Brigham City stated that his entire business which he distributes to retailers in various states would not exceed *four carloads a year* (R. 549) and the business of the retailers is so small that [fol. 2481] they cannot deal in carload lots. (Sheet 36a)

The Brigham City dealer has "keen" competition at Salt Lake City. Since both of these dealers are located at points served by the Union Pacific they have identical

rates and transit privileges. The Brigham City dealer testified that he has complete transit privileges on all shipments that move via Union Pacific to destinations on its line (R. 549) and as Salt Lake City is on the line of the Union Pacific apparently both the dealer at that point and the dealer at Brigham City may fabricate or transit stone and move it on into Idaho at equal joint rates to points on the Union Pacific. Since the joint rates do not apply via the Rio Grande, neither of these dealers can ship via that line at joint rates and transit privileges. In other words, they are on exactly the same basis with respect to shipments moving over the Rio Grande and those moving over the Union Pacific. There could not possibly be either preference or prejudice as between them. As to the less-than-carload retailers at points on the Rio Grande, their situation is simply that of hauling less-than-carload shipments at carload rates. It is not the duty of the Union Pacific or any other railroad to equalize a retailer with a wholesaler for the Supreme Court has held that "The law does not attempt to equalize fortune, opportunities or abilities," *Interstate Com. Comm. v. Diffenbaugh*, 222 U. S. 42, 46. If this were not the law, then every less-than-carload shipper would be entitled to rates and privileges that would equalize him with carload shippers.

The report states on Sheet 36a that "A substantial portion of this traffic has been lost to the trucks." While [fol. 2482] the witness said that the business was going to the trucks, he made it plain that from the railroads "we don't get the service that the truck people give us" (R. 545); that his competitor trucks stone from the West Coast and from Wisconsin and Minnesota in "duplex trucks" and that he cannot compete with those conditions (R. 546). Since the total business of this Brigham City wholesaler would not exceed four carloads per year and his retailers can handle only less-than-carloads, it seems the height of frivolity for the Commission to assert that there is an "urgent" and "special" need for through routes and joint rates via the Rio Grande on this commodity, especially since nothing will be accomplished except to furnish distribution service by rail of less-than-

carload lots at carload rates. Regardless of the desire of these dealers to increase their profits to that extent, the fact remains that the Brigham City dealer is at no disadvantage whatever compared to his alleged competitor at Salt Lake City and it results that there is no possible evidential basis for a finding of undue prejudice and preference between the shippers of this commodity.

In *Salt from Louisiana Mines to Chicago*, 69 I. C. C. 312, the report of the full Commission on further argument holds at page 316:

> "The economic problem should not be confused with the transportation problem. Primarily it is not our concern to equalize market competition. *Western Cement Rates*, 48 I. C. C. 201, 234."

In *Magor Car Corp. v. D., L. & W. R. R. Co.*, 144 I. C. C. 135, the Commission said at page 138:

> "The advantage enjoyed by the fabricators in the Pittsburgh district lies in the close proximity of their [fol. 2483] plants to the steel-producing district. In *Vinegar Rates from Pacific Coast*, 81 I. C. C. 666, we said:
>
> > "'We have repeatedly held, however, that we can not regulate rates for the purpose of equalizing cost of production or manufacture and that "primarily it is not our concern to equalize market competition." *Salt from Louisiana Mines to Chicago*, 69 I. C. C. 312, 316.'"

All of the commodities in connection with which the report says there is a basis for a finding of undue prejudice and undue preference are eastbound except westbound monuments just discussed.

Livestock: The inclusion of livestock in the finding of undue prejudice and undue preference is a complete repudiation by the Commission of rates prescribed by it in *Livestock Western District Rates*, 176 I. C. C. 1, credit at Sheet 39a of the report where it is correctly said that the rates prescribed in that case were predicated on the shortest routes but that carriers were not required to

maintain the rates over such routes where it would result in short hauling within the meaning of section 15(4) of the Act. The rates thus prescribed in that case were found to be reasonable and are set forth in the miles scale in Appendix H to the report.

It is the rates so prescribed by the Commission itself in that case which resulted in the 13-cent rate advantage pointed out on Sheet 41 which operators and feeders in the Arkansas Valley on the lines of other carriers have on cattle from the southwest over feeders located on the Union Pacific; and it is the same Commission prescribed rates which give the operators and feeders on the Union [fol. 2484] Pacific the 8.5-cent advantage on cattle from the northwest over feeders and operators at points on the Rio Grande whose advantage is greater by 4.5 cents on cattle from the southwest than shippers on the Union Pacific have on cattle from the northwest.

The report offers no explanation whatever for its destruction of the rate structure the Commission created in the *Livestock* case. It merely observes that operators in the Arkansas Valley have to absorb 8.5 cents on livestock from the northwest (Sheet 40), and it shows on Sheet 41 that operators on the Union Pacific have to absorb 13 cents on cattle from the southwest, but suggests no reason why the Arkansas Valley operators should be permitted to retain their 13-cent advantage while the operators on the Union Pacific must give up their 8.5-cent advantage. Plainly, the Commission's order would create undue prejudice against some 30 operators, producers and feeders on the Union Pacific and undue preference of operators and feeders located on the Rio Grande.

Moreover, as pointed out in the report, the Commission in prescribing rates in the *Livestock* case, definitely protected railroads against short hauling, but as shown on Sheet 41a of the report in the instant case, the Commission now proposes to short haul the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City, to enable livestock to move from the northwest over the 219-mile longer route of the Rio Grande. In no other case since its decision in the *Livestock* case has the Commission departed from the rates and short-haul protection prescribed

in that case, and the two decisions cited on Sheet 41a [fol. 2485] demonstrate the Commission's consistent adherence to the rates and formula prescribed by it in that case. The record contains no facts and the report refers to none which could possibly justify the finding of undue prejudice and undue preference with respect to shippers of livestock. The only apparent justification is that the Commission now seems to think that its decision in the *Livestock* case should be forgotten so that the Rio Grande may move cattle from northwest over its longer circuitous route at the same rates such cattle now move over the shorter more direct line of the Union Pacific.

It is incomprehensible that the Commission would resort to such drastic action in this case in the face of its decision in the *Livestock* case, and in view of the following finding in *Los Angeles Union Stock Yards Co. v. C., M., St. P. & P. R. Co.*, 222 I. C. C. 23, at page 28:

> "The Commission said in *Investigation of Alleged Unreasonable Rates on Meats*, 23 I. C. C. 656, at page 662:
>
> > "'The transportation of livestock demands, above almost any other kind of freight, expedition in service. Cattle or other live animals should be gotten to the market at the earliest possible moment and with the least possible railroad haul. Considering, therefore, the nature of the transportation, almost any additional length of haul would render the route unduly circuitous and would justify us in establishing a joint rate over the direct line even when a two-line haul was involved. We can not, however, make any general order which will meet this situation, but must apply our mandatory process to particular cases, which must be presented and [fol. 2486] considered upon their individual merits."
>
> "Considering the character of this traffic, we are of the opinion that the shortest established routes through Oregon from points in Montana to points in California are unreasonably long within the meaning of Section 15(4) of the act in instances where they are more than 150 miles longer than the routes of the

Union Pacific through Silver Bow or Butte from and to the same points."

At page 83 of the decision in the *Livestock* case the Commission held that livestock could not be expected to do more than "pay its own way", that it could not sustain rates which would produce more than cost of service plus a minimum of profit, that under rates therein prescribed there was room for doubt whether livestock moving more than 1,000 miles would produce more than a small margin above actual cost of transportation. The Commission now ignores all of these circumstances and would require these depressed and subnormal rates to be applied over the Rio Grande's longer route while short hauling the Union Pacific over 1,000 miles.

The Commission also ignores the fact that, of the total eastbound movement of 6,453 carloads of animals and animal products in 1948 from Idaho, Montana, Oregon and Washington via the Union Pacific, practically all of which terminated in the northern half of the eastern half of the United States, 5,094 carloads originated on the Union Pacific in Idaho and Montana and that line would receive an extremely short haul and very little revenue if the movement was via Ogden with the Rio Grande; nor to the fact that 61 per cent of all traffic originating on the [fol. 2487] Union Pacific in Idaho is loaded at branch line stations and incurs very high gathering costs ranging from $18.99 to $106.12 per car (R. 1236, Ex. 27).

These facts require that the Union Pacific be given reasonable preference in accordance with the mandate of section 15(4), which the report and order also erroneously ignore.

We urge the Commission in the light of the foregoing, and the more extended discussion at pages 413-430 of Union Pacific's exceptions and brief, to reverse its finding of undue preference and undue prejudice with respect to livestock.

Agricultural Commodities: At Sheet 42 of the Report the Commission states that producers of and dealers in several agricultural products in Idaho "market such products throughout the United States" and then inconsistently

states that they "need as many markets and outlets as possible," thus implying that markets "throughout the United States" are not sufficient outlets for those products. The report states that because carloads of these products routed over the Union Pacific and connections through Denver to points in the southwest, and after trying markets in that area, cannot be diverted to markets east of New Orleans at joint through rates "The southwestern markets are pocket markets in that respect." This means nothing short of "wide-open routing," complete elimination of any routing restruction on these products, nullification of the short haul prohibition in section 15(4). The Commission is not at liberty to nullify or to eliminate by construction [fol. 2488] or application the impact of the protection given carriers by the short-haul prohibition. *Thompson v. U. S.*, 343 U. S. 549.

The "pocket market" theory is not only contrary to the short haul provision of section 15(4), but is in fact an illusory and mythical invention by the Rio Grande in the hope of improving its own financial condition. The utter unreasonableness of the theory and contention based on it is demonstrated by the fact that an actual count of cities and towns having populations of 1,000 and more in the southwestern states of New Mexico, Texas, Louisiana, Arkansas and Oklahoma shows that there are 1,060 such markets which these shippers under present joint rates and routing, may "try" in those states, 45 of which have populations of 25,000 or over (Rand McNally Commercial Atlas and Marketing Guide, 1952). We submit that it is wholly unreasonable to demand that after trying all these markets at the joint rates available, shippers of potatoes and other agricultural commodities be permitted to go on into six or eight southeastern states at the joint rates and continue to "try" markets in that area. As the routing restrictions apply to all shippers alike, there can be no basis for a finding of undue prejudice and preference.

Moreover, as shown in the testimony of witness Stilling, discussed at pages 435-437 of Union Pacific's exceptions and brief the so-called "pocket market" situation discussed by a few shippers supporting the Rio Grande does not actually exist and no attempt to deny or rebut his

testimony was made by either the Rio Grande or its supporting shipper witnesses. In demonstrating that the [fol. 2489] "pocket market" theory is essentially a camouflage, Mr. Stilling said (R. 1239-1240):

"If movement into Wichita is via Denver and the AT&SF Ry., shipments may be diverted to any point on the Santa Fe System lines in Kansas, Oklahoma or Texas and to destinations on many other lines in Texas with which the Santa Fe makes connection. If movement into Wichita is via Denver, Colorado, and the CRI&P Railroad, shipments may be diverted to points on that line in Kansas, Oklahoma and Texas and to Little Rock, Arkansas, and Memphis, Tennessee, also to destinations on many other lines in Texas with which the Rock Island makes connection.

"If movement into Wichita is via Kanopolis, Kansas, and the Missouri Pacific Railroad, shipments may be diverted to stations on Missouri Pacific System lines in Kansas, Oklahoma, and Texas, also to destinations on many other lines serving Texas, Arkansas, Tennessee and Alabama, including such points as Shreveport and New Orleans, Louisiana, Mobile, Alabama, and Memphis, Tennessee.

"If movement into Wichita is via Ellsworth, Kansas, and the StL-SF Railway, shipments may be diverted to all stations on that line and to stations on many connecting lines in Oklahoma, Texas, Arkansas, Louisiana, also to St. Louis, Missouri, and via St. Louis to the entire southeast or to Chicago and quite generally to other points in Illinois and to Iowa and other points in Western Truck Line Territory. Routing via Ogden with the Rio Grande to Denver or Pueblo and its connections beyond would not give the shippers any greater outlet beyond Wichita, Kansas, than they have via routes presently in effect unless [fol. 2490] some of the prairie lines permitted expensive out-of-line hauls via Wichita.

"During the year 1948, 5,295 carloads of potatoes moved out of Idaho into Oklahoma and Texas. The movement of dry onions amounted to 145 carloads. Many of these carloads undoubtedly did move through

Wichita; and, if sufficient time was available to determine the actual Oklahoma or Texas destination of each car, it could be shown that most of them could have tried the Wichita market and then have been diverted to its actual destination at the through one-factor rate.

"Many additional cars terminating in the southeast and in Western Trunk Line territory could also have tried the Wichita market via the route through Ellsworth with the StL-SF Railway.

"The preceding remarks about routing on potatoes and onions to Wichita, Kansas, and points beyond also applies to lettuce and any other vegetable shipped out of Idaho."

Fresh Fruits: No shipper located within the "excluded territory" could possibly be unduly prejudiced by lack of joint rates via the Rio Grande in shipping fresh fruits to markets south and east of Denver, for all such markets are "wide open" to fruit from the "excluded area" under joint rates with transit via the Union Pacific and its Denver and other connections (R. 423, 579; Ex. 25, p. 15).

Thirteen shippers of fruits from the northwest area testified that in shipping many thousands of carloads of various kinds of fresh and frozen fruits annually, they [fol. 2491] had never experienced any need or desire for joint rates via that line and that the lack of such rates presented no handicap or disadvantage in their reaching all markets for their products (V. S. 48, 26, 30, 24, 19, 27, 23, 25, 22 and R. 1638, 1372 and 1353). One witness located on or near the Union Pacific at North Ogden, Utah, professed a desire for joint rates via the Rio Grande (R. 259), but the orchards from which the fruit is obtained are located in the vicinity of or nearby Ogden and trucked to that place for movement by rail (R. 261). A portion of his fruits are shipped to a receiver and processor at Delta, Colorado, on the Rio Grande and his claim is that joint rates with the Rio Grande are desirable for such movement despite the fact that the greatest distance required for the truck movement to Ogden is only 18 miles

and the buyer at Delta instructs him to truck the fruit to Ogden for loading on the Rio Grande (R. 262). This grower makes no claim or pretence that he has lost business or has been injured in any way because of competitors located on the Union Pacific and it is certain from his testimony that the fruit he ships to Delta would continue to move from the orchards by truck to Ogden for loading on the Rio Grande because, the fruit must be trucked from the orchards to a rail loading point and the distance is obviously so short that it is certainly more economical to truck the fruit on into Ogden. That he is not handicapped is clearly shown by his statement that he ships to markets at Topeka, Omaha, Wichita, Kansas City, Dallas, New Orleans and sometimes to Chicago (R. 264).

The receiver and processor of fruit at Delta (R. 175) is located in an area that grows an abundant supply of the [fol. 2492] fresh fruits which he processes (R. 1248-1249) and it is plain from the testimony that the Delta processor has no need or desire to purchase fruit in Idaho except when he finds an over production there which enables him to buy the fruit at distressed or salvage prices. He said, "I don't want a lower rate, I want a freezing in transit privilege" (R. 183). The Rio Grande can satisfy that shipper by broadening the scope of its transit tariff.

We submit that the testimony concerning fresh fruits is without substance or probative force to afford any basis whatever for the finding of undue prejudice and undue preference. Certainly, that testimony proves no legal injury or disadvantage inflicted by the Union Pacific upon the North Ogden producer or upon the Delta processor and it establishes no "need" sufficient to justify short hauling the Union Pacific on fruit that now reaches markets south and east of Denver via the Union Pacific's direct and shorter line.

Potatoes and Other Vegetables: The producers and shippers of potatoes and other vegetables from the "excluded territory" are all located on the Union Pacific and all of them have the choice of joint rates and transit privileges via the Union Pacific or they may ship via the Rio Grande with transit privileges at the higher combination rates. Apparently, those who support the Rio Grande's com-

plaint are regarded by the Commission as unduly prejudiced by lack of equal rates via the Rio Grande, but as we have previously pointed out, since they also have advantage of lower rates via the Union Pacific they fall within the class of preferred shippers on the Union Pacific and it [fol. 2493] results that their preferential status on the Union Pacific becomes the cause of their claimed prejudice in connection with the Rio Grande route.

No shipper or receiver of potatoes or other vegetables located at points on the Rio Grande, testified in support of the complaint, hence there is no claim by shippers located on that line of any disadvantage or prejudice caused by lack of joint rates via that line on these products. It results that the basis for the finding of undue prejudice to shippers of fruits and vegetables using or desiring to use the Rio Grande route is the fact that they have lower rates available to them via the Union Pacific, on which line they are located, and that the only way in which they could be prejudiced would be to elect to route over the Rio Grande instead of the Union Pacific. Thus, the alleged prejudice claimed by shippers who elect to route via the Rio Grande becomes the source of their own positive advantage when they elect to ship over the Union Pacific. This could not be a basis for a finding under section 3(1). It may not be said that a shipper is *in competition with himself* over the routes of these two railroads.

The Commission's rejection at Sheets 44-44a of the suggestion that if the record shows that any relief is needed it could, as admitted in the report, be given by lifting restrictions in connection with routes of the Union Pacific to Denver and connecting lines beyond, finds no justification in the assertion on Sheet 44a that the only effective remedy is the establishment of the same rates over the Rio Grande as those over the Union Pacific. The mere desire [fol. 2494] of such shippers for an additional longer and more onerous route via the Rio Grande does not constitute the "need" which could justify short hauling the shorter, direct and more efficient line of the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City (Sheet 41a), or to any other point.

That the Idaho shippers of potatoes and other vegetables have not been handicapped in their distribution and mar-

keting by the lack of through routes and joint rates via the Rio Grande and have no need for them in the future, has already been shown by many facts, one of its shipper witnesses declaring that *he sells his product in every state in the United States and in several foreign countries* (R. 334). Particular emphasis is given to this fact by shippers who testified for the Union Pacific and by data on pages 96 and 97 of the Commission's decision in *Idaho Public Utilities Comm.* v. *Alton R. Co., supra.* It is there shown that in 1939 Maine shipped 40,462 carloads of potatoes and Idaho, 34,522 carloads, but in markets "far more distant from Idaho than from Maine" the Idaho shippers sold very substantial quantities where Maine sold small or insignificant quantities. At page 96 the report states:

> "At Chicago, where in 1938 and 1939 the totals were 15,863 and 16,506, respectively, there were 5,323 carlot unloads of potatoes from Idaho in 1938 and 5,374 in 1939, and there was but 1 carlot unload of Maine potatoes in 1938 and none from that State in 1939."

The following table and comment at page 97 of that report shows the freedom of movement and effectiveness of competition of Idaho potatoes and onions:

[fol. 2495] "Carlot unloads of potatoes, year 1939

At	From Idaho	From Maine
Atlanta, Ga.	218	197
Detroit, Mich.	651	435
Indianapolis, Ind.	294	66
Louisville, Ky.	102	13
Nashville, Tenn.	279	4

> "For several years, the Idaho potato traffic has increased at most, if not all, of the principal markets. At several cities in the East, South and West, carlot unloads of onions from Idaho exceeded unloads from points in most other States."

In the face of these facts it is difficult to understand how, in fairness and good conscience, the conclusion could be

reached that "Idaho producers * * * find it difficult to compete" (Sheets 42-42a); and that:

> "The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities." (Sheet 60)

Idaho potato shippers having practically taken over many important markets throughout the United States and selling also in foreign markets, we wonder what the Commission really thinks "effective participation" could mean. Moreover, equal rates via the Rio Grande could not enable them to sell in any market in which they can not now sell. They do not claim that they are unable to reach all the markets. Instead, their claim is that they can not "try" all of the markets in the country at joint through rates. Since all shippers of fruits and vegetables in the "excluded territory" have exactly the same rates with the same reconsigning and transit privileges, and the same routing [fol. 2496] restrictions, there can not possibly be undue prejudice or preference among them.

Dried Beans: The undue prejudice finding includes dried beans handled by two Colorado bean dealers discussed on Sheet 43 of the report. One of these is Fred Simpson, Jr., who said he wants to purchase red beans in Idaho for mixing in transit at Colorado Springs with other beans he purchases from California, Idaho, Colorado, New Mexico, Nebraska and Wyoming, and sell the mixed beans mostly in the southeastern section of the United States east of the Missouri River. He now has rates under which he can transit Idaho beans at Colorado Springs and ship to all markets west of the Missouri River (R. 567-568).

The other bean mixer is Max Osborn, Fruita, Colo. He wants Idaho beans for packaging at his Fruita plant and selling to local customers. His sources of supply are the same as those of Witness Simpson (R. 572, 576). He said he had a "customer" at Gering, Nebraska, but apparently meant a competitor, who is located on the Union Pacific and has the benefit of transit at that point on dried beans originating in Idaho (R. 575). These two Colorado bean

dealers can, of course, ship Idaho beans via the Rio Grande for transit at their respective places of business, but at higher rates than they would have if the joint rates sought by the Rio Grande are required to be established. They apparently have transit privileges at satisfactory joint through rates on beans that they buy from all other states than Idaho and therefore they merely want a rate reduction on the Idaho beans.

[fol. 2497] The claim of these witnesses that Idaho beans are needed in some of their mixtures is quite likely a screen to hide the fact that what they really want is the benefit of the 15-cent per 100 pounds lower Government price support on Idaho beans than the price support in other states (R. 570). In fact Osborn said he handles "pinto" beans and Idaho red beans (R. 573), but he handles Idaho beans only "for local consumption" and that—

> "We don't mix them, we bring them in for packaging in cellophane for local trade only." (R. 574)

Osborn further said his "local trade consumes Idaho varieties * * * which constituted a major part of our bean operation" (R. 576), and it is therefore plain enough that he is not shipping mixtures containing Idaho beans, that he disposes of such Idaho beans as he handles to his local trade, and that he has no need for transit on those beans.

Their "customer" at Gering, Nebraska, is Chester B. Brown Company, for whom witness Snyder filed Verified Statement 52.

The company's plant at Gering is located on the Union Pacific and it has another plant at Morrill, Nebraska, on the Chicago, Burlington & Quincy Railroad. That company purchases beans in Colorado, Utah, Oregon, Washington, Wyoming, Montana and Nebraska, and after processing them at its Morrill or Gering plant ships them to customers generally east of Colorado and Wyoming and as far as the Atlantic Seaboard, and Oklahoma and Texas. Witness Snyder testified that his company often finds it necessary to purchase certain varieties of beans at origin [fol. 2498] points from which through rates do not apply to the ultimate destination. In such cases his company pays the higher combination rates and charges for out-of-

line hauls which must be absorbed in meeting competition. He also purchases beans from origins on which no transit privilege is available and on which the combination of rates into their Morrill and Gering plants and from those points to final destination is the only rate applicable. For example, he purchases Pinto beans from Colorado largely along the Rio Grande on which the pays an out-of-line haul of 7 cents per 100 pounds over the direct through rate when processed at Gering on the Union Pacific and final destination is at the Missouri River or beyond. He cannot obtain Colorado beans for processing at his Gering plant and movement beyond to points west of the Missouri River except at higher combination rates into and out of Gering, but he stated that this was not an unusual situation among bean dealers in western territory and many of them either absorb the higher transportation costs or avoid such sources of supply. His company established the one plant at Gering on the Union Pacific and the other at Morrill on the CB&Q in order to obtain beans from as large an area as possible with the least possible absorption of costs for out-of-line hauls "recognizing that a railroad granting the transit privilege and performing the terminal service, is entitled to its long haul into and out of the transit station from its origin territory" (page 4).

It is clear that this company would be unduly prejudiced in violation of section 3 of the Act with respect to shipments of beans from Colorado if the sought rates are re- [fol. 2499] quirred on Idaho beans with transit at the plants of Osborn and Simpson at Fruita and Colorado Springs who can and do presently obtain Colorado beans at no cost above the through rate on which beans witness Snyder's company must pay an out-of-line charge of 7 cents per 100 pounds when final destination is at the Missouri River or beyond, and must pay a straight combination of local rates when destination is west of the Missouri River. In addition, Snyder states that his Colorado competitors would be added competition for beans in the Idaho market, and he points out that they already have "free" access to producing areas in Utah and California and would have added "free" access to Idaho, Oregon and Washington on the Union Pacific for shipment to the Missouri River

and beyond. Snyder testified that granting the Rio Grande's demands in this case would have a detrimental effect on his company's business because it would open up additional territory to his Colorado competitors both for supply and market, leaving them with advantages in addition to those they already have and leaving his company with the disadvantage it has in the rates on beans from Colorado and certain other origins. He said that beans from all the involved origins can move "free" to any consuming territory and that there is no need for routing via the Rio Grande so far as distribution of the bean crop in the territory under discussion is concerned. He said that the addition of that route would not give any rate reduction to growers, processors or the consuming public and that the only advantage would accrue to his Colorado competitors at the expense of others, including his company, and that the additional traffic that the Rio Grande might obtain would be at the expense of the Union Pacific.

[fol. 2500] It is obvious from this testimony that the Commission's order would create undue prejudice against the Nebraska dealers and undue preference of the Colorado dealers.

Frozen Poultry, Frozen Foods, Butter and Eggs: The testimony on which the Commission finds undue prejudice and undue preference with respect to these products is that of two cold storage plant operators located at Pueblo, Colorado. No producer or shipper of these products located in the "excluded territory" testified about these products or expressed any need or desire to store these products in transit at Pueblo. Witness Stanger (R. 342) said he shipped "processed" turkeys from Idaho Falls to Philadelphia, New York and Chicago, but neither he nor any other shipper located in the "excluded territory" even hinted that they needed or desired joint rates via the Rio Grande for storage in transit of frozen poultry, frozen foods, butter or eggs at Pueblo. W. G. Miller (R. 768) supported the Rio Grande's complaint. His company ships canned fruits and vegetables from Milton, Oregon, but he expressed no need or desire for storage in transit at Pueblo. His only reason for Rio Grande routes was to have them available in times of emergency—which he already has under section

15(4). Marion Olsen, President, Cache Valley Turkey Growers Association (V. S. 6) ships turkeys to eastern points from Paradise, Utah, but he opposed the complaint and has no need or desire for the Rio Grande route or storage at Pueblo.

The testimony of the two cold storage plant operators at Pueblo affords no basis whatever for the Commission's finding of undue prejudice and undue preference with re- [fol. 2501] spect to these products. While they claim they have two competitors at Denver (Sheet 42a) it is not shown whether such competitors are actually located on the Union Pacific or that they have inflicted any injury upon or caused any damage or loss of business whatever to the Pueblo cold storage operators.

It is correctly shown at Sheet 42a of the report that what the Pueblo storage operators want is to apply the joint rates via the long route of the Rio Grande making Pueblo "intermediate" to Denver, which, as shown on Sheet 13, adds 175 additional miles via the Rio Grande. Pueblo is 119 miles south of Denver. It is obvious that the geographical locations and operating and transportation conditions of the Denver and Pueblo storage plants are too dissimilar to afford any basis or justification for the Commission's finding of undue preference of the former or undue prejudice to the latter. Moreover, to require 175 miles' additional transportation merely to reduce freight charges of the Pueblo operators would clearly be a flagrant example of "wasteful" transportation.

The fact is that no shipper submitted any testimony about storage in transit at Pueblo. The two witnesses who testified about storage conduct storage plants at Pueblo and their only purpose is to increase their storage business. Both of these plants store fruit among other products and both witnesses admitted the fact that they already have joint through rates on fruit from Idaho via the Union Pacific and Denver and connecting lines beyond under which they can store or process in transit at Pueblo and ship the fruit at the balance of the joint through rates to all destinations (R. 423, 579).

[fol. 2502] The first of these two witnesses was Belcher (R. 417), and although his location has the advantage of

a four-way railroad center, north, south, east and west, and has joint through rates via the Union Pacific, the fact that he is located 119 miles south of Denver necessitates a back haul from Pueblo to Denver on products from the Northwest via the Union Pacific to Pueblo if he takes any business from the two storage operators at Denver. What he wants is that the same joint rates that he now has via the Union Pacific and connections be made applicable via the Rio Grande in order to make Pueblo an intermediate point to Denver so he can take business from the two storage plants at Denver. If this justifies short hauling the Union Pacific then every shipper in the United States would have a right to compel routes and joint rates through the point where he is located so as to make his location intermediate at joint through rates with transit privileges to all destinations over all routes. The proposal is absurd and is contrary to the repeated decisions of the Commission cited elsewhere in this petition holding that carriers may restrict routing in protection of their long hauls except in cases where actual discrimination results. "There is no express requirement of law that routes *must* pass through particular intermediate points," *Pennsylvania R. Co. v. United States*, 54 F. Supp. 381, 392, and having deliberately located his plant at a four-way railroad center where he could have the services of several railroads, this witness is not in position to claim a right to be precisely equalized with the situation of the two storage plants in Denver who likewise have no through routes and joint rates via the Rio Grande and who are entitled to the benefits of their geographical location, regardless of the purposes of [fol. 2503] the Rio Grande in this case. Belcher's plant is not on Rio Grande trackage, but is served by the Santa Fe and C&S and any shipments received via the Rio Grande would necessitate an interchange with those carriers and a switch movement by them to his plant (R. 422).

The second of the two storage plant operators at Pueblo is the American Stores Company, Inc. (R. 577). That company did not wish "to take sides in the matter, and expressed a desire to be neutral" (R. 583) in this case, but witness Heidel, who is the manager of the Pueblo plant, was subpoenaed by the Rio Grande, and he claimed he

was appearing "in the interests" of his company, but it is obvious that the management of his company did not feel sufficiently interested in the Rio Grande's case or in joint rates via that line to make any such representations as Heidel made. Like the plant of witness Belcher, the plant of American Stores handles fruits among other things and, as stated, already has joint through rates via the Union Pacific with storage and other transit privileges at Pueblo, and to all destinations beyond.

American Stores buys Idaho lambs at Ogden for slaughter and packing at its Pueblo plant (R. 580). Of course, it has joint through rates via the Union Pacific with transit privileges at Pueblo, but Heidel stated that for the past year the lambs were shipped via the Rio Grande from Ogden to Pueblo at the higher combination rate in order to avoid one feeding en route which would be necessary if they moved via the Union Pacific. He also said the lambs suffered less "shrink" when moved via the Rio Grande because they were delivered "more rapidly" (R. 581).

[fol. 2504] We submit that the desire of Belcher and the lack of desire by American Stores, but the thought of its Pueblo manager that joint rates via the Rio Grande would expand the operations at these Pueblo plants, afford no ground for compelling the Union Pacific to short haul itself nearly 600 miles merely to divert the traffic from its own direct single line to Denver, to the line of the Rio Grande, nor for a finding that these Pueblo operators are unduly prejudiced.

VII.

The Finding That the Substantial Differences in Transportation Conditions Found in the Report to Exist in Hauls Over the Union Pacific and Over the Rio Grande Via Ogden Between the "Excluded Territory" and Points North and West of the Southern and Eastern Boundaries of Kansas, the Missouri River and the Lines of the Union Pacific and Chicago and North Western Railroads From Omaha to Chicago "Become Relatively Insignificant" and that "Transportation Conditions Are Substantially Similar" for Hauls Between Points in the "Excluded Territory" and Points South and East of the Described Territory, Is Arbi-

trary, Erroneous, Contrary to and Without Support of Evidence.

The evidence which proves the substantial differences found at Sheet 62 between transportation conditions over the Rio Grande and those over the Union Pacific is the evidence to which reference is made at Sheets 46-47 and 60a of the report showing that the Union Pacific routes are shorter, more favorably situated, is efficiently operated and furnish good service; that comparison of physical characteristics shows that the Rio Grande is less favorably situated, is longer and that its operating conditions are "more onerous" than those on the Union Pacific or any other transcontinental defendant. These dissimilarities in transportation conditions on the Rio Grande compared to those on the Union Pacific have always been recognized by the [fol. 2505] Commission, as shown in *Commercial Club, Salt Lake City v. A., T. & S. F. Ry. Co.*, 19 I. C. C. 218, 221-222, and in the cases cited on Sheets 60a-61 of the report.

The dissimilarities in transportation conditions affecting the traffic in question are due entirely to conditions on the Rio Grande between Ogden and Denver compared to operating conditions on the Union Pacific between McCammon, Idaho, and Cheyenne and Denver. Excepting this comparison between the points mentioned of the Rio Grande and the Union Pacific, there is no evidence whatever in the record concerning or comparing transportation conditions on other parts of the Union Pacific or routes in which it participates with routes in which the Rio Grande participates or with routes that could be made via its line. Therefore, there is not a scintilla of evidence to justify the conclusions on Sheet 62 that the proved dissimilarity of conditions on the Rio Grande and those on the comparable portion of the Union Pacific "become relatively insignificant" and that "transportation conditions are substantially similar" between points in the "excluded territory" and points south and east of Kansas, the Missouri River and the Chicago and North Western to Chicago. The conditions on the Union Pacific and the Rio Grande which give rise to the substantial differences in transportation conditions are local to the Rio Grande and the Union Pacific between McCammon and Cheyenne and Denver, and those

conditions cannot be avoided, eliminated, diluted or be made to disappear by the arbitrary and erroneous statement that they "become relatively insignificant" for long hauls to the southern and eastern part of the country. The dissimilar conditions are fixed by nature and are per- [fol. 2506] manent. There is no escape from them in either long hauls or short hauls, for the traffic sought by the Rio Grande must encounter its disadvantageous conditions when moving over that line. The Commission is without authority to ignore or eliminate these dissimilarities by "spreading" them over long hauls, and the attempt to do so is plainly contrary to the evidence which proves that the dissimilarities exist because of unfavorable conditions on the Rio Grande between Ogden and Denver.

If the Commission were correct in this method of eliminating differences in transportation conditions then any difference in conditions no matter how great could be disregarded if the hauls which encountered the differences were long enough. In other words, by this erroneous and arbitrary process the Commission would make the question whether transportation conditions are dissimilar depend entirely upon distance and would disregard the physical and other characteristics which create the differences. These dissimilarities are physically fixed and located in Idaho, Wyoming, Utah and Colorado and they are encountered just as effectively on hauls to the southern and eastern part of the country as on hauls to Western Trunk Line territory.

We submit that the process, method or reasoning by which the Commission concludes that transportation conditions are substantially similar for hauls between the "excluded territory" and the southern and eastern part of the country is arbitrary and erroneous and contrary to the evidence which proves the existence, presence and geographical location of the dissimilar conditions which the [fol. 2507] report finds to exist with respect to shorter hauls.

VIII.

The Conclusion That Through Routes and Joint Rates on the Specified Commodities Via the Rio Grande Are "Necessary and Desirable in the Public Interest, in Order to Pro-

vide Adequate and More Economic Transportation" Is Contrary to the Overwhelming Preponderance of the Evidence, Contrary to and Inconsistent With Facts Clearly Found and Stated in the Report and Is Based Upon an Erroneous Interpretation and Application of the Words "Needed in Order to Provide Adequate and More Efficient or More Economic, Transportation."

On Sheet 59 the report correctly states that the complaint does not allege that defendants' routes are not adequate for the traffic hauled and that complainant requests no finding to that effect. The report then incorrectly suggests that the lack of such request may be due to the Rio Grande's contention that through routes via Ogden and its line already exist. The real reason that the Rio Grande made no such allegation or request is explained by facts found in the report and by testimony of its Vice President Bradford who said (R. 1694):

> "In regard to the testimony of Mr. Hanson, may we again state that at no time have we in any way questioned the capacity of the Union Pacific Railroad physically to handle the business it now handles, nor have we at any time in this case brought up for discussion the relative efficiency of the Union Pacific-Rio Grande."

While the complaint alleges (p. 7) that the sought through routes already "exist," and that complainant and "the public" are deprived of the use of available and reasonable through routes at reasonable and non-discrim- [fol. 2508] inatory "through joint rates which are necessary and desirable in the public interest" (pp. 12-13), it does not allege that the through routes with joint rates are "needed in order to provide adequate, and more efficient or more economic, transportation." In fact, the complaint alleges no reason or circumstance which, if proved, could under section 15(4) justify short hauling the Union Pacific.

The Commission concludes, however, that no through routes within the meaning of the Act now exist by way of the Rio Grande on the traffic concerned and that any order requiring establishment of such routes and joint

rates over them must be grounded upon findings that such routes "are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation" (Sheets 9-9a). Thus, since the Commission cannot short haul a railroad except under one or more of the conditions specified in section 15(4), its conclusion is that its order must rest upon an issue not presented by the complaint. Despite its own rulings that "we are not at liberty to read into a complaint an issue which it plainly does not present," *Lasker & Bernstein v. Director General*, 98 I. C. C. 624, 626, and *Barschi & Son v. Baltimore & O. R. Co.*, 155 I. C. C. 350, the Commission attempts to supply the missing allegation by saying (Sheet 59) that testimony of shippers raises a "question" as to the "need for more adequate and economic service than afforded by existing routes with respect to some commodities." But, even this "question" does not present an *issue* of the circumstances on which the Commission says the short-hauling order must be grounded.

[fol. 2509] On Sheet 58, the Commission concludes that "more efficient or more economic" transportation are not determinative considerations "unless the existing routes can be found *not* to provide 'adequate' transportation."

Hence, the first and determinative consideration is not, as the report and order imply, whether there is need for "*more* adequate and economic service than afforded by existing routes," but whether Union Pacific routes provide "adequate" transportation. Keeping in mind that through routes and joint rates are already available to and from all intermediate points on the Rio Grande, and that all of the traffic involved in this proceeding is "bridge" traffic, whether or not it is reconsigned or transited on the Rio Grande, and would simply move over rails of the Rio Grande between the same origins and destinations that it now moves over Union Pacific routes, we ask the Commission to reconsider the prerequisite question whether, in the light of the following facts correctly found in the report, it can in fairness and good conscience, hold that Union Pacific routes do not provide adequate transportation for the traffic the Rio Grande seeks to divert to its line.

1. Transcontinental traffic to or from the "excluded territory" moves over the Union Pacific from or to Colorado

or Missouri River gateways, rather than over the Rio Grande because the Union Pacific routes are shorter (Sheet 15)..

2. Union Pacific routes are from 1 per cent to 37½ per cent shorter than Rio Grande routes (Sheets 17, 20).

[fol. 2510] 3. Present Union Pacific facilities are *adequate* to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future (Sheet 46).

4. Union Pacific has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line (Sheet 46).

5. Physical characteristics of the two lines show that the Rio Grande is less favorably situated than the line of the Union Pacific (Sheet 47).

6. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours' additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services (Sheet 47).

7. Operating conditions on the Rio Grande are more onerous than those on the line of the Union Pacific or any of the other transcontinental defendants herein (Sheet 60a).

8. Through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande (except with respect to commodities enumerated on Sheet 59) (Sheet 60).

Those findings obviously compel the conclusion that the Union Pacific routes provide "adequate" transportation for the traffic between the points it moves and that no "more adequate and economic service" can possibly be [fol. 2511] rendered by the Rio Grande. In the face of the facts the Commission has found, it is incredible that it could reach the conclusion on Sheet 60 that on the specified commodities, reconsigned or accorded transit privileges "at points on the Rio Grande" the defendants' routes are "inadequate and less economical than are the Rio Grande routes." The report does not particularize as to the inadequacies of defendants' routes for traffic to be reconsigned or transited at points on the Rio Grande

except to say that for such purposes at such points "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply." Since the Union Pacific and other defendants do not serve shippers located at points on the Rio Grande except at Ogden, Salt Lake City, Provo and Denver, it is obvious that their lines are not and could not be "available" at any intermediate points on the Rio Grande because those points are served exclusively by the tracks of that line. The report points to no legal obligation of the Union Pacific to furnish service at points along the Rio Grande and it seems indisputable that there is no such obligation. In sustaining routing restrictions which gave the Illinois Central System its long haul, *Routing Cottonseed to Kansas and Missouri*, 231 I. C. C. 775, the Commission said, "A carrier cannot be charged with unlawful prejudice against a community which it does not serve."

The conclusion that Union Pacific routes are "less economical" than Rio Grande routes is likewise incomprehensible, first because "higher rates apply" via the Rio Grande and even under the order no lower rates would be applicable via the Rio Grande than via the Union Pacific; and second, the facts found in the report and mentioned [fol. 2512] above plainly compel the conclusion that the expense necessarily entailed by the "onerous" operating conditions over the Rio Grande necessarily make that route less economical than Union Pacific routes. Even with the same rates that apply via Union Pacific routes, we submit that it is impossible that the onerous Rio Grande route could provide "more" adequate and "more" economic service than could the Union Pacific in moving the traffic between the Northwest and points in the eastern and southern part of the United States.

An apparent attempt is made on Sheets 59-60 to bolster and support the ultimate conclusion that through routes and joint rates via the Rio Grande are necessary "to provide adequate and more economic transportation." There the report attempts to place the necessity upon the "marketing system" which has been developed with respect to perishable commodities, and the conclusion is reached that such commodities, including those specified, "must be

moved to market with expedition and care, and over as many routes as possible." The findings already cited contradict the suggestion that the commodities can move over the Rio Grande as expeditiously as they now move over the Union Pacific and there is no testimony that they would move with greater "care" via the Rio Grande. The statement that such commodities must move "over as many routes as possible" cannot possibly be legally correct. There is no such requirement in the Act or elsewhere in law. The statement could not be correct so long as there is any protection against short hauling left in section 15(4). The Commission's attempt to nullify the restriction against short hauling by pointing to the marketing system [fol. 2513] which has developed for perishable commodities is wholly untenable, for the protection against short hauling is not concerned with nor does it exempt particular commodities. The nature of a commodity has no bearing upon the right of a carrier not to be short hauled.

Moreover, the cases cited on Sheet 60 do not support but instead contradict the theory that the perishable nature of the specified commodities affords justification for short hauling. The first case, *Southeastern Vegetable Case*, 200 I. C. C. 273, describes the expensive extra service required in transporting vegetables, and the desire of shippers in that case for less restrictive reconsignment rules, to which the railroads apparently objected only because of the possibility of indirect hauls in some cases. At page 279 the decision shows that the Commission left the matter in the hands of the carriers. The second case, *Routing Lumber and Fruits, South to C. F. A. Territory*, 256 I. C. C. 223, involved proposed tariff provisions "to eliminate unnecessary and circuitous routing resulting in wasteful transportation" (p. 234), leaving in effect combination rates higher than the joint rates (p. 225). The Commission vacated its suspension order and let the tariff provision become effective, finding at page 234 that the railroads' effort to comply with tariff Circular 20 and "to eliminate wasteful transportation is praise-worthy and in the public interest." The situation condemned by the Commission in that case was exactly that which its order would compel in the instant case.

In a further effort to justify its conclusion that defendants' routes are inadequate, the report on Sheet 60a cites *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I. C. C. 333, [fol. 2514] saying that there is one point of difference between that case and the instant case, namely, that operating conditions on the respective routes in that case were substantially similar while here "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein." Why the Commission should overlook or refrain from mentioning other essential differences which entirely distinguish that case from the instant case, and in fact make the *Stickell* case authority for refusing to do what the Commission here requires is not understandable. The report in the *Stickell* case shows that the Pennsylvania Railroad had its own line to Hagerstown, the transit point, while here none of the defendants have lines reaching points on the Rio Grande except terminal points. The through routes required in that case eliminated four extra days of time in transit; a 149-mile out-of-line haul costing 90 cents per ton, and two switching interchanges at Hagerstown and would *not* result in wasteful transportation. In the instant case, the Commission would require an out-of-line haul via the Rio Grande adding 200 miles additional of wasteful transportation over the most "onerous" operating conditions of any western railroad, requiring two additional interchanges and at least two days' more transit time. The routes sought up to Hagerstown were "well established and generally accepted as reasonable by shippers and carriers" and were not shown to be less economical as parts of the sought through routes then as parts of existing routes; while here the Commission finds, correctly, that through routes via the Rio Grande have not been established for the traffic it seeks, and its findings which make operating conditions "more onerous" [fol. 2515] on the Rio Grande, including its longer route, compel the conclusion that routes which include the Rio Grande would necessarily be less economical for the involved traffic than Union Pacific routes. The facts which were held to justify the order in that case were the reverse of the facts on which the Commission attempts to base its order in the instant case.

The Commission has repeatedly held that carriers are not legally obligated to establish through routes and joint rates over *all possible* routes, but that only a reasonable number of such routes between the same points are required by law, and that higher combination rates over other possible routes may properly be maintained without violating the Act. *Lehigh Portland Cement Co.* v. *Lehigh Valley R. Co.*, 238 I. C. C. 199, 201; *Kansas City Hay Dealers Asso.* v. *C., G. W. R. R. Co.*, 49 I. C. C. 372, 377. Not only does this new theory and interpretation of the Commission that commodities of perishable nature must move over "as many routes as possible" contradict its previous holdings, but it is squarely contrary to the short hauling prohibition in section 15(4).

In short, the interpretation and application which the Commission here gives to the words "adequate, and more efficient or more economic, transportation" means that the transportation furnished by no railroad in the country is adequate and economic unless such railroad makes through routes and joint rates with all other railroads so that shippers at points served by such other railroads will have *the same* rates and transit privileges as are available on the first railroad. In other words, the holding is that the [fol. 2516] Union Pacific and its connections have not discharged their duty by furnishing shippers located on their lines adequate transportation over their own routes for the traffic in question, but that they have a further duty to furnish the same transportation service to shippers located on the Rio Grande at points not served by their lines. It is obvious that shippers located on the Rio Grande would not, under the order, have any new or additional transit privileges nor would they have any new or additional carrier serving them, nor would they have any more expeditious or careful service than they now have, for they would still be "stuck" with and wholly dependent upon the Rio Grande. In fact, such shippers on the Rio Grande would gain nothing except a rate reduction to the extent of the difference between present combination rates via the Rio Grande and joint rates applicable on Union Pacific routes. Their service would not be more adequate or more efficient; it would simply be cheaper and in no otherwise affected.

Therefore, the Commission's interpretation is that the exceptions to the short-hauling provision in section 15(4) permit it to require through routes and joint rates that short haul the Union Pacific to enable shippers located on the Rio Grande to obtain a rate reduction. This is plainly contrary to the purpose of Congress in the enactment of section 15(3) and (4) for long prior thereto it had empowered the Commission upon proper factual showing to reduce rates that shippers pay, and that power has since been fortified. Sections 1 and 15(1).

The Supreme Court of the United States has twice told this Commission that it cannot by its own interpretation [fol. 2517] limit "the impact of the short haul restriction on its power to establish through routes," to say nothing of completely nullifying that restriction. *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269 (1929), and *Thompson* v. *United States*, 343 U. S. 549 and 555 (1952). In the latter case, the Court further warned the Commission that it could not, by resorting to particular formalities, evade the prohibition of section 15(4) against "tinkering with through routes" for the purpose of assisting a carrier to meet its financial needs, citing *United States* v. *Gr. Nor. R. Co.*, 343 U. S. 562, 575 (1952).

Another error is indulged by the Commission in its misuse of its power to short haul the Union Pacific routes. On Sheet 9 it correctly says that any order requiring the sought routes and joint rates must be grounded upon findings that the routes "are necessary or desirable in the public interest, and are needed in order to provide adequate and more efficient or more economic transportation," but when it comes to its ultimate finding or conclusion it departs from that requirement and finds merely that the sought routes and joint rates are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation." Thus, the Commission has "jumbled" the provision of section 15(3) under which it may prescribe through routes and joint rates *which do not short haul* a carrier, with the provision of section 15(4) which enables it to short haul a carrier if a proposed route is "needed in order to provide adequate, and more efficient or more economic, transportation." The Commission has

not found that routes via the Rio Grande are "needed" nor [fol. 2518] that they will provide more "efficient" service, whereas the power to short haul may be used only when a proposed route is needed to provide adequate *and* more efficient, *or* more economic transportation. It is not enough to find that a proposed route will provide "adequate and more economic" service. In addition to finding that the proposed route is necessary to provide adequate service, the Commission must find that it is also needed to provide "more efficient" service for the word "adequate" is conjoined with "more efficient" by the word "and". The requirement of the provision is that the proposed route is needed to provide "adequate and more efficient" service or that it is needed to provide "more economic" service than that provided by existing routes. The Commission finds that service via Union Pacific is adequate except to points it does not serve located on the Rio Grande, and that Union Pacific's service is efficient, but it does not find that "more efficient" service will be provided by the Rio Grande. The ultimate finding and conclusion clearly is not that which is required before the Union Pacific may be short hauled on the theory that the Rio Grande route is "needed" to provide "adequate, and more efficient or more economic, transportation," and we submit that the facts found in the report and in the testimony of record will not support a finding necessary to meet the statutory requirements, but, instead, compel dismissal of the complaint.

In finding that the through routes and joint rates via the Rio Grande "are necessary and desirable in the public interest", we submit that the Commission has misappraised, improperly weighed and considered, or not considered, the evidence; that the finding here challenged rests [fol. 2519] upon other findings which are not "in accordance with the facts proved" and are "contray to the 'indisputable character of the evidence' ". *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91. In its treatment of the evidence, the Commission has reversed the elementary rule that "the substance, and not the shadow, determines the validity of the exercise of the power", and has erroneously based its order upon "a mere scintilla" of evidence and not upon the overwhelming preponderance and indis-

putable character of the evidence of record. *Int. Com. Comm.* v. *Union Pac. R. R.*, 222 U. S. 541, 547, 548.

A determination of public interest, like a determination of public convenience and necessity, "is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands," *Colorado* vs. *U. S.*, 271 U. S. 153, 169. In exercising the power granted by section 15(3), the interests of carriers and the public as well as the interests of shippers and prospective shippers "should be considered and a fair balance found." *Pennsylvania R. Co.* v. *U. S.*, 323 U. S. 588, 593.

In a case of this kind "public interest" embraces elements and interests, in addition to but far removed from the direct monetary effect on the Union Pacific of the Rio Grande's revenue raiding proposal. It reaches out and includes not only shippers who are dependent upon the Union Pacific's ability to provide adequate service, but also the general economic welfare of Union Pacific communities including employment, general commercial activity, present and future security and progress of those communities.

[fol. 2520] In *United States* v. *Lowden*, 308 U. S. 225, 240, the Supreme Court said that under a permissible power to regulate commerce—

> "* * * the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, *as well as the public at large, is undoubted.*". (Emphasis supplied.)

Actually, the Commission weaves its report and order around a half-dozen shippers whose desires, at most, are to improve their competitive and financial positions through a rate reduction. Yet, in *Public-Convenience Application of Utah Terminal Ry.*, 72 I. C. C. 89, the Commission said at page 93:

> "A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field."

The desire of a few disgruntled shippers, succumbing to the Rio Grand's sinister indoctrination, for an opportunity to route away from the Union Pacific the traffic it must originate and deliver and to short haul it in "retaliation" or to hold a "competitive weapon" over the Union Pacific in the routing of traffic, even when combined with the Rio Grande's "financial needs," is far from enough to constitute "public interest" within the meaning of section 15(3) of the Act. The Commission may not console itself with the thought that shippers supporting the Union Pacific would still have available the services of that line. In *Jamestown, N. Y., C. of C.* v. *Jamestown W. & N. W. R. Co.*, 195 I. C. C. 289, the Commission said at page 292:

> [fol. 2521] "The expression 'in the public interest' means more than a mere desire on the part of shippers or other interested parties for something that would be convenient or desirable to them. Where something substantial is to be taken away from a carrier for the sole benefit of such parties, and with no corresponding benefit to the carrier, as in this case, we are inclined to the view that some actual necessity or some compelling reason must first be shown before we can find such action in the public interest. In determining what is 'in the public interest' we must take into consideration not only the interests of the particular shippers at or near the terminal considered, but also the interests of the carriers and of the general public."

Here, the Commission apparently gives no weight to testimony of witnesses supporting the Union Pacific who are not only pleading for retention of present conditions under which they have adequate and efficient rail service but who are also telling the Commission *that in their own experience as shippers and members of the public there is no transportation need or commercial reason* for the Rio Grande's proposal to jeopardize them and their communities and the general public by diverting traffic and revenues away from the Union Pacific. In *Worm Extension—Ainsworth and Johnstown, Nebr.*, 32 M. C. C. 641, at page 644:

> "The prime element in determining the public interest is the maintenance of adequate transportation

facilities for handling general traffic. It may be that some individual shipper may find it more convenient or more economical to have a contract carrier handle for him a particular kind of traffic. This, however, does not constitute a conclusive test. If taking that traffic from the established transportation agencies [fol. 2522] may so reduce their earnings that they will be unable to maintain adequate and efficient common-carrier service for the public, including that individual, then it is not in the public interest. Beyond resulting in the curtailment of service, the diversion of selected traffic may even cause losses so heavy as to necessitate abandonment of the facilities which are depended on for community life. Here petroleum traffic is an important factor in supporting railroad operations. If those operations are to be continued, the diversion of available traffic by authorizing such operations as are proposed by this application must not be encouraged."

In *Smith-Wilson & Co. v. A., T. & S. F. Ry. Co.*, 129 I. C. C. 65, a shipper wanted joint rates applicable via the Santa Fe's routes to be made applicable via his route in lieu of higher combination rates. Violations of sections 1 and 15 were alleged. At pages 67-68 the Commission stated:

"The primary purpose in filing this complaint was to obtain any advantage which might accrue by reason of having the rate now maintained over the Sante Fe system available also via Pecos and the T. & T., with option of concentration at Pecos. Under section 15, paragraph (3), of the act the commission has the power to establish through routes and joint rates, 'whenever deemed by it necessary or desirable in the public interest,' subject to the limitation in paragraph (4) that a carrier may not be required to short haul itself unless its route is unreasonably long as compared with another practicable route."

Testimony of opposing shippers in that case that diversion of traffic away from the Santa Fe might result in poor

train service and equipment, and in losses to and hardship [fol. 2523] upon the shippers, clearly weighed heavily with the Commission while in this case similar testimony is ignored. At page 71 it said:

> "Resolutions passed by the chambers of commerce of Carlsbad, Artesia, Roswell, and Hope, all in the Pecos Valley, and by the Associated Chambers of Commerce of the Pecos Valley, were introduced by officers of those bodies. They all ask that complainant's prayer be denied. Witnesses residing at those points testified substantially to the same effect as the witnesses mentioned in the foregoing paragraph. Some express apprehension that the diversion of cotton through the Pecos gateway will seriously affect the Santa Fe and will thus bring about the curtailment of train service, poor equipment, hardship upon patrons of the Santa Fe, and losses in revenues to all parties concerned. In their opinion the application of the Santa Fe's single-system rate as a joint rate via Pecos, and concentration there, will not result in higher prices to the cotton planters for their products."

Finding that mere comparison of assailed combinations rates with the lower sought joint rates afforded no basis for condemning the former, and that establishment of sought joint rates was not in the public interest, the Commission said at page 73:

> "Although there is some division among the shippers of the Pecos Valley as to the necessity, desirability, and advantage of joint rates via Pecos and the T. & P., the evidence indicates that the weight of opinion is opposed to the establishment of such rates because of the probable effect it would have upon the industries and the carrier service in the valley. The Santa Fe's branch through the valley is the only rail line in southeastern New Mexico. Shippers along its entire length from Clovis to Pecos would be affected [fol. 2524] by the logical consequences of the change here sought. Industries in the valley are dependent upon that line for their progress and perhaps for their existence. Anything tending to bring about a reduc-

tion in the service over it, such as lessening the already light traffic density, would be detrimental to the best interests of the people of the valley."

In denying the application in *Chicago, B. & Q. R. Co., Control,* 271 I. C. C. 63, the Commission quite apparently gave very meticulous consideration and great weight to the same possible consequences about which so many witnesses for defendants in this case are voicing their interest. In that case, beginning at page 132, the Commission devoted over 7 pages to discussion of "Effect of diversions on protesting railroads," two pages, 140-141, to discussion of "Possible abandonments," two pages, 142-143, to "Possible effects on railway employees," and nearly two pages, 144-145, to discussion of possible resulting "Unsound Economic Conditions Et Cetera."

The circumstances in that case, from a "public interest" standpoint, were the same in principle as those in this case, except that, in that case the applicants proposed to spend considerable money in "rehabilitating" and "improving" an existing line, while here, the Rio Grande expects to gain traffic and revenue without spending one dime to contribute additional transportation facilities or service or for anything else other than solicitation of the traffic.

The following conclusions of the Commission in that case, pages 164-165, should guide and control in this case:

[fol. 2525] "If instead of its application for authority to extend its service to St. Louis as here proposed, the Sante Fe had presented an application under section 1 (18) of the act to build a new line at a cost no greater than that of rehabilitating and improving the Kansas City-St. Louis line, or if prior to transfer of our jurisdiction over operation under trackage rights from section 1 (18) to section 5(2) of the act, the Santa Fe had presented its application to extend this service to St. Louis by operation under trackage rights, the fact that such construction or operation would result in the diversion of most of the anticipated traffic from other railroads would, on this record and in accordance with well-established principles in such cases, have required denial of the application. The same

principles should apply to the proposals here presented by the Santa Fe. Furthermore, in applying to the proposed transactions the test of public interest as defined in *New York Central Securities Corp. v. United States, supra,* we must consider the adequacy of transportation service, its essential conditions of economy and efficiency, and the appropriate provision and best use of transportation facilities not only for Santa Fe territory and St. Louis, but for the entire southwestern section of the country. Any proposal for the extension of Santa Fe service to St. Louis should be coupled with other proposals looking to the preservation of adequate transportation service, the establishment of essential conditions of economy and efficiency, and the appropriate provision and the best use of transportation facilities in the southwestern territory as a whole."

The report suggests no reason for the Commission's plain departure in this case from the guides and principles [fol. 2526] laid down and applied by it and the Courts in the cases cited. It has arbitrarily ignored the broad "public interest" in this case and based its order on transit and reconsignment privileges for a few individuals.

Since public interest is to be determined by weighing and appraising the interests, circumstances and activities of all of those for whom testimony was submitted, it is appropriate to point to the fact that the state commissions supporting the defendants represent the interests of all citizens in those respective states and must be considered as having spoken in behalf of the entire populations of those states, with the exception, of course, of those few individuals who appeared in support of the Rio Grande. Attention is called to the fact that the total population of the six intervening states supporting defendants was nearly 7,000,000 people as of 1940 and we think the Commission must treat the interventions and testimony of these supporting states as expressing the interests and desires of this great number of people. The interests of many of them were voiced again through commercial or other organizations of which they are members and many others

personally testified with respect to their own individual interests. From the State of Idaho, where the Rio Grande seemed to concentrate its propaganda campaign and sought more desperately to gain supporting shipper testimony, it succeeded in procuring only some 10 witnesses, while 38 witnesses from Idaho testified in support of the defendants and particularly the Union Pacific. Their testimony for themselves and for groups and organizations for whom they had been authorized to testify may be said to embrace [fol. 2527] substantially all of the general business activities and public interests and welfare of Idaho with the exception of two Idaho organizations representing farmers and ranchers, but many of whose members testified in their own behalf in support of the defendants. The Idaho Public Service Commission is of the view that the complaint should be dismissed except as to fruits, vegetables and livestock, but suggests the feasibility of accomplishing this by removal of routing restrictions at Denver, leaving the Union Pacific its haul to that point and excluding the Rio Grande.

It is not possible to discern from the report by what method or process the Commission weighed or undertook to balance the "bridge" traffic needs of the Rio Grande and pretended desires of its procured shipper witnesses for transit and reconsigning privileges against the interests of the Union Pacific, its employees and other defendants, and the interests of shippers, the communities and the general public served by defendants. Indeed, the report on its face justifies the conclusion that the Commission used no process of balancing respective interests and, in fact, did no "balancing." Instead it apparently was so impressed with the Rio Grande's "interest" in "bridge" traffic to be diverted from the Union Pacific, the rate reduction benefits that might accrue to a few "small dealers" who are less-than-carload receivers located on that line, and with the pretended desire of a few shippers located on the Union Pacific for the same rates via the Rio Grande they have via the Union Pacific so they could use the Rio Grande in "retaliation" and as a "competitive weapon" against the Union Pacific when they may feel so disposed, that it lost sight of all others concerned in the "public in-[fol. 2528] terest" aspects of the case.

The record shows that a total of 60 witnesses testified for the Rio Grande, including 50 witnesses of whom some are shippers and others are commission men who merely buy and sell, but who do not own the commodities or bear freight charges or concern themselves with routes over which the traffic moves. The record shows that a total of 134 witnesses testified for the Union Pacific and other defendants, including 85 actual shippers and some 35 additional witnesses who testified for the defendants on behalf of intervening state commissions, chambers of commerce and other organizations representing very large groups of individual shippers and others interested generally in transportation services and for the economic welfare of the communities served by the Union Pacific. Appendix A to Union Pacific's Exceptions and Brief is a complete list, with record references of the 134 witnesses who testified in behalf of defendants.

Among other points to be mentioned later, the testimony of these witnesses shows that the *present routes are adequate to reach all markets* and that *service over those routes is efficient and satisfactory;* that as shippers *they have had no occasion to request or suggest through routes and joint rates via the Rio Grande;* that the Rio Grande route is not and would not be used by them because *it would require longer time and additional interchanges in transit;* that the Rio Grande tried to persuade them to support its case; and that diversion of any substantial volume of traffic from the Union Pacific would jeopardize and deteriorate the service they receive.

[fol. 2529] There is no reason why the testimony of the large number of witnesses who testified for the Union Pacific and other defendants should not be accepted at full face value equally as the Commission has accepted the testimony of witnesses supporting the Rio Grande. The contrast in treatment of the Rio Grande's testimony and that of the Union Pacific and other defendants, as reflected in the report itself, is shocking. The report shows that in dealing with the Rio Grande's shipper testimony, the Commission selected individual shippers and devoted paragraphs of emphasis to their particular situations as individuals or as groups shipping similar commodities (Sheets

34-45a). However, in disposing of testimony of shipper and other witnesses for the Union Pacific and other defendants, the report says on Sheet 51, "It is not practicable to deal with all of this evidence in detail, but the testimony and position of the parties have been considered," apparently intending to leave those who may read the report with the conclusion that defendants' shipper and public testimony was so lacking in substance, merit or credibility as to justify no place, space or discussion in the text of the report and that only the Rio Grande's testimony deserved full exposure and discussion in the report.

Such inequality of treatment of Union Pacific testimony and facts ignores entirely the fact that shipper witnesses who testified for the Union Pacific actually ship or receive a total of approximately 136,000 carloads of commodities annually, whereas the record indicates that witnesses who testified for the Rio Grande ship or receive approximately 28,000 carloads annually. The tenuous, vague and speculative possible prospective use that the witnesses selected [fol. 2530] from the Rio Grande's procured witnesses would make of the joint rates via that line resolves into simple monetary benefits such shippers might derive from the difference between the combination rates and the joint rates, but the Commission nevertheless gives such testimony full weight and credibility while it gives no weight or effect to the testimony of Union Pacific shippers and receivers of 136,000 carloads annually of the same kind and types of traffic handled by the Rio Grande's shipper witnesses, to and from the same producing and marketing areas, whose testimony shows beyond question that the shippers and receivers of that far greater volume of traffic have experienced throughout the years none of the alleged handicaps claimed by Rio Grande's witnesses because of the lack of joint rates via that line with the Union Pacific to and from the Northwest, and that the absence of such joint rates has presented no restriction or difficulty in the distribution of their commodities or in reaching adequate market areas freely. The statement on Sheet 51 that the opposition of this large number of Union Pacific witnesses arises from their fear of "assumed effects of the diversion from the Union Pacific of the full amount, or a very large

portion, of the traffic estimated by the Rio Grande as the potential traffic" that it seeks in this case is wholly erroneous and indicates a thoroughly unrealistic conception of the facts and circumstances that should govern the decision in the case.

We submit that it is entirely incredible that in their years of transactions the 85 Union Pacific shippers and receivers of approximately 186,000 carloads of traffic annually of the same general type and character of traffic [fol. 2531] shipped and received by the Rio Grande's shipper witnesses handling some 28,000 carloads annually, could have escaped experiencing or realizing any handicaps or inadequacies in the Union Pacific's routes or experiencing and realizing any desire or need for routes and joint rates via the Rio Grande that might have been experienced or realized by the Rio Grande's shipper witnesses.

Many statements and findings in the report would lead the judges of a Court or any other reader of the report having no knowledge of the testimony, to a wholly erroneous and incorrect impression of the preponderance of the evidence of record. For example, the statement on Sheets 42-42a that "Idaho producers" of fruits and vegetables "find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City" obviously is intended to have readers of the report believe that *all* "Idaho producers" testified to that effect.

The truth is that about 10 "Idaho producers" and shippers who testified for the Rio Grande ship and receive approximately 10,000 carloads annually of fruits and vegetables and their shipments go to all markets in the 48 states and to Canada, South Pacific, South America, Cuba, South Africa and other points (R. 334).

The record further shows that the 37 "Idaho producers" and shippers of fruits and vegetables who testified for the Union Pacific ship and receive annually over 60,000 carloads of these products and all of them stated that the lack of joint rates between the Union Pacific and the Rio Grande had never handicapped or interfered with free and wide dis- [fol. 2532] tribution of their fruits and vegetables.

Another example of such misleading, improper and in-

correct statement is the following on Sheet 60 of the report:

> "The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities."

By that statement, the Commission would have a Court and other readers of the report believe that *all shippers* in the originating area testified to that effect. The facts are that no shipper from that area made such statement; that no shipper of butter, eggs, frozen poultry, frozen foods and dried beans from that area submitted any testimony; that only two livestock shippers and about 10 fruit and vegetable shippers from that area testified—*not* that they were "debarred from effective competition" but that (regardless of section 15(4)), they desired all routing restrictions and "gateways" removed, including Ogden via the Rio Grande.

The further and controlling facts are that 5 witnesses from the State Commissions of Montana, Oregon and Washington, some 37 shippers of fruits and vegetables and 29 shippers of livestock, most of them were from the originating area, and numerous shippers of other commodities testified most emphatically that the lack of through routes and joint rates via the Rio Grande presented no handicap, obstruction to or disadvantage in their distribution to markets throughout the United States (see Union Pacific [fol. 2533] Exceptions and Brief, pp. 320-472, and Appendix A thereto).

The report further is misleading and erroneous in making it appear that Rio Grande shipper testimony is not only of substance and unquestionable credibility, but also that it is far more voluminous than it is in reality. For example, in speaking of livestock on Sheet 87, the report refers to needs of "A number of producers in the northwest area," but it then shows that the Rio Grande witnesses from the "northwest" who testified about livestock were from a small locality in southeastern Idaho, and the record shows there were not "a number" but *only two* (R. 686 and

719). Not one livestock witness from the vast area of the Northwest except those two, testified for the Rio Grande. In fact, even with its propaganda campaign, the Rio Grande was able to procure only two shipper witnesses out of all the multitudes in Oregon, Washington and Montana. These were W. S. Miller representing a canning factory at Milton, Oregon (R. 754), who said that "the strongest argument" he has for the joint rates is that "it would give us another route in the event storm areas would develop along the Union Pacific" (R. 767), and R. E. Titus who actually was not a shipper but was an executive of a forest products association who stated that no one could tell whether the members of that association would use the Rio Grande's route, but that he favored the joint rates via that line because he thought such action "necessary to carry out the national transportation policy" (R. 286, 292).

The Commission quite apparently gave no weight whatever to the fact that the Rio Grande's shipper testimony [fol. 2534] was admittedly procured by agitation, persuasion and other methods, nor to the fact that none of those shippers have filed complaints or otherwise made any efforts to have the joint rates established, nor to the fact that the only "need" in this case is the Rio Grande's need for additional revenues from traffic it expects to obtain if it succeeds in compelling a reduction in the rates to the level of the joint rates, nor to the fact that the only use any shipper indicated he might possibly make of the joint rates would be to exercise reconsigning and transit privileges or stop to partially unload less-than-carload shipments moving at carload rates on the Rio Grande.

The implication (Sheets 33, 42-43) that there are substantial markets at points on the Rio Grande to be "tried" or for the actual sale of substantial quantities of carloads of any commodities, is negatived by the very clear demonstration that the "small dealers" along the Rio Grande are able to handle only less-than-carload quantities (Sheets 34, 36a). It is further negatived by the fact that, excepting Denver, Salt Lake City, Provo and Ogden, all of which are served by the Union Pacific, of the 52 stations or points on the main line of the Rio Grande between Ogden and Den-

ver, according to the official 1940 census, four points had no population, one point had 1; 14 points had less than 50; 20 points had less than 100; 31 points had less than 500; 37 points had less than 1,000; 11 points had more than 2,000 and only 3 points had a population of more than 5,000. The record shows no need for joint rates to enable a car from Chicago to partly unload at Pueblo, Colorado Springs, Grand Junction or Price and further movement via the Rio Grande to Boise. The illustration (Sheet 33) is purely hypothetical.

[fol. 2535] In appraising the shipper testimony procured by the Rio Grande, the Commission ignored the fact established of record and discussed elsewhere in this petition, that no shipper has felt sufficient need or desire for the through routes and joint rates sought by the Rio Grande in this case to complain to the Commission, to state commissions or to the Union Pacific. Since this is the Rio Grande's complaint and even though it procured some shippers to testify, the situation in reality is like that in *El Paso Chamber of Commerce* v. *A., T. & S. F. Ry. Co.*, 92 I. C. C. 75, wherein joint rates were sought, and the Commission observed at page 78 that "The Pecos Valley shippers, who pay the freight charges, are not here complaining * * *."

The Commission should have given weight to the obvious fact that the very nature of its shipper testimony, such reasons as they stated, and even their language are but a reflection of the Rio Grande's campaign of agitation and accusation. Each of those shipper witnesses has been misled by the Rio Grande to believe that in this case he, like the Rio Grande, has some possibility of financial gain. But these shippers located on the Union Pacific, fail to realize that, unlike the Rio Grande, which has everything to gain and nothing to lose in this case, they have nothing to gain but additional longer and less efficient routes, and could in the future lose a great deal, because with substantially decreased revenues, the inevitable result would be curtailment of their service, higher rates and abandonment of many of the branch lines that Union Pacific now operates.

[fol. 2536] On Sheets 28-29, in its discussion of the

amount of traffic that might be diverted to the Rio Grande, the Commission concludes as follows:

> "Whatever the amount, it would be the result mainly of (a) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (b) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it."

This conclusion squarely contradicts and refutes the ultimate finding that the through routes and joint rates are "necessary or desirable in the public interest," and calls for dismissal of the complaint. Certainly the routes and rates are not "necessary" or "needed" to provide adequate, and more efficient, or more economic transportation if shippers who have pretended such need must be induced by solicitation and persuasion to use the Rio Grande as a "bridge route" or to use transit privileges on that line in connection with bridge traffic. The statement that growth of traffic "over" that line in the 1934-1948 period indicates the interest of shippers and receivers on the Rio Grande [fol. 2537] in development of transit activities on that line refutes any "necessity" for the joint rates to increase "bridge" traffic via the Rio Grande, for the "growth of traffic" has taken place in the absence of the sought through routes and joint rates. The growth of traffic "over" that line without the joint rates also demonstrates that the report is misleading and erroneous in placing the emphasis it does on the importance of transit activities on that line. Transit activities on that line is an obvious

"smoke-screen" of the Rio Grande and its supporting shippers to disguise the Rio Grande's real purpose to enhance its financial position by diverting bridge traffic from the Union Pacific.

In view of the Commission's definite and positive assurance, indicated in the finding last quoted, that very little traffic, if any, will be diverted to the Rio Grande* unless it

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*The assurance of the Commission and of witnesses and counsel for the Rio Grande sounds a note of pessimism in exact reverse of the enthusiastic optimism of President McCarthy as to what he expects to gain under the Commission's order. The following is from the San Francisco Examiner, March 10, 1953:

"Through Traffic

RIO GRANDE RAILROAD 1953 OUTLOOK BRIGHTER

By Charles St. Peter

Financial Editor

"President Wilson McCarthy of the Denver, Rio Grande & Western Railroad, a distant relative of the Western Pacific Railroad, was in town yesterday feeling very pleased with the way things are going on his line.

"For one thing, the Rio Grande had one of the lowest transportation ratios in the business in the month of January. That is the ratio of operating expenses to operating revenues. It stood at 61.56 per cent for January, an enviable figure. He estimates it was 65 per cent in February.

"With revenues running slightly ahead of last year, and operating expenses well under control, 1953 has the makings of a good year for the pioneer western road.

PROFITS FATTENED.

"The large amount of through traffic hauled by the DRG&W helps fatten the profit column, McCarthy ex-

can succeed in soliciting, persuading and inducing shippers [fol. 2538] to use its line as a bridge route and for transit purposes, it necessarily follows that there is no actual, genuine or real "public interest" in having the through routes and joint rates established. If, as the Commission has found, a substantial amount of the traffic will not flow naturally to the Rio Grande because of recognition by shippers of "some actual necessity or some compelling reason" for using that line for the traffic involved, then the routes and joint rates are not in the "public interest" [fol. 2539] *Jamestown, N. Y., C. of C.* v. *Jamestown W. & N. W. R. Co.*, 195 I. C. C. 289, 292

Despite its effort to minimize the amount of traffic that may be diverted to the Rio Grande, the validity of the Commission's order must depend on "necessity" and

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plained in an exclusive interview at the Clift Hotel. This is traffic originating at a connecting line at one end of the system and delivered to another connecting line at the other end. It requires no sorting, switching and short hauls so it is very profitable. Over half of the freight moved on the system is through traffic.

"The line stands to increase its traffic volume considerably if an Interstate Commerce Commission order on rates through the Ogden Gateway (Utah) stands.

"This would give Denver & Rio Grande an entree into the Pacific Northwest. For several years they have sought to get Union Pacific Railroad to grant them through rates on commodities moving over UP lines to and from the Pacific Northwest via the gateway. Union Pacific has posted a combination rate which is considerably higher than a through rate and has kept DRG&W pretty much out of the territory.

OPENED GATEWAY.

"The ICC order partially opened the gateway. It gave the road through rates on vegetables, fruits and livestock, said McCarthy. Among other things, it would get them into the big Idaho potato shipping market. Union Pacific is expected to contest the order, and the Rio Grande in turn will contest the contest. * * *"

"need" for the routes and joint rates which is the equivalent of a finding that the amount of such diversion will be "substantial"; otherwise, the order is frivolous and capricious.

We urge the Commission to reconsider and reverse its finding that through routes and joint rates via the Rio Grande on the commodities specified in the order are necessary and desirable in the public interest, in order to provide adequate and more economic transportation. In reappraising and reconsidering the evidence, we urge the Commission to take a fresh and realistic view of the question whether such vague, tenuous and speculative interest as it finds that Rio Grande shippers profess outweighs and overbalances the public interest evidence we have discussed above and justifies:

1. Taking substantial traffic and revenues amounting to several million dollars annually from the Union Pacific, the Chicago and North Western and the Wabash railroads.

2. Requiring over 200 miles of additional wasteful transportation at an estimated cost of $125.00 per car to move the same traffic between the same points it now moves over other railroads.

3. Subjecting employees of the Union Pacific, Chicago and North Western, Wabash railroads, and Union Pacific [fol. 2540] Coal Company to substantial losses in wages.

4. Subjecting cities, towns and communities served by the Union Pacific to substantial economic loss through reduction in its employees and payrolls.

5. Requiring loss of one or two days in transit and the addition of two more interchanges at an expense of some $10.00 or $20.00 per car per interchange.

6. Forcing traffic through the overtaxed Ogden terminal facilities, adding $9.26 per car to Union Pacific's share of expense in operating and maintaining those facilities, and delaying and substantially interfering with those terminal operations.

7. Short-hauling the 200-mile shorter, faster and direct route of Union Pacific by 1,000 miles.

8. Wasting at least two car days on every car routed via the Rio Grande.

9. Economic and transportation waste resulting from in-

creased idle and surplus transportation capacity which the Union Pacific now has to extent of 50 to 100 percent.

10. Economic loss and waste to shippers defendent on Union Pacific resulting from curtailments and retrenchments in train service and operations following loss of a substantial volume of traffic.

In its reconsideration of this point, we urge that the Commission keep in mind the principles laid down in de-
[fol. 2541] cisions of the Supreme Court and of this Commission.

In *Texas* v. *United States,* 292 U. S. 522, decided in 1934, the Court said at page 530 that the Act of 1920 "introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service" and that—

> "It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public."

In *N. Y. Central Securities Co.* v. *U. S.,* 287 U. S. 12, the Court, in discussing the purposes of the 1920 Act, said at page 23: "The public interest is served by economy and efficiency in operation" and at page 25 that the purpose of Congress in granting by that Act power to the Commission to do specified things in the public interest with the ultimate aim of insuring adequate transportation service, was directly related "to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, * * *." In *United States* v. *Louisiana,* 290 U. S. 70, the Court said at page 74 that one of the purposes of the Transportation Act of 1920 was to prevent "cut-throat" competition. In one of its earlier interpretations of the 1920 Act, *Texas & Pac. Ry.* v. *Gulf, etc., Ry.,* 270 U. S. 266, at page 277, the Court said:

> "By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that *preservation of the earning capacity; and conservation of the financial resources, of individual carriers is a matter* [fol. 2542] *of national concern;* that the property em-

ployed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; *that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss.* See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. *The Act sought, among other things, to avert such losses.*" (Emphasis supplied.)

Recent decisions of the Commission, summarized in *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331, emphasize the avoidance of wasteful and uneconomic transportation in authorizing short hauling:

"Section 15(4) of the act has been in its present form since September 18, 1940. In several proceedings since then, reasonable through routes which short haul one or more carriers have been prescribed. See *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I. C. C. 333 (sustained in *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588); *Allied Mills, Inc., of Virginia* v. *Alton R. Co.*, 272 I. C. C. 49; *California Milling Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 269 I. C. C. 725 and 274 I. C. C. 120. In the first two of those proceedings it appeared that the routes required to be established eliminated expensive out-of-line hauls, and in the latter proceeding the routes required were shown to be shorter in many instances than those which had existed. In all of those proceedings the routes required were at least as economical, from the standpoint of the [fol. 2543] carriers as well as of the shippers, as were most of the existing routes.

"The instant situation differs. All of the routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation. In addition,

> because of the circumstances here present, we believe a requirement that the routes sought be established would not 'give reasonable preference' to the originating carrier." (pp. 333-334.)

In that case the Commission said on page 332 that from origin to ultimate destination the circuity of the proposed routes was only 8 per cent, but it nevertheless held their establishment would "encourage wasteful and uneconomic transportation" and refused to require the sought routes.

In *Mine Timbers from Missouri to Illinois*, 191 I. C. C. 41, the Commission said at page 43:

> "We have heretofore pointed out that the unnecessary hauling of traffic over unduly circuitous routes at the same rates that are applicable over direct routes results in wasteful transportation. See *Brick and Clay Products in the South*, 113 I. C. C. 380."

IX.

The Order Violates the Requirement in Section 15(4) That Reasonable Preference Be Given the Originating Carrier.

One of the mandates in section 15(4) to the Commission in compelling through routes that short haul a carrier is—

> "That in prescribing through routes the Commission shall, so far as is consistent with the public in-
> [fol. 2544] terest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

We find nothing in the report to indicate that the Commission gave the slightest recognition to this statutory mandate. Yet on Sheet 27 the report shows that 101,476 carloads originated in 1948 on the Union Pacific in the "excluded territory." Of the total traffic, 157,762 carloads, originated and terminated on the Union Pacific that year, 46 per cent originated or terminated on 2,913 miles of Union Pacific branch lines in that territory. Of the eastbound tonnage for that year, 50,349 carloads or 43

per cent of the total were products of agriculture, including those specified in the order (R. 1161). The report shows on Sheets 46 and 47 that the 2,913 miles of branch lines constitutes more than 50 per cent of the total of 5,606 miles of line of the Union Pacific in that territory and that Union Pacific has invested over $600,000,000 in the routes that would be affected by the diversion of the traffic to the Rio Grande. The unusual proportion of branch line mileage was obviously constructed for the purpose of developing and originating traffic in this essentially agricultural area for the purpose of obtaining a long main-line haul. The eastbound commodities which would be diverted to the Rio Grande under the Commission's order are agricultural products moving under sub-normal and depressed rates (R. 1238), and it is inescapable that the effect of such diversion will necessarily tend toward curtailment of service generally and abandonment of the feeder branch lines on which 46 per cent of the total traffic originates and terminates.

[fol. 2545] These facts demonstrate the reasons for and the fairness of the legislative mandate requiring the Commission in compelling through routes that short haul a carrier to give reasonable preference to the carrier that originates the traffic. The necessity of revenues from main-line movement of such branch-line traffic is too plain for argument unless the Commission is sympathetic to a policy that potentially forces branch line abandonments and weakening of the Union Pacific financially. Such necessity for revenues and continued maintenance of branch lines clearly must be weighed and balanced against the pretended desire of a few shippers for routes which would divert the traffic to the Rio Grande so they may reconsign or take advantage of transit privileges while the traffic is on that line. The Commission has clearly ignored the mandate to give reasonable preference to the Union Pacific in these circumstances, but instead has based its order entirely upon the pretended desire of the few shippers who supported the Rio Grande. It has departed from the rule laid down by the Supreme Court that "both interests should be considered and a fair balance found," *Pennsylvania R. Co.* v. *U. S.*, 323 U. S. 588, 593.

X.

The Commission Misconstrues and Misapplies Section 15(4) by Finding That the Shorter Union Pacific Route Should Be Short Hauled Because Routes Not More Than 37 Per Cent Longer Could Be Made Via the Rio Grande and Because the Union Pacific Would Still Obtain a Substantial Haul After Being Short Hauled 925 Miles.

Although as shown by the map on page 3 of Exhibit 25, any route that could be made over the Rio Grande for the traffic it seeks would be from 33 to 219 miles longer than [fol. 2546] Union Pacific routes and the Commission admits on Sheet 15 that "the Union Pacific routes are shorter," the report nevertheless places great emphasis on the fact that other routes embracing the Rio Grande could be made for movement of the traffic which would be longer than Union Pacific routes but would leave the Union Pacific a "substantial haul" even though it would be short hauled by 925 miles by diverting the traffic to the Rio Grande routes (Sheets 19-21). Such routes via the Rio Grande to numerous destinations are set forth in the table on Sheet 20 of the report which compares respective distances and circuities with Union Pacific routes.

It is apparent that the Commission is of the erroneous view that, although it is without power to compel routes that short haul the Union Pacific when its route is shorter and not unreasonably long, it may short haul the Union Pacific if it is able to find routes via the Rio Grande that it considers to be not unreasonably long or unduly circuitous, and would leave the Union Pacific a "substantial" haul after short hauling it 925 miles. If this is not the Commission's view, then it is impossible to see any purpose in the long and detailed discussions of the numerous possible routes, and speculation as to length of hauls the Union Pacific would have even though short hauled (Sheets 19-22a).

This is exactly the reverse of the condition under which section 15(4)(a) permits short hauling. A carrier may be short hauled if routes via *its own line* are unreasonably long but it may not be short hauled merely because, as in this case, the Commission is able to find routes it [fol. 2547] considers not unreasonably long that could be

established via another line. In other words, the statute permits short hauling the unreasonably long route, but it most certainly does not permit short hauling the shorter route by using another which is considered not unreasonably long. Nor does section 15(4) permit short hauling a carrier because it would still have a substantial haul left.

The report also erroneously places great emphasis on the fact that the Union Pacific participates in through routes and joint rates with certain other carriers in the Northwest which short haul the Union Pacific, some of which routes are longer than some of the routes that could be made via the Rio Grande through Ogden. But such participation with other lines by the Union Pacific in through routes and joint rates is not one of the conditions specified in section 15(4) under which the Commission may compel routes that short haul the Union Pacific. The Union Pacific is entitled to its long haul in every instance except those specified in section 15(4).

The Commission has no authority to chop up the line of the Union Pacific and piece the portions together with the Rio Grande line in an attempt to establish routes via the latter line which may not be unduly long. This is exactly what the Supreme Court has told the Commission it cannot do. *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269.

[fol. 2548]

XI.

The Commission Erred in Finding That the Additional Traffic That Will Be Diverted to the Rio Grande Under the Order Can Be Interchanged Through Present Facilities at Ogden or Salt Lake City Without Serious Detriment to Operating Efficiency, and in Ignoring Obstacles of Present Interchange at Denver.

The Commission devotes two paragraphs on Sheets 48-49 to this subject, contents itself by stating that the interchange facilities at Ogden were able to handle 892,058 more cars in the peak war year 1945 than were handled in 1949, and proceeds to the conclusion on Sheet 64 that the facilities can handle the additional traffic that would be diverted to the Rio Grande "without serious detriment to the operating efficiency of the railroads concerned."

The report fails completely to portray any real concep-

tion of the physical difficulties and circumstances shown of record concerning those facilities. For example, the report says "several instances of delays to trains" and "considerable congestion and delay to trains" are shown. Such minimization of the difficulties at the Ogden interchange is clearly unwarranted, arbitrary and erroneous in the light of uncontradicted testimony of record.

Witness Bradford of the Rio Grande admitted that there was "the handicap of slow service through the Ogden terminal" (R. 1685) and suggested that interchange through that terminal between the Union Pacific and the Rio Grande could be improved if Union Pacific would "block" trains properly at Pocatello and "with some change in the present methods of handling at Ogden" (R. 1686). Mr. Bradford further admitted that the operation [fol. 2549] of the Rio Grande over its track which crosses the Depot Company's tracks at the point marked "A" on the map, Exhibit 14, "presents a problem" (R. 16[illegible]) which he said was not insurmountable and then went on to describe efforts that were made in 1942 "in trying to solve some of the problems that have vexed us at Ogden for some time." He further described suggested plans discussed in 1943 and thereafter to relieve conditions in the Ogden terminal, which plans necessitated consolidation of facilities, a new entrance via a new track and an expenditure by the Depot Company of large sums to readjust its facilities to accommodate the Rio Grande, which, of course, would bear no part of the expense (R. 1692-1693). He concluded that if the business the Rio Grande might get as a result of this case proved more than the present Ogden terminal facilities could handle "then it is apparent that the necessary improvements could be made in the present yard plan" (R. 1694). In other words, Mr. Bradford admits the inadequacy of the Ogden terminal facilities, but would solve the difficulty by having the Depot Company, Southern Pacific and Union Pacific spend prohibitive sums of money to accommodate the interchange of traffic which the Rio Grande wishes to divert from the Union Pacific.

The error of the finding concerning the adequacy of the Ogden terminal facilities is fully demonstrated by witness Edens, Superintendent of the Depot Company (R.

861), and by witness Lynch, who discussed the conditions in that terminal and (R. 826) introduced an aerial photograph of the Ogden yard (page 10, Ex. 12).

[fol. 2550] The Rio Grande is not a party to the contract covering the ownership, maintenance and operation of the Ogden terminal facilities and makes no use of those facilities for freight trains. Rio Grande does not bear in any manner any part of the expense of operating the freight yard zone which it is necessary to use in interchanging traffic with it (R. 865).

Because the limited facilities of the terminal freight yards had become so congested with war traffic as to practically paralyze operations, the Depot Company constructed the East Yard (left end of the map, Exhibit 14) at a cost of $864,000 during the period 1942-1945. This yard is more than 2 miles from the main freight yard facilities and it was constructed to handle overflow traffic from the main freight yards. The East Yard was constructed that distance from the main yards "because it was found that, due to the industrial development around the Ogden terminal facilities, there was no room for expansion in a location adjoining the main freight yards" (R. 868-869 and 1081-1082).

The Rio Grande train yard is just west of the north end of the Depot Company's yard and the main line tracks of the Southern Pacific (point marked "X", Ex. 14); Rio Grande's roundhouse, car shops, freight house tracks for interchange with Bamberger Electric and a number of industries served by the Rio Grande are located east of the Depot Company's yard. Connecting its train yard on the west with the facilities to the east, the Rio Grande has a track which crosses at right angles, at point marked "A" on Exhibit 14, four combination switching and freight yard lead tracks in the north end of the Depot Company's yard [fol. 2551] which are used by the Southern Pacific and Union Pacific freight trains for entrance and exit, also the main line tracks used by the Southern Pacific for all of its eastbound and westbound passenger trains.

At the Rio Grande's crossing at point "A" there is a crossing protection with signals normally set clear for Depot Company's switch movements. The Rio Grande con-

trols this device and when its crews want to cross Depot Company's tracks they unlock the control box and set the signals at stop against all Depot Company's switching and Union Pacific's freight trains from and to the north and all Southern Pacific's freight and passenger trains arriving and departing (R. 869-870). This Rio Grande crossing is "a bottleneck within a bottleneck" (R. 875-878).

Instead of "several instances of delays to trains" as stated in the report, the undisputed evidence is that interruptions from Rio Grande movements over this crossing averaged 17 per day, blocking terminal and main track operations an average of 7 minutes per movement. These interferences are "frequent" and cause "serious delays" to both terminal and main-line train operation of the Union Pacific and Southern Pacific, some of which are from 30 to 60 minutes, causing 100-car freight trains to make emergency stops and to stand by while the Rio Grande performs its switching (R. 875-878).

The Ogden terminal facilities having been designed and constructed for the purpose of interchanging eastbound and westbound traffic between the Union Pacific and Southern Pacific, a fact which the report ignores, it requires no [fol. 2552] fertility of imagination to comprehend the awkwardness and the complications involved in interchanging the northbound and southbound traffic which the Rio Grande seeks in this case. The Rio Grande traffic could not escape passing through these terminal facilities as the Union Pacific's tracks do not directly connect with those of the Rio Grande at Ogden (R. 870).

Both witnesses Lynch and Edens testified without contradiction that the Ogden yard facilities are inadequate for expeditious and efficient handling any more traffic than they now handle, and even now they frequently incur serious delays (R. 826, 880).

Their testimony was confirmed by that of witness W. F. Kirk, who, as Agent appointed by this Commission, had the duty of directing the movement of traffic over the western lines during World War II. He said the Ogden and Salt Lake terminals gave him his "greatest headaches" while acting in that capacity (R. 1294).

The Commission recognizes that the additional traffic

that would be diverted under its order to the Rio Grande could not be handled through the Ogden terminal without "detriment to the operating efficiency" of the Union Pacific and Southern Pacific, but consoles itself with the thought that the detriment would not be "serious".

In the face of the undisputed testimony of Vice President Lynch and of the Superintendent of the Ogden terminal, and even the admissions of Rio Grande Vice President [fol. 2553] Bradford, we submit that the Commission's conclusions are not supported by, but are contrary to the evidence concerning the inability of those facilities reasonably to handle additional traffic that would be diverted to the Rio Grande under the Commission's order.

For reasons not disclosed in the report and not warranted in the record, the Commission injects Salt Lake City as, presumably, a sort of "alternative" interchange point for the traffic the Rio Grande wants from the Union Pacific. This goes beyond the complaint which demands the traffic at Ogden and Denver and not at Salt Lake City. Witness Bradford of the Rio Grande stated definitely and positively that the traffic sought by that line would be interchanged through the Ogden facilities (R. 196), and all of the testimony concerning interchange at the west end of the Rio Grande related solely to Ogden. There is no testimony directed toward the adequacy and capacity of facilities for interchanging at Salt Lake City the traffic the Rio Grande seeks, and the suggestion by the Commission of that point for alternative interchange is unwarranted and without basis in the record.

Concerning the unsatisfactory interchange at Denver, Mr. Lynch of the Union Pacific testified (R. 828):

> "Our experience in the interchange of traffic with the D&RGW at Denver is not all satisfactory. Serious delays are encountered, because the Rio Grande is either unable to handle the traffic promptly or employs inefficient methods of handling it. As will be shown by another witness, cars we have interchanged to the Rio Grande at Denver have been delayed by that line as long as 117 hours."

[fol. 2554] Witness Hanson showed that intolerable delays were incurred by westbound Union Pacific traffic rerouted during the 1949 blizzards via the Rio Grande at Denver, where Union Pacific held a large number of carloads waiting until the Rio Grande was able to handle them (R. 990). He illustrated these delays at Denver by showing that some 200 of the 1,092 westbound carloads that were rerouted via the Rio Grande at Denver were delayed from a minimum of 19 hours and 20 minutes to a maximum of 116 hours and 10 minutes because of the Rio Grande's inability to accept the cars and move them out of Denver (R. 991).

Similar demonstrations of the Rio Grande's inability to handle any considerably heavier volume of traffic were shown by witness Hanson at times other than the storm period. For example, on October 17, 1948, the Rio Grande's interchange tracks at Denver had been blocked for 48 hours and the Union Pacific was holding empty refrigerator cars for delivery to the Rio Grande. Another example of the limited capacity of the Rio Grande to accept traffic at Denver is indicated in the following wire from its Superintendent of Transportation to the Union Pacific on September 1, 1949 (R. 992):

> "Due to yard conditions at Denver account heavy movement of peach crop will be unable to accept any empties at Denver for 48 hours, except will take delivery of refrigerators from Union Pacific over Northwestern terminal and refrigerators from CB&Q at North Yard. Cannot accept any over Denver interchanges. Appreciate your holding up all other empties until we can get perishables cleaned up."

[fol. 2555] Witness Hanson pointed out that these were instances where the Rio Grande was handling their normal flow of traffic (R. 992) and while the 1949 congestion was during the movement of the Colorado peach crop, it nevertheless demonstrates conclusively that the Rio Grande has not equipped itself to handle efficiently even its own annual and recurring peak load of traffic to say nothing of any sizeable portion of the traffic it seeks in this case.

The Commission should find that there is no evidence

of record concerning interchange facilities at Salt Lake City and that such facilities at Ogden and Denver are shown to be inadequate for handling the traffic that its order would divert to the Rio Grande.

XII.

The Commission Erred in Failing to Hold That It Has Power to Consider the Probable Effect Any Substantial Diversion of Traffic and Revenues From the Union Pacific to the Rio Grande Would Have on Union Pacific, Its Employees and Its Service on Cities, Towns and Communities Served by It, and in Failing to Find That the Probable Diversion Under Its Order Would Impair and Deteriorate Service Required by Shippers and a Large Segment of the Commerce of the Country and the National Defense.

The Commission apparently dismisses from consideration the probable detrimental effects of a substantial diversion of traffic and revenues to the Rio Grande on Union Pacific employees and on the main line and branch line service of that line and upon numerous cities, towns and communities served by and largely dependent upon it. At Sheet 53, it seems content to say that there is no specific provision in section 15(3) or (4) requiring that conditions for protection of Union Pacific employees be imposed in connection with the requirement of through routes and [fol. 2556] joint rates via the Rio Grande and at Sheet 54 it disposes of the detrimental effects of diversion of traffic and revenues to the Rio Grande by simply saying it is impossible to say definitely how much traffic might be so diverted.

Such summary disposition of these significant and closely related matters is clearly erroneous. That the "public interest" includes probable detrimental effects of the order upon railroad employees, regardless of the absence of a specific provision in section 15(3) for that purpose, was settled in *United States v. Lowden*, 308 U. S. 225, and the following quotation from page 240 of the decision in that case makes it plain that all of the probable detrimental consequences urged in our Exception No. XII, sub-topic 10, beginning at page 268 of our Exceptions to the Proposed

Report, are to be considered in connection with and as a part of "public interest":

> "If we are right in our conclusion that the statute is a permissible regulation of interstate commerce, the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, as well as the public at large, is undoubted."

The data we have laid before the Commission clearly shows that every carload of freight diverted to the Rio Grande will deprive the Union Pacific of an average estimated revenue loss of about $315.00 per car and the fact that no one can determine "definitely" the amount of such diversion is no excuse for the Commission to dismiss the probable detrimental effects from consideration or to de-
[fol. 2557] part from its own decisions and others in which public detriment from infliction of potential injury by competing carriers by Commission action was decisive. *Chicago, B. & Q. R. Co., Control*, 271 I. C. C. 63, 165; *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266; *Western Pac. R. Co.*, v *Northwestern Pac. R. Co.*, 191 I. C. C. 127; and *Pacific Intermountain Exp. Co.—Control and Purchase*, 57 M. C. C. 341.

It is now estimated by Union Pacific officers that, based on 1951 tonnage of the commodities on which the order would require through routes and joint rates, the estimated possible revenue loss would amount to more than $12,000,000 per year or nearly one-fourth of the total possible loss of $49,880,000 annually if the Commission had given the Rio Grande its full demands. In that proportion to total possible losses the order would result in possible annual losses of about $1,000,000 to the Chicago and North Western and $400,000 to the Wabash (Sheets 50, 52). If only 15% or 20% of this possible loss resulted from diversion of traffic to the Rio Grande, the financial loss to those three defendants would approximate $3,000,000 per year which they would suffer solely to satisfy the Rio Grande's desire to improve its financial condition by taking "bridge" traffic from the Union Pacific and other defendants. If the required through routes and joint rates are needed and are

"in the public interest" as the Commission has found, then under the decisions cited above, the same "public interest" requires that the Commission give consideration to the probable detrimental effects as well as alleged benefits and determine "whether the probable benefits overbalance the probable injuries," *Chicago, B. & Q. R. Co. Control*, 27[1] [fol. 2558] I. C. C. 63, 146. In *Chicago, R. I. & G. Ry. Co. Trustees Lease*, 233 I. C. C. 21, 25, the Commission itself emphatically held that:

> "* * * the welfare of the employees affected is one of the matters of public interest which we must consider in proceedings under section 5(4), * * *"

before there was any specific requirement in that section that the welfare of employees be considered, and this holding was sustained by the Supreme Court in *U. S. v. Lowden*, 308 U. S. 225.

XIII.

There Is No Evidence to Support or Justify the Finding That Maintenance by the Union Pacific of Joint Rates With the Bamberger Railroad South of Ogden While Refusing to Participate in Like Rates With the Rio Grande Discriminates Against the Latter in Violation of Section 3(4) of the Act.

On Sheet 64 the report correctly states that to support a finding of discrimination under section 3(4) it must be shown that transportation conditions over the route alleged to be discriminated against are no less favorable than over the route said to be preferred, and proceeds to find that the Union Pacific discriminates against the Rio Grande by refusing joint rates with it while maintaining them with the Bamberger Railroad. There is no evidence concerning or comparing transportation conditions on the Bamberger's electric line between Ogden and Salt Lake City with conditions on the Rio Grande. In the absence of such testimony, the Commission attempts to support its finding by saying "there is no apparent reason" why similar arrangements should not apply with the Rio Grande and that "it appears that there is no important dissimilarity" between transportation conditions on the two roads.

[fol. 2559] The burden was on the Rio Grande to submit evidence proving similarity of transportation conditions. Its failure to do so cannot be overcome by what is *not shown* or what might *appear* to the Commission outside the record. The Commission is without power to make a finding without evidence, and an order based on such finding is void. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88; *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541.

The Bamberger Railroad operates between Ogden and Salt Lake City, Utah, and serves intermediate points, most of which are also served by both the Rio Grande and Union Pacific. Union Pacific's joint rates and through routes with the Bamberger have been in effect many years, and its relations with that line are the same as those between the Bamberger and the Rio Grande. While the Union Pacific does have through single-factor rates between stations in the Northwest and stations in Utah south of Ogden to and including Salt Lake City, which will apply via Ogden with the Bamberger but not with the Rio Grande, *the Rio Grande also has through single-factor rates between local stations on its line in Colorado and stations in Utah, Salt Lake City and north to and including Ogden, which apply via Salt Lake City with the Bamberger but not with the Union Pacific.* To grant the Rio Grande's demand for joint rates via Ogden with the Union Pacific would be to give it the opportunity to take traffic that Union Pacific adequately and efficiently handles while the Rio Grande refuses to be as liberal with the Union Pacific to and from its local territory in Colorado. The Bamberger now handles some business with the Union Pacific that the Rio [fol. 2560] Grande could handle, and it probably also handles some business with the Rio Grande that the Union Pacific could handle. Publication of this new route via the Union Pacific with the Rio Grande is not necessary so far as the public is concerned, but it would establish a new route that could and probably would deprive the Bamberger of some business it now handles.

XIV

The Commission Is Requested to Reconsider and Reverse Its Refusal to Receive in Evidence Defendants' Offer of

Proof Concern- the Rio Grande's Propaganda Campaign to Procure Shipper Witnesses, the Radio Broadcasts and the So-Called Editorial by Senator Edwin C. Johnson.

By its orders of June 5 and October 2, 1950, the Commission has refused to receive our offer of proof portraying the activities indulged in by the Rio Grande in its propaganda campaign to solicit and procure shipper witnesses to help it win its case (R. 1116). The Commission has denied the Union Pacific's petition dated February 20, 1951, to reopen the record and receive in evidence the speech of Senator Edwin C. Johnson brodcast January 27, and February 2, 1951, over Radio Station KFEL at Denver, Colorado, and it has also denied our petition dated November 20, 1952, to reopen the record and receive a so-called editorial by Senator Edwin C. Johnson published in the Wichita Beacon, October 28, 1952, and to dismiss the complaint for reasons cited in that petition.

Without restating the reasons previously presented, we request that the Commission reconsider its refusal to receive the described offers of evidence and that for the reasons set forth in our respective petitions and upon au- [fol. 2561] thority of decisions cited in the Union Pacific's Memorandum of Additional Authorities, etc., October 5, 1951, that it reverse its previous rulings and receive the proffered material in evidence and give it the weight to which our citations show it is entitled in connection with the decision that should be made in this case.

Conclusion

For the foregoing reasons, it is requested that this proceeding be reopened for reargument and reconsideration and that the Commission's findings and conclusions hereinabove discussed be reversed and the complaint dismissed. It is further requested that the effective date of the order be postponed pending such reargument and reconsideration.

Rspectfully submitted, Roland J. Lehman, Carson L. Taylor, Eugene S. Davis, L. E. Torinus, Jr., Conrad Olson, F. O. Steadry, Elmer B. Collins, (s) Elmer B. Collins, Attorneys for Above-named Defendants.

Due Date:

April 15, 1953

1416 Dodge Street
Omaha 2, Nebraska

[fol. 2562] Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing by first-class mail a copy thereof properly addressed to each other party.

Dated at Omaha, Nebraska, this 13th day of April, 1953.

(s) Elmer B. Collins, Elmer B. Collins, Of Counsel.

[fol. 2563] At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 10th Day of June, A. D. 1953.

No. 30297

The Denver and Rio Grande Western Railroad Company

v.

Union Pacific Railroad Company et al.

Order Denying Petitions for Reconsideration and Modification of Findings and Order—June 15, 1953

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petitions for reconsideration, and for modification of the findings and order filed by complainant, defendants and various interveners, and the several replies to the petitions, and it appearing that none of the petitions presents matters that are materially different from those of record in the proceeding, or offers new or additional contentions or arguments that

vary substantially from those previously advanced and considered by the Commission in disposing of the issues:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

George W. Laird, Acting Secretary.

(Seal)

(6255-4)

Key to Location of Briefs in this Microcard Set.

Brief No.	Docket No.	Title of Brief	Microcard Index No.
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2	117,118,119	Brief of Appellant, The Denver and Rio Grande Western Railroad Co., in Opposition to Motion to Affirm in Nos. 117 and 119 and to Reverse in No. 118	5537
3	117-119,332-334	Consolidated Opening Brief of the Denver and Rio Grande Western Railroad Co.	5537-40
4	"	Consolidated Reply Brief of the Denver and Rio Grande Western Railroad Company	5540-42
5	117 - 119	Motion to Affirm in Nos. 117 and 119 and Reverse in No. 118	5542-43
6	117-119, 332-334	Supplemental Memorandum for Union Pacific Railroad Company, et al., Washington Public Service Commission, et al.	5543
7	118	Statement as to Jurisdiction	5544-5547
8	117-118, 332-334	Brief for Above Named Appellants	5547-5551
9	117-118, 332-334	Brief for Above Named Appellants (Wash. Public Serv. Comm., et al.)	5551-53
10	"	Reply Brief for Union Pacific Railroad Company, et al., Washington Public Service Commission, et al.	5553-54
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12	117-119, 332-334	Brief for the United States of America, the Interstate Commerce Commission , and the Secretary of Agriculture	5555-56

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16	"	Brief of Appellee in Opposition to Motion to Reverse	5559
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IN THE

Supreme Court of the United States

October Term, 1954

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

STATEMENT AS TO JURISDICTION

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IN THE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

STATEMENT AS TO JURISDICTION

In compliance with Rule 13 of the Rules of the Supreme Court of the United States, as revised, The Denver & Rio Grande Western Railroad Company submits herewith its statement particularly disclosing the basis on which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court entered in this cause December 20, 1954. Notice of appeal was filed in the District Court February 3, 1955. As the

result of a motion duly filed in the District Court by appellant, the time within which the appellant may docket the cause and file the record thereof with the Clerk of the Supreme Court of the United States was by order of the District Court entered March 22, 1955, enlarged from April 4, 1955 to June 1, 1955.

OPINIONS BELOW

The opinion of the District Court for the District of Nebraska, Omaha Division, is not yet reported. A copy is attached hereto as Appendix A. A copy of the Final Judgment of the District Court entered December 20, 1954 is also attached as Appendix B. The decision of the Interstate Commerce Commission is reported as *Denver and R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611.

JURISDICTION

The jurisdiction of the Supreme Court to review the decision in this case is conferred by 28 U.S.C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of this court to review the judgment on direct appeal. *Pennsylvania R. Co.* v. *United States*, 323 U.S. 588, *U. S.* v. *Capital Transit Co.*, 325 U.S. 357, *New York* v. *United States*, 331 U.S. 284 and *United States* v. *Great Northern Railway*, 343 U.S. 562.

QUESTIONS PRESENTED

The questions presented arise out of the decision and order of the Interstate Commerce Commission of January 12, 1953, which on the complaint of the appellant, herein called the Rio Grande, and others prescribed joint through rates and competitive through routes applicable to certain commodities (287 I.C.C. 611 at p. 659) via the Ogden, Utah gateway and the Rio Grande between points on the Union Pacific Railroad Company in Washington, Oregon, Idaho, Northern Utah and Montana and points such as Denver, Colorado Springs and Pueblo,

Colo., and points east thereof on the lines of the defendant railroads. The Commission found that joint competitive through rates and through routes on the traffic covered by its order are necessary and desirable in the public interest to provide adequate and more economic transportation and that the existing rates and charges on the same traffic are and for the future will be unjust and unreasonable and unduly prejudicial to shippers and receivers using or desiring to use the routes of the Rio Grande and unduly preferential of shippers and receivers using the routes of the Union Pacific Railroad Company and other defendants. The Commission also found that in the maintenance by the Union Pacific Railroad and other rail defendants of joint rates between the northwest area described, on the one hand, and points on the Bamberger Railroad Company south of Ogden, on the other hand, while refusing to maintain like rates to and from the same points on the line of the appellant south of Ogden subjects the appellant to discrimination in violation of Section 3(4) of the Interstate Commerce Act.

Upon the suit of the Union Pacific Railroad Company and certain other railroads filed in the District Court, the validity of the order of the Commission was assailed on various grounds. That court sustained the order of the Commission in part and overruled it in part. All of the principal parties have filed notices of appeal.

The questions presented on this appeal are:

1. Whether the District Court erred in overruling certain findings of fact and conclusions of law of the Interstate Commerce Commission.

2. Whether the court erred in holding in paragraph III of its Conclusions of Law that there is no substantial evidence to support the findings and order of the Commission which requires the establishment of through joint rates and competitive through routes between the Union Pacific Railroad Company, the Rio Grande and other railroads with respect to the commodities and the areas spec-

ified in the order, and in substituting its own judgment and findings by which it modified the scope of the relief granted by the Commission by restricting the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande, accorded in-transit privileges at such points, and are later reshipped to points beyond the Rio Grande.

3. Whether the court erred in interpreting and in applying to the evidence of the case, the provisions of Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act. (49 U.S.C. §§ 3(1), 15(3) and 15(4))

4. Whether the court erred in setting aside, in part, the order of the Commission, which requires the Union Pacific Railroad Company and the other defendants before the Commission to participate with the Rio Grande in the maintenance of through competitive routes and joint rates on the commodities described by the Commission to and from the involved northwest area and the designated area east of Denver, Pueblo and Trinidad, Colorado, whether or not transit privileges are used on the Rio Grande.

5. Whether the court erred in ruling, contrary to the findings of the Commission and the evidence, that on the commodities specified by the Commission the through competitive routes and joint rates required by its order via the Rio Grande to and from the northwest area and a designated area east of Denver, Pueblo and Trinidad, Colorado, are not needed in order to provide adequate and more economic transportation.

6. Whether the court erred in overruling the findings and conclusions of the Commission that as to the commodities specified by the Commission the existing transportation services and facilities via the Union Pacific routes were inadequate and uneconomical between the northwest area and points of destination in a designated area east of Denver, Pueblo and Trinidad, and in substituting its own

finding that the existing transportation services and facilities via the Union Pacific routes are adequate.

7. Whether the court erred in overruling the findings and conclusions of the Commission that the existing rates assailed are and will be unjust and unreasonable, and unduly prejudicial to shippers and receivers using or desiring to use the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes in and to the extent that such rates exceed, or may exceed, the joint rates maintained on the specified commodities from and to the same points over the Union Pacific routes.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended 49 U.S.C. § 1, *et seq.*, are attached hereto as Appendix C.

STATEMENT

The Questions Presented are Substantial

Both the appellant and the appellees claim, *inter alia*, that the District Court misinterpreted three important provisions of the Interstate Commerce Act, namely, paragraphs (1), (3) and (4) of Section 15 and paragraph (1) of Section 3, and the appellees have filed a notice of appeal.

Section 3(1) prohibits and makes unlawful for any carrier to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic in any respect whatsoever; or to subject any of the persons, localities, districts, territories or traffic described to any undue or unreasonable prejudice or disadvantage.

Section 15(1) gives the Commission the power to prescribe just, reasonable, fair and non-discriminatory through rates, including joint rates, when existing rates are found

by it to be unjust, unfair, unreasonable, unduly prejudicial or otherwise in violation of the Act. Section 15(3) provides that the Commission may and shall whenever deemed by it to be necessary or desirable in the public interest prescribe joint through rates and through routes. Section 15(4) provides that in establishing a through route the Commission shall not require any railroad, without its consent, to take less than the entire length of its railroad, except (a) as provided in Section 3 of the Act, (b) where the Commission finds that a through route is needed in order to provide adequate, and more efficient or more economic transportation, and (c) under four other exceptions not here pertinent.

In *Pennsylvania R. Co.* v. *United States,* 323 U.S. 588, 593, the court sustained the decision of the Commission in *Stickell* v. *Alton R. Co.,* 255 I.C.C. 333, 343, where the Commission held that the exception in clause (b) of Section 15(4) means adequate and more efficient and more economic transportation from the public or the shippers' standpoint as well as from that of the carriers. The existence of any of the exceptions nullifies the limitation on the power of the Commission to prescribe through routes.

The questions presented are substantial and important and should be resolved by this court. The opinion of the court below is in certain respects novel and unprecedented since that court not only misconceived the law and the evidence, but acted upon the erroneous assumption that it had the right to prescribe, and did prescribe, its own conception of the appropriate remedy to be applied as a substitute for the remedy the Commission prescribed to cure the wrongs the Commission found to exist.

The District Court Erred in Applying the Pertinent Statutes and in Substituting Its Judgment for That of the Commission on Factual Questions

In weighing the evidence the District Court allowed the incidental question of stopping cars in transit for various purposes, a common commercial practice among shippers and railroads, to control the category and in doing so be-

came confused as to the main issue in the case, which is the need in the public interest for joint through rates and competitive through routes in connection with the traffic and between the areas involved. The testimony before the Commission, as set forth at pages 132-146 of the transcript of the hearing and in Section H of Exhibit 3, shows 22 types of in-transit privileges provided by the Rio Grande in its published tariffs and by other railroads. These privileges permit the reconsignment and the stopping of freight in transit for the purpose of loading or partly unloading, for feeding and grazing of livestock and for merchandising and milling grain, etc. The evidence shows that these and other transit arrangements are commercially ineffective unless they can be used under joint competitive through rates applicable to the commodity from the point of its origin to its ultimate destination.

More than 27 shippers and organizations of shippers, representing over 300,000 persons, intervened as complainants in the complaint of the Rio Grande before the Commission. The testimony of numerous witnesses convinced the Commission of the public need for the joint rates and competitive through routes, the existence of which would not only enable these shippers to reach markets not now available to them, but to enjoy the benefit of competitive transit privileges in route when needed.

The Rio Grande is a common carrier by railroad engaged in the transportation of persons and property in intrastate, interstate and foreign commerce and operates approximately 2,400 miles of railroad in Colorado, New Mexico and Utah. It has interchange track connections and interchanges traffic with the Union Pacific Railroad at Denver, Colo., and at Ogden, Salt Lake City and Provo, Utah, with the Southern Pacific at Ogden and with the Western Pacific at Salt Lake City. It also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo, Colo., with the Santa Fe, the Colorado and Southern, and the Missouri Pacific

Railroad; at Walsenburg, Colo., with the Colorado and Southern, and at Trinidad, Colo., with the Santa Fe and the Colorado and Southern.

In August 1949 the Rio Grande filed a complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroad defendants. The complaint alleged, *inter alia*, that the failure and the refusal of the Union Pacific Railroad and some 216 other defendant railroads to establish joint competitive through rates and routes via the Ogden gateway and the Rio Grande on interstate and foreign freight traffic in carload or trainload quantities in any quantity lots, or in less-than-carload lots, resulted in through rates which are excessive, unjust, unreasonable and discriminatory in violation of Section 1, Section 3 and Section 15 of the Interstate Commerce Act, and was and is contrary to the national transportation policy since it deprives the public, shippers, and the Rio Grande of the use of available and reasonable through routes and rail facilities at just, reasonable and non-discriminatory through joint rates which were and are necessary and desirable in the public interest.

At Ogden, Utah, looking west, the Union Pacific has two diverging lines of railroad which are in the shape of a large "Y". One line extends in a southwesterly direction through Salt Lake City and Provo, Utah, and Las Vegas, Nev., to Los Angeles, Calif. Between points on that line and Colorado common points and points east thereof, the Union Pacific maintains competitive joint through rates and through routes on all freight traffic in connection with the Rio Grande via Salt Lake City and Ogden. The other line of the Union Pacific extends in a northwesterly direction from Ogden through Utah, Idaho, Oregon, Washington and Montana. This is the territory to and from which the Union Pacific and its connections refuse to maintain joint rates on freight traffic via the routes of the Rio Grande through Ogden or Salt Lake City, except on sheep and goats from that territory to a few points and except on lumber to Canon City, Colo.

The Rio Grande intervened in the court below as a defendant and filed an answer in which it stated that it waived no rights but reserved the right to assail in a court of competent jurisdiction the validity of that part of the order of the Interstate Commerce Commission which imposed territorial and other restrictions in respect to the joint competitive rates prescribed and failed and refused to prescribe the joint rates and competitive routes on all of the traffic and between all of the points involved in the complaint of the Rio Grande before the Commission. Such a suit was later filed by the Rio Grande in the District Court of the United States for the District of Colorado, Civil Action No. 4492, and was decided by that court of three judges on January 13, 1955, not yet reported. That court held that the part of the order of the Commission which denied the relief sought by the Rio Grande is contrary to the evidence, arbitrary and contrary to the applicable statutes. It remanded the case to the Commission. On April 22, 1955, the District Court of Colorado denied the motions of the Union Pacific and others for a new trial or for reconsideration. No notice of appeal has as yet been filed by any of the parties to that suit.

In paragraph I of the Conclusions of Law in the opinion of the Court below, it held that the evidence supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities, in carloads, originating in the northwest area

> "consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities, the order of the Commission is valid under Sections 1, 15(3) and 15(4) of the Act and does not violate the direction of Section 15(4) that reasonable preferences be given the carrier which originates the traffic."

A similar finding was made by the Court below in paragraph II of its Conclusions of Law as to shipments of marble and granite monuments, in carloads, from points in Vermont and Georgia to points of final destination in the Northwest territory, which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area.

In paragraph III of the Conclusions of Law the District Court held that:—

> "To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad, said order is not valid, because Sec. 15(4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destination specified in this paragraph, that factual premise, essential to the validity of the order, is lacking."

As shown, the District Court found that the order of the Commission is invalid as applied to the traffic not originally consigned to points on the Rio Grande west of Denver, Pueblo and Trinidad, accorded transit privileges at such points, and then reshipped to points east of Denver, Pueblo and Trinidad. While the Commission was rightly influenced by the evidence which showed a wide spread demand for the existing transit privileges pro-

vided by the Rio Grande and its rail connections, it understood, what the court below did not, that what the shippers needed to make the existing transit privileges commercially available is the establishment of joint competitive rates via the routes of the Rio Grande. It is obvious that the District Court in attempting to weigh the significance of the evidence, came to the erroneous conclusion that the joint rates prescribed by the Commission are necessary only as to traffic accorded transit privileges at points on the Rio Grande.

The court not only erred in weighing the evidence as against the finding of the Commission, but misconceived the issues and the evidence. To illustrate: The evidence shows that a shipment of a carload of vegetables from a point on the Union Pacific in Idaho or Oregon might be initially consigned to Wichita, Kans., or to other points beyond the line of the Rio Grande and the shipper might find while the car is rolling or after it reached its billed destination that a better price could be obtained for the vegetables at say, Kansas City or Tulsa, Okla., or at Pueblo or Denver. Under the decision of the District Court the joint rates, the need of which is the pivotal issue, would not apply to shipments handled as described in the example.

The District Court appears to have been influenced in its conclusion by a misconception of *Central R. Co. of New Jersey* v. *United States*, 257 U.S. 247. In that case joint rail rates on lumber were maintained by southern and northern railroads from points in the south to points in the north, including points in New Jersey. Railroads in the south provided creosoting in transit privileges at points on their lines, but the Central Railroad of New Jersey and other northern railroads did not provide for creosoting in transit at Newark, N. J., or at other northern points. Upon the complaint of the American Creosoting Company, 61 I.C.C. 145, the Commission found that the refusal of the northern railroads to provide creosoting in

transit at Newark was unduly prejudicial to the complainant. This court reversed the Commission on the premise that transit at particular points is a local matter to be determined by the interested railroads and that the Commission misconstrued Section 3(1) of the Interstate Commerce Act in finding that the refusal of the northern railroads to provide for creosoting in transit at Newark was unduly prejudicial. But this court did not hold that the undue prejudice and undue preference prohibited by Section 3(1) of the Interstate Commerce Act is a local matter as the District Court seems to have assumed. See in this connection *New York* v. *United States*, 331 U.S. 284, 342. The Supreme Court merely held that the granting or the withholding of transit at a particular point is a local matter to be determined by the railroad. This court also held that under the provisions of Section 1 of the Interstate Commerce Act, which require railroads to maintain just and reasonable rates, charges, regulations and practices, the Commission has the power to decide under that section whether a particular transit privilege should be granted. (257 U.S., at p. 257)

The District Court also erred in holding in paragraph III of its Conclusions of Law that the evidence does not justify the finding by the Commission that the establishment of the joint rates and through routes prescribed are necessary and desirable in the public interest to provide adequate and more economic transportation on the traffic involved and therefore that the order is invalid under the limitation on the Commission's power to prescribe through routes in Section 15(4) of the Interstate Commerce Act. In that conclusion the court disregarded the fact that the limitation on the power to prescribe through routes is subject to six exceptions which provide that the limitation does not apply:—

1. Where the defendant railroad or railroads consent to take less than their long haul,

2. Where discrimination and undue prejudice is found under Section 3 of the Interstate Commerce Act,

3. Where one of the carriers in the route is a water carrier,

4. Where the route or routes sought to be protected by railroads are unreasonably long compared with another practical through route which could otherwise be established,

5. Where the Commission finds that the through route proposed or sought "is needed in order to provide adequate, and more efficient or more economic transportation,"

6. Where the Commission requires the establishment of temporary through routes as necessary and desirable in the public interest because of a shortage of equipment, congestion of traffic or other emergency found by the Commission to exist.

Since the Commission found that the rates assailed by the Rio Grande were unduly prejudicial and preferential in violation of Section 3 of the Interstate Commerce Act and that through routes and joint rates are necessary and desirable in the public interest to provide adequate and more economic transportation, it is clear that if either of these findings are supported by evidence the limitation on its power to prescribe through routes does not apply. They are supported by the evidence. The District Court did not give any real consideration to the exceptions to the limitation on the power of the Commission to prescribe through routes. This court should keep in mind that the limitation in Section 15(4) relates to the power of the Commission to prescribe through routes and not to its power to prescribe reasonable and non-discriminatory through rates. This is clearly indicated by the decisions of this court in *Virginian Railway Company* v. *United States*, 272 U.S. 658, 667, and *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U.S. 768, 776. Since these decisions are to the same effect, it will be sufficient to quote from the decision in the *Virginian Rail-*

way case in which, at page 667, this court said apropos of this question:

> "Section 15(3) does not require that the Commission must make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law."

In dealing with the question of undue prejudice and preference prohibited by Section 3(1) of the Interstate Commerce Act, the District Court misconceived the facts on which the Commission based its findings, as well as the scope and purpose of that section and of the issues before the Commission for decision. The District Court said in part apropos of Section 3(1) that: (p. 11a)

> "If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3(1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15(4) heretofore considered. But the prejudice and preference prohibited by Sec. 3(1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3(1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3(1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion."

The District Court failed to grasp that while the Union Pacific was the principal defendant in the complaint before the Commission there were over 200 other rail defendants with which the Union Pacific participated in joint competitive rates and through routes and that the joint rates sought by the Rio Grande are the same in amount as the rates generally maintained by the railroad defendants

on transcontinental and other traffic eastbound and westbound. Although the Union Pacific is the principal source and cause of the unjust discrimination claimed and found to exist by the Commission, it is not the only source. On the contrary, the other railroad defendants before the Commission act and acted in conjunction with the Union Pacific and are in *pari delicto* since the undue prejudice and preference found by the Commission could not exist unless they participated with the Union Pacific in maintaining the preferential joint competitive rates via various junction points with each other, while refusing to maintain similar joint competitive rates in connection with the considered traffic between the areas involved via Ogden or Salt Lake City and the Rio Grande.

The language of Section 3(1) and the numerous decisions of this Commission and of the courts make it clear that a finding of undue prejudice and preference as between two or more origin or destination groups or as to territories or regions may be validly made if the defendants serve both groups either directly or indirectly through connecting lines. This doctrine was pointedly recognized by this court in *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U.S. 136, 38 S. Ct. 49, 52, where the court stated that localities and shippers require protection as much from combination of connecting carriers as from a single carrier whose rails reach them. See also *Texas & P. Ry. Co.* v. *United States*, 289 U.S. 627, 650; *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U.S. 287; *State of New York* v. *United States*, 331 U.S. 284, 345, and *Ayrshire Collieries Corporation* v. *United States*, 335 U.S. 573, 593. In the *State of New York* case, 331 U.S., at page 341, this court said: "A proper finding of unlawful discrimination under Section 3(1) thus enables the Commission not only to direct the carriers to eliminate the practice but also, pursuant to Section 15(1) to prescribe the alternative," and at page 342 this court also said:

> "Once the Commission has found rates to be 'unjust or unreasonable or unjustly discriminatory or unduly

preferential or prejudicial,' it is empowered to prescribe rates which are 'just and reasonable' or 'the maximum or minimum, or maximum and minimum, to be charged * * *.' § 15(1)"

The Commission made such findings in this case.

CONCLUSION

For the reasons stated, we urge that jurisdiction be noted and that the judgment of the court below be reversed in respect to the issues and questions raised by this appeal.

Respectfully submitted,

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PROOF OF SERVICE

I, ROBERT E. QUIRK, one of the attorneys for the appellant, The Denver & Rio Grande Western Railroad Company, and a member of the bar of the Supreme Court of the United States, hereby certify that on May 31, 1955, I served copies of the foregoing Statement As To Jurisdiction on the several parties as follows:

1. On the United States by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

E. Riggs McConnell, Esq.
Special Assistant to the Attorney General
Department of Justice
Washington 25, D. C.

and with air-mail postage prepaid to:

Donald R. Ross, Esq.
United States Attorney
306 Post Office Building
Omaha, Nebraska

2. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Henry B. Cockrum, Esq.
Acting Associate Solicitor
United States Department of Agriculture
Washington 25, D. C.

Charles W. Bucy, Esq.
Associate Solicitor
United States Department of Agriculture
Washington 25, D. C.

3. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Edward M. Reidy, Esq.
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

4. On the Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis and Omaha Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company, plaintiffs; and employee organization of Union Pacific Railroad Company, intervening

plaintiffs; by mailing a copy in a duly addressed envelope with air-mail postage prepaid to their respective attorneys of record, as follows:

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Washington, D. C.

5. On the State of Nebraska and the Nebraska State Railroad Commission; Washington Public Service Commission; Public Utilities Commission of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization of Wyoming; Public Service Commission of Wyoming; Public Service Commission of Utah; National Livestock Producers Association, by mailing a copy in a duly addressed envelope with air-mail postage prepaid to their respective attorneys of record, as follows:

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ROBERT E. QUIRK
Attorney for Appellant,
The Denver & Rio Grande
Western Railroad Company.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

UNION PACIFIC RAILROAD COMPANY, ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*.

Before JOHNSEN and COLLET, Circuit Judges, and DELEHANT, District Judge.

Opinion

COLLET, *Circuit Judge*.

The Denver and Rio Grande Western Railroad Company, hereafter referred to as the Rio Grande, filed a complaint with the Interstate Commerce Commission requesting the Commission to order the Union Pacific Railroad Company (and other lines comprising the Union Pacific System, together with connecting carriers comprising, in all, 221 railroads, which will be referred to as the Union Pacific) to file joint rates over through routes with the Rio Grande for the transportation of freight from and to certain areas. The Commission granted the request as to certain types of freight with substantial territorial limitations. The [Union Pacific] Union Pacific brings this action to enjoin and set aside the order. A reference to a map of the United States will be helpful in understanding the following summarization of the facts.

The northern terminus of the Rio Grande is Ogden, Utah. From Ogden it runs south through Salt Lake City and Provo, Utah, then southeasterly and east, entering Colorado at about the south central part of that state, thence east and somewhat north through the central part of Colorado to Dotsero, west of Denver, where it divides, one branch going on east to Denver, the other swinging south and east to

Pueblo, Colorado. From Denver the Rio Grande line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serve territory in southern Utah, northwestern New Mexico, and southern Colorado. These latter lines are not of special importance in this action. At Denver, Colorado Springs, Pueblo, and Trinidad the Rio Grande maintains joint rates and through routes with lines other than the Union Pacific to destinations east and south of those points.

The Union Pacific (including connecting lines which were defendants in the I.C.C. proceedings) serves the greater part of the east, south and midwestern sections of the United States. Traffic involved in this action from those sections flowing westward over the Union Pacific and connecting lines converges at Denver and Cheyenne, Wyoming, then moves westwardly across the southern part of Wyoming to Ogden and Salt Lake City. One of its lines runs from Salt Lake City south to Provo, Utah, thence southwest to Los Angeles, California.

The Union Pacific also serves the northwestern part of the United States, including that part of Utah north of Ogden, Idaho, Montana, Oregon, and Washington. It is traffic from and to this latter territory, referred to herein as the northwest territory or area, which is the principal subject of the pesent controversy.

The Union Pacific maintains joint rates and through routes over its lines and with many connecting carriers from and to the northwest territory through Ogden and Salt Lake City, Cheyenne, Denver, and points east and south to the Atlantic Seaboard and the Gulf of Mexico. For a comparatively short distance, from Ogden through Salt Lake City to Provo, where the Los Angeles line swings southwest, the Union Pacific and the Rio Grande parallel and serve some common points. To and from these points, joint rates and through routes are maintained by the Union Pacific over its lines with the northwest territory and the area east of Cheyenne and Denver served by the Union Pacific. The Union Pacific does not maintain joint through rates with the Rio Grande, with certain exceptions not material in this proceeding. Freight moving from the north-

west territory to points in southern Utah and Colorado on the Rio Grande, finally destined to points east of the eastern termini of the Rio Grande, moves on the combination rate, consisting of the total of the Union Pacific rate to Ogden via Union Pacific and the Rio Grande rate from Ogden via Rio Grande to points on the Rio Grande. The same is true of the rates on shipments from points east of Denver to those points on the Rio Grande finally destined to the northwest territory. This combination of rates, or combination rate, as it is called, is considerably higher than a joint through rate. Freight moving from and to the northwest territory from and to all points east of Denver[1] served by the Union Pacific and connecting carriers has the benefit of joint through rates via Union Pacific, with accompanying in-transit privileges en route, while freight originating on the Union Pacific in the northwest territory and moving to the area east of Denver, which is routed

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[1] "All points east of Denver" will be used as the designation of all points included in the Commission's order to or from which through routes and joint rates were ordered established by the Union Pacific with the Rio Grande. The Commission's order in this respect was: (287 I.C.C. 611, 659)

"We conclude:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, then immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

over the Rio Grande, pays the combination rate without in-transit privileges at points on the Rio Grande. The result is that practically all of the long-haul traffic originating in the northwest area and destined to the area east of Denver goes over the Union Pacific all the way on the lower joint and through rates. Since the formal record before the Commission consists of 1,957 pages of testimony, 57 exhibits and 74 verified statements, the foregoing statement is obviously only a salient outline of the basis for the Rio Grande's complaint. For a complete understanding of the intricacies of the case by one unfamiliar with the record, it will be necessary to refer to the extensive report and order of the Commission reported in 287 I.C.C. 611.

The Commission ordered the establishment of through routes and joint rates via Ogden or Salt Lake City by the Union Pacific with the Rio Grande for the transportation of granite and marble monuments in carloads from points of origin in Vermont and Georgia to destinations in the northwest area, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from points of origin in the northwest territory to destinations "east of Denver". The order is based upon three primary basic findings. First, that the through routes and joint rates are necessary and desirable in the public interest, in order to provide *adequate and more economic transportation;* second, that the existing joint rates maintained by the Union Pacific are and will be *unjust and unreasonable and unduly prejudicial* to shippers and receivers of freight using or desiring to use the Rio Grande and *unduly preferential to shippers and receivers of freight using the Union Pacific;* third, that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad between the northwest area and points on the Bamberger line between Ogden and Salt Lake City, while refusing to establish joint rates with the Rio Grande to and from the same points on the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Sect. 3(4) of the Interstate Commerce Commission Act. Finding No. 1 has heretofore been quoted in footnote

1. Findings 2 and 3 are set out below.[2] To understand the import of these findings it is necessary to explain the factual theory upon which they are based.

First as to the finding that the rates ordered are necessary and desirable to provide adequate and more economic transportation. Located along the route of the Rio Grande, between Ogden on the west and Denver, Pueblo and Trinidad on the eastern termini, are a number of livestock feeders. Some of these are ranchers who graze and feed cattle and sheep. Others are operators of beet sugar plants which produce livestock feed as a by-product and feed the by-product to livestock. These livestock feeders buy cattle and sheep in the northwest area, which are ultimately destined for the market, and ship them to points on the Rio Grande for feeding. Many of the principal livestock markets of the United States are located east of Denver. Without joint through rates with in-transit privileges which would permit these livestock feeders to ship from the northwest area to the feeding points on the Rio Grande and then reship on joint through rates to points east of Denver, Pueblo, and Trinidad, they are at a substantial rate disadvantage with similar livestock feeders following the same practice who are located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific, who reship to points east of Denver. They are also at a sub-

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[2] "2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act."

287 I.C.C. 611, 659-660.

stantial rate disadvantage in purchasing livestock in the northwest area in competition with buyers located on the Union Pacific lines west of Denver and Cheyenne who have the benefit of joint through rates and in-transit privileges over the Union Pacific.

Also located on the Rio Grande are a number of industries which clean, package, process, freeze, and store fresh fruits, vegetables, poultry, food products, butter, eggs, and beans, and ship them on east to points beyond Denver, Pueblo, and Trinidad. These industries are at a comparable rate disadvantage, without in-transit privileges, as livestock feeders, and for the same reasons.

Monument dealers obtaining or shipping granite and marble from Vermont and Georgia are unable to ship full carloads to the northwest territory and have the rate advantage of partially unloading cars at intermediate points on the Rio Grande under in-transit privileges of through routes and joint rates which are available at points located on the Union Pacific.

This finding, which is finding No. 1 quoted in the footnote, is held by the Commission to justify ordering the establishment of through routes and joint rates under Secs. 15 (3) and 15 (4). Title 49 U.S.C.A. Secs. 15 (3) and 15 (4). Sec. 15 (3) empowers the Commission to establish through routes and joint rates when necessary or desirable in the public interest,[3] but Sec. 15 (4) prohibits the Commission from ordering the establishment of through routes by a carrier under Sec. 15 (3) without the carrier's consent if the result would be to short-haul that carrier unless, as provided by Sec. 15 (4), the Commission finds that the through route is needed in order to provide (1) *adequate*, and (2) *more efficient* or *more economic* transportation.[4]

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[3] "Sec. 15 (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by carriers subject to this part, * * *."

[4] "Sec. 15 (4) In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire

The Commission accurately states the legal effect of Sec. 15 (4) in its report (Denver & R.G.W. R. Co. v. Union Pac. R. Co., 287 I.C.C. 611) at page 655 as follows:

> "Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the 'through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation.' Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In Pennsylvania R. Co. v. United States, 323 U.S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in D. A. Stickell & Sons, Inc., v. Alton R. Co., supra, the supreme court said that the expressions 'more efficient or more economic' transportation, as used in section 15 (4), 'may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found.' These latter considerations are not determinative, however, unless the existing routes can be found not to provide 'adequate' transportation.

'length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, * * * (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. * * *"

"In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests."

Was there evidence to support the finding of inadequacy? Only in the event there was inadequacy of transportation can the question of efficiency or economy be reached. It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order. There is no evidence to support a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are inadequate. There is abundant support, however, for the finding that the service is inadequate to patrons of the Rio Grande, located on the Rio Grande between Ogden on the west and Denver, Pueblo, and Trinidad on the east (not served by the Union Pacific between Ogden and Provo), who do not have in-transit privileges with respect to freight moving from the northwest area which is to be reshipped to points east of Denver, if under the law the lack of in-transit privileges may constitute "inadequacy." That is also true as to the service to shippers of marble and granite from Vermont and Georgia to initial points on the Rio Grande who need the in-transit privileges of partial unloading or processing en route, incident to reshipment to final destination points between Ogden in the northwest area. The foregoing inadequacies are based upon the premise that the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15 (4). The Union Pacific vigorously contends that it does not. This question presents the crux of this case. If, as the Union Pacific contends in-transit rights and privileges are matters over which the Commission under the law has no control, the existence or granting of which is subject only to managerial discretion of the carrier, and relate only to economy or efficiency of transportation to the exclusion of considerations of ade-

quacy of transportation, then the lack of in-transit privileges will not suffice as a proper basis for ordering "adequate" transportation. The argument is made in effect that since the transportation facilities are now available over the Union Pacific and the Rio Grande on the higher combination rates, the present nonexistence of in-transit privileges relates only to the cost or economy of transportation. Reference is made to excerpts from opinions which it is said support the conclusion that the Commission may not under its general regulatory power force a carrier to provide or establish in-transit privileges. The question has many ramifications. We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. Pennsylvania R. Co., et al. v. United States, et al., 323 U.S. 588, 54 F. Supp. 381.

But the inadequacy established by the evidence does not extend to shipments from the northwest area to initial destinations east of Denver. The same is true of shipments of monuments from Vermont and Georgia to points of initial destination in the northwest territory. Transportation service is now adequate between those points. There is ample evidence to support the finding that the establishment of the through routes and joint rates between the northwest area and points on the Rio Grande (not also served by the Union Pacific between Ogden and Provo), as to shipments which require in-transit privileges at points on the Rio Grande for reshipment to points east of Denver, will result in more economical transportation. Differences in mileage and other comparative factors are for the Commission to weigh, evaluate and determine. Its ultimate factual conclusion may not be overturned when supported by the evidence. But, again, there is no evidence that the service is inadequate or that more economical transportation service will result with respect to ship-

ments from the northwest area to points between Ogden and Provo served by both the Union Pacific and the Rio Grande and to be reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established. The evidence therefore sustains the finding of inadequacy and the need for more economical transportation only as to (1) carload shipments of commodities embraced in the Commission's order from points in the northwest territory destined to points of final destination east of Denver which require in-transit privileges at points on the Rio Grande; (2) shipments of granite and marble monuments from Vermont and Georgia to final destinations in the northwest territory which require in-transit privileges at points on the Rio Grande not also served by the Union Pacific. If the order had been so limited to the evidence, it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15 (4).

The second finding, that the combination rates maintained by the Union Pacific and the Rio Grande are unduly prejudicial to shippers using or desiring to use the Rio Grande and unduly preferential to shippers and receivers using the Union Pacific to the extent they exceed the joint and through rates available to shippers located on the Union Pacific, is made for the purpose of bringing the order within the authorization of Sec. 3 (1). Title 49 U.S.C.A. Sec. 3 (1). That section is as follows:

> "Sec. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference

> or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The situation which this finding seeks to correct, simply stated, is that the shippers and receivers of the designated commodities located on the Rio Grande who do not have in-transit privileges and joint and through rates are at an economic disadvantage compared to shippers and receivers located on the route of the Union Pacific who do have joint and through rates and in-transit privileges.

If the prejudice and preference shown by the evidence falls within the prohibition of Section 3 (1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15 (4) heretofore considered. But the prejudice and preference prohibited by Sec. 3 (1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3 (1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3 (1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in Central R. Co. of New Jersey v. United States, 257 U.S. 247, was different, the purpose of Sec. 3 (1) was there stated as follows: (loc. cit. 259-260)

"What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose of scope of section 3."

If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3 (1) merely because a shipper entity described in Sec. 3 (1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15 (4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3 (1).

The third finding, heretofore quoted, to the effect that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad to and from points in the northwest area and points on the Bamberger line from Ogden to Salt Lake City, inclusive, while refusing to maintain joint rates with the Rio Grande on shipments from the northwest area to the points served by both the Rio Grande and the Bamberger Railroad from Ogden to Salt Lake City, inclusive, discriminates against the Rio Grande, is based on Sec. 3 (4), which is as follows:

"Sec. 3(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting lines in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier

subject to the provisions of this part or any common carrier by water subject to part III."

The Bamberger Railroad is an electric line operating only from Ogden to Salt Lake City, serving those cities and intermediate points. The Rio Grande serves all points served by the Bamberger. The criterion for determining unlawful discrimination under Sec. 3 (4) is stated by the Commission at page 658 of its order as follows:

> "A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred."

The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3 (4) clearly prohibits such discrimination. The Commission's order in this respect is valid under Sec. 3 (4).

Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the Rio Grande's case before the Commission. We do not find justification for serious consideration of that question.

Findings of Fact

I.

The findings of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points

of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points.

II.

The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.

III.

The record supports the Commission's finding that present transportation service for granite and marble monuments, in carloads, originating in Vermont and Georgia, consigned to initial destination points on the Rio Grande, requiring unloading and in-transit privileges for continued movement to points in the northwest territory, is inadequate and uneconomical and that the establishment of joint rates and through service is necessary in order to provide adequate and more economic transportation for such shipments.

IV.

The evidence supports the finding that as to designated items of traffic moving from the northwest area, shippers and receivers of freight located on the Rio Grande are at an economic disadvantage compared with shippers and receivers of freight from the northwest area who are located on the Union Pacific. But there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3 (1).

V.

The evidence supports the finding of the Commission, referred to and quoted herein as Finding 3, that unlawful discrimination prohibited by Sec. 3(4) is being practiced by the Union Pacific in refusing to establish through routes and joint rates with the Rio Grande comparable to those existing between the Union Pacific and the Bamberger Line on traffic moving from the northwest area to points served by both the Bamberger Line and the Rio Grande between Ogden and Salt Lake City.

Conclusions of Law

I.

The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4). The evidence therefore supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities in carloads originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities the order of the Commission is valid under Sees. 1, 15 (3), and 15 (4) of the Act and does not violate the direction of Sec. 15 (4) that reasonable preference be given the carrier which originates the traffic.

II.

The evidence supports the finding of the Commission that it is necessary, in order to provide adequate and more economic transportation of shipments of marble and granite monuments in carloads from points in Vermont and Georgia to points of final destination in the northwest territory, which require unloading and in-transit privileges at points

on the Rio Grande incident to the continuation of the shipment to the northwest area, that through routes and joint rates be established between the Union Pacific and the Rio Grande as to such shipments.

III.

To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad said order is not valid, because Sec. 15 (4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking.

IV.

To the extent the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande at Ogden on carload traffic moving from the northwest area to points between Ogden and Salt Lake City, inclusive, served by both the Rio Grande and the Bamberger line, the order is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act.

To the extent stated in the foregoing opinion, findings of fact, and conclusions of law, the order of the Commission will be enjoined. The cause is remanded to the Interstate

Commerce Commission for such further proceedings as it may deem appropriate, consistent herewith.

Copy
Filed
District of Nebraska
Oct. 22, 1954
Mary A. Mullen Clerk

JOHNSEN, *Circuit Judge*, dissenting.

The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute. The majority opinion upholds in part the result which the Commission has so reached.

What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is "perishable food articles". Here, as taken from its Report, are the manner and perspective of its approach to the question.

"Growers [of perishable food articles in Idaho, located on the Union Pacific] * * * market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon and Washington] need as many markets and outlets as possible."[1] 287 I.C.C. at page 642. To comprehend or evaluate that need, says the Commission, "it is necessary to consider the nature, extent and functioning of our intricate and far-flung commodity marketing system." P. 655.

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[1] It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a "bridge" line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles.

The importance, in our condition of growing population and national development, of having "a constantly expanding flow of diverse commodities" and "particularly articles of food" is emphasized. The comment is made that "A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible," and the truism is expressed that "Adequate transportation facilities and services are required for the proper functioning of the system." P. 656.

Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

1. "Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible.* This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities maybe avoided and that *as much flexibility as possible in the distribution process* be permitted." (Emphasis mine.) P. 656.

2. "A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities." In-transit privileges, "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit," are available at various points on the Union Pacific to through-shipper on the basis of the joint rates applicable over that route, and similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these additional facilities would be able to enjoy them on the same basis as those on the Union Pacific. Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union Pacific, "The shippers in the originating area involved in this complaint with respect

to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities." P. 656.

3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them "from effective participation in the widespread system developed for the marketing of such commodities." In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given "as many routes as possible" and "as much flexibility as possible in the distribution process", because otherwise they will be "debarred from effective participation in * * * the marketing of such commodities."

In other words, whenever it is possible physically and practicably to open up a new or an additional through route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15 (4) of the Act, 49 U.S.C.A. § 15 (a), where the element of short-hauling another carrier is involved, as it is here, that such an added through-route must also provide "more efficient or more economic transportation" than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15 (3) to prescribe joint rates and pointing out that

joint rates necessarily in the situation will provide "more economic transportation", since they obviously are lower than the previous combination rates.

I have grave legal doubt whether the Commission's power to establish joint rates under section 15 (3) has any relationship to the term "more economic transportation" in section 15 (4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term "more economic transportation" in section 15 (4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportational comparison from the standpoint of the interests of both the public and the carriers—and that the Commission's power to establish joint rates under section 15 (3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15 (4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term "more economic transportation" under section 15 (4), in the addition of another carrier's route as a mere "bridge" line for such traffic. If that be not so, then there is not any situation in which the Commission can not make a finding of "more economic transportation" for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to "as many routes as possible" and "as much flexibility as possible in the distribution process," so that on this basis, and without regard to any other factor, any existing through route can be called inadequate,

because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and further such new route can be declared to provide "more economic transportation", because by placing joint rates in effect the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15 (4) entirely, as affording them any protection whatsoever against deprivation of their long hauls.

Here the opening up of a through route over the Rio Grande as a bridge carrier for the transcontinental freight involved will deprive the Union Pacific of a long haul of 975 miles upon such traffic as the Rio Grande is able to solicit away from it. But this is not the sole purport or effect of the Commission's order. If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessary will reduce the cost of using the new through route as against the combination rate previously applicable.

Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" is, as previously indicated, "perishable food articles". But it has, by means of some artificial classification, included ordinary livestock as a perishable food article (P. 656), saying merely, before doing so, that "We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway." And it has further held that a little monument dealer, located

on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and therein Colorado, on a through rate basis, some individual monuments out of an estimated four-carload lot of monuments per year.[2]

All of this to me is but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that end. But Congress has never been willing to accede to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All this is familiar history in the railroad world, and I shall not bother to go into it further here.

It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which

[2] I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of "urgent need" (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to his extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of "as many routes as possible" and "as much flexibility as possible in the distribution process" for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country.

the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out.

I do not mean to make any implication, nor do I here assume to pass judgment, on whether the Ogden gateway is in other manner or to other extent subject to being opened up. All I say is that the philosophy and standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" can not be made the basis for overriding the short-haul provisions of section 15 (4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term "more economic transportation" to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did.

I have previously referred to the fact that most of the traffic that is here involved originates on the branch lines of the Union Pacific, and that on such of this traffic as the Rio Grande is able to solicit to use its route, the Union Pacific will lose a line haul of 975 miles. The Report of the Commission admits that "the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves" is about 200 miles. Page 654. It also recognizes that the Rio Grande is a mountainous route, of higher grades, more circuity, and

greater operational costs than the Union Pacific. "The total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific. Other data as to physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services." Page 648.

All of these matters, however, the Commission lightly brushes aside, as not having relationship to the question of "more economic transportation" in the situation, and so leaving it free to hold, as above indicated, that the new through route provides "more economic transportation", because its joint rates necessarily are lower than the previously applicable combination rates. All that the Commission says, in brushing aside the transportational differences which I have set out, as not requiring consideration on the question of "more economic transportation" in the situation, is that, when they are spread over hauls of such great lengths as are here involved, "they become relatively insignificant." Page 658.

The Report does not undertake to show what amount of traffic goes where. It merely says that "About 90 per cent of the traffic upon which joint rates are sought via Ogden and the Rio Grande moves to (Missouri River crossings and points east and southeast) and about 10 per cent to the Southwest." Page 626. How much terminates at the Missouri River crossing-points or at other midwestern destinations, the Report does not state. As to livestock, however, it certainly is a matter of common knowledge that the primary markets are Chicago, Omaha, Kansas City and some other Missouri River points. To each of these points, as well as to the Minneapolis and St. Louis markets, the record shows that a haul of 200 miles more, and a transportation time of at least 24 hours longer, as well as at least one or two more terminal-yard services, are involved over the Rio Grande route. I do not believe that without rational demonstration the Com-

mission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1524 miles (Chicago), the elements of difference which I have set out are so "relatively insignificant" as to be entitled to be ignored on the question of whether "more economic transportation" is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportational and service differences existing, as related to the question of "more economic transportation" under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without establishment of the reality of that horizon for lumping purposes.

Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District Rates*, 176 I.C.C. 1, 190 I.C.C. 175, 190 I.C.C. 611, 200 I.C.C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the

livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations.

This dissent is being written hastily, in order not to delay the filing of the majority opinion, and I shall accordingly not take the time to go into detail on other matters. I agree with the majority that the Commission had no right here to find a violation of section 3 (1) of the Act against the Union Pacific and its connecting through-route carriers, but the basis for my view is not that adopted by the majority, that a discrimination under this section cannot at all exist, unless the complaining person or entity is located upon the lines of the carrier or combination of carriers claimed to have committed the discrimination. I do not believe that this viewpoint is tenable on the language of section 3 (1), nor on the expressions contained in St. Louis Southwestern Ry. Co. v. United States, 245 U.S. 136, 144, as well as on the plain, contrary assumptions made in Texas & Pacific Ry. Co. v. United States, 289 U.S. 627. But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3 (1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3 (1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3 (1), I am certain that its action resting on this basis alone could not on these facial realities be up-

held. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15 (4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through routes and joint rates in relation to the existing conditions.

In the pattern of the Commission's apparent attempt to strike at as much in the present situation as possible, the Commission further, as noted in the majority opinion, required the Union Pacific to establish joint rates with the Rio Grande to and from the same points where it maintained joint rates with the Bamberger Railroad. The Report says: "The Bamberger, operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande." P. 659. The brief of the Union Pacific argues pointedly that "No evidence was submitted concerning or comparing transportation conditions on the Bamberger's electric line between Ogden and Salt Lake City with conditions on the Rio Grande." The brief of the Commission makes no denial of the fact that no such evidence is contained in the record. The most that the Commission could properly have said, I think was that it had not been made to appear by the evidence that there was any important dissimilarity in the conditions on the two roads. But the lack of any such evidence of dissimilarity could hardly afford a basis for a finding of similarity on the part of the Commission. This segment of the Commission's order is perhaps of relatively small importance in the present controversy. I refer to it simply as being characteristic or in the pattern of the loose and improper basis and manner in which it seems to me that the Commission has dealt with the entire situation.

I would strike down the Commission's order generally, on the basis and manner in which its result has been reached. In taking that position, however, I would again emphasize that I intend no implication that there may not

exist some proper basis and some proper manner of reach as to some parts of the Ogden gateway situation. I have not allowed my mind to look at that avenue, in either one direction or the other. The pervading infirmities on which the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right here.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA OMAHA DIVISION

Civil Action No. 76-53

UNION PACIFIC RAILROAD COMPANY, ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL., *Intervening Defendants*.

Final Judgment and Decree

The above-entitled action having come on for final hearing on November 23 and 24, 1953, before Circuit Judges Johnsen and Collet and District Judge Delehant, constituting a District Court of three judges, convened pursuant to Title 28 U.S.C., Sections 2284 and 2325, and all parties being represented by counsel and the Court having received the evidence offered by the parties and heard the arguments of counsel and having considered the pleadings, the evidence and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its opinions, findings of fact and conclusions of law herein on October 22, 1954, and the majority of the Court being of opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297, is a valid and lawful order and should be sustained, except to the extent and in the particulars set forth in the opinion of the majority of the court:

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the majority opinion of the Court, heretofore filed, it is ordered adjudged and decreed that the injunction and other relief prayed for in the complaint be denied insofar as it is inconsistent with said findings of fact, conclusions of law and the majority opinion of the Court filed herein, and is granted insofar as it is consistent with said findings

of fact, conclusions of law and the majority opinion of the Court, and that the suit be dismissed.

Dated this 20th day of December, 1954.

JOHN C. COLLET
Judge, United States Circuit Court of Appeals

JOHN W. DELEHANT
Judge, United States District Court

HARVEY M. JOHNSEN, *Judge*, United States Circuit Court of Appeals dissenting insofar as the foregoing final judgment and decree fails to enjoin and annul said order in its entirety.

APPENDIX C

Section 1 (4) of the Interstate Commerce Act (49 U.S.C. § I, par. (4)) reads as follows:

"(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3(1) of the Interstate Commerce Act (49 U.S.C. § 3, par. (1)) reads as follows:

"(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prej-

udice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3 (4) of the Interstate Commerce Act (49 U.S.C. § 3, par. (4)) reads as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 13(1) of the Interstate Commerce Act here pertinent reads as follows:

"That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission."

Section 15(1) of the Interstate Commerce Act reads as follows:

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15 (3) of the Interstate Commerce Act (49 U.S.C. § 15, par. (3)) reads as follows:

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public

interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisons of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Section 15 (4) of the Interstate Commerce Act (49 U.S.C. § 15, par. (4)) reads as follows:

"(4) In establishing any such through route the Commission shall not (Except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or

(b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

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Nos. 117, 118 and 119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Appellant*,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL.

No. 119

UNITED STATES OF AMERICA, ET AL., *Appellants*,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

Appeals from the United States District Court for the District of Nebraska, Omaha Division

BRIEF OF APPELLANT, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, IN OPPOSITION TO MOTION TO AFFIRM IN NOS. 117 AND 118 AND TO REVERSE IN NO. 118

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT

As authorized in Rule 16 of the Revised Rules of this Court, this brief is filed for The Denver and Rio Grande Western Railroad Company, herein called the Rio Grande, appellant in No. 117 of the cases shown in the above title, in opposition to the motion of the Union Pacific Railroad

Company, et al, to affirm the judgment of the court below in Nos. 117 and 119 and to reverse the judgment of the court below in No. 118. The motion was filed with the Supreme Court and served upon the interested parties on June 29, 1955. Upon the request of the Interstate Commerce Commission and the United States of America, the time for filing briefs in opposition to the motion was enlarged to August 4, 1955.

Since the decision of the Interstate Commerce Commission, which is reported in 287 I.C.C. 611, and is assailed as invalid by the movants, and the opinion of the court below for the District of Nebraska, Omaha Division, copy of which is attached to the jurisdictional statements, clearly reveal that the questions presented by the appeals are substantial and are of general public importance, little or no argument is necessary or will be made to show that the motion should be denied and that the court should consider the appeals on their respective merits.

The movants devoted 36 printed pages in their jurisdictional statement to show that the questions involved are substantial and important. This is also demonstrated by the 28 printed pages in the motion to affirm and to reverse. While thus tacitly conceding that the questions involved are substantial and important, the movants nevertheless urge that the judgment of the court below in Nos. 117 and 119, in which the Rio Grande, the United States and the Interstate Commerce Commission are appellants, should be affirmed but that the judgment of the court below in No. 118, in which the Union Pacific Railroad Company and others are appellants, should be reversed. This is indeed an extraordinary treatment of the questions. The movants apparently desire to have their cake and eat it too.

The jurisdictional statements filed by the movants, the United States, the Interstate Commerce Commission, and the Rio Grande are enough, without more, to show that

the questions presented by the appeals are substantial and of public importance and should not be resolved by this court until the interested parties have been permitted to file briefs and accorded the privilege of oral argument on the merits of the questions involved in the appeals.

The contentions and arguments made by movants in their motion to affirm and to reverse are largely a reiteration of the contentions and arguments made by them in their jurisdictional statement. In the circumstances, it is not considered necessary to deal *seriatim* with these contentions and arguments in this reply. Instead and to avoid unnecessary reiteration and repetition we ask the court to consider as a part of this reply the joint jurisdictional statement of the United States and the Interstate Commerce Commission and the jurisdictional statement of the Rio Grande. It is sufficient to say that none of the contentions and arguments made in the motion warrant the granting of the motion.

The motion should be denied.

Respectfully submitted,

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July 28, 1955

PROOF OF SERVICE

I, ROBERT E. QUIRK, one of the attorneys for the appellant, The Denver & Rio Grande Western Railroad Company, and a member of the bar of the Supreme Court of the United States, hereby certify that on July 28, 1955, I

served copies of the foregoing Brief In Opposition To Motion To Affirm on the several parties as follows:

1. On the United States by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

E. Riggs McConnell, Esq.
Special Assistant to the Attorney General
Department of Justice
Washington 25, D. C.

and with air-mail postage prepaid to:

Donald R. Ross, Esq.
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Omaha, Nebraska

2. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

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5. On the State of Nebraska and the Nebraska State Railroad Commission; Washington Public Service Commission; Public Utilities Commission of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization of Wyoming; Public Service Commission of Wyoming; Public Service Commission of Utah; National Livestock Producers Association, by mailing a copy in a duly addressed envelope with air-mail postage prepaid to their respective attorneys of record, as follows:

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Nos. 117, 118, 119, 332, 333 and 334

Supreme Court of the United States

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UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 119

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CONSOLIDATED OPENING BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

OPINIONS BELOW

This Brief is filed on behalf of The Denver and Rio Grande Western Railroad Company (hereinafter called "the Rio Grande"), as the appellant in Case No. 117, being an appeal from the United States District Court for the District of Nebraska, Omaha Division (hereinafter sometimes called "the Nebraska court"); as an appellee in Cases Nos. 118 and 119, being other appeals from the same decision of the Nebraska court, and as appellee in Cases Nos. 332, 333 and 334, being appeals from the United States District Court for the District of Colorado (hereinafter sometimes called "the Colorado court"). All of the foregoing appeals were consolidated by order of this Court dated October 24, 1955.

The opinions and judgments of the courts below are reported as *Union Pacific R. R. v. United States,* 132 F.Supp. 72 (D.C. Neb.) (Neb. R. 151-179, 210, 211),* and *The Denver & Rio Grande Western R. R. v. United*

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*There are four volumes of Transcript of Record in these appeals, two small unnumbered volumes, and two large volumes designated Vol. I and Vol. II. The pages of one of the small volumes relating to the formal proceedings in the Nebraska case (which will be referred to in this brief as "Neb. R.") are consecutively numbered 1 to 245. The pages of the other small volume relating to the formal proceedings in the Colorado case (which will be referred to in this brief as "Colo. R.") are consecutively numbered 1 to 374. The pages of the two large volumes designated Vol. I and Vol. II constituting the consolidated portion of the Transcript of Record on these appeals are consecutively numbered beginning with Vol. I (pp. 1-912) and continuing to the end of Vol. II (pp. 913-1779). References in this brief to matters contained in the consolidated portion of the Transcript of Record will be designated "Consol. R.," I or II, as the case may be, followed by the appropriate page.

States, 131 F.Supp. 372 (D.C. Colo.) (Colo. R. 279-302, 361). In both of these decisions the three-judge district courts dealt with the validity of an order of the Interstate Commerce Commission dated January 12, 1953 (Consol. R., II, 1595), which was based upon the Report and conclusions of the Commission in *Denver & Rio Grande Western R. R. v. Union Pacific R. R.,* 287 I.C.C. 611 (Consol. R., II, 1518-1594). The formal Order of the Interstate Commerce Commission (Consol. R., II, 1595) is not reported, but for convenience is set forth and printed as Appendix A hereto.

JURISDICTION

The jurisdiction of the Supreme Court to review (by direct appeal) the decisions in the cases above referred to is conferred by 62 Stat. 928, 28 U.S.C. 1253, and by 62 Stat. 961 and 63 Stat. 104, 28 U.S.C. 2101 (b). The following decisions sustain the jurisdiction of this Court: *Pennsylvania R. R. v. United States,* 323 U.S. 588; *United States v. Capital Transit Co.,* 325 U.S. 357; *New York v. United States,* 331 U.S. 284, and *United States v. Great Northern Ry.,* 343 U.S. 562.

The judgment of the United States District Court for the District of Nebraska was entered December 20, 1954 (Neb. R. 210, 211). The Rio Grande filed its Notice of Appeal therefrom in the said District Court February 3, 1955 (Neb. R. 226-228). In compliance with Rule 13 of the Rules of the Supreme Court, the Rio Grande duly served and filed its Statement as to Jurisdiction and caused the record to be filed, and the appeal was duly docketed, being Case No. 117.

Separate notices of appeal from the United States

District Court for the District of Nebraska were duly filed by the Union Pacific Railroad Company, et al. (hereinafter called "the Union Pacific"), being Case No. 118 (Neb. R. 230-237), and by the United States of America (Neb. R. 229-230), the Interstate Commerce Commission (Neb. R. 239-241) and the Secretary of Agriculture (Neb. R. 242-244), being Case No. 119.

The judgment of the United States District Court for the District of Colorado was entered February 1, 1955 (Colo. R. 361, 362). Separate notices of appeal were duly filed by the Washington Public Service Commission, *et al.* (being Case No. 332) (Colo. R. 369-372), by the Union Pacific Railroad Company, *et al.* (being Case No. 333) (Colo. R. 365-369), and by the United States of America and the Interstate Commerce Commission (being Case No. 334) (Colo. R. 364). These appeals were docketed on August 20, 1955.

On October 24, 1955, this Court issued an order noting probable jurisdiction and consolidating the several appeals.

On the 4th day of November, 1955, the parties filed their stipulation, designating the portions of the record to be printed.

QUESTIONS PRESENTED

I. The Nebraska Case

1. Whether the Nebraska court erred in overruling certain findings of fact and conclusions of law of the Interstate Commerce Commission where such findings and conclusions were within the administrative function of the Commission.

2. Whether the Nebraska court erred in holding

in paragraph III of its Conclusions of Law (Neb. R. 167, 168) that there is no substantial evidence to support the findings and order of the Commission which require the establishment of competitive joint rates and through routes between the Union Pacific, the Rio Grande and other railroads with respect to the commodities and the areas specified in the order, thus substituting its own judgment and findings which modified the scope of the relief granted by the Commission, by restricting the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande requiring in-transit privileges at such points, and to be later reshipped to points beyond the Rio Grande.

3. Whether the Nebraska court erred in setting aside, in part, the order of the Commission, which requires the Union Pacific and other defendants before the Commission to participate with the Rio Grande in the maintenance of through routes and competitive joint rates on the commodities described by the Commission between the involved northwest area and points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad, regardless of whether or not transit privileges are used on the Rio Grande.

4. Whether the Nebraska court erred in ruling, contrary to the findings of the Commission and the evidence, that on the commodities specified by the Commission, the through routes and competitive joint rates required by its order via the Rio Grande between the northwest area and points south and east of a designated area which extends northerly and to some extent southerly from Colo-

rado common points, such as Denver, Pueblo and Trinidad, are not needed in order to provide adequate and more economic transportation.

5. Whether the Nebraska court erred in overruling the findings and conclusions of the Commission that as to the commodities specified by the Commission, the existing transportation services and the facilities via the Union Pacific routes were inadequate and uneconomic between the involved northwest area and points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad, and in substituting its own finding that the existing transportation services and facilities via the Union Pacific routes are adequate.

6. Whether the Nebraska court erred in overruling the findings and conclusions of the Commission that the existing rates assailed are and will be unjust and unreasonable, and unduly prejudicial to shippers and receivers using or desiring to use the Rio Grande routes and unduly preferential to shippers and receivers using the Union Pacific routes, in and to the extent that such rates exceed, or may exceed, the joint rates maintained on the specified commodities from and to the same points over the Union Pacific routes.

II. The Colorado Case

1. Whether the Colorado court erred in setting aside the order of the Commission and holding that through routes once in existence continue in existence despite the mere cancellation of joint rates over such routes, if the connecting railroads involved continue to offer continuous carriage of goods on through bills of lading from originating

points on the line of one to destinations on the line of the other.

2. Whether the Colorado court erred in holding that in a proceeding to obtain reasonable and nondiscriminatory rates over through routes already in existence, the Interstate Commerce Commission erred in considering itself bound by the limitations of Section 15(4) of the Interstate Commerce Act (which do not apply if through routes are already in existence or if the provisions of Section 3 of that Act are applicable), and thereby prejudiced its approach to the entire case and its consideration of the issues.

3. Whether the Colorado court erred in remanding the case to the Interstate Commerce Commission, to enable the Commission under Sections 1(4), 3(1), 15(1) and 15(3) of the Interstate Commerce Act to correct the discrimination and prejudice practiced by the Union Pacific and the other defendant railroads against the Rio Grande, and to enable the Commission to prescribe future just, reasonable and nondiscriminatory competitive joint rates over the Rio Grande in connection with the Union Pacific and its presently preferred connections, free of the limitations of Section 15(4) of the Act.

STATUTES INVOLVED

These appeals involve the following statutes:

The Interstate Commerce Act, Title 49 U.S.C., particularly the declaration of National Transportation Policy (preceding Section 1), and Sections 1(4), 1(5), 1(15), 3(1), 3(4), 6(1), 13(1), 15(1), 15(3), 15(4), and 15(8); all of which are set forth verbatim in Appendix B hereto.

STATEMENT

The Rio Grande is a common carrier by railroad engaged in the transportation of persons and property in intrastate, interstate and foreign commerce. It operates 2,400 miles of railroad in Colorado, New Mexico and Utah (Consol. R., I, 80). It has interchange track connections and interchanges traffic with the Union Pacific at Denver, Colo., and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and with the Western Pacific at Salt Lake City. It also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern Railroads; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo with the Santa Fe, the Colorado and Southern and the Missouri Pacific; at Walsenburg, Colorado, with the Colorado and Southern, and at Trinidad, Colorado, with the Santa Fe and the Colorado and Southern (Consol. R., I, 83-92; see also Map, App. C hereto).

The Union Pacific Railroad with Omaha (Council Bluffs) and Kansas City as its eastern termini extends westward in two lines. The Omaha line runs directly to Wyoming. One line from Kansas City runs northwesterly and connects with the Omaha line east of Kearney, Nebraska, and the other runs from Kansas City, first to Denver, Colorado, and then northerly into Wyoming; and thence both lines through Wyoming westerly to Ogden, Utah (Consol. R., I, 797-799; see also App. C hereto).

At Ogden, Utah, the Union Pacific has two

diverging lines of railroad which are in the shape of a large "Y." One arm of the "Y" extends in a southwesterly direction through Salt Lake City and Provo, Utah, and Las Vegas, Nevada, to Los Angeles, California. Between points on that line and Colorado common points and points east thereof, the Union Pacific and other defendant railroads maintain competitive joint rates and through routes on all freight traffic in connection with the Rio Grande via Salt Lake City and Provo (Consol. R., I, 91). The other arm of the "Y" of the Union Pacific extends in a northwesterly direction from Ogden through Utah to points in Idaho, Oregon, Washington and Montana. This is the "closed door" territory (sometimes called "the northwest area" or "the excluded territory") directly to and from which the Union Pacific and the other defendant railroads herein refuse to maintain competitive joint rates on freight traffic via the Rio Grande through Ogden or Salt Lake City to and from Colorado common points and points east thereof (Consol. R., I, 91, 92, 94; see also Map, App. C hereto), except on sheep and goats from that territory to Missouri River points and east thereof (Consol. R., I, 118, 119) and on lumber to Canon City, Colorado, and east of Canon City to the first station west of Pueblo as shown in published tariff ICC No. 1474 by Agent Kipp (Consol. R., I, 112; Earley Exhibit 3, Sec. G, p. 2).

Except as to freight traffic moving via the Union Pacific to and from the "closed door" territory above described, the Rio Grande participates generally in the transportation of transcontinental traffic at competitive joint rates on equal terms with the Union Pacific

and other railroads (Consol. R., I, 92). While the Union Pacific is the principal defendant, it is not the only source or the sole cause of the situation sought to be corrected. The other railroad defendants cooperate with the Union Pacific in maintaining the existing restrictions on freight traffic moving to and from the "closed door" territory. Without their cooperation and joint participation, the restrictions would not be effective. The situation sought to be corrected is illustrated by the "closed door" territory shown on the Map, Appendix D hereto, and by the lines of railroads shown on the Map annexed hereto as Appendix C.

Prior to January, 1936, the Union Pacific controlled the Oregon Short Line Railroad Company, the Oregon-Washington Railroad and Navigation Company,* the Los Angeles and Salt Lake Railroad Company and the St. Joseph and Grand Island Railway Company, but at that time these several railroad companies were operated as separate legal entities. In 1932 the Union Pacific applied to the Interstate Commerce Commission for authority to lease and operate the above-named railroads. That application was approved by the Commission in *Union Pacific Railroad Company Unification*, 189 I.C.C. 357 and 207 I.C.C. 543. As a result of that ap-

*The lines of these two railroad companies substantially serve the "closed door" territory. The Oregon Short Line Railroad Company extends from Salt Lake City through Ogden into Idaho, northwest to Huntington, Ore., north to Butte, Mont., and east to Granger, Wyo.; the lines of the Oregon-Washington Railroad and Navigation Company extend from Huntington, Ore., to Portland, Ore., into Seattle, Wash. When in 1906 the Union Pacific reacquired control of these railroads, their lines became and have since remained a part of the present Union Pacific system. (Consol. R., I, 798, 799).

proval, the properties of the railroads named have been operated as a single system under lease by the Union Pacific since January, 1936 (Consol. R., I, 90, 799).

In 1897 competitive joint rates and through routes were established in connection with the Rio Grande via Ogden and Salt Lake City between the territories above described, on the traffic from and to points on the Oregon Short Line Railroad Company and the Oregon-Washington Railroad and Navigation Company. This situation continued during the time that these two companies and the Union Pacific were in separate receiverships (Consol. R., I, 84-87). By August, 1906, the Union Pacific had re-acquired control over the Oregon Short Line Railroad Company and the Oregon-Washington Railroad and Navigation Company, and between August, 1906, and December, 1912, it caused the joint rates in effect via the Rio Grande through the Ogden gateway to be cancelled; but no action was taken then or later by the Union Pacific or the other interested railroads to cancel the through routes (Consol. R., I, 87, 88).

Mr. A. J. Stilling, the principal traffic witness for the Union Pacific, unequivocally admitted that through routes via the Ogden gateway and the Rio Grande are now open and available to shippers who are willing to pay through rates based on the aggregate of the intermediate local rates of the various carriers in the routes. Mr. Stilling stated:

> "The Interstate Commerce Act gives all shippers the right to specify the lines over which their shipments shall move so the Ogden gateway and route via the Rio Grande is actually available

today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington. However, most of that traffic originates or terminates at points on the Union Pacific, and it ordinarily moves via the Union Pacific through Wyoming because the joint through rates to and from that territory are restricted so that they will not apply when traffic is interchanged with the Rio Grande at junction points in Utah." (Consol. R., I, 799, 800).

Mr. Elmer B. Collins, counsel for the Union Pacific, made a like admission before the Commission during a colloquy between himself and Chairman Alldredge on the question whether the tariffs which cancelled the joint rates in 1906-12 closed the through routes via the Rio Grande through Ogden (Consol. R., II, 1621). This colloquy was as follows:

"CHAIRMAN ALLDREDGE: Before you start, Mr. Collins, may I ask you a question?

I assume there is no dispute about the fact that from a physical standpoint these routes are open; that is, business physically can be interchanged between the Denver & Rio Grande and the Union Pacific.

MR. COLLINS: Yes, sir; exactly. As was the case in the Western Pacific case.

CHAIRMAN ALLDREDGE: You contend, however, that you have closed this route on the traffic here in question.

MR. COLLINS: That is right.

CHAIRMAN ALLDREDGE: Now, will you tell this Commission exactly how you closed the routes?

MR. COLLINS: We cancelled the joint through rate billing. We provided by tariff publication that

the joint rates would not apply via Ogden with the D.&R.G.W.

CHAIRMAN ALLDREDGE: You provided in the tariff that the joint rates would not apply?

MR. COLLINS: A restriction in the route.

CHAIRMAN ALLDREDGE: That is the joint rate?

MR. COLLINS: Yes, sir.

CHAIRMAN ALLDREDGE: Do you think that closes this route for this traffic?

MR. COLLINS: No, I don't think so, if they want to pay more, if they want a route via the Rio Grande and pay the price."

The undisputed evidence before the Commission shows that many shippers have paid the higher rates where they wanted to use the Rio Grande and that the Union Pacific has never refused to issue a through bill of lading on such shipments. The evidence with respect to through shipments moving over the Rio Grande via the Ogden gateway from and to the "closed door" territory in connection with the Union Pacific may be summarized as follows:

During the period from November 2, 1942 to August 17, 1945, approximately 19,000 carloads of traffic were moved via the Union Pacific and Rio Grande through route into the "closed door" territory from points on the Rio Grande line and from eastern points destined to points in Oregon and Washington which carloads originally had been routed via the Rio Grande and the Western Pacific or the Rio Grande and the Southern Pacific, but which were diverted to the Union Pacific at Ogden or Salt Lake City and were accepted and carried by the Union Pacific as through shipments (Consol. R., I, 70, 71).

During January and February, 1949, when blizzards and snow storms blocked the Union Pacific main line between Cheyenne and Ogden, 4,208 carloads of freight both eastbound and westbound were diverted to the Rio Grande for movement via its line between Denver and Utah junction points and thence via the Union Pacific. Of that number 1,394 carloads originated or were destined to Union Pacific points in the "closed door" territory at which competitive joint rates* were not applicable. During that same blizzard period, the Rio Grande handled 210 carloads of express and 276 carloads of mail between Denver and Salt Lake City for the Union Pacific. (Consol. R., I, 72).

The carload traffic just described was diverted under service orders of the Commission, none of which, however, purported to establish or did establish temporary through routes as specified in Section 15(4) of the Act (Consol. R., I, 72). The traffic was diverted by the Commission to the Rio Grande under Section 1(15) on the apparent assumption that through routes and the facilities for operating such routes already existed and that, therefore, there was no need to establish temporary through routes.

In addition to the traffic that was diverted to the route of the Rio Grande on service orders, a large volume of traffic was initially routed via the Rio Grande on bills of lading via Ogden and the Union Pacific between points in the "closed

*"Competitive joint rates," sought by the Rio Grande herein, mean such joint rates to and from the "closed door" territory (shown on the Map, Appendix D hereto) as apply via the Union Pacific or via the Union Pacific and its preferred connections, but which the Union Pacific and its preferred connections decline to accord to the Rio Grande.

door'' territory and eastern points. For example, during World War II there were several special trains, consisting of troops and military supplies in freight cars, which were handled on freight billing and which consisted of from 30 to 50 cars per train (Consol. R., I, 71).

One train, consisting of 24 cars of military supplies and six passenger cars, moved from Ft. Sill, Okla., in December, 1941, to Ft. Lewis, Wash., via eastern connections, over the Rio Grande through Ogden and the Union Pacific (Consol. R., I, 71).

Another special train, consisting of 50 cars of military supplies and some troops, moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February, 1942, via different eastern railroads in connection with the Rio Grande through Ogden and the Union Pacific. Another special train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February, 1942, via different eastern railroads, the Rio Grande through Ogden and the Union Pacific (Consol. R., I, 71).

Still another train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., in February, 1942, to Ft. Lewis, Wash., via the Rio Grande through Ogden and the Union Pacific. Competitive joint rates were applied on all of this traffic and the through charges among the railroads were divided on a satisfactory basis of interline settlements (Consol. R., I, 71).

During the period March, 1942, to May, 1945, the Rio Grande handled 524 carloads of war material from eastern points which were originally consigned to Ogden and Clearfield, Utah, for the purpose of being stored. These cars were diverted to points in the northwest area via the route of the

Union Pacific through Ogden without ever having been unloaded at the original destinations named. Joint competitive rates were applied on this traffic, and the through charges were divided among the interested railroads on a satisfactory basis of interline settlement (Consol. R., I, 71; 72).

In 1948 (a "typical year," as testified by Mr. Hogue, Vice-President of the Rio Grande (Consol. R., I, 76)), 39 carloads of freight moved eastbound from points in the "closed door" territory on through bills of lading issued by the Union Pacific or its connections consigned to Colorado common points, some of which may have been diverted to points east thereof. These cars contained canned goods, machinery, contractors' equipment, paper bags, lumber, wallboard, flour, sheet, roofing, acid, newsprint and canned salmon (Consol. R., I, 74).

The Rio Grande transported 19 carloads of a variety of commodities, such as tractors, canned goods, agricultural implements, furniture, soap, castings, feed, rubber, iron and steel, on through bills of lading issued by eastern railroads which routed the traffic via the Rio Grande to Ogden and thence via the Union Pacific to points in the "closed door" territory. The freight charges were assessed on the basis of the aggregate of the combination of intermediate rates (Consol. R., I, 75).

In addition during 1948, 22 other westbound carloads of various commodities from points east and south of Colorado common points consigned to points in the "closed door" territory were routed on through bills of lading via the Rio Grande and the Union Pacific. Such routings on these cars were detected by the Rio Grande and, because competitive joint rates did not apply via the Ogden gateway in connection with the Union Pacific,

the cars were held temporarily at Denver and Pueblo, Colo., until disposition or rerouting instructions could be obtained from the shippers or from the originating lines (Consol. R., I, 75, 76). Some of the cars were later sent on via routes over which competitive joint rates apply, while the others went forward subject to charges based upon the aggregate of combination rates.

At the Commission hearing in December, 1949, Vice-President Hogue, of the Rio Grande, testified that he used the year 1948 because it was the last calendar year prior to the hearing and that the same situation prevailed to about the same extent in prior years, and had continued to the time of his testifying in 1949 (Consol. R., I, 76).

The Union Pacific maintains through routes and competitive joint rates in connection with the Rio Grande on all transcontinental traffic from and to points in southern California, Nevada and southern Utah via Provo or Salt Lake City — thereby giving shippers in those areas, as against shippers in the "closed door" territory, the opportunity of shipping via the Rio Grande without suffering the penalty of paying a higher combination rate (Consol. R., I, 91, 92).

The map (App. C hereto) pointedly discloses the extent to which the Union Pacific joins with its preferred railroad connections in routes which short-haul it, while refusing to join with the Rio Grande in routes via the Ogden gateway. As will be noted, routes and distances on the map are shown thereon between North Portland, Ore., and St. Louis, Mo. These points have been selected as representative because North Portland is a point on the Union Pacific from

and to which the Union Pacific will short-haul itself via its various northwest connections, and because St. Louis is more or less centrally located in the territory from and to which the Rio Grande is seeking the establishment of competitive joint rates in connection with the Union Pacific through Ogden. Illustrative routes, which include the route of the Rio Grande, may be summarized, in the order of their respective distances, as follows: (Consol. R., I, 101-110; Earley Exhibit 3, Sec. F; Consol. R., I, 844-846, and Consol. R., II, 1046).

It will be noted (App. C hereto) that the short route (Route (1)) between North Portland and St. Louis is via the Union Pacific from McCammon through Kemmerer, Wyo., to Kansas City, Mo., thence Wabash, via which route the distance is 2,167 miles, and that the distance via the Union Pacific route through Ogden, Utah, via which point many shipments move for transit either at Ogden proper or at other stations on the Union Pacific south of Ogden without charge for the out-of-line haul, is 2,232 miles, or 65 miles longer than the route of the Union Pacific through Kemmerer, Wyo.

The next route in order of distance (App. C hereto, Route (2)) is the Rio Grande route, *i.e.*, via the Union Pacific to Ogden, Utah, the Rio Grande to Denver, Colo., CRI&P to Kansas City, Mo., and Wabash to St. Louis, the distance over which route between North Portland and St. Louis is 2,367 miles, or but 9% longer than the short route of the Union Pacific through Kemmerer, Wyo., and only 6% longer than the Union Pacific route through Ogden.

Taking as examples two of the routes in which the Union Pacific presently participates with its connections at competitive joint rates that accord it only a short haul (App. C hereto, Routes (3) and (9)), we find that these two routes range from 2,495 miles via Spokane and the Great Northern to 3,134 miles via Portland and the Southern Pacific through California, Arizona and New Mexico, and that they are 11% and 45% longer than the short route (Route (1)) via the Union Pacific through Kemmerer, Wyo. In the case of the route via UP-Portland, Ore.; then SP-Santa Rosa, N. M.; then CRI&P-Kansas City, Mo.; then Wabash to St. Louis, Mo.—the circuity is 32% greater than via the Rio Grande route and 45% greater than the short route of the Union Pacific (Route (1)); whereas, as previously pointed out, the Rio Grande route through Ogden would be but 9% longer than Union Pacific Route (1) via Kemmerer, Wyoming.

The Union Pacific accepts a haul of but 8 miles from North Portland to Portland, Ore., in connection with the Southern Pacific; 215 miles to Wallula, Wash., in connection with the Northern Pacific; 311 miles to Marengo, Wash., and 385 miles to Plummer, Idaho, in connection with the Milwaukee Road; and 372 miles to Spokane in connection with the Great Northern and Spokane International; whereas, if the Union Pacific joined in competitive joint rates and through routes via the Rio Grande, it would receive a haul of 851 miles from North Portland to Ogden. If the Union Pacific insisted on its long haul and treated the Great Northern, Milwaukee Road, Northern Pacific, Spokane International and Southern Pacific as it treats the Rio Grande,

it would receive a haul of 1,893 miles to Kansas City via Kemmerer, Wyoming.

Appendix G to this brief based on Section F of Exhibit 3, by Witness Earley of the Rio Grande, and his testimony (Consol. R., I, 101-111), shows typical examples of existing joint rates and distances via routes which the Union Pacific and other defendants in cooperation with each other take less than their respective long hauls.

The foregoing illustrations, based on the testimony, disclose that the Union Pacific freely joins its preferred railroad connections in through routes at competitive joint rates that traverse the northern and southern portions of the United States, as well as in routes which involve hauls of hundreds of miles through Canada, all of which routes may be considered as constituting the circumference of a great circle, but refuses to join in a direct, central route at such rates with the Rio Grande through Ogden, which route may be regarded as the diameter of the circle formed by the longer routes.

From and to points in the "closed door" territory north of Ogden in Utah and south of McCammon in Idaho, as well as from and to points in southern Idaho and northern Utah on the Union Pacific's Malad, Idaho and Cache Valley branches, traffic generally moves through Ogden, Utah, via the Union Pacific. Furthermore, shipments move via Ogden for transit from and to points west of McCammon, Idaho (Consol. R., I, 644, 645, 844-846). The distance between Logan, Utah, just north of Ogden, and Denver, Colo., is 649 miles via the Union Pacific and 679 miles via the Rio Grande (Consol. R., I, 132-135; Earley Exhibit 3, Sec.

K, p. 4, line 1). Therefore, on traffic from, to or via Denver, moving through Ogden, there would be a difference of but 30 miles between the two routes, which difference is insignificant when compared with the total through mileages involved.

The Union Pacific makes particular point of the fact that the mileage over the Union Pacific's short route through Kemmerer, Wyo., between Denver, Colo., and McCammon, Idaho, and points west and north thereof, is 95 miles shorter than the route via the Rio Grande through Ogden; and, in addition, claims that the distances via the Union Pacific route from and to various eastern and southern points in the areas east and south of Denver, as compared with the Rio Grande route, are generally shorter, ranging from a minimum of 33 miles to a maximum of 219 miles (Consol. R., I, 802-805; Stilling Exhibit 25, pp. 3, 5). These advantages in mileage claimed by the Union Pacific are in connection with routes, the total mileages of which range from 623 to 2,537 miles from McCammon, Idaho, and from 1,538 to 3,452 miles from Seattle, Wash.

The Union Pacific throughout the proceedings has undertaken to graphically indicate the above differences in mileage by a map showing the claimed differentials in oblongs thereon. It should be pointed out that neither these mileage differentials nor the map fully represent the facts with respect to the comparative distances.

Actually, the differences in mileage as claimed by the Union Pacific, ranging from a minimum of 33 miles to a maximum of 219 miles, are based upon routes which in several instances are not the "long-haul" routes cus-

tomarily used by the Union Pacific and required by the tariffs. For example, at New Orleans, where the claimed differential in mileage in favor of the Union Pacific route is shown as 33 miles, traffic from and to the "closed door" territory customarily moves and is required to move in most instances over the Union Pacific via its "long-haul" route through Kansas City, thence connections, such as the L&A to Shreveport, La., and KCS to New Orleans, which "long-haul" route via the Union Pacific is 35 miles longer than the route over the Rio Grande and its connections (UP-Ogden, Utah; Rio Grande-Pubelo, Colo.; C&S-Sixela, N.M.; FW&D-Ft. Worth, Tex.; T&P) to New Orleans (Consol. R., I, 132-135; Earley Exhibit 3, Sec. K, pp. 2, 3, 5-15, line 12). In other instances at points east of the eastern boundary lines of the states of Kansas, Oklahoma and Texas, where the Union Pacific under the tariffs customarily requires its "long-haul" route via Missouri River junctions (Consol. R., I, 101-111; Earley Exhibit 3, Sec. F, pp. 1-5), the differences in distance would also be in favor of the Rio Grande route.

Another example of where the differential in mileage does not favor the Union Pacific is on shipments between New Orleans, La., and Logan, Utah (just north of Ogden) from and to which point Union Pacific traffic moves via Ogden, Utah. On such traffic the difference in distance in favor of the Rio Grande route (UP-Ogden, Utah; Rio Grande-Pueblo, Colo.; C&S-Sixela, N.M.; FW&D-Ft. Worth, Tex.; T&P) (1,951 miles), as compared with the customary "long-haul" route of the Union Pacific (UP-Kansas City, Mo.; L&A-Shreveport, La.; KCS-New Orleans) (2,051

miles), is 100 miles (Consol. R., I, 132; Earley Exhibit 3, Sec. K, p. 4, line 12). This difference of 100 miles in favor of the Rio Grande route prevails between New Orleans and all other points in the "closed door" territory on traffic moving via the Union Pacific route through Ogden, Utah.

There are many other instances where the Rio Grande route would be the short route. As an illustration, between Malad, Idaho, and Ft. Worth, Tex., the distance via the Union Pacific route (UP-Denver, Colo.; C&S-Sixela, N.M.; FW&D) is 1,449 miles, and via the Rio Grande route (UP-Ogden, Utah; Rio Grande-Pueblo, Colo.; C&S-Sixela, N.M.; FW&D) is 1,418 miles, or a distance advantage in favor of the Rio Grande route of 31 miles (Consol. R., I, 123; Earley Exhibit 3, Sec. I, p. 14, line 27). This same difference in favor of the Rio Grande route would also exist between Ft. Worth and all other points in the "closed door" territory on traffic moving via the Union Pacific through Ogden, Utah.

Another illustration of where the Rio Grande route is the short route is between Preston, Idaho, and Oklahoma City, Okla. The distance via the Union Pacific route (UP-Denver, Colo.; AT&SF) is 1,408 miles, and 1,377 miles via the Rio Grande route (UP-Ogden, Utah; Rio Grande-Pueblo, Colo; AT&SF), resulting in a differential of 31 miles in favor of the Rio Grande route (Consol. R., I, 123; Earley Exhibit 3, Sec. I, p. 10, line 7). Here again this difference would exist in favor of the Rio Grande route from and to all points in the "closed door" territory on traffic moving via the Union Pacific through Ogden, Utah.

Other instances could be cited where the Rio Grande route is the short route, but the above illustrations suffice to show the fallacy of the allegation of the Union Pacific that its route constitutes the short route in all cases.

On August 1, 1949, the Rio Grande filed its complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroads. The complaint (Consol. R., I, 1-25), alleged *inter alia*, that the failure and refusal of the defendant railroads to establish competitive joint rates and to maintain the existing through routes via Ogden, Utah, over the Rio Grande on interstate and foreign freight traffic, in carloads and in other quantities, resulted in through rates which were and are excessive, unjust, unreasonable and discriminatory, in violation of Section 1, Section 3 and Section 15 of the Interstate Commerce Act and that such action was and is contrary to the national transportation policy since it deprives the public and the Rio Grande of the use of available and reasonable through routes and rail facilities at just, reasonable and nondiscriminatory joint through rates which are necessary and desirable in the public interest.

In its complaint (Consol. R., I, 1-25), the Rio Grande requested the Commission to enter an order requiring the Union Pacific and other railroad defendants to establish and maintain for the future, just, reasonable, and nondiscriminatory competitive joint rates and to maintain through routes on freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific and its connections in Utah north of Ogden, and in

Idaho, Montana, Oregon and Washington, herein called the "closed door" territory, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, and points east thereof; and between Utah common points and the "closed door" territory served by the Union Pacific and its connections already described.

The complaint also alleged that the through rates and charges applicable to such traffic between the points described via such through routes were and are based upon the combination of the intermediate, local or other rates, which rates and charges in the aggregate were and are substantially higher than the joint through rates maintained by defendant railroads on similar freight traffic between the same origin and destination places and territories which moves via through routes maintained by the Union Pacific in connection with the other defendant railroads; that the combination rates applicable on the traffic and between the territories described via said through routes over the Rio Grande and defendant railroads were and are unjust, unreasonable and discriminatory and unduly prejudicial as compared with the competitive joint rates maintained by the Union Pacific or via the Union Pacific and the other defendant railroads on like freight traffic over other competitive routes.

Various individual shippers, shipping organizations, flour milling companies, chambers of commerce, lumber and grain shippers, including associations interested in the production of fruits and vegetables, butter and eggs, dried beans, frozen poultry, livestock and other commodities, intervened before the Commission

or testified in support of the complaint of the Rio Grande. Among such interveners and witnesses were the following:

American National Live Stock Association
Colorado Cattlemen's Association
Idaho Cattlemen's Association
National Live Stock Producers Association
Utah Cattle and Horse Growers Association
The Arkansas Valley Stock Feeders Association
The Arnold Milling Company
The Buhler Mill & Elevator Company
The Consolidated Flour Mills Company
Dixie Portland Flour Company
The Arkansas City Flour Mill
The Kansas Milling Company
The William Kelly Milling Company
Lawrence Milling Company, Inc., d/b/a Moundridge Mill & Elevator Company
Light Grain and Milling Company
The New Era Milling Company
The Wall Rogalsky Milling Company
The Walnut Creek Milling Company
Colorado Wool Growers' Association
Executive Committee Utah State Farm Bureau Federation
The Grand Junction Chamber of Commerce
Holly Sugar Corporation
Idaho State Farm Bureau
Producers Live Stock Marketing Association
Idaho Wool Growers Association
The Pueblo Chamber of Commerce
Western Forest Industries Association

Herbert P. Heidel, Manager, American Stores, Inc., Lincoln Packing Division, Pueblo, Colo.

Reginald T. Titus, Vice-President, Western Forest Industries Association, Portland, Ore.

J. A. Hayley, Manager, Monarch Lumber Company, Military Junction, Colo.

Floyde H. Hughes, Purchasing Agent of Independent Lumber Company, Grand Junction, Colo.

Robert C. Johnson, District Manager, Wood Preserving Division, Koppers Company, which treats lumber at Salida, Colo., and at Denver

J. Arthur Knudsen, General Manager, Knudsen Builders Supply Company, Salt Lake City, Utah

M. S. Rosenblatt, President and General Manager, Structural Steel and Forging Company, Salt Lake City, Utah

Lorenzo J. Bott, Brigham, Utah, fabricator and wholesaler of granite and marble

W. H. Snyder, Grand Junction, Colo., retail dealer in monuments

Kenneth G. Self, holder of a large interest in Inter-Mountain Tractor Sales Corporation, Salt Lake City, Utah. Engaged in distributing tractors and other agricultural implements.

D. G. Adams, Branch Manager, J. I. Case Company, Salt Lake City, Utah, which is among largest producers of agricultural implements and farm machinery in the United States. (Consol. R., I, 26 *et seq.*)

A summary of the testimony of typical witnesses appears in Appendix F attached hereto, with appropriate citations to the Transcript of Record.

The Secretary of Agriculture, the Public Utility Commission of Colorado, the Public Service Commission of Utah, and the American Short Line Railroad Association also intervened in support of the Rio Grande (Consol. R., I, 26 *et seq.*).

The Union Pacific and the other defendant railroads denied the material allegations of the complaint and opposed the granting of any relief thereunder.

Among the interveners in support of the Union Pacific were the Public Utilities Commissions of Washington, Oregon, Montana, Wyoming, Nebraska and Kansas, as well as numerous chambers of commerce, shippers, cities, towns and other public agencies (Consol. R., I, 26 *et seq.*).

The major defenses which the Union Pacific sought to establish may be summarized as follows:

1. That through routes on freight traffic to and from the "closed door" territory over the Rio Grande via the Ogden gateway ceased to exist when the Union Pacific cancelled the joint rates covering said routes (Consol. R., II, 1621).

2. That the Union Pacific offers adequate, efficient and economic transportation on all freight traffic to and from the "closed door" territory, and that there is no public need for the establishment of new through routes for the competitive joint rates sought by the Rio Grande, because the Rio Grande route is not needed to provide adequate, and more efficient or more economic, transportation (Consol. R., I, 899 *et seq.*).

3. That the Rio Grande route is in all instances longer than the route of the Union Pacific to and from the "closed door" territory (Consol. R., I, 802-805).

4. That through routes and competitive joint rates over the Rio Grande via the Ogden gateway in connection with the Union Pacific would result in depriving the Union Pacific of such a large volume of traffic as to seriously impair the Union Pacific's financial ability to continue to properly serve the shippers and the public interest in the "closed door" territory (Consol. R., I, 587, 588).

5. That the existing arrangements between the Union Pacific and its preferred connections with respect to through routes and competitive joint rates (from which the Rio Grande is excluded) are justified because they are mutually beneficial in the sense that the railroads participating in such through routes and competitive joint rates all share in long hauls and short hauls with each other; also that these arrangements are of long standing and therefore should not be a ground for complaint by the Rio Grande (Consol. R., I, 816, 817).

These appeals and the district court decisions below arise out of the Report and Order of the Interstate Commerce Commission of January 12, 1953, which, on the aforesaid complaint of the Rio Grande prescribed competitive joint rates and through routes applicable to certain commodities via the Ogden gateway in Utah over the Rio Grande between points on the Union Pacific and its connections in Washington, Oregon, Idaho, Montana and northern Utah and points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad (Neb. R. 22, 23 and Colo. R. 2; see Map, App. E hereto).

The conclusions of the Commission, made a part of its Order of January 12, 1953, are based upon Sections 15(3) and 15(4) and Sections 1 and 3 of the Interstate Commerce Act. The conclusions appear in the Commission's Report, 287 I.C.C. 611, 659 (Consol. R., II, 1578, 1579), but for convenience, are here reproduced:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and

more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

"2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points

in the northwest area, on the one hand, and points on the Bamberger railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act.

"4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

The Union Pacific and certain of the other railroad defendants assailed the validity of the Commission's order by filing suit in the United States District Court for the District of Nebraska (Neb. R. 3-24).

The Rio Grande intervened as a defendant in the Nebraska case, and as a defendant it supported the validity of the order challenged in the Nebraska court; but in its answer the Rio Grande reserved the right to assail, by suit in a court of competent jurisdiction, the validity of that part of the Commission's order, not assailed in the Nebraska court, which failed and refused to find through routes in existence and to prescribe the competitive joint rates sought by the Rio Grande on all traffic and on all commodities between the points involved in its complaint before the Commission, as well as that part of the Order of the Commission which imposed territorial and other restrictions in the application of said competitive joint rates and through routes prescribed. Such a suit, as hereinafter set forth, was filed shortly thereafter by the Rio Grande in the United States District Court for the District of Colorado.

The Nebraska court sustained the order of the Com-

mission in part, and over-ruled it in part by restricting the application of the rates prescribed by the Commission to shipments via the Rio Grande to be accorded in-transit privileges at points west of such Colorado common points as Denver, Pueblo and Trinidad, and to be later shipped to points east thereof (Neb. R. 167, 168).

The appeal of the Union Pacific (No. 118) (Neb. R. 230 *et seq.*) is based upon the theory that the Nebraska court erred in not reversing *in toto* the order of the Commission of January 12, 1953, instead of merely modifying it.

The appeal of the Rio Grande (No. 117) (Neb. R. 226 *et seq.*) and the appeals (No. 119) of the United States (Neb. R. 229), of the Interstate Commerce Commission (Neb. R. 239) and of the Secretary of Agriculture (Neb. R. 242) are predicated on the contention that the Nebraska court erred in modifying the Commission order of January 12, 1953, by limiting the prescribed rates to shipments requiring in-transit privileges at points on the Rio Grande west of such Colorado common points as Denver, Pueblo and Trinidad.

The Rio Grande, as already indicated, attacked the validity of the Commission's order by filing suit in the United States District Court for the District of Colorado, upon the ground *inter alia* that the refusal of the Commission to consider the case free of the limitations of Section 15(4) and to grant relief as to all commodities and shipments on the basis of the existence of through routes via the Ogden gateway was arbitrary and capricious, contrary to the evidence, and contrary

to law, particularly the provisions of Section 1, Section 3 and Section 15 of the Interstate Commerce Act.

The Rio Grande took no appeal in the Colorado case because the decision was favorable to the Rio Grande, in that it held that through routes are in existence and that the Commission should have so found and should have proceeded to determine the issues, without restricting itself to a consideration of the limitations imposed by Section 15(4) with respect to the establishment of through routes where none exist. The Colorado court remanded the case to enable the Commission to determine the issues involved and the relief requested on the basis that through routes as a matter of fact and as a matter of law are already in existence.

The gist of the Colorado decision is represented by the following pertinent statement in the unanimous opinion of that three-judge court (Colo. R. 294):

> "The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act, free of any of the limitations imposed by Section 15(4) with respect to establishing through routes."

The final judgment and decree of the Colorado court annulled and set aside the Commission order of January 12, 1953, insofar as it denied relief to the Rio Grande and its intervenors and remanded the cause to the Interstate Commerce Commission for further pro-

ceedings in conformity with the opinion and judgment of the Colorado court (Colo. R. 361, 362).

The appeals of the Union Pacific and others in Nos. 332, 333 and 334 (disregarding the procedural points raised by various motions of the Union Pacific, *et al.*, which inferentially were denied when the Supreme Court noted probable jurisdiction) involve the primary question, whether the Colorado court erred in setting aside the order of the Commission and in holding as a matter of law that through routes exist over the Rio Grande in connection with the Union Pacific via Ogden, Utah, on the traffic and between the origin and destination territories involved in the litigation. If any of the procedural points above referred to are again raised in the opening briefs of the other parties to these particular appeals, they will be dealt with in such reply brief as the Rio Grande may file under the reservation so to do, set forth at p. 35 hereof.

As a result of the foregoing sequence of proceedings, the positions of the parties in this Court may be summarized as follows:

(1) The Union Pacific and its interveners contend that the Colorado court should be reversed; that the Nebraska court should be reversed; that the Commission order should be reversed, and that the Rio Grande should be accorded no relief whatever.

(2) The United States, the Secretary of Agriculture and the Interstate Commerce Commission contend that the Colorado court should be reversed; that the Nebraska court insofar as it modified the Interstate Commerce Commission order should be reversed; and that the Commission order

of January 12, 1953, should be restored and affirmed, leaving the Rio Grande with the relief therein granted.

(3) The Rio Grande and its interveners contend that the Colorado decision should be affirmed and the case remanded to the Commission on the basis that through routes via the Ogden gateway are in existence and that the Rio Grande is entitled to have the case considered and decided by the Commission, free of the limitations of Section 15(4); that the Nebraska court should be reversed and the Commission's order reversed insofar as it denies the relief prayed for by Rio Grande; that in the alternative, in the event that the Colorado court is not affirmed, this Court should reverse the Nebraska decision and affirm the Commission Order.

SEQUENCE OF ARGUMENT IN THIS BRIEF

With a view to carrying out the spirit of the order of consolidation of this Court, entered October 24, 1955, and in accordance with the suggestion made to Rio Grande counsel by the Clerk of this Court in a letter dated November 15, 1955, the Rio Grande, as already indicated, is filing this brief as a consolidated opening brief covering both series of appeals, reserving the right to file a reply brief insofar as necessary to meet contentions advanced in the briefs of the other parties to these appeals, which may not be sufficiently covered in this Consolidated Opening Brief.

The United States in its Jurisdictional Statement in the Colorado case (footnote 6, p. 10 thereof) takes the position that the two series of appeals are interdependent and that this Court will not need to reach the issues

involved in the Nebraska appeals (Nos. 117-119) if it affirms the judgment in the Colorado case. Such a result does not necessarily follow an affirmance of the Colorado case, because the Colorado court in remanding that case to the Commission (131 F.Supp. 372 at 387) annulled and set aside the Commission's order only "insofar as it *denied* and *withheld* relief to the plaintiff and intervening plaintiffs" (Emphasis supplied) (Colo. R. 361). The Colorado court did not annul or set aside the *affirmative* relief which the Commission order accorded the Rio Grande and which was the sole matter under review in the Nebraska case.

The jurisdiction of the Nebraska court was only invoked to deal with that part of the Commission's order which granted affirmative relief to the Rio Grande. This relief was limited to the prescription of through routes and competitive joint rates on certain named commodities, and was also restricted territorially (Consol. R., II, 1595-1597; see also Map, App. E hereto). The Nebraska court imposed further limitations upon the relief granted by the Commission, by limiting the joint rates prescribed on the named commodities to shipments requiring in-transit privileges at points on the Rio Grande (Neb. R. 167, 168).

However, the Colorado court held that through routes are in existence as a matter of law, as claimed by the Rio Grande, and that the failure of the Commission to so hold had prejudiced its approach to the entire case and improperly caused it to treat itself, in granting relief, as restricted by the limitations of Section 15(4) (Colo. R. 279 *et seq.*).

On this basis, an affirmance by this Court of the Colo-

rado decision could properly involve sending the entire matter back to the Commission in a remand broad enough to require the Commission to reapproach the entire case upon the basis that through routes are in existence. Such a remand by this Court would carry with it the issues dealt with by the Nebraska court to such extent that this Court would not reach or need to deal with those particular issues. In the absence of such a broad remand by this Court, the issues involved in the appeals in the Nebraska case would need to be disposed of independently.

Because of the foregoing unusual situation, and because an affirmance of the Colorado decision as indicated could avoid the necessity of having to deal with the issues in the Nebraska case, it is logical and may better serve this Court, so far as this Consolidated Opening Brief is concerned, to argue the questions presented on the appeals from the Colorado decision prior to the questions arising in connection with the Nebraska case. Accordingly, the Rio Grande argument on the merits will be directed first to the issues involved in the Colorado case. The argument on the issues raised by the Nebraska case appears *infra*, pp. 86-116.

SUMMARY OF ARGUMENT

Colorado Decision

In *Missouri & Illinois Coal Co. v. Illinois Cent. R.R.*, 22 I.C.C. 39, the inherent purpose and policy of the Interstate Commerce Act, with special reference to Sections 1(4) and 3(4) of the Act, was cogently stated by the Commission as follows:

"Reading these provisions together, there can

be no doubt as to the intent of Congress. Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

The Commission's view of the inherent purpose and policy of the Interstate Commerce Act was confirmed by Congress and extended to all of the provisions of the Act in its statutory declaration of National Transportation Policy as set forth as a preamble to the Interstate Commerce Act, United States Code, Title 49 (App. B. hereto, 1).

In 1897 when the Oregon Short Line Railroad Company and the Oregon-Washington Railroad and Navigation Company were not under the control of the Union Pacific, they published competitive joint rates via the Rio Grande through Ogden on all freight traffic which moved between points on those railroads, now operated under lease by the Union Pacific Railroad, and Colorado common points and the territory east thereof. That action was in accord with the underlying policy of the Interstate Commerce Act.

By 1906 the Union Pacific had reacquired control of the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company, and between 1906 and December, 1912, the Union Pacific caused the competitive joint rates via Ogden and the Rio Grande which had been established in 1897 to be canceled; but no action was taken then or later by the Union Pacific or

its preferred railroad connections to cancel or close the through routes via the Rio Grande.

In spite of the higher rates, a substantial amount of freight traffic has continued to move on through bills of lading via the Ogden gateway over the Rio Grande to and from the "closed door" territory, with the consent and knowledge of the Union Pacific and its presently preferred connections. The evidence is undisputed that many shippers pay the higher rates where they want to use the Rio Grande, and that the Union Pacific and the other defendant railroads involved never refused to issue a through bill of lading for such shipments (see Statement, *supra* pp. 13-17).

Both the principal traffic witness of the Union Pacific and counsel for the Union Pacific admitted that through routes via the Ogden gateway over the Rio Grande are open and available to shippers who are willing to pay through rates based on the aggregate of the intermediate local rates of the various carriers in the route (see Statement, *supra* pp. 11-13).

That the cancellation of joint rates does not cancel through routes was recently emphasized in *United States v. Great Northern Ry.*, 343 U.S. 562, 572.

This Court has also rejected as without legal significance the contention of a railroad that through routes which are said to be "commercially closed" as a result of higher and discriminatory rates are not through routes within the meaning of the Interstate Commerce Act. *Virginian Ry. v. United States*, 272 U.S. 658.

Upon the foregoing facts and authorities (and other authorities referred to in its opinion), the Colorado

court correctly held that the Commission erred in failing to find that through routes over the Rio Grande via the Ogden gateway in connection with freight traffic moving to and from the "closed door" territory are in existence.

The Colorado decision further held that the Commission erroneously treated itself as bound by the limitations of Section 15(4) of the Interstate Commerce Act, thereby subjecting its consideration of the whole case to the limitations of that section, which only apply to the establishment of through routes where none already exist.

Under its Final Judgment and Decree, the Colorado court annulled and set aside the order of the Interstate Commerce Commission insofar as it denied and withheld relief to the Rio Grande and the other intervening plaintiffs. The Commission, in denying and withholding relief, mistakenly regarded Sections 1(4), 3(4), 15(1) and 15(3) of the Interstate Commerce Act as subject to the limitations of Section 15(4), and thereby failed properly to apply those sections to the issues in the case.

Section 1(4), which requires a common carrier to furnish transportation upon reasonable request and to establish just and reasonable rates, fares, charges and classifications, is not subject to the limitations of Section 15(4) of the Act. *Atchison, T. & S. F. Ry. v. United States,* 279 U.S. 768, 777; *Virginian Ry. v. United States,* 272 U.S. 658, 666.

Section 3(4) of the Interstate Commerce Act which

requires carriers by railroad to afford reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines; and forbids them to discriminate between connecting lines in their rates, fares and charges, is not subject to the limitations of Section 15(4) of the Act. *United States v. Great Northern Ry.*, 343 U.S. 562, 574, 575; *Great Northern Ry. v. United States*, 81 F. Supp. 921, 924 (D.C. Del.), aff'd 336 U.S. 933.

Section 15(1) implements Sections 1(4) and 3(4) of the Act by empowering the Commission to prescribe just and reasonable railroad rates, fares and charges and just, fair and reasonable classifications and practices, in order to correct unjust, unreasonable, unjustly discriminatory or unduly preferential or prejudicial rates, fares, charges, classifications or other practices.

Section 15(3) of the Act authorizes and requires the Commission, "whenever deemed by it to be necessary or desirable in the public interest," to establish through routes and joint rates, fares and charges. The limitations of Section 15(4) do not apply to the establishment of joint rates, fares and charges over through routes which are already in existence. *United States v. Great Northern Ry.*, 343 U.S. 562, 576. However, the Commission erroneously considered its power to establish joint rates, fares and charges under Section 15(3) as limited by the restrictions of Section 15(4).

The Colorado court was, therefore, correct in holding that the Interstate Commerce Commission erred in the following particulars:

(1) In failing to hold, under the undisputed

evidence that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific, and

(2) In narrowly limiting itself to a consideration of the case under the restrictions of Section 15(4) of the Interstate Commerce Act, since that section does not apply where (a) through routes are in existence, or (b) where under the evidence of the case, and as a matter of law, relief should be granted under Sections 1(4); 3(4), 15(1) or 15(3) of the Act.

A remand of the case as ordered by the Colorado court is the appropriate procedure for enabling the Commission to correct its several errors.

Nebraska Decision

The Commission in its order of January 12, 1953, prescribed competitive joint rates and through routes on granite and marble monuments from origins in Vermont and Georgia to destinations in the "closed door" territory, and on a limited number of commodities eastbound via the Union Pacific through Ogden or Salt Lake City from the "closed door" territory to points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad, without the imposition of any conditions with respect to the stopping of shipments at points in-transit for loading, unloading, cleaning, milling, storing, fabrication, etc.

The Nebraska court sustained the order of the Commission in part, and overruled it in part by restricting

the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande and requiring in-transit privileges at such points.

In modifying the Commission's findings, the Nebraska court entered the field allocated to the exclusive jurisdiction of the Commission and erroneously substituted its judgment with respect to the weight and significance of the evidence for the judgment of the Commission. Only questions of law, including those affecting constitutional power, statutory authority and basic prerequisites of proof can be raised against an order of the Commission. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 140, 145, 146; *Atchison, T. & S. F. Ry. v. United States*, 284 U.S. 248, 262; *O'Keefe v. United States*, 240 U.S. 294, 303; *ICC v. Union Pacific R. R.*, 222 U.S. 541, 547; *ICC v. Chicago, R. I. & Pac. Ry.*, 218 U.S. 88, and *ICC v. Illinois Cent. R. R.*, 215 U.S. 452.

The court below erroneously assumed that the primary need with respect to the named commodities covered by the Commission order was for in-transit privileges at points on the Rio Grande, whereas in fact the primary need was and is for competitive joint rates via the Rio Grande so that its route can be used and cars stopped at points on the Rio Grande or at points on other railroads east of the Rio Grande, if so desired by shipper. The facts before the Commission show without dispute that in-transit privileges already exist on the Rio Grande and its connections with respect to all the named commodities, but that competitive joint rates are necessary to make these privileges effective.

The Commission, in its administrative capacity, so decided.

The Commission correctly understood what the Nebraska court did not, that such existing in-transit privileges are commercially ineffective unless the freight which is accorded in-transit privileges may move from the original points of shipment to ultimate destinations at competitive joint rates.

The Nebraska court erred in interpreting and applying Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, and particularly in holding that Section 3(1) and its implementing Section 15(1) were inapplicable to the facts in the instant case.

Section 3(1) of the Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provisions of the Act—

> "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *"

The Nebraska court erred in holding that Section 3(1) does not apply to the instant case, even though the defendant railroads involved (the Union Pacific and its preferred connections) clearly have the power to eliminate the violations of that section.

In this connection the Nebraska court misconceived the decision of the Supreme Court in *Central R.R. of N.J. v. United States*, 257 U.S. 247. The court's error arose from its failure to grasp that the wrongs which the Rio Grande and the intervening complainant shippers sought to have the Commission correct could not exist, unless the other defendant railroads joined the Union Pacific in establishing and maintaining competitive joint rates and through routes with each other while refusing to include the Rio Grande in such rates.

A finding of undue prejudice and preference as between the territories and regions involved is sustained where, as here, the defendants singly or jointly, directly, or indirectly through connecting lines, serve the same origins or destination points or territories. *New York v. United States*, 331 U.S. 284; *Chicago, I. & L. Ry. v. United States*, 270 U.S. 287; *St. Louis Southwestern Ry. v. United States*, 245 U.S. 136; *Southern Ry. v. United States*, 204 Fed. 465 (Commerce Ct.); *Seneca Wire & Mfg. Co. v. Baltimore & O. R.R.*, 112 I.C.C. 95, and *Lake Dock Coal Cases*, 89 I.C.C. 170.

In dealing with Sections 15(3) and 15(4) the lower court erred in assuming that the question of public interest and of "adequate, and more efficient or more economic, transportation," as a purely legal proposition, must be confined to shipments requiring in-transit privileges on the Rio Grande, since the question of what is in the public interest and what constitutes adequate and more efficient transportation is, under the facts of this case, an administrative question with respect to which the Commission has exclusive jurisdic-

tion and is not a legal question to be determined by the court.

The errors of the Nebraska court requiring a reversal of its decision therefore may be briefly summarized as follows:

(1) It substituted its judgment for the judgment of the Commission with respect to administrative findings made by the Commission and supported by substantial evidence.

(2) It misinterpreted and misapplied Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, particularly in holding that Section 3(1), which prohibits any carrier from giving undue preference to any person, locality, territory or region, or subjecting any person, locality, territory or region to any undue prejudice, does not apply in the instant case.

Disposition of the Consolidated Appeals

In view of the consolidation of the Colorado and Nebraska appeals, there immediately follows as a part of this Summary a brief statement, amplified in the Conclusion at the end of this Consolidated Opening Brief, as to what, in the opinion of Rio Grande counsel, would be an appropriate disposition of the appeals herein.

I.

The decision of the United States District Court for the District of Colorado involved in appeals Nos. 332, 333 and 334 should be affirmed, with appropriate directions to the Interstate Commerce Commission; the decision of the United States District Court for the District of Nebraska involved in appeals Nos. 117,

118 and 119 should be reversed, and the order of the Interstate Commerce Commission should be set aside insofar as it denies the relief sought by the Rio Grande.

II.

In the alternative, in the event that the decision of the United States District Court for the District of Colorado is not affirmed, the decision of the United States District Court for the District of Nebraska involved in appeals Nos. 117, 118 and 119 should be reversed and the order of the Interstate Commerce Commission should be affirmed.

ARGUMENT

COLORADO DECISION

I.

Geographic and Economic Background of This Litigation

For a proper understanding of the argument in connection with the Colorado decision it is appropriate to review the geographic and economic situation underlying this litigation.

The "closed door" territory in Northern Utah, Idaho, Montana, Washington and Oregon is a large and developing area of the United States (Consol. R., I, 178 *et seq.*), which the Union Pacific claims as its own principality, to and from which it asserts the right to control the movement of railroad traffic and with respect to which as a matter of whim or otherwise it asserts the right to prefer certain railroad connections. In so doing the Union Pacific discriminates

against the Rio Grande and the intervening shippers and excludes the Rio Grande from traffic moving to and from the area, unless the shippers (the public) are willing to pay a higher price.

As to freight traffic moving to and from the "closed door" territory, the Union Pacific with the aid of its preferred connections claims the right to say to shippers that they may ship over Union Pacific lines to and from Colorado common points and east thereof at competitive joint rates, or that they may ship at competitive joint rates via the Union Pacific and its preferred connections by routes longer than the distances via the routes of the Rio Grande through Ogden.

The extent of this situation is disclosed by the routes heretofore described in the Statement in this brief, pp. 17-20, and illustrated by the map attached hereto as Appendix C. The effect of this situation is that the Union Pacific maintains a monopoly with respect to the movement of railroad traffic to and from the "closed door" territory. It asserts the right, free from any authority of the courts or otherwise, to grant or withhold to other railroads equality as to rates and interchange practices as it sees fit. This is contrary to the provisions of and the policy underlying the Interstate Commerce Act, which requires railroads to act together to constitute one national coordinated system of transportation, of which the Rio Grande is as much a part as any other railroad.

The Interstate Commerce Act as a matter of broad policy intends that there shall be no discrimination in rates and charges between connecting railroad lines,

whereby the public is coerced into employing one competing line to the exclusion of another, and a monopoly is thus created in favor of one particular railroad. This principle was set forth in *New York & No. Ry. v. New York & N. E. R. R.*, 3 I.C.C. 542, 550, in the following words:

> "When, therefore, the Statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the Statute it is only a meaningless enactment. * * *"

The Rio Grande's complaint before the Interstate Commerce Commission (filed August 1, 1949) directly challenged this over-lordship exercised by the Union Pacific and its preferred connections with respect to the business and economic life of a territory greater in extent than the combined areas of New England, New York, Pennsylvania and Maryland. As already indicated, a number of interested shippers, organizations and public service commissions intervened. After the taking of voluminous testimony, the Interstate Commerce Commission through its present Chief Examiner, who heard all of the testimony, rendered a report in favor of the contentions of the Rio Grande. Numerous exceptions to the Examiner's Report were filed, followed by comprehensive briefs by the parties

directly involved (the Rio Grande and the Union Pacific); and by various intervenors on each side.

II.

No Clear Commission Decision with Respect to the Existence of Through Routes

On January 12, 1953, the Commission made its Report and Order—the Order specifically making the Report a part of the Order, by reciting in the Order that the "report is hereby referred to and made a part hereof" (Consol. R., II, 1595). This Report and Order, with certain territorial limitations, accorded relief to the Rio Grande and to the interested shippers with respect to certain named commodities but denied relief with respect to all other commodities shipped to and from the Union Pacific's "closed door" territory (See Map, App. E hereto). Among the ten commissioners who participated in the Commission decision (one, Commissioner Knudsen, not participating (Consol. R., II, 1592)), there was a wide difference of opinion, and several varying separate written opinions were filed (Consol. R., II, 1579 *et seq.*).

Although there was a concurrence of six Commissioners in the measure of relief granted as to the named commodities, there was an even division of opinion — five to five—on what was alleged in the complaint and treated by all of the Commissioners as the first and basic issue of the case, namely, whether as claimed by the Rio Grande through routes are in existence via the Ogden gateway in connection with the Union Pacific so as to entitle the Rio Grande to relief apart from Section 15(4) of the Act, which imposes limitations on the

Commission with respect to the establishment of through routes where none exist. The limitations of Section 15(4) were summarized by this Court in *Thompson v. United States*, 343 U.S. 549, 552, as follows:

> "The Commission's power to establish through routes is limited by a provision of §15(4), quoted in the margin, whenever such action would require a carrier to short haul itself. Under that Section, a carrier may be required to short haul itself only where its own line makes the existing through route 'unreasonably long as compared with another practicable through route which could otherwise be established,' or where the Commission makes special findings that a proposed through route 'is needed in order to provide adequate, and more efficient or more economic, transportation.'"

A reference to the Commission Report (287 I.C.C. 611) (Consol. R. II, 1579 *et seq.*) shows:

(1) That Commissioner Patterson *concurred in part,* but held the Report inconsistent in failing to grant relief on lumber;

(2) That Commissioner Arpaia *concurred* in the Report and Order as made, and though he *held that through routes existed,* voted to limit the competitive joint rates to the commodities specified in the majority Report;

(3) That Commissioner Lee *concurred in part,* but *held that through routes existed,* and would extend the relief;

(4) That Commissioner Mahaffie (with whom Commissioners Splawn and Cross joined) *dissented in part,* but *held that through routes existed,* and would extend the relief.—

The minute order entered by the Commission on January 12, 1953, reads as follows:

> "Report and order in the above-entitled proceeding approved and adopted; Commissioner Arpaia concurring, Commissioners Lee and Patterson concurring in part, Commissioners Mahaffie, Splawn and Cross dissenting in part, and Commissioner Knudsen not participating."

Whatever is otherwise said of what was decided or not decided as to the existence of through routes, it is apparent that there was no clear decision by a majority of the Commission on this first and foremost question —*the existence of through routes, via the Rio Grande through the Ogden gateway in connection with the Union Pacific*—and that the failure of the Commission to clearly decide this question colored and distorted its whole approach to the case.

The Colorado court held that under the evidence before the Commission and by reason of the admissions of counsel and of the principal traffic witness of the Union Pacific, through routes exist as a matter of law, and that the Commission in considering the issues erred in imposing upon itself the necessity of proceeding under the stringent limitations of Section 15(4) (Colo. R. 279 *et seq.*). Hence, the Colorado court remanded the case to the Commission for further proceedings in accordance with the law as determined by that court with respect to the existence of through routes.

III.

The Existence of Through Routes Via the Ogden Gateway Is the First and Basic Issue

The existence of through routes via the Rio Grande through the Ogden gateway in connection with the Union Pacific, was from the beginning and is now the first and basic issue in this litigation. The Rio Grande, as the original complainant, alleged the existence of such through routes (Consol. R. I, 6). The Commission admitted that the existence of through routes was the first issue in the case to be decided (Consol. R., II, 1523 *et seq.*), but never clearly decided it (Consol. R., II, 1579-1592). The Colorado court recognized the existence of through routes as the first and basic issue, and decided it in favor of the Rio Grande as a question of law. The Nebraska court assumed through routes were not in existence and acted on the assumption that new through routes must be established, and hence that Section 15(4) was the law governing the case.

The Rio Grande was and is entitled to have the basic issue in the case as presented to the Commission by its complaint resolved and decided independently and on its own merits. The Commission not having done so because of an equal division of opinion, the Rio Grande was and is entitled to a specific decision on this question by the courts.

The question of the existence of such through routes, although originally a mixed question of fact and of law, becomes a pure question of law where the evidence, as the Colorado court found in this case, is undisputed. Therefore, the Commission's failure to resolve this

question is not merely a failure to make an administrative finding. Although in the first instance the question was one for the Commission, yet after the underlying facts are established by undisputed evidence, either the failure of the members of the Commission to decide the basic issue in the case, or an erroneous decision of that issue (if it be argued that a decision was made) calls upon a court to examine into the matter and decide upon the whole record whether through routes are in existence as a matter of law. *Thompson v. United States,* 343 U.S. 549; *ICC v. Northern Pacific Ry.,* 216 U.S. 538. This is exactly the issue which the Colorado court had to deal with, and it decided this basic issue in favor of the Rio Grande.

IV.

Under the Law and the Evidence, Through Routes Via the Ogden Gateway Exist

As already indicated (see Statement, *supra* p. 11) the record discloses that through routes and joint rates to and from the points here involved were established in 1897. The joint rates continued until cancelled by the Union Pacific in 1906 from and to some points and in 1912 from and to remaining points. Admittedly, no specific action was taken to cancel the through routes. However, the Union Pacific seems to contend that the mere cancelling of the joint rates cancelled the through routes by somehow closing them "commercially." But there is no law to support what the Union Pacific contends in this particular. On the contrary, it has been definitely indicated by the Supreme Court that the cancellation of a joint rate does

not cancel a through route. This was recently (1952) emphasized in *United States v. Great Northern Ry.*, 343 U.S. 562, at page 572, where the Court said:

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this Court expressly has approved the Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates. As a result, the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes."

To the same effect are the decisions in *Thompson v. United States,* 343 U.S. 549; *Great Northern Ry. v. United States,* 81 F.Supp. 921 (D.C. Del.), aff'd. 336 U.S. 933; *Atchison, T. & S.F. Ry. v. United States,* 279 U.S. 768; *Virginian Ry. v. United States,* 272 U.S. 658, and *St. Louis Southwestern Ry. v. United States,* 245 U.S. 136. In the last cited case, Justice Brandeis stated in a footnote that:

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; * * * ."

This statement by Justice Brandeis in the *St. Louis Southwestern* case is a judicial determination of what constitutes a through route under the provisions of the

Interstate Commerce Act: The court below in deciding that through routes exist was governed by that determination.

In *Routing via Quanah, A. & P. Ry.*, 220 I.C.C. 137, 139, the Commission acted on the theory that the cancellation of a joint rate does not cancel a through route; it went on to hold that when a joint rate is cancelled it is the duty of the railroads to leave in effect through combination rates which are just, reasonable and otherwise in accordance with the standards of the Interstate Commerce Act. Upon review by a three-judge court, the foregoing proposition in the *Quanah* case was sustained in *Thompson v. United States*, 20 F.Supp. 827 (D.C. E.D. Mo.).

The principle that the cancellation of a joint rate does not cancel an existing through route likewise is supported by *Quanah, A. & P. Ry. v. Atchison, T. & S. F. Ry.*, 226 I.C.C. 201, 209; *Routing Grain and Grain Products via Chicago, R.I. & Pac. Ry.*, 198 I.C.C. 117; *Routing on Iron and Steel Articles*, 168 I.C.C. 175, and *Grain and Grain Products*, 161 I.C.C. 709.

The proposition that the cancellation of a joint rate does not of itself cancel an existing through route is also supported by Section 6(1) of the Interstate Commerce Act, which affirmatively recognizes the existence of through routes in the absence of joint rates. The pertinent part of Section 6(1) provides:

> "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between dif-

ferent points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. *If no joint rate over the through route has been established,* the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separate established rates, fares and charges applied to the through transportation.* * *." (Emphasis supplied)

The emphasized language of the statute would not make sense unless Congress contemplated the existence of through routes in the absence of joint rates.

In the decision of the Colorado court (Colo. R. 279, at page 288) the evidence which the court characterized as "undisputed" as to the existence of through routes was effectively summarized as follows:

"A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at through combination rates, without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small. In 1948, which was selected as a representative year, 37 carload shipments were made on through bills of lading from the northwest area to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific or its connections, but none moved to any destination east of Colorado common points. In the same year, 18 carload shipments were made westbound on through bills of lading from points east and southwest over connecting lines and the Rio Grande to Salt Lake City or Ogden and the

Union Pacific to destinations in the Northwest area. In addition, 21 carload shipments moved on through bills of lading from various eastern points to destinations in the northwest area, which were routed over the Rio Grande and Union Pacific, were held by the Rio Grande at Denver or Pueblo for change of the routing because the joint through rates were not applicable. The traffic movement to and from the northwest area over the Rio Grande through the Ogden gateway on through bills of lading and at through rates was substantially the same in years prior to 1948 and continued into 1949, until the date of the Commission hearings.

"From November, 1942 to August, 1945, a number of shipments were diverted under service orders issued by the Commission from the regularly used routes to the Rio Grande route. During World War II mixed trains of troops in passenger cars and of military supplies in freight cars moved from eastern and southern points on through billing over the Rio Grande via Ogden and Union Pacific to the closed door area. These trains were not routed under service orders issued by the Commission. In 1949, when the main line of the Union Pacific in Wyoming was blocked by snow, the traffic was diverted over the Rio Grande between Denver and junctions with the Union Pacific in Utah. These latter movements were made under emergency conditions and admittedly do not tend to establish an ordinary course of business between the carriers involved, but the Commission did not invoke its authority under §15(4) of the Act to establish temporary through routes which indicates that the Commission assumed that through routes were already in existence."

There is no evidence to the contrary, to-wit: that the

Union Pacific has ever refused to issue a through bill of lading over the Rio Grande when the shipper is willing to pay the price.

V.

Commission's Misconception of the Law of Through Routes

The Commission (five members out of ten) misconceived *Thompson v. United States,* 343 U.S. 549, and erroneously assumed its facts to be similar to those of the Rio Grande case. There are substantial differences between the facts of the Rio Grande case and the facts in the *Thompson* case. In the *Thompson* case the Court said, at page 551, with respect to the existence of a through route from Lenora to Omaha via the Burlington line:

> "But there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line or that the carriers have ever offered through service over that route * * *."

In the instant case there is undisputed evidence of numerous through shipments through the Ogden gateway via the Rio Grande in connection with the Union Pacific (see Statement, *supra* pp. 13-17).

At page 557 of the *Thompson* case, the Court observed:

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

What is a "holding out" as announced in the *Thompson* case? In any form of business, it does not require active, affirmative solicitation of business. The merchant who has his shop on any street, with his door open to the public, holds himself out to accept business and thus solicits business. There is a "holding out" whether he receives a large or a small amount of business and whether his prices are higher or lower than a shop up the street. There is a lack of "holding out" only when he refuses to accept business. Under the undisputed evidence in the instant case and under its own admissions, the Union Pacific never refuses to accept through shipments and issue through bills of lading over the Rio Grande where a shipper to or from the "closed door" territory is willing to pay the higher combination rate. As shown by the evidence and as set forth in the decision in the Colorado case, in spite of the higher rates, substantial typical shipments via the Rio Grande on through bills of lading issued by the Union Pacific were made during the years immediately preceding the institution of these proceedings before the Commission (see Statement, *supra* pp. 13-17). This evidence shows that the contention that the through routes are "commercially closed" is pure theory.

The five Commissioners out of the ten who participated in the decision of the Commission and who failed to hold that through routes exist, misconceived the meaning of Section 6(1) of the Interstate Commerce Act, and the *Thompson* case, 343 U.S. 549, and the *Virginian* case, 272 U.S. 658. They also ignored and disregarded the evidence which establishes that a substantial

volume of traffic has been shipped on through bills of lading by shippers, including the Government, via the Rio Grande in connection with the Union Pacific through the Ogden gateway; that another substantial volume of traffic had been handled via the same through routing under service orders of the Commission; and that in 1948 and prior thereto, and continuing to the time of the hearings, through routes have been used under through bills of lading issued to shippers by the Union Pacific and the other defendant railroads (Consol. R., I, 76). The same five Commissioners also ignored and disregarded the legal effect and significance of the admissions made by the Union Pacific principal traffic witness, Mr. Stilling (Consol. R., I, 799, 800), and by Mr. Collins, counsel for the Union Pacific (Consol. R., II, 1621), that through routes exist, as well as the legal effect and significance of the Commission's own service orders utilizing the through routes via R Grande already in existence.

The basic error inherent in the Commission's conclusion (five members) as to the non-existence of through routes is shown by the Commission's statement in its Report (287 I.C.C. 611, 616; Consol. R., II, 1518, 1523) as follows:

> "As above stated and as testified by numerous shippers in this proceeding, the Ogden Gateway routes are not considered as open or through routes *commercially*, but as routes that are closed to shippers *because of the higher rates applicable*. Plainly, a finding that such routes should be opened to shippers on a *commercial basis* by establishing competitive joint rates would result in the establishment of such routes as effective through routes,

a character which they do not now possess." (Emphasis supplied)

The Commission by that statement evidently adopted the position that because through routes are subjected by the Union Pacific to the commercial deterrent of shippers being arbitrarily required to pay higher than the competitive joint rate, they cannot be regarded as through routes within the meaning of the Act. In this the Commission erred. In *St. Louis Southwestern Ry. v. United States,* 245 U.S. 136, and in *Virginian Ry. v. United States,* 272 U.S. 658, this Court rejected as without legal significance the contention of a railroad that routes which are "commercially closed" as a result of higher and discriminatory combination rates are not through routes within the meaning of the Interstate Commerce Act.

The holding in the *Virginian* case that a through route does not cease to exist because *through traffic* over it is commercially restricted by reason of higher combination rates was cited with approval by the Supreme Court in *Thompson v. United States,* 343 U.S. 549. At footnote 18 of the decision in that case, Chief Justice Vinson, in distinguishing the facts in the *Thompson* case from those in the *Virginian* case, said that:

> "*Virginian R. Co. v. United States,* 272 U.S. 658, is inapposite since through routes were there found to be in existence but commercially closed solely because of unreasonable and discriminatory rates charged by the *Virginian* over its portion of the route."

Despite the noncompetitive character of the combina-

tion rates in effect over the routes via the Rio Grande, through traffic has continued to move over such routes as shown by the evidence summarized at pp. 13-17, 57, 58, of this brief. Hence, if the *Thompson* case, as Chief Justice Vinson stated, is inapposite with respect to the *Virginian* case, it is even more inapposite with respect to the Rio Grande case. Therefore, the Commission erred in treating the *Thompson* case as controlling.

It is also a distortion of the *Thompson* case to say, as five members of the Commission did, that the Supreme Court cited *Beaman Elevator Co. v. Chicago & N. W. Ry.*, 155 I.C.C. 313, with approval. The *Thompson* case referred to the *Beaman* case in footnote 13 which stated merely that the Commission held in the *Beaman* case that proof of one shipment—and that apparently in error—on a through bill of lading over a certain route was not sufficient to establish the existence of a through route because one shipment was not representative of the carriers' course of business.

Moreover, in *Great Northern Ry. v. United States*, 81 F.Supp. 921 (D.C. Del.) aff'd *per curiam*, 336 U.S. 933, the court reiterated the doctrine of the *Virginian* case and added at p. 924:

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to the destination on the line of another. In determining the existence of a 'through route,' all of the circumstances connected with the shipments from place to place may be taken into account."

Whatever other facts or incidents may serve to prove

the existence of a through route, it is sufficient that "A through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of a 'through route.'" *Through Routes and Through Rates,* 12 I.C.C. 163, 167. In that decision the Commission relied upon a passage defining through routes set forth in *Cincinnati, N.O. & T.P. Ry. v. ICC,* 162 U.S. 184. At page 167, referring to a Supreme Court definition of the existence of a through route in the above case, the Commission said:

> "The full significance of this passage" (from the Supreme Court decision in the *Cincinnati* case, *supra*) "appears when it is remembered that it was written in a decision holding that an intrastate common carrier became a part of a through route on traffic as to which it expressly declined to arrange for a joint rate, and to which it applied its local rates. Therefore it is settled that, whatever other facts or incidents of a shipment may serve to prove the existence of a through route, a through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of a through route."

In connection with the through traffic moving over the Rio Grande via the Ogden gateway, the majority of the Commission ignored the statutory conditions under which a shipper may select a route. Section 15(8) of the Interstate Commerce Act provides that at the time of the delivery of property to a common carrier railroad for transportation, the shipper may designate in writing the route via which the shipment shall move where "two or more through routes and through rates shall have been established as in this part provided to

which through routes and through rates such carrier is a party * * *." Thus, unless there is a choice of two or more established through routes, a shipper is not permitted by law (Section 15(8)) to select a particular route as a through route. Hence the Union Pacific in permitting shippers in the "closed door" territory (even at a higher rate) to route over its lines and via the Rio Grande through the Ogden gateway on through bills of lading, as the record shows it continuously has consented to do, must under the law be treated as having recognized such a route as an existing through route. This conduct of the Union Pacific constitutes a "holding out" and is a legal recognition of the existence of a through route.

Clearly the Union Pacific's contention that the mere cancellation of joint rates effected a cancellation of through routes is contrary to law, and contrary to its own conduct, and as heretofore stated, contrary to the admissions of its own counsel and of its own principal traffic witness. Its counsel and its principal traffic witness expressly admitted that a shipper who is willing to pay the higher combination rate has the right to specify through routes via the Union Pacific and Rio Grande—which right only exists (Section 15(8)) when such through routes are already in existence.

To support the existence of through routes over the Rio Grande in connection with the Union Pacific, actual movement of traffic on through billing over each and every of the possible routes involved was not required. Typical shipments are sufficient to support the existence of through routes generally. Although four

members of the Commission treated the shipments as typical and sufficient, the majority held in effect that it is necessary to have detailed evidence covering every commodity from every point of origin to every destination via every route, before the Commission can find through routes in existence as alleged in the Rio Grande complaint. In this respect the Commission again erred as a mater of law.

As was cogently stated by Justice Brandeis in *The New England Divisions Case*, 261 U.S. 184, at page 197:

> "Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed 600; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past, and how it had dealt with them."

The quoted statement of the Court is as applicable to the nation-wide scope of the through route issue involved in the Rio Grande case as it was in *The New England Divisions Case*. The observation made in *The New England Divisions Case* is amply supported by the decisions of this Court in *Georgia Pub. Serv. Comm'n v. United States*, 283 U.S. 765, 774; *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R.R.*, 257 U.S. 563, 579, and

Illinois Cent. R.R. v. Public Utilities Comm'n, 245 U.S. 493, 507.

The decisions in *Quanah, A. & P. Ry. v. Atchison, T. & S. F. Ry.*, 226 I.C.C. 201, and *Cancellation of Rates and Routes Via Short Lines*, 245 I.C.C. 183, embraced issues and rates and routes that were also nation-wide in scope. In the *Quanah, Acme and Pacific* case the defendants before the Commission were the same as the defendants before the Commission in the Rio Grande case, and in *Cancelation of Rates and Routes Via Short Lines* the same railroads were respondents. Each of these cases involved rates on commodities generally, between practically all points in the United States over more than a hundred routes. In those cases, as here, the defendant railroads contended that the Commission could not make the findings requested by the complainants in the absence of specific evidence which showed in detail that the transportation conditions on each railroad participating in the numerous alleged unduly preferred routes were substantially the same as the conditions on each railroad against which the alleged discrimination operated. In the cases cited, the Commission properly considered the evidence introduced as typical of the traffic and transportation conditions as a whole, and rejected the contentions made by the railroad defendants.

The Union Pacific has tried to belittle the Rio Grande evidence as to the number of shipments on through bills of lading via the Ogden gateway, but the wonder is that there have been so many shipments or instances of through bills of lading where shippers are arbitrarily required to pay a higher price in order to

use the Rio Grande. Since the evidence shows substantial and typical shipments, and there was an absence of any proof to the contrary, it was not necessary to submit further proof on the existence of through routes.

In this connection, it should be kept in mind that Mr. Hogue, Vice-President of the Rio Grande, in testifying with respect to the shipments during the year 1948, said that he used the year 1948 because it was the last calendar year prior to the hearings before the Commission, and that the same situation with respect to shipments existed to about the same extent in prior years and continued to the time of the hearings (Consol. R., I, 76).

Moreover, it is very rare to have the counsel for a litigant and the chief witness of that litigant admit a basic contention in a case, as was done here with respect to the existence of through routes via the Ogden gateway, and then be faced with denial by the litigant of the very proposition admitted.

VI.

The Commission's Misapplication of Section 15(4) Resulted in Its Failure to Give Full Force and Effect to Sections 1(4), 3(4), 15(1) and 15(3) of the Act

The Colorado court in its Final Judgment and Decree annulled and set aside the Commission Order insofar as it denied and withheld relief to the Rio Grande and its interveners. The opinion of the Commission indicates, as the Colorado court pointed out, that in denying and withholding full relief under the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Interstate Commerce

Act, it mistakenly regarded itself as bound by the limitations of Section 15(4) with respect to the establishment of new through routes. Though the Commission made purported findings against the Rio Grande under these sections, it is obvious that its approach to the entire case, including the application of these sections, was colored and distorted by its erroneous conclusion that the stringent limitations of Section 15(4) governed its disposition of the case.

The provisions of these sections may be summarized as follows:

Section 1(4) requires every common carrier to furnish transportation upon reasonable request and establish just and reasonable through rates, fares, charges and classifications.

Section 3(4) imposes upon common carriers the duty, according to their respective powers, to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines"; and the duty not to "discriminate in their rates, fares and charges between connecting lines * * *."

Section 15(1) *inter alia* empowers the Commission on its own initiative or in extension of any pending complaint, when it is of the opinion that any individual or joint rate, fare, charge, classification or other practice by a carrier subject to the Act is "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial," to prescribe just and reasonable rates, fares and charges and just, fair and reason-

able classifications and practices to be followed thereafter.

Section 15(3) of the Act authorizes and requires the Commission, "whenever deemed by it to be necessary or desirable in the public interest" to establish through routes and joint rates, fares and charges. The limitations of Section 15(4) apply only to the establishment of new through routes where none already exist. They do not restrict the broad power of the Commission under Section 15(3) to establish, whenever necessary or desirable in the public interest, competitive joint rates over existing through routes. This was expressly held in *United States v. Great Northern Ry.*, 343 U.S. 562, where the Court, speaking of the limitations of Section 15(4), pointed out at page 576 that this section restricted the power of the Commission only "in respect to those joint rates applicable to through routes established by the Commission," and that "the Commission's power to establish joint rates over existing through routes remains unimpaired."

Because in its entire approach to the instant case the Commission considered itself bound by the limitations of Section 15(4), it failed to give full force and effect to its unrestricted powers under Section 15(3) to prescribe competitive joint rates. It is clear from the Report of the Commission itself that the Commission erroneously considered its power under Section 15(3) to establish joint rates, fares and charges as limited by the restrictions of Section 15(4). The Commission stated (Consol. R., II, 1522): "The power to establish through routes *and joint rates* is limited by the provisions of Section 15(4),* * *." (Emphasis supplied)

As pointed out by the Colorado court, the Commission's failure to find through routes colored and distorted its approach to the entire case, including the application of Section 15(3). If through routes are in existence, as claimed by the Rio Grande and as determined by the Colorado court, the Commission is required to approach all the issues, particularly the necessity or desirability in the public interest of establishing competitive joint rates under Section 15(3), free from the limitations of Section 15(4).

The broad language of the Final Judgment and Decree of the Colorado Court must be interpreted as holding that the Commission erred in its interpretation and application of the foregoing sections to the facts in the instant case. Thus the Commission's misconception of the law of through routes clearly prejudiced the outcome of the proceedings before the Commission.

As is the situation in connection with Section 15(3), so also the limitations of Section 15(4) are inapplicable where under the evidence, relief should be granted under Section 3(4). The chief basis for the foregoing proposition with respect to Section 3(4) is the language of Section 15(4) itself, which expressly provides that the limitations on the establishment of through routes set out therein shall not apply to the power of the Commission to grant relief under Section 3. All the limitations on the power of the Commission in Section 15(4) with respect to the establishment of through routes are inapplicable to a Section 3 violation, and hence are not applicable to the granting of relief under Section 3(4).

The following cases support the foregoing proposi-

tion: *United States v. Great Northern Ry.*, 343 U.S. 562, 574, 575; *Great Northern Ry. v. United States*, 81 F.Supp 921, 924 (D.C. Del.) aff'd, 336 U.S. 933; *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768, 777; *Virginian Ry. v. United States*, 272 U.S. 658; *General Mills, Inc. v. Great Northern Ry.*, 269 I.C.C. 457, 466, and *Idaho v. Oregon Short Line R.R.*, 157 I.C.C. 501, 505.

With special reference to Section 1(4) and Section 3(4), the policy of the Interstate Commerce Act was clearly stated in *Missouri & Illinois Coal Co. v. Illinois Cent. R.R.*, 22 I.C.C. 39, at page 46, as follows:

> "* * * Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

The aim of the Act and its policy are to bring about a national system of transportation to the end that the commerce of the country may freely move between all points in the United States over available rail routes, at rates that are neither unreasonable nor discriminatory as between shippers and the railroads or as between connecting railroads: *Railroad Comm'n of Wis. v. Chicago, B. & Q. R.R.*, 257 U.S. 563.

The provisions of Section 3(4) require that reasonable, proper, and equal facilities be provided for the operation of connecting lines as well as reasonable rules and regulations with respect thereto. The restrictive and arbitrary rate policy of the Union Pacific and the

other defendant railroads is not in accord with the foregoing general policy of the Act, and directly violates the specific statutory provisions of Section 3(4).

The only answer of the Commission to the applicability of Section 3(4) to the instant case was:

> "There is upon this record, however, no substantial evidence of the transportation conditions over the established routes referred to. The finding of discrimination under section 3(4) of the act must be supported by showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against and over the routes said to be preferred. No such showing has here been made." (Consol. R., II, 1577)

In the first place, the quoted statement by the Commission is broader than the evidence of record warrants. In the second place, once the Rio Grande establishes a *prima facie* case of discrimination, based upon the inequality of rates and routes and practices with respect to the traffic involved, it becomes the duty of the Union Pacific and the other railroad defendants to show, if they can, that the transportation conditions via the Union Pacific and its preferred connections are sufficiently dissimilar to the transportation conditions via the Rio Grande routes through Ogden to excuse the treatment as not unjustly discriminatory.

In *Continental Steel Corp. v. New York, C. & St. L. R.R.*, 256 I.C.C. 167, at page 174, the Commission said apropos of a similar question:

> "The burden is not on a shipper to show similarity of carrier competition from the alleged prejudiced and preferred points, but it is on defendants to show by satisfactory and convincing

evidence that a sufficient dissimilarity exists to justify the different treatment. Mere assertions that competition exists from the alleged preferred points is not enough."

It is established that while the burden of proof does not shift, the burden of going forward with the evidence does shift to the party in a given case who is in position to furnish the facts. There is a revealing discussion of this question in *Commercial Molasses Corp. v. New York T. Barge Corp.*, 314 U.S. 104, 111. There the Court said in effect that where a breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the facts in issue and to account for the damage or loss which is claimed. In the instant case the Rio Grande alleged that the Union Pacific and the other railroad defendants before the Commission were guilty of breaches of duty in that they violated certain provisions of the Interstate Commerce Act which required them to maintain reasonable through routes and reasonable and non-discriminatory through rates and practices for the operation of such through routes, as well as reasonable, proper, and equal interchange arrangements, and also provides that carriers "* * * shall not discriminate in their rates, fares, and charges between connecting lines * * *."

Moreover, since the Interstate Commerce Act is a remedial statute which should be broadly construed and which imposes affirmative duties upon the railroads and confers authority upon the Commission to enforce such duties, the Commission erred as a major premise in holding that the burden of proof was upon the Rio

Grande to show that the transportation conditions over the alleged preferred railroad connections of the Union Pacific are the same, or substantially the same, as the transportation conditions via the route of the Rio Grande through Ogden. That view is supported by the decisions of the Commission and of the Supreme Court already cited, and by *United States v. Grogg*, 9 F.2d 424 (D.C. W.D. Va.); *Warn v. Davis Oil Co.*, 61 Fed. 631, 632 (D.C. S.D. N.Y.); *The Emma F. Angell*, 217 Fed. 311 (D.C. E.D. Pa.); *Williams v. Casebeer*, 126 Cal. 77; *Baxter v. Camp*, 71 Conn. 245; and other cases cited in Sec. 190, Chamberlayne on Evidence, and 27 Corpus Juris, Sec. 21.

When properly appraised, the evidence in the record before the Commission does show that the transportation conditions on the traffic involved through Ogden via the route of the Rio Grande and its connections are not less favorable than are the transportation conditions via the preferred routes which the Union Pacific maintains with numerous other railroads. On the contrary, there is substantial evidence which demonstrates that the transportation conditions over the routes of the Rio Grande and the Union Pacific through Ogden are just as favorable as the transportation conditions via many of the preferred routes in which the Union Pacific joins other railroads in maintaining competitive joint rates. Moreover, in many instances the distances are shorter in connection with the Rio Grande route through Ogden than are the distances via the Union Pacific's preferred routes. For example, it belies belief that the transportation conditions over the route of the Rio Grande and Union Pacific through Og-

den could be or are any less favorable than the transportation conditions via the Rio Grande where it now participates with the Southern Pacific and the Union Pacific and other railroads at competitive joint rates on traffic that originates or terminates at points in western Washington, which may be routed to Portland via the Union Pacific, thence via the Southern Pacific through Oregon, northern California, Nevada and Utah, to Ogden, thence via the Rio Grande to Denver, Pueblo or other Colorado common points and thence via the Rio Grande's prairie line connections, including the Union Pacific, to destinations such as Kansas City, St. Louis, or Chicago.

It is a known geographical fact that the Rio Grande route traverses a mountainous terrain. The same is true of the Southern Pacific over its lines through Oregon and northern California, and also of the northern transcontinentals in crossing the Rockies in Idaho and Montana, which railroads are preferred connections of the Union Pacific, and as such are accorded through routes and competitive joint rates. The same is also true of the Union Pacific on various portions of its lines.

Commissioner Lee said: "The evidence does not establish that transportation conditions are more favorable over these routes" (the Union Pacific and its connections) "than over the Rio Grande route which is discriminated against by the defendants" (Consol. R., II, 1584).

With respect to the present excellent status of the Rio Grande as an up-to-date railway with modern equipment and efficiently operated in comparison with other railroads throughout the United States, the Com-

mission entirely overlooked the significance of the testimony of Mr. Wilson McCarthy, President of the Rio Grande. Mr. McCarthy testified that within recent years the Rio Grande had become financially sound and is today an efficient, modern railway system. He said (Consol. R., I, 42 *et seq.*):

"The capital structure has been revamped so that annual fixed charges on our mortgage obligations, which in 1935 amounted to $5,073,390, are now only $1,314,077.

"The physical plant has been improved to the point where greater economy and expeditious operation is now possible. Since my coming to the property approximately 109 million dollars have been expended in improving the company's property and facilities.

"When I came to the property, 70 per cent of our standard gauge freight equipment was over twenty years old. Today only 40 per cent of this equipment is over that age. Proportionately even greater gains have been made in our freight and passenger schedules.

"In 1935 our locomotives had an average tractive effort of only 49,574 pounds. Today the average tractive effort is 70,638 pounds—a gain of over 42 per cent.

"The Rio Grande has moved rapidly toward dieselization and I believe today owns proportionately more of this type of equipment than any other western Class I railroad. Today over 70 per cent of our freight traffic is handled by diesel power. This compares with an average of 32 per cent for all Class I railroads.

"During the same period since 1935, the Company's main line was virtually rebuilt. Four hun-

dred and seventy-four bridges have been built or rebuilt, 531 repaired and some 215 eliminated. A total of 1,457 miles of rail have been laid—843 miles with new rail. Almost four million cross ties have been replaced with treated ties and heavy slag ballast has been applied to 634 miles of track.

"The capacity of our company's main line has been further increased through the construction of a second tunnel through the Continental Divide at Tennessee Pass, the installation of some 507 miles of Centralized Traffic Control and 186 additional miles of Automatic Block Signals, the building of more and longer passing tracks, and the reduction of grades and curvatures.

"Safety and economy have been promoted through the construction of slide detector fences, widening of cuts, installation of track and flange oilers, purchase of off-track work equipment and the providing of a greatly improved communications system. The Rio Grande was the first U. S. Railroad to receive a regular license to install and operate radio communication equipment on its trains.

"Similar improvements have been made in the company's yard and terminal facilities with the view to expediting service and reducing costs. These have included extensive track changes, the construction of modern yard offices, the flood-lighting of yards, and the installation of pneumatic tube, radio and loud-speaker communication systems. Service and schedules have likewise benefited from an extensive motive power modernization program.

"Our research laboratory is known throughout the world and many of its discoveries have added to the safety and economy of rail transportation.

"The effect of all this on the company's operating efficiency is evidenced in the fact that the Rio Grande has shown proportionately greater gains in recent years than either Class I or Western District Carriers as a group in the number of gross ton-miles it has produced per train hour operated. The record shows, moreover, that, notwithstanding the mountainous terrain, the company's freight trains in 1948 actually operated at higher average speeds than most lines.

"Because of the improved physical conditions, and for other reasons that will be covered in the testimony for the complainant, the management of the complainant reached the conclusion that there is no justification for the failure and refusal of the defendants, including the Union Pacific, to maintain joint competitive rates via the route of the Rio Grande through the Ogden Gateway; and, as a result of these considerations and conclusions, the complaint was filed with the Interstate Commerce Commission on August 1, 1949."

There is no evidence in the record contradicting the foregoing testimony as to the favorable transportation conditions and the efficiency of operation of the Rio Grande as compared with the other Class I railroads of the country or Western District Carriers as a group.

The statutes impose on railroads an affirmative duty to interchange and forward traffic between connecting lines without discrimination in their rates and charges. This principle was announced very early by the Commission and has never been varied. In *Western Pacific R. R. v. Southern Pacific Co.*, 55 I.C.C. 71, at p. 80, the Commission in referring to Section 3(2), which later became Section 3(4), said:

"There is no escape from the plain intent of these enactments. Reasonable, proper and equal facilities must be afforded for the affirmative duty, and there must be no partiality or injustice in the terms and conditions upon which the duty is performed—in other words, no discrimination in rates and charges. All parts of this provision are of equal authority and obligation. They are the mandate of the same source of power, and it must be assumed that they are intended to have full and complete effect. * * * "

As stated by Chairman Cooley in *New York & No. Ry. v. New York & N. E. R. R.*, 3 I.C.C. 542, 550, Section 3(4) "can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the Statute it is only a meaningless enactment. * * * "

The only excuse appearing in the record for the unjust discrimination above referred to, forbidden by Section 3(4) of the Interstate Commerce Act, was offered by the principal traffic witness for the Union Pacific, Mr. Stilling, who undertook to justify participation by the Union Pacific with the Southern Pacific, the Great Northern, the Northern Pacific, the Milwaukee and the Spokane International and their other preferred connections on the grounds:

(1) That the arrangements have been in effect over a long period of time (Consol. R., I, 816); and

(2) That the arrangements are mutually beneficial

in the sense that the railroads participating in the routes share in long hauls and short hauls with each other (Consol. R., I, 816, 817).

But the fact that the arrangements have been established for a long time and that they are mutually satisfactory to the participants in no manner excuses the discrimination and the violation of the statutes involved. In *Pennsylvania Co. v. United States*, 236 U.S. 351, where the validity of an order of the Commission was assailed, the defendants before the Commission contended that there was no unjust discrimination because of the lack of similar reciprocal interchange arrangements with the complaining railroad. In dealing with this question, the Supreme Court said, at p. 365:

> "We agree with the Commission and the court below that the alleged reciprocal shipping arrangements do not remove the discriminatory character of the treatment of the Rochester road."

The decision of the Supreme Court in *Chicago, I. & L. Ry. v. United States*, 270 U.S. 287, is to the same effect and deals with a situation substantially similar to the contentions made by the Union Pacific's witness Mr. Stilling.

The discrimination in this connection on the part of the Union Pacific and the other defendant railroads is obvious. Section 3(4) was designed to reach and terminate such discriminatory and unreasonably prejudicial practices as the Union Pacific and its favored connections are now imposing with respect to the movement of railroad traffic in and to the vast growing and

developing area consisting of large parts of five great western states.

We now turn to a consideration of Section 1(4) in its relationship to the Colorado decision. This section requires every common carrier to furnish transportation on reasonable request and with other carriers to prescribe just and reasonable through rates, fares, charges and classifications.

The limitations with respect to the establishment of through routes set forth in Section 15(4) were not intended as a restriction upon the duty of a railroad company to establish reasonable rates. Under Section 1(4), a railroad company has a duty to establish reasonable rates, and under Sections 15(1) and 15(3), the Commission has the power, after a hearing in an appropriate proceeding, to prescribe just and reasonable single or joint rates when the rates under investigation are unjust and unreasonable, or unduly prejudicial and unjustly discriminatory. The broad and unrestricted power of the Commission to pass upon the reasonableness of rates is well set forth in *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768, at page 776, as follows (opinion by Justice Brandeis):

> "The broad power to pass on the reasonableness of rates conferred upon the Commission in 1887 has not been in terms limited by any amendatory act. On the other hand, there has been much legislation designed to make the power more effective. The special power to establish through routes and joint rates was not conferred until 1906. Act of June 29, 1906, c. 3591, §4, 34 Stat. 584. There is not, in that act as amended (see *United States v. American Ry. Express Co.*, 265 U.S. 425, 430, 44 S.Ct.

560, 68 L.Ed. 1087, note 2), or in any decision of this court construing it, or in any of the decisions of the Commission applying it, to which attention has been called, the slightest basis for the suggestion that in conferring the restricted power to establish through routes, Congress intended to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates. Compare *Nashville, Chattanooga & St. Louis Ry. Co. v. Tennessee*, 262 U.S. 318, 323."

Moreover, in *Great Northern Ry. v. United States*, 336 U.S. 933, this Court affirmed a decision of the United States District Court for the District of Deleware (81 F.Supp. 921), which in turn had affirmed a Commission decision (269 I.C.C. 457), holding that the Commission was not required to establish through routes under Sections 15(3) and 15(4), in order to find that combination rates were unlawful under Sections 1 and 3 of the Interstate Commerce Act. To the same effect is *New York v. United States*, 331 U.S. 284.

The facts referred to *supra* pp. 17-20, and *infra* pp. 107-110, with respect to prejudice and discrimination under Section 3(4) are equally applicable here to establish under Section 1(4) that the rates and practices of the Union Pacific and its preferred connections are unjust and unreasonable.

In the Rio Grande case, the Commission acted on the theory that in order to grant any relief whatever it was under the necessity of establishing new through routes under Section 15(4). The Colorado court was fully justified in stating that this erroneous self-imposed restriction upon the Commission's authority to estab-

lish reasonable or joint rates obviously prejudiced and distorted its approach to the entire case and improperly caused it to treat itself, in denying relief to the Rio Grande under Sections 1(4), 3(4), 15(1) and 15(3), as somehow restricted by the limitations of Section 15(4). Therefore the Colorado court in its Final Judgment and Decree (Colo. R. 361) properly remanded the entire cause to the Commission, in so far as the Commission denied and withheld relief to the Rio Grande and the intervening plaintiffs, for further proceedings "in conformity with the opinion and judgment" of the Colorado court.

VII.

The Errors of the Commission Require an Affirmance of the Colorado Decision

By way of summary, it is submitted that the Colorado court was correct in holding that the Interstate Commerce Commission erred in the following particulars:

(1) In failing to hold, under the undisputed evidence, that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific, and

(2) In narrowly limiting itself to a consideration of the case under the restrictions of Section 15(4) of the Interstate Commerce Act, since that section does not apply where: (a) through routes are in existence, or (b) where under the evidence of the case, and as a matter of law, relief as to reasonable rates or joint rates should be granted under a proper application of Sections 1(4), 3(4), 15(1) and 15(3) of the Act.

A remand of the case with proper directions, as ordered by the Colorado court, is the appropriate procedure for enabling the Commission to correct its errors.

NEBRASKA DECISION

I.

Outline of Issues

As pointed out in connection with the appeal from the Colorado court, the Comission, by erroneously proceeding on the theory that through routes via the Rio Grande through the Ogden gateway in connection with the Union Pacific do not exist, granted only limited relief to the Rio Grande and to the intervening plaintiffs. The Commission limited the relief to prescribing competitive joint rates and through routes as to certain named commodities. It further imposed a territorial limitation which made the relief applicable on the named commodities via the Ogden gateway over the Rio Grande from points on the Union Pacific and its connections in Washington, Oregon, Idaho, Montana and northern Utah only to points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad (see Map, App. E hereto).

In terms the Commission order of January 12, 1953 requires the Union Pacific Railroad Company and the more than 200 other railroad defendants before the Commission to cease and desist from publishing, demanding or collecting transportation charges on cer-

tain commodities which exceed the rates and charges prescribed by the Commission from and to the points named and from practicing the undue prejudice, preference and unlawful discrimination referred to in the order (Consol. R., II, 1595-1597).

The Commission's Report, containing its findings of fact and conclusions, is expressly made a part of its Order and the two must be read together. *Georgia Pub. Serv. Comm'n v. United States,* 283 U.S. 765, 771. The conclusions are set forth in this brief at pages 29-31, but for convenience, are summarized as follows:

> The Commission concluded under Sections 15(3) and 15(4) of the Interstate Commerce Act that competitive joint rates and through routes on the traffic covered by its order are necessary and desirable in the public interest to provide adequate and more economic transportation; and under Sections 1 and 3 that the existing rates and charges on the said traffic are and for the future will be unjust and unreasonable and unduly prejudicial to shippers and receivers using or desiring to use the routes of the Rio Grande, and unduly preferential for shippers and receivers using the routes of the Union Pacific and other defendants. The Commission also found that maintenance by the Union Pacific and other railroad defendants of joint rates between the northwest area described, on the one hand, and points on the Bamberger Railroad between Salt Lake City and Ogden, Utah, on the other hand, while refusing to maintain like rates to and from the same points on the line of the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Section 3(4) of the Interstate Commerce Act.

The Nebraska court sustained the Order of the Commission in part, and over-ruled it in part by restricting the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande, to be accorded in-transit privileges at such points, and to be later shipped to points beyond the Rio Grande (Neb. R. 167).

The basic issues involved in the Nebraska case (which may not be reached if the Colorado decision is affirmed by this Court) are:

1. Whether the Nebraska court erroneously substituted its judgment for the judgment of the Commission with respect to the administrative findings made by the Commission under which the Rio Grande was granted relief (see Questions Presented 1-6, *supra* pp. 4-6).

2. Whether the Nebraska court erred in interpreting and applying Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, and particularly in holding that Section 3(1) prohibiting any carrier from giving undue preference to any person, locality, etc., or subjecting any person, locality, etc., to any undue prejudice, does not apply where the persons and localities affected by the preference or prejudice are located on different railroad lines and where, as in this case, the defendant railroads involved (the Union Pacific and its preferred connections) clearly have the power to eliminate the preference and prejudice complained of (see Questions Presented 1-6, *supra* pp. 4-6).

II.

The Nebraska Court Erred in Overruling Findings of the Commission Which Were Administrative in Character and Supported by Substantial Evidence

In exercising its recognized administrative functions, the Commission is operating in an area over which it has been given exclusive jurisdiction by Congress for the purpose of assuring a coordinated and efficient national transportation system and establishing just, reasonable and non-discriminatory railroad rates. *Dayton-Goose Creek Ry. v. United States,* 263 U.S. 456, 478; *The New England Divisions Case,* 261 U.S. 184; and *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. R.,* 257 U.S. 563.

While in exercising its delegated powers the Commission does not have freedom of ownership and operates in an area limited by constitutional rights and legislative requirements, the Supreme Court has frequently said that the outlook of the Commission and its powers must be greater than the interest of particular carriers and must in fact be as comprehensive as the interest of the whole country, and that only questions of law including those affecting constitutional power, statutory authority and basic prerequisites of proof can be raised against an order of the Commission. *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 140, 145, 146; *Atchison, T. & S.F. Ry. v. United States,* 284 U.S. 248, 262; *O'Keefe v. United States,* 240 U.S. 294, 303; *ICC v. Union Pacific R.R.,* 222 U.S. 541, 547; *ICC v. Chicago, R.I. & Pac. Ry.,* 218 U.S. 88, and *ICC v. Illinois Cent. R. R.,* 215 U.S. 452.

In modifying the Commission's findings in the instant case, the Nebraska court entered the field allocated to the exclusive jurisdiction of the Commission, erroneously substituted its judgment with respect to the weight and significance of certain facts for the judgment of the Commission and in doing so ordered different and narrower relief than the relief prescribed by the Commission. (Questions Presented 1-6, *supra*, pp. 4-6).

Since the subjects dealt with in paragraphs 1 to 6, inclusive, of the Questions Presented in the Nebraska case are interrelated and are concerned with interrelated findings and ultimate conclusions of the court below, they will be discussed collectively.

As we have already indicated, the Commission prescribed competitive joint rates and through routes on granite and marble monuments in carloads from origins in Vermont and Georgia to destinations in the "closed door" territory, and on a limited number of commodities eastbound from the "closed door" territory via the route of the Union Pacific through Ogden or Salt Lake City and via the Rio Grande to destinations south and east of a designated area which extends northerly and to some extent southerly from Colorado common points (see Map, App. E hereto), without the imposition of any conditions with respect to the stopping of the freight at points in transit for loading, unloading, cleaning, milling, storing, fabrication, etc.

Because the testimony of various shippers and producers before the Commission (see App. F hereto) emphasized the importance and the necessity of in-

transit arrangements, which are maintained by the Rio Grande and railroads generally throughout the country, as an aid to producers and shippers in the preparation and the processing of commodities for marketing, the court below erroneously assumed that the primary need was for in-transit privileges at points on the Rio Grande, whereas in fact the primary need is for competitive joint rates via the Rio Grande so that its route can be used and cars stopped at points on the Rio Grande or at points on other railroads east of the Rio Grande.

In-transit privileges are generally provided by the Rio Grande in its published tariffs (Consol. R., I, 114; Earley Exhibit 3, Sec. H, pp. 1-6). The privilege of stopping through freight in transit at points on the Rio Grande or on its eastern connections is, as stated, already provided for in the tariffs of the Rio Grande and other railroads. In the circumstances, the Commission was not called upon to require the defendant railroads to establish the privilege of stopping freight for various in-transit privileges at points on the Rio Grande or at points on the Union Pacific or on such railroads as the Missouri Pacific, the Rock Island, the Burlington, the Santa Fe and other railroads with which the Rio Grande connects at Colorado common points. The Commission correctly understood that such in-transit privileges are commercially ineffective unless the freight which is accorded in-transit privileges may move from the original points of shipment to ultimate destinations at competitive joint rates.

In paragraph I of the Conclusions of Law in the opinion of the Nebraska court (Neb. R. 167), that court held that the evidence supports the finding of the Commission that the establishment of competitive joint rates and through routes between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the commodities involved originating in the "closed door" territory, only if—

> "consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities, the order of the Commission is valid under Sections 1, 15(3) and 15(4) of the Act and does not violate the direction of Section 15(4) that reasonable preferences be given the carrier which originates the traffic."

On the other hand, in paragraph III of its Conclusions of Law (Neb. R. 167, 168), the Nebraska court held that:

> "To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad, said order is not valid, because Sec. 15(4) constitutes a limitation on the

power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide *inter alia*, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking."

In the last conclusion quoted, the court said in effect that to the extent that the Order of the Commission requires the establishment of competitive joint rates and through routes via the Union Pacific and the Rio Grande on carload traffic from the "closed door" territory to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such a nature as not to require in-transit privileges, and as to all traffic moving from the "closed door" territory to points of original destination east of Denver, Pueblo and Trinidad, the Order is invalid because Section 15(4) constitutes a limitation on the power of the Commission to establish through routes which will result in short-hauling the Union Pacific unless such routes are necessary in order to provide, *inter alia*, adequate transportation.

In that conclusion the court ignored the fact that the Commission not only found that the competitive joint rates and through routes prescribed are "necessary and desirable in the public interest; in order to provide adequate and more economic transportation," but

that the rates assailed by the Rio Grande are and for the future will be unjust and unreasonable, and "unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes."

The conclusion of the Nebraska court results in the anomaly that lower joint rates are made available on in-transit shipments, stopped on the Rio Grande and then reconsigned, than will be available on through shipments that do not require the services or the expense connected with in-transit privileges.

The authority of the Commission to compel railroads to establish just, reasonable and non-prejudicial individual or joint rates or charges is conferred in Section 15(1) of the Act. The standard for action in that section is that the existing rates or charges are unjust, unreasonable, unduly prejudicial, etc.

Paragraph (3) of Section 15 authorizes the Commission "whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint * * * " to establish through routes and joint rates, fares or charges, etc., as well as the terms and conditions under which such through routes shall be operated. The standard for action under Section 15(3) is that the joint rates or through routes are necessary or desirable in the public interest.

Paragraph (4) of Section 15 provides that,

> "In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: Provided, however, that in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. * * * "

The limitations in Section 15(4) of the Interstate Commerce Act on the power of the Commission to require the establishment of through routes are exceptions to the general policy and objectives of the Interstate Commerce Act, and should be strictly construed, whereas the affirmative remedial provisions of the Act should be liberally construed. *Piedmont & No. Ry. v. ICC*, 286 U.S. 299, 311, 312 and *Spokane & I.E. R.R. v. United States*, 241 U.S. 344.

In *Routing via Quanah, A. & P. Ry.*, 220 I .C.

137, 139, sustained in *Thompson v. United States*, 20 F.Supp. 827 (D.C. E.D. Mo.), the Commission said that the provisions of Sections 15(3) and (4) with respect to through routes and joint rates do not stand alone and that "They must be considered in the light of other provisions of the Act, including Sections 1 and 3." In the recent decision of the Commission in *Borough of Edgewater, N. J. v. Arcade & A. R. Corp.*, 280 I.C.C. 121, 123, sustained in *Baltimore & O. R.R. v. United States*, 100 F.Supp. 1002 (D.C. S.D. N.Y.), the Commission stated this proposition more pointedly:

> "The provisions of section 15(4) quoted above, which recognize the right of a carrier to its long haul, are, as indicated, subordinate to the provisions of section 3 of the act, by which, among other things, any undue or unreasonable prejudice or disadvantage is prohibited."

In the same decision, 280 I.C.C. 121, at page 134, the Commission made the following significant statement as to the present policy of the Interstate Commerce Act:

> "Ever since the Transportation Act, 1920, it has been the purpose or policy of Congress that rates be adjusted and other steps taken to ensure adequate, efficient, and economical transportation for the country. That policy has never been regarded as intending that we should accept as the guide transportation service which is just barely adequate, or adequate only if needed or desirable improvements in service are lost sight of. See *McLean Trucking Co. v. United States*, 321 U.S. 67, 78, 81. Rather, that policy seeks affirmatively to build up a transportation system prepared to handle promptly all the traffic of the country.

Dayton-Goose Creek Ry. Co. v. United States; 263 U.S. 456, 478."

In short, the aim of the Interstate Commerce Act and its policy is to bring about a national transportation system, to the end that the commerce of the country may freely move between all points in the United States over available rail routes at rates that are neither unreasonable nor discriminatory as between shippers and railroads, or as between railroads. *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R.R.*, 257 U.S. 563, and *The New England Divisions Case*, 216 U.S. 184.

The Commission was properly influenced by the testimony before it (see App. F hereto) which showed a widespread demand for the use of existing in-transit privileges at competitive joint rates, and it understood what the court below apparently did not understand, namely, that shippers and producers needed competitive joint rates via the Rio Grande and its connections on the traffic involved for general marketing purposes and not solely for in-transit purposes. The court not only erroneously applied the limitations in Section 15(4) of the Act on the power of the Commission to prescribe through routes, but too narrowly construed the exceptions in Section 15(4) which exclude the limitations.

Moreover, the court, in weighing the evidence and in considering the needs of shippers and the public interest, substituted its judgment for the judgment of the Commission and reached the erroneous conclusion that the competitive joint rates prescribed by the Commission are justified and necessary *only* as to traffic origi-

nally consigned to points on the Rio Grande, requiring in-transit privileges at such points, and later to be reshipped to points east and south of Denver, Pueblo and Trinidad and east and south of Kansas City, Mo., and certain other Missouri River points. In other words, the court below went beyond what the Supreme Court has repeatedly stated are the limited functions of courts in reviewing orders of the Commission. In *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 593, the Supreme Court reiterated its views on this subject as follows:

> "We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it."

The lower court also erroneously assumed that the joint rates prescribed by the Commission were needed only by shippers located on the rails of the Rio Grande. Most of the shippers who testified before the Commission are located at points in northern Utah, in Idaho, in Oregon and Washington served by the Union Pacific. A summary of the testimony of various shippers and producers of the commodities involved in the order of the Commission is set forth in Appendix F attached hereto. The testimony of these shippers establishes beyond question the need for the competitive joint rates and through routes prescribed by the Commission.

Generally speaking, the commodities covered by the order of the Commission produced in and shipped from the "closed door" territory are marketed at various

points throughout the United States. In numerous instances the ultimate purchaser of the commodity may not be known at the time the shipment starts "rolling" from the origin points. The shippers want to be in position to use whatever rail route best suits their purpose at a given time in the light of weather, market and other conditions, and some of the shipments are stopped several times in transit for partial loading or unloading before the shipment reaches its final destination.

Under the existing rate restrictions imposed by the Union Pacific and its preferred connections, shippers in northern Utah, Idaho, Montana, Washington and Oregon do not have an opportunity of making a selection of routes enabling them more profitably to market their products, and in some cases to "feel out" the markets at such points as Grand Junction, Pueblo, Colorado Springs and other points in Colorado and Utah served by the Rio Grande via Ogden or Salt Lake City. As already stated, the Order of the Commission prescribes joint rates via the Union Pacific, Ogden and the Rio Grande which if established would permit shippers of the commodities involved located on the Union Pacific in the "closed door" territory, as well as shippers, feeders, brokers and others located on the Rio Grande and on its eastern connections, to use the route of the Rio Grande without being penalized by the higher combination rates if the shipments were reconsigned to points beyond the Rio Grande.

Under the judgment of the Nebraska court a shipper in the "closed door" territory cannot obtain the bene-

fit of the competitive joint rates prescribed by the Commission unless the shipment is originally consigned to points on the Rio Grande, at which points it requires in-transit privileges, and then is reconsigned to points specified in the Commission order. In-transit privileges are important, but as the Commission recognized they are not needed on every shipment that might be routed via the Rio Grande under the rates and routes prescribed by the Commission. The fact that a shipper does not exercise his right to in-transit privileges should not warrant subjecting him to the penalty of a higher rate.

The Nebraska court has given the phrase "adequate and more efficient or more economic transportation" as used in clause (b) of Section 15(4) a narrow and unjustified interpretation with respect to the facts of this case. The Commission repeatedly has held that the public interest is not served by shutting out markets from shippers by the denial of joint rates and through routes which do not require the performance of substantially greater total service than the service over existing routes. *D. A. Stickell & Sons, Inc. v. Alton R.R.*, 255 I.C.C. 333, sustained in *Pennsylvania R.R. v. United States*, 54 F.Supp. 381 (D.C.-Md.) which decision in turn was affirmed by the Supreme Court in a case of the same title in 323 U.S. 588.

These decisions hold that the phrase "adequate, and more efficient or more economic, transportation" includes the interest and welfare of the shipper, as well as of the carrier, and that in these circumstances the Commission has authority to consider and weigh the

relative importance of all factors affecting both the shipper and the carrier. In exercising its administrative function in this area the Commission must be sustained when its action is supported by substantial evidence (see App. F hereto). The Nebraska court appears to have been primarily concerned with a comparison of the physical operating conditions of the Union Pacific and the Rio Grande, rather than with the needs of shippers under the complex market conditions that exist and with their right to use various railroads at competitive joint rates as the circumstances may require.

In this connection it should be pointed out that the word "adequate" and the words "more efficient or more economic, transportation" in Section 15(4) were not intended to be restricted to a comparison between two particular railroads, to-wit the Union Pacific and the Rio Grande. Moreover, the words of the statute are intended to be considered from the point of view of the shippers and the general public, at least as much as from the point of view of the carriers.

Nor are the words restricted to a consideration of the physical adequacy, the mechanical efficiency or the economical operation of one railroad as compared to another. Neither the dictionary nor the law defines "economic" as meaning "economical." It is not a question of cheapness of operation of one railroad as compared to another, but more a question of whether the transportation would be better for the economy of the area involved and the country as a whole.

Effective support for the foregoing propositions is

found in *Pennsylvania R.R. v. United States*, 323 U.S. 588, where the Supreme Court, in a detailed opinion, approved the thorough analysis of the language "adequate, and more efficient or more economic, transportation" by the court below, 54 F.Supp. 381, 388-390 (D.C. Md.), which in turn had approved the Commission's views of the same case, *D. A. Stickell & Sons, Inc. v. Alton R.R.*, 255 I.C.C. 333, 339-344. Other cases sustaining a broad meaning for the language are *Baltimore & O. R.R. v. United States*, 100 F.Supp. 1002, 1011 (D.C. S.D. N.Y.); *Helix Milling Co. v. Great Northern Ry.*, 287 I.C.C. 77, 86, 87; and *General Mills, Inc. v. Great Northern Ry.*, 269 I.C.C. 457, 465.

The questions to be answered in applying Section 15(4) are: Is the kind of transportation offered to the shippers to and from the "closed door" territory and to shippers to and from points in the area designated in the Commission order, as adequate as it would be if through routes and competitive joint rates were in operation over the Rio Grande through the Ogden gateway? Is it more efficient for the economy of the "closed door" territory and the economy outside the "closed door" territory to have a choice of routes, than to be confined to one route or required to pay a higher rate over one route when two alternative routes could be made available at the same rate; and would the economy of the "closed door" territory and the economy of the country as a whole be afforded "more economic transportation" if through routes and competitive joint rates were available via the Ogden gateway?

The Nebraska court erred in adopting a narrow and

erroneous interpretation of the language "adequate, and more efficient or more economic, transportation" found in Section 15(4) of the Interstate Commerce Act, and thereby erroneously reduced the measure of relief granted by the Commission.

III.

The Nebraska Court Erred in Interpreting and Applying Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, and particularly in holding that Section 3(1) and its Implementing Section 15(1) were Inapplicable to the Facts in the Instant Case

Section 3(1) of the Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provisions of this part—

> "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * * "

One aspect of the caprice practiced by the Union Pacific in the exercise of its monopoly is illustrated by the fact that the Union Pacific between points in southern Utah, Nevada and southern California on its Los Angeles line, on the one hand, and Colorado common points

and points east thereof, on the other, participates in competitive joint rates and through routes in connection with the Rio Grande via Provo or Salt Lake City, Utah. In other words, from or to points on the Los Angeles and Salt Lake line in southern California, southern Nevada and southern Utah, the Union Pacific accords its shippers the right of selecting their own route as between the Union Pacific and the Rio Grande and of routing their freight at equal rates over the Rio Grande if they so elect (Consol. R., I, 91, 92).

Such position is in striking contrast to the arbitrary and monopolistic attitude adopted by the Union Pacific with respect to traffic from or to points in the "closed door" territory where it withholds from its shippers the right of selection of routes and of routing over the Rio Grande through Ogden or Salt Lake City at equal rates. The Union Pacific, therefore, from or to points in the "closed door" territory not only assumes the right to discriminate against the Rio Grande but also the right to discriminate against shippers in that area, resulting in undue prejudice to such shippers. Certainly, the shippers on the Union Pacific in the "closed door" territory are entitled to the same freedom in the choice of their routes and of routing over the Rio Grande at equal rates, if they so choose, as the shippers on the Los Angeles line of the Union Pacific.

The Commission also appears to have found undue prejudice and discrimination by the Union Pacific and its preferred connections against the territory served by the Rio Grande, as compared with the territory served

by the Union Pacific between Ogden on the west and Denver on the east, in violation of Section 3(1) of the Act. It is well known, and was found by the Commission, that effective participation in the national transportation system is required for the proper economic growth of any region or territory. To the extent that shipments via the Rio Grande are prevented by the rate differentials maintained by the Union Pacific, the economic growth of the territory and region along the Union Pacific lines is promoted at the expense of the territory and region along the Rio Grande. Since the rate differentials are unjustified by transportation conditions, the Commission properly found them to be violations of Section 3(1). The Nebraska court erred in holding that such a finding was not in accordance with law.

In dealing with the finding by the Commission that intervening shippers suffer undue prejudice and undue and unreasonable preference prohibited by Section 3(1), the Nebraska court misconceived the facts on which the Commission acted as well as the scope of Section 3(1), and of the issues before the Commission for decision. The court below said *apropos* of the finding by the Commission in respect to Section 3(1):

> "If the prejudice and preference shown by the evidence falls within the prohibition of Section 3(1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15(3) and 15(4) heretofore considered. But the prejudice and preference prohibited by Sec. 3(1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3(1) which are served by the one carrier or the combination

acting as one. The prohibition of Sec. 3(1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in *Central R. Co. of New Jersey v. United States,* 257 U.S. 247, was different, the purpose of Sec. 3(1) was there stated as follows: (loc. cit. 259-260) 'What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c.91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of Section 3.'"

The Nebraska court not only failed to appreciate the legal significance of the facts on which the Commission relied in finding that the rates assailed by the Rio Grande subjected the intervening shippers to undue prejudice and undue preference, but misconceived and misapplied the decision of the Supreme Court in *Central R.R. of N.J. v. United States,* 257 U.S. 247. This is illustrated by the above statement of the court below that the prohibitions against undue prejudice and preference of Section 3(1) of the Act do not apply to a situation "such as this where the comparison of preferences and advantages or prejudices and disadvan-

tages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion."

That is the nub of the error of the Nebraska court. It failed to grasp that while the Union Pacific is the principal defendant in the complaint before the Commission, there were more than 200 other railroad defendants who participated with the Union Pacific in the maintenance of competitive joint rates and through routes in connection with the traffic and between the areas involved and that these defendants acted in concert and in collusion with each other and are therefore in *pari delicto* as to the violations of Section 3(1) which the Commission found to exist. In other words, the wrongs which the Rio Grande and the intervening complaining shippers sought the power of the Commission to correct could not exist unless the defendant railroads and the Union Pacific joined in establishing and maintaining competitive joint rates and through routes with each other, while refusing to include the Rio Grande in such rates and routes.

Moreover, the Union Pacific and its preferred connections not only joined in maintaining the undue prejudice and undue preference against shippers found to exist by the Commission, but in numerous instances neither the Union Pacific nor its preferred connections, in joining in such practices, insist as against each other that each railroad always obtain its long haul. In other words, the other railroad defendants participate with the Union Pacific in maintaining the unjust competitive joint rates via various junction points with

each other, regardless of their respective long hauls, but refuse to maintain similar competitive joint rates in connection with the traffic from and to the "closed door" territory via Ogden or Salt Lake City over the Rio Grande.

A few examples (Consol. R., II, 1636 *et seq.*) will be sufficient to illustrate the above point.

Between Seattle, Wash., and Chicago, Ill., via the Union Pacific, to Council Bluffs, and thence via the Chicago and North Western, the distance is 2,439 miles and the haul of the Union Pacific is 1,954 miles. However, the Union Pacific participates in joint rates through Portland with the Southern Pacific on traffic moving through Oregon, California, Arizona and New Mexico, thence Rock Island to Chicago, where the total distance is 3,541 miles. In that movement, the Union Pacific receives a haul of 184 miles. If the Union Pacific is required to establish the rates sought with the Rio Grande through Ogden, it would receive a haul from Seattle to Ogden of 1,027 miles out of a total distance of 2,651 miles, instead of 184 miles between Seattle and Portland as it does when the traffic moves either via the Southern Pacific from Portland through Oregon, California, Arizona and New Mexico or via the Southern Pacific to Ogden, thence via the Rio Grande to Denver or Pueblo, and via the Burlington or any of the so-called prairie lines, including the Union Pacific.

Between Pendleton, Ore., and St. Louis, Mo., the long haul of the Union Pacific is from Pendleton to Kansas City, a distance of 1,674 miles. The Union

Pacific participates in joint rates on transcontinental traffic between Pendleton and St. Louis via the route through Spokane composed of the Spokane International, Canadian Pacific and Soo Line to Minneapolis and the Rock Island and the Wabash to St. Louis. The distance via this route is 2,317 miles, and the haul of the Union Pacific is 227 miles. If the competitive joint rates sought via Ogden were established via the Rio Grande to Denver, the Rock Island and the Wabash to St. Louis, the distance would be 2,149 miles and the Union Pacific haul would be 633 miles.

Between Pendleton, Ore., and Oklahoma City, Okla., the long haul of the Union Pacific would be via Kansas City. However, it participates in competitive joint rates with the Santa Fe through Denver via which route its haul is 1,144 miles, and it participates with the Northern Pacific through Wallula, Wash., and various connections through Kansas City in which the total haul is 2,602 miles, and the haul of the Union Pacific is only 70 miles. If the competitive joint rates sought via Ogden and the Rio Grande and its connections were established, the haul of the Union Pacific would be 633 miles, and the total distance via available routes would be 1,910 miles. The Union Pacific also participates in competitive joint rates between Pendleton and Oklahoma City via the Great Northern through Spokane and eastern connections in which the haul of the Union Pacific is 227 miles.

Between Colfax, Wash., and Chicago, Ill., the long haul of the Union Pacific is 1,756 miles through Council Bluffs, Iowa. But the Union Pacific participates with

the Milwaukee Railroad via Plummer, Ida., in which the haul of the Union Pacific is 54 miles and the total distance 1,888 miles. If the competitive joint rates sought through Ogden and the Rio Grande were established, the haul of the Union Pacific to Ogden would be 829 miles.

In addition to the examples referred to above, Appendix G shows numerous other situations in which the Union Pacific participates with other defendants in taking less than their respective long hauls in connection with particular traffic. On lumber moving from points on the Union Pacific and its connections in Idaho, Washington and Oregon, etc., to points east of Colorado common points, the Union Pacific participates in joint rates and routes with other railroads through Denver and Cheyenne in which it takes less than its long haul. It refuses to accord like treatment to the Rio Grande at Ogden. On the eastbound movement of fruits, vegetables, grain and certain other commodities from Idaho, Washington and Oregon, etc., the Union Pacific participates with other railroads in joint rates and routes which apply via Denver to destinations in Missouri River territory and the southwest. The long haul of the Union Pacific to most of the destination territory just mentioned would be the entire distance to some of the points, or to junctions on its line in Kansas or Nebraska.

The language of Section 3(1) and the numerous decisions of the Commission and of this Court make it clear that there is a sufficient basis in law and in the evidence to sustain the finding of undue prejudice and preference as between the territories or regions in-

volved if the defendants singly or jointly, directly, or indirectly through connecting lines, serve the same origin or destination points or territories. *Chicago I. & L. Ry. v. United States,* 270 U.S. 287; *Southern Ry. v. United States,* 204 Fed. 465 (Commerce Ct.); *Seneca Wire & Mfg. Co. v. Baltimore & O. R.R.,* 112 I.C.C. 95, and *Lake Dock Coal Cases,* 89 I.C.C. 170. In the cases cited the Commission held that where a carrier or a group of carriers participates in joint rates and is in a position either to continue participation or to decline to do so, such carrier or group may be held responsible for any undue prejudice or preference that arises out of such participation in such rates or in its failure to do so. This doctrine was pointedly recognized by this Court in *St. Louis Southwestern Ry. v. United States,* 245 U.S. 136, in which the Court stated that localities and shippers require protection as much from the combination of connecting carriers as from the action of a single carrier whose rails reach them.

In *New York v. United States,* 331 U.S. 284, the Court sustained an order of the Commission that found the relation between the interterritorial class rates to Official territory from Southern territory and the interterritorial class rates within Official territory resulted in an unreasonable preference of Official territory, as a whole, and of shippers and receivers of freight located therein and in undue prejudice to complaints in Southern territory in violation of Section 3(1). In that case contentions similar to the views of the Nebraska court here challenged were made by the State of New York and certain other parties who challenged the validity of the order of the Commission.

The claim was also made in the *New York* case that under the doctrine of *Texas & Pac. v. United States*, 289 U.S. 627, a Section 3 order of the Commission had to be in the alternative. However, this Court rejected these contentions and said (331 U.S. 341) that:

> "A proper finding of unlawful discrimination under §3(1) thus enables the Commission not only to direct the carriers to eliminate the practice but also, pursuant to §15, to prescribe the alternative."

And at page 345 the Court also said:

> "Once the Commission has found rates to be 'unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial,' it is empowered to prescribe rates which are 'just and reasonable' or 'the maximum or minimum,' or maximum and minimum, to be charged * * * ." §15(1)."

In holding that the Commission in the instant case erred in finding that the intervening complainant shippers before the Commission suffered undue prejudice and preference, the Nebraska court was obviously influenced by its misconception of the decision of the Supreme Court in *Central R. R. of N. J. v. United States*, 257 U.S. 247. In the *New York* case, 331 U.S. at page 342, this Court held in effect that the principle of the *Central R. R. of N. J.* case means merely that "the Commission may not require carriers to do what they are powerless to perform." In the instant case, the Union Pacific and its preferred connections have complete power to eliminate the prejudice and preference complained of.

The *Central R.R. of N.J.* case involved joint rail rates

on lumber which were maintained by southern and northern railroads from points in the south to points in the north, including Newark, N. J., and other points in New Jersey. Railroads in the south provided creosoting in transit on lumber at points on their line, but the Central Railroad of New Jersey and other northern railroads did not provide for creosoting in transit at Newark, N. J., or at other northern points. Upon the complaint in *American Creosoting Co. v. Director Gen.*, 61 I.C.C. 145, the Commission found that the refusal of the northern railroads to provide creosoting in transit at Newark, N.J. was unduly prejudicial to complainant. This finding was reversed by this Court on two grounds—first, that the establishment of transit at particular points on particular commodities is a local matter for each railroad to decide; and second, that the fact that the northern railroads participated with southern railroads in joint rates on lumber did not mean that the refusal of the northern railroads to provide like in-transit privileges at Newark, N.J. was unduly prejudicial.

The facts in the *Central R. R. of N. J.* case are distinguishable from the facts in the instant case, since here the Rio Grande provides in-transit privileges of practically every description at all points on its railroad. In the circumstances there was neither the occasion nor the necessity for the Commission to require the Rio Grande to establish in-transit privileges at points on its line. Moreover, the decision in the *Central R.R. of N.J.* case appears to have been modified, if not overruled by the *per curiam* decision in *Great North-*

ern Ry. v. United States, 336 U.S. 933, in which this Court granted the motion to affirm the judgment of the three-judge court in *Great Northern Ry. v. United States,* 81 F.Supp. 921 (D.C. Del.).

The latter judgment sustained the decision of the Commission in *General Mills, Inc., v. Great Northern Ry.,* 269 I.C.C. 457, in which the Commission required the Great Northern Railway to establish storage in transit at Great Falls, Mont. on wheat and its products originating at points on its line in central Montana and thereafter moved by the Great Northern to Butte, Mont. and thence by its connections to points in Utah, Nevada, Arizona and California, upon the ground that the refusal of the Great Northern to establish such transit at Great Falls was unreasonable and unduly prejudicial to the complainant. The Great Northern relied, *inter alia,* upon the *Central R.R. of N.J.* case in support of its contention that the Commission was without power under Section 3, and because of Section 15(4) of the Act to require the establishment of in-transit privileges at Great Falls and thence via Butte, which would deprive the Great Northern of its long haul through Seattle, Wash., and Portland, Ore., to the destinations involved.

The Commission knew from its own experience and from the evidence in the instant case that the in-transit privileges provided by the Rio Grande were commercially and competitively ineffective, in the absence of competitive joint rates via the route of the Rio Grande. Therefore, the Commission, acting in its administrative capacity, prescribed such competitive joint rates.

It is appropriate to state in passing that in the *Central R.R. of N.J.* case, this Court did recognize that the Commission had the power under Section 1 of the Interstate Commerce Act to determine whether in a particular case in-transit privileges should be granted or should be withdrawn (257 U.S., at p. 257).

Under Section 13(1) of the Interstate Commerce Act, any person, firm, corporation, company or association or any common carrier may complain to the Commission of anything done or anything omitted to be done by any common carrier subject to the provisions of the Act. The shippers and other associations which intervened in the complaint before the Commission in the instant case were authorized to do so under the General Rules of Practice of the Commission. Under the doctrine of the *Chicago Junction Case,* 264 U.S. 258, and *Youngstown Sheet & Tube Co. v. United States,* 295 U.S. 476, the shippers, chambers of commerce and associations which intervened as complainants before the Commission had a right to do so, and the Commission did not err in finding that the restrictions as to routing in connection with the existing rates via Ogden and the Rio Grande on the traffic involved resulted in undue prejudice to such complainants who use or desire to use the Rio Grande routes, and in undue preferences to shippers and others using the Union Pacific routes, in and to the extent that the rates via the Rio Grande routes exceed, or may exceed, the competitive joint rates on the commodities involved from and to the same points over the Union Pacific routes.

From the foregoing it is evident that the holding of the Nebraska court that the prohibitions against undue preference and prejudice under Section 3(1) of the Interstate Commerce Act do not apply to the instant case is erroneous.

IV.

The Errors of the Nebraska Court Require a Reversal of Its Decision

The errors of the Nebraska court requiring a reversal of its decision are as follows:

(1) It substituted its judgment for the judgment of the Commission with respect to administrative findings made by the Commission and supported by substantial evidence, by restricting the relief granted by the Commission to shipments requiring in-transit privileges at points on the Rio Grande west of Colorado common points such as Denver, Pueblo and Trinidad.

(2) It misinterpreted and misapplied Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, particularly in holding that Section 3(1), which prohibits any carrier from giving undue preference to any person, locality, territory or region, or subjecting any person, locality, territory or region to any undue prejudice, does not apply in the instant case, although the defendant railroads involved (the Union Pacific and its preferred connections) clearly have the power to eliminate the violations of Section 3(1).

CONCLUSION

For the reasons stated, The Denver and Rio Grande Western Railroad Company respectfully submits:

I.

That the decision of the United States District Court for the District of Colorado, involved in appeals Nos. 332, 333 and 334 should be affirmed, with directions to the Interstate Commerce Commission that it proceed to a determination of the issues on the basis that through routes via the Ogden gateway are in existence, and that the Rio Grande is entitled to have the evidence considered and the case decided by the Commission free of the limitations of Section 15(4); that the decision of the United States District Court for the District of Nebraska involved in appeals Nos. 117, 118 and 119 should be reversed and the Order of the Interstate Commerce Commission of January 12, 1953, should be annulled and set aside in so far as it denies to The Denver and Rio Grande Western Railroad Company the relief prayed for in its complaint.

II.

In the alternative, in the event the decision of the United States District Court for the District of Colorado is not affirmed, that the decision of the United States District Court for the District of Nebraska involved in appeals Nos. 117, 118 and 119 should be reversed, and the Order of the Interstate Commerce Commission should be affirmed.

Respectfully submitted,

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March 12, 1956.

APPENDIX A

FORMAL ORDER OF INTERSTATE COMMERCE COMMISSION

JANUARY 12, 1953

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination:

It is ordered, That the defendant named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeed-

ing paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD, *Acting Secretary.*

(SEAL)

APPENDIX B

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT (UNITED STATES CODE, TITLE 49)

Statutory declaration of National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12 and 13 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12 and 13 of this title), shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(4)—Title 49

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish rea-

sonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1(5)—Title 49

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 1(15)—Title 49

"Whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (a) to suspend the

operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded."

Section 3(1)—Title 49

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corpora-

tion, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4)—Title 49

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

Section 6(1)—Title 49

"Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and

points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

Section 13(1)—Title 49

"Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter

in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 15(1)—Title 49

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions

of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—Title 49

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addi-

tion to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Section 15(4)—Title 49

"In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more conomic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In

time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15(8)—Title 49

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this chapter to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this chapter provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where com-

peting lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

APPENDIX C

ROUTES AND DISTANCES

Between North Portland, Ore. and St. Louis, Mo.

ROUTE	MILES		CIRCUITY
①	2167	(Via Kemmerer, Wyo.)	Short Route
	2232	(Via Ogden, Utah)	3%
②	2367		9%
③	2405		11%
④	2407		11%
⑤	2422		12%
⑥	2461		14%
⑦	2468		14%
⑧	2492		15%
⑨	3134		45%

EXPLANATION OF ROUTES

① UP-Kansas City, Mo., Wab.
② UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wab.
③ UP-Spokane, Wash., GN-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab.
④ UP-Plummer, Ida., CMStP&P-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab. (See Note)
⑤ UP-Marengo, Wash., CMStP&P-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab. (See Note)
⑥ UP-Spokane, Wash., SI-Eastport, Ida., CP-North Portal, Sask.-Portal, N.D., Soo-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab.
⑦ UP-Wallula, Wash., NP-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab.
⑧ UP-Portland, Ore., SP-Ogden, Utah, UP-Kansas City, Mo., Wab.
⑨ UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P-Kansas City, Mo., Wab.

NOTE—Applies only on westbound traffic.

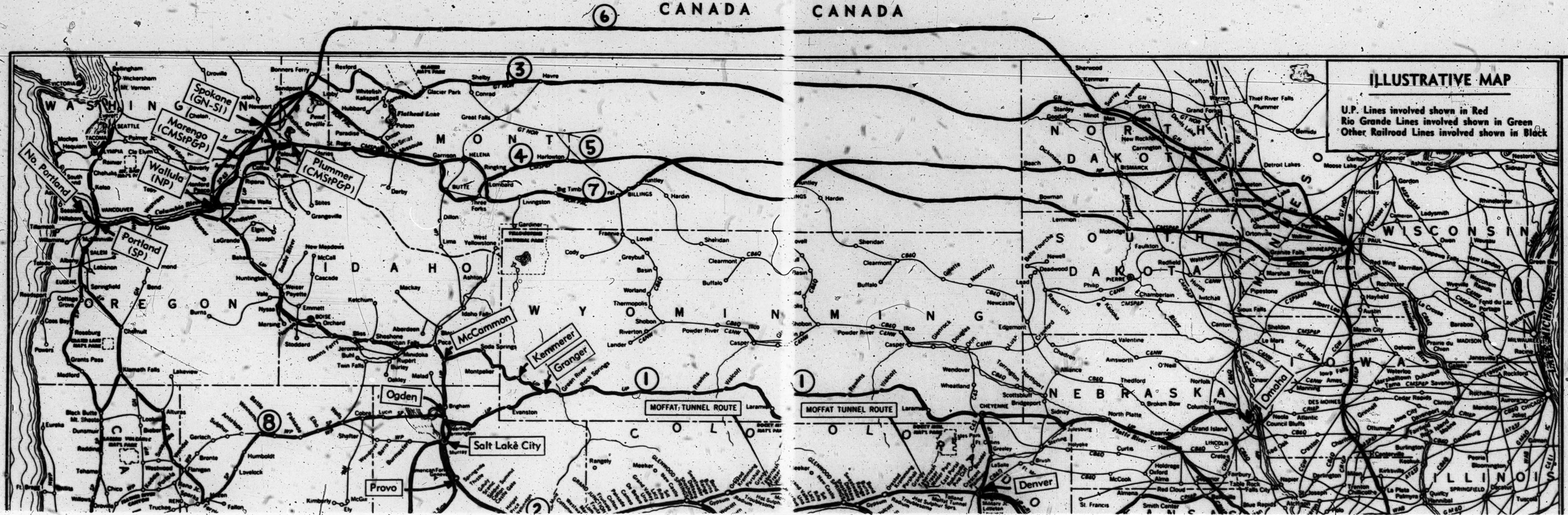
DISTANCES VIA UNION PACIFIC

BETWEEN

North Portland ..... Ore. *Miles*

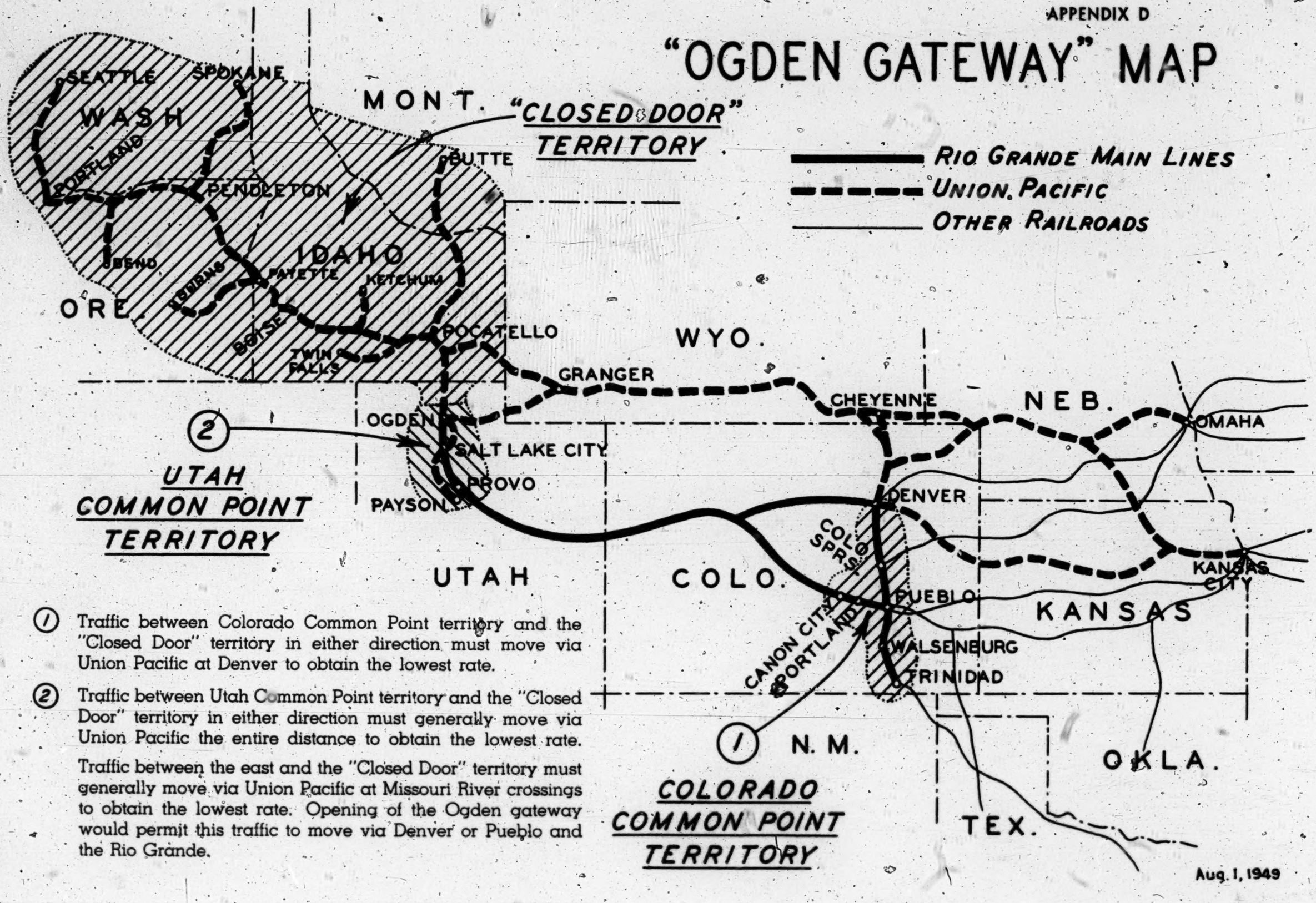
AND

Portland	Ore.	8	
Wallula	Wash.	215	
Marengo	Wash.	311	
Spokane	Wash.	372	
Plummer	Ida.	385	
Ogden	Utah	851	
Kansas City	Mo.	1893	(Via Kemmerer, Wyo.)
		1958	(Via Ogden, Utah)


CANADA
CANADA
ILLUSTRATIVE MAP
U.P. Lines involved shown in Red
Rio Grande Lines involved shown in Green
Other Railroad Lines involved shown in Black
Spokane (GN-SI)
Marengo (CMStPGP)
Wallula (NP)
No. Portland
Portland (SP)
Plummer (CMStPGP)
McCammon
Kemmerer
Granger
Ogden
Salt Lake City
Provo
MOFFAT TUNNEL ROUTE
Denver
Omaha
WASHINGTON
OREGON
IDAHO
MONTANA
WYOMING
COLORADO
NEBRASKA
NORTH DAKOTA
SOUTH DAKOTA
MINNESOTA
IOWA
WISCONSIN
ILLINOIS

APPENDIX D

"OGDEN GATEWAY" MAP



(1) Traffic between Colorado Common Point territory and the "Closed Door" territory in either direction must move via Union Pacific at Denver to obtain the lowest rate.

(2) Traffic between Utah Common Point territory and the "Closed Door" territory in either direction must generally move via Union Pacific the entire distance to obtain the lowest rate.

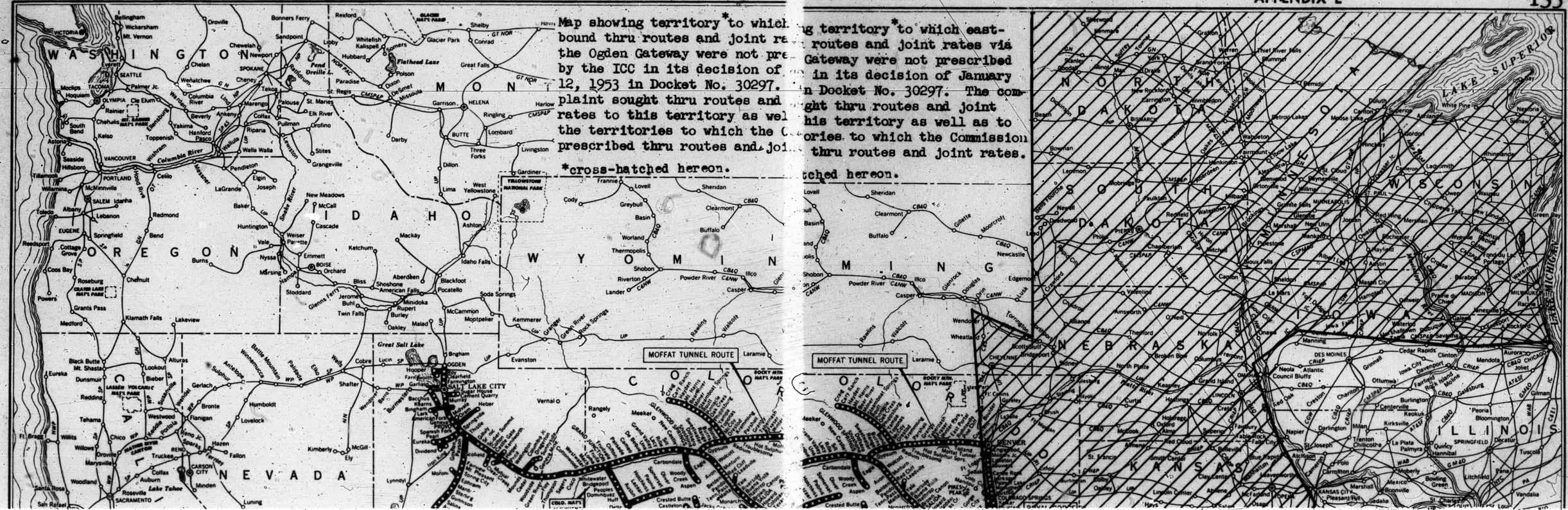
Traffic between the east and the "Closed Door" territory must generally move via Union Pacific at Missouri River crossings to obtain the lowest rate. Opening of the Ogden gateway would permit this traffic to move via Denver or Pueblo and the Rio Grande.

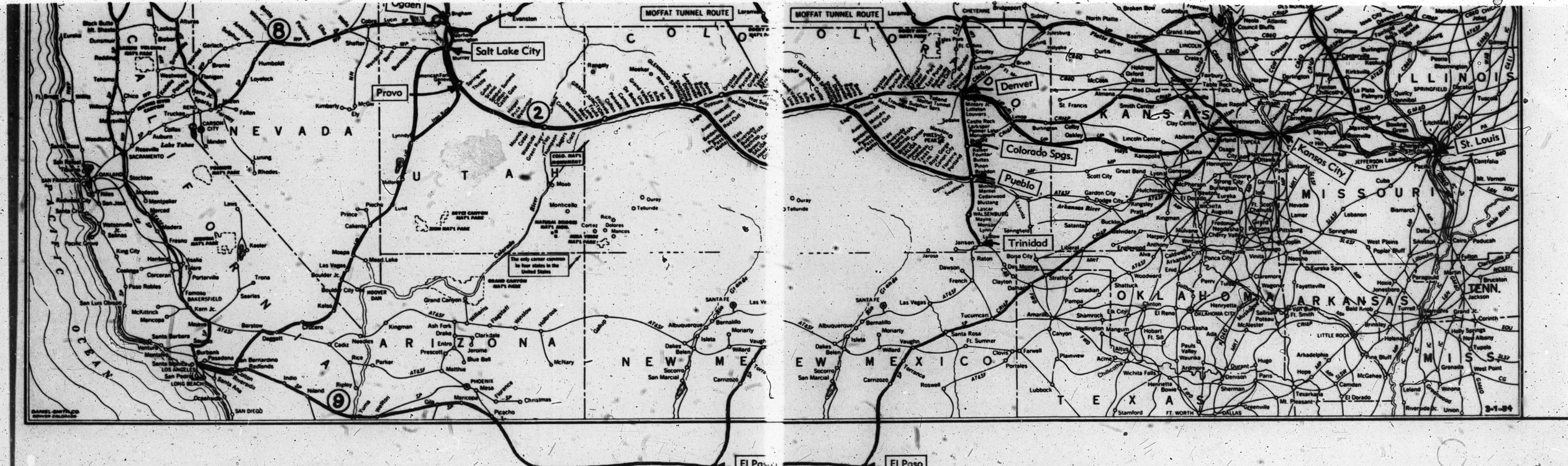
Map showing territory* to which
bound thru routes and joint ra
the Ogden Gateway were not pre
by the ICC in its decision of
12, 1953 in Docket No. 30297.
plaint sought thru routes and
rates to this territory as wel
the territories to which the C
prescribed thru routes and joi

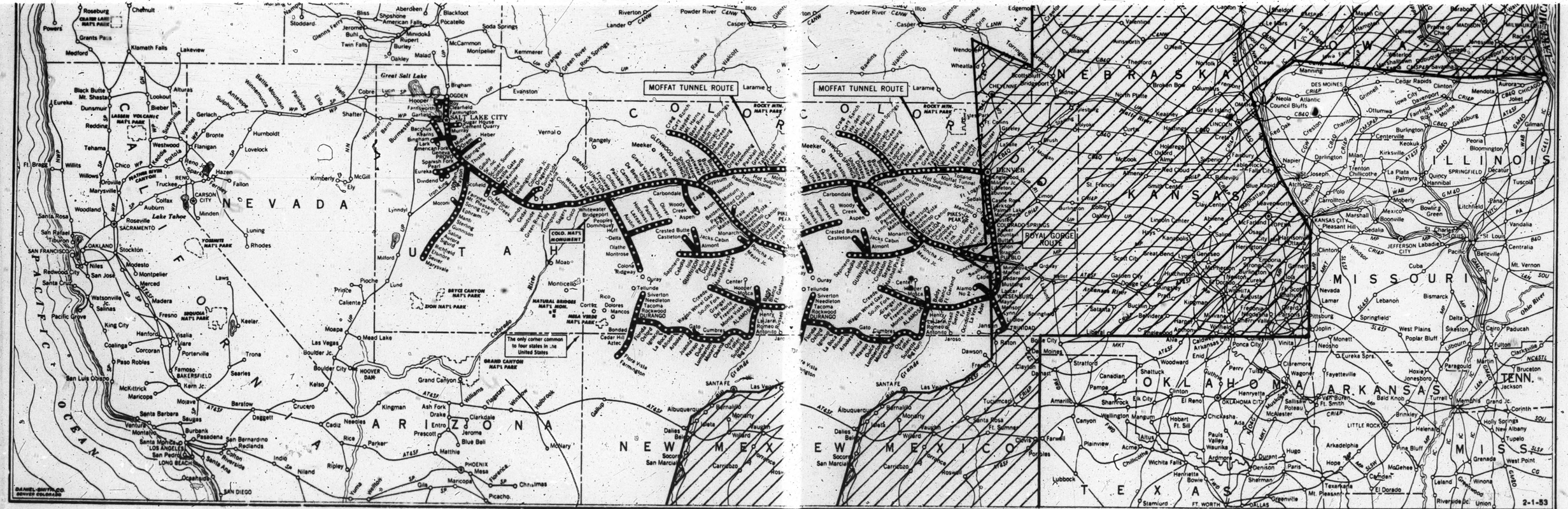
*cross-hatched hereon.

g territory* to which east-
routes and joint rates via
Gateway were not prescribed
in its decision of January
n Docket No. 30297. The com-
ght thru routes and joint
his territory as well as to
ories to which the Commission
thru routes and joint rates.

tched hereon.




MOFFAT TUNNEL ROUTE
Ogden
Salt Lake City
Provo
Evanston
Rangely
Meeker
Glenwood Springs
New Castle
Grand Junction
Delta
Montrose
Ouray
Telluride
Cortez
Dolores
Mancos
Rico
Durango
Pagosa Springs
Monticello
Moab
Green River
Price
Helper
Castle Gate
Scofield
Soldier Summit
Thistle
Spanish Fork
Nephi
Fillmore
Cedar City
Milford
Lund
Lynndyl
Kimberly
McGill
Ely
Wendover
Tooele
Grantsville
Delle
Wells
Elko
Battle Mountain
Lovelock
Winnemucca
Fallon
Hawthorne
Tonopah
Goldfield
Beatty
Las Vegas
Boulder Jct.
Boulder City
HOOVER DAM
Kingman
Ash Fork
Drake
Williams
Flagstaff
Winslow
Holbrook
Gallup
Grand Canyon
Seligman
Peach Springs
Truxton
Valentine
Kingman
Oatman
Needles
Cadiz
Rice
Parker
Blythe
Ripley
Indio
Niland
Brawley
El Centro
Calexico
Yuma
Gila Bend
Casa Grande
Eloy
Picacho
Marricopa
Phoenix
Mesa
Florence
Chrisman
Globe
Miami
Superior
Kearny
Hayden
Winkelman
Oracle
Tucson
Benson
Willcox
Douglas
Bisbee
Nogales
Sierra Vista
Fort Huachuca
Tombstone
Safford
Clifton
Morenci
Duncan
Springerville
Eagar
Show Low
Holbrook
Winslow
Flagstaff
Williams
Ash Fork
Prescott
Jerome
Clarkdale
Cottonwood
Sedona
Camp Verde
Cottonwood
Matthie
Blue Bell
Entro
Drake
Ash Fork


MOFFAT TUNNEL ROUTE
ROYAL GORGE ROUTE
COLORADO
NEBRASKA
KANSAS
NEVADA
UTAH
ARIZONA
NEW MEXICO
OKLAHOMA
TEXAS
ILLINOIS
MISSOURI
ARKANSAS
IOWA
PACIFIC OCEAN
SALT LAKE CITY
DENVER
COLORADO SPRINGS
PUEBLO
TRINIDAD
OGDEN
LAS VEGAS
SANTA FE
PHOENIX
Great Salt Lake
Lake Tahoe
Colorado River
Rio Grande
Arkansas River
Ohio River
LASSEN VOLCANIC NAT'L PARK
REDWOOD NAT'L PARK
YOSEMITE NAT'L PARK
SEQUOIA NAT'L PARK
BRYCE CANYON NAT'L PARK
ZION NAT'L PARK
COLO. NAT'L MONUMENT
NATURAL BRIDGES NAT'L MON.
MESA VERDE NAT'L PARK
GRAND CANYON NAT'L PARK
ROCKY MTN. NAT'L PARK
HOOVER DAM
The only corner common to four states in the United States
DANIEL-SMITH CO. DENVER COLORADO
2-1-53

APPENDIX F

SUMMARY OF TESTIMONY OF TYPICAL WITNESSES

Anton Poitevin, President of the Idaho Potato Growers, testified that his organization had 1200 members and shipped 5,000 cars of potatoes in 1948 for such members (Consol. R., I, 500); that the Idaho Potato Growers annually shipped 10% of the Idaho crop, and that he had personally grown and shipped as high as 200 cars of potatoes in a year. He testified that the Idaho Potato Growers favored the establishment of the joint rates sought by complainant (Consol. R., I, 500, 501).

He stated that the Idaho potato, while in demand throughout the United States, is not produced close to the larger markets and is always sold at a freight rate premium. For this reason there should be no rate handicap upon the sale of Idaho potatoes.

Many potato growers and shippers in Idaho produced evidence as to the importance of free and flexible routing of their product and as to the injury they had suffered because of the present rate and routing restrictions.

M. M. Bass (Consol. R., I, 242 *et seq.*) and *A. G. Stanger* (Consol. R., I, 250 *et seq.*) of Idaho Falls, Idaho, testified for the Idaho Falls Bonded Produce and Supply Company. In the last fiscal year this organization shipped 1,063 units of potatoes and onions (Consol. R., I, 245). Bass stated that closed gateways restricted markets of his organization (Consol. R., I, 243). Stanger stated that shippers and producers should have the right to route their products and at present they were restricted to the Union Pacific (Consol. R., I, 251).

In explanation of what he thought could be produced

by beneficial competition, Stanger cited a rate of $4.31 per hundred from Idaho Falls to New York on processed turkeys as compared to a rate of $3.51 per hundred from Cedar City, Utah. The same rate ($3.51) applied from Richfield, Utah, which is located on the Denver and Rio Grande. Richfield and Cedar City are competitive shipping points and are on different railroads. The comparative mileage from the three towns to market for rate-making purposes is the same.

Both men testified as to the need for flexible routing and for reconsigning privileges also as to the restrictions now effective on their shipping activities by the present rate barriers which bring about danger of being caught in the so-called "pocket markets."

L. E. Stephens of Blackfoot, Idaho (Consol. R., I, 247 *et seq.*), *C. R. Holden* of Idaho Falls (Consol. R., I, 292 *et seq.*), *P. G. Batt* of Caldwell, Idaho (Consol. R., I, 420 *et seq.*), *T. S. Vanderford* of Aberdeen, Idaho (Consol R., I, 472 *et seq.*), *Wayne Newcomb* of Burley, Idaho (Consol. R., I, 438 *et seq.*), *Jack Adams* of Idaho Falls (Consol. R., I, 474 *et seq.*), *W. B. Long* of Twin Falls, Idaho (Consol. R., I, 477 *et seq.*), and *L. D. Robbins* of Twin Falls (Con. R., I, 479 *et seq.*), all presented additional testimony as to the "pocket markets" and the restrictive effect on their business of being completely dependent upon the Union Pacific for rates, routes, cars and diversion privileges.

J. F. Watson of Parma, Idaho, testified that he is Vice-President and General Manager of the J. C. Watson Company of Parma, which is engaged in the production, packing and distribution of fresh fruits and vegetables, such as peas, lettuce, prunes, apples, potatoes and onions, and that these products are marketed throughout the United States and part of Canada (Consol. R., I, 432 *et seq.*). That company ships an-

nually from 1500 to 2000 cars. It is constantly seeking new markets. Watson supported the complaint, and testified that joint rates through the Ogden gateway and the Rio Grande should be established so that there could be a free flow of fruits and vegetables from Idaho to all markets (Consol. R., I, 432 *et seq.*). Watson also testified that relief sought by complainant would give producers in Idaho wider distribution and more markets, especially into the southwestern territory, which he considers a logical market (Consol. R., I, 432, 433).

He also testified that in shipping fruits and vegetables from Idaho these commodities frequently encounter market areas which may be called "pocket markets." That phrase means that certain shipments reach points in Kansas, such as Wichita and Hutchinson, which are not served by the Union Pacific, and if for any reason the shipments are rejected or cannot be sold at a satisfactory price, the shipments cannot be reconsigned to Kansas City or points east under the existing rate restrictions. If such shipments are re-shipped from points in Kansas, Oklahoma or any points south of the Union Pacific line to points east of the Missouri River, they must pay the combination rates to and from the "pocket market" (Consol. R., I, 433). If the joint rates sought by the complaint are established, these "pocket markets" in Kansas and Oklahoma will be eliminated.

Watson gave certain examples of the difficulties encountered and the additional expense incurred when shipments are distressed in a "pocket market." One example related to a car of potatoes from Notus, Idaho, on August 5, 1949, consigned to Wichita, Kansas, which was invoiced at $506.00. The car was rejected. Attempts were made to sell the potatoes in other markets, but because the car was "off the Union Pacific" it could not be marketed east of Kansas City without paying combination rates over Wichita. After making unsuccess-

ful efforts to dispose of the car without a loss, the original buyer offered $317.00 for the car. The car was sold to the original buyer at that figure, which meant a loss of $189.00 (Consol. R., I; 433, 434).

In addition, Watson cited an example of a car of lettuce to Wichita on which the loss was $218.40, and another car to Liberal, Kansas, which likewise was finally sold at a loss. He stated that he had 15 to 20 such distressed cars in a year's time, and that he had always been so handicapped (Consol. R., I, 434-436).

John W. Gerber is Executive Secretary and General Manager of the Utah Growers Cooperative (Consol. R., I, 465 *et seq.*), which has approximately 450 members (Consol. R., I, 468), and supported the complaint of the Rio Grande. The Cooperative operates two branches on the Union Pacific and three on the Rio Grande. The latter are at American Fork, Springville and Midvale (Consol. R., I, 465), all south of Salt Lake City in Utah. He would like to buy box crate material in Idaho and ship to his American Fork and Springville sheds on the Rio Grande, but the lowest rate does not apply via the Rio Grande in connection with the Union Pacific (Consol. R., I, 465, 466). To his Midvale shed he has to absorb a switching charge on this traffic (Consol. R., I, 465, 466). On manufactured fertilizer purchased for his growers at Pocatello, Idaho, and Anaconda, Montana, he stated that "it necessitates a combination of rates at Ogden or Salt Lake, or the trucking of this fertilizer across town at the two main operations, American Fork and Springville (Consol. R., I, 466). The same is true with seed potatoes obtained in Idaho and Montana (Consol. R., I, 466). On seed potatoes obtained in the Red River Valley of North Dakota (Consol. R., I, 466, 470) he would like to unload part carload shipments at Springville, American Fork, Midvale (at Rio Grande locations at all points) and "go into north of Ogden"

(Consol. R., I, 466). This cannot be done and have the through rate protected under present status (Consol. R., I, 466).

The markets east of the Mississippi River have been greatly limited because of post-war rate increases and because of increases in estimated weights on celery and carrots (Consol. R., I, 466, 471). This necessitated going into smaller markets, *viz.*, Idaho, Montana, Wyoming, Nebraska, by truck (Consol. R., I, 466, 467). He can not at present move his vegetables from American Fork, Springville and Midvale on the Rio Grande to Idaho and Montana without a penalty (Consol R., I, 467). He closed his Corrine operation this year (1949) and moved the celery produced in that area to Midvale by truck "so that we would not get into the so-called 'pocket markets' of the Southwest that we would be bound to reach moving via UP to Denver, and transferring on to other lines" (Consol. R., I, 467).

Gerber had 100 members in the district north of Ogden, and they would like to be able to load their onions and potatoes, ungraded, and move them to packing sheds at American Fork and Springville and process in transit and go on, which they cannot presently do (Consol. R., I, 467). His outbound business ranges from 600 to 1100 cars (Consol. R., I, 468). In bringing in cars via Union Pacific (*i.e.*, at Springville or American Fork) he *could* haul the traffic across town, but because of lack of icing facilities in summer and because of danger of freezing (seed potatoes) in winter, he does not do this (Consol. R., I, 468, 469).

W. S. Miller (Consol. R., I, 531 *et seq.*) is Manager of the Umatilla Canning Company in Milton, Oregon. This company is a farmers' cooperative and processes and sells fruits and vegetables for its farmer

members (Consol. R., I, 531). The principal markets for these canned products are distributed over a wide area and the company will ship 150 carloads of canned goods and 150 carloads of frozen goods this year (1949) (Consol. R., I, 532).

Two transportation factors that are important to this shipper are "time" and "temperature" (Consol. R., I, 533). Extreme temperatures have a detrimental effect on canned goods (Consol. R., I, 534) and if possible he would prefer to so route his products as to avoid storm areas. The rates sought here would be beneficial to his company (Consol. R., I, 533). His company is new and it is necessary to develop markets in the Southwest (Consol. R., I, 535, 536). Usually each car stops three times for partial unloading (Consol. R., I, 535). It cannot ship into the Colorado area because it cannot partially unload and ship on under a joint through rate. If one railroad gets blocked because of storm or other conditions he wants another with equal rates (Consol. R., I, 540).

Donald L. Reed (Consol. R., I, 140 *et seq.*), President of the Skyland Food Corporation, Delta, Colorado, testified that this company is engaged in the operation of a frozen food plant at that point, processing mostly fruit; that the capacity of the plant at Delta is about 15 million pounds annually, and that the average usage of his plant is about 50 per cent of capacity (Consol. R., I, 141). He also testified that, in addition to fruits procured in Western Colorado for processing at Delta, he also gets fruit from Utah points and could use apples from Idaho (Consol. R., I, 141, 142). He cannot, as a general rule, afford to obtain apples from Idaho for processing at Delta because of the absence of through competitive rates from Idaho by way of the Rio Grande through Delta to final destination. If through rates via Ogden and the Rio Grande were

available, he could likewise procure fruit in the Brigham area (Brigham, Utah, north of Ogden) and process that fruit in transit at Delta (Consol. R., I, 143). At present the fruit obtained in the Brigham district is trucked to Ogden and loaded there on the Rio Grande (Consol. R., I, 143).

Reed also testified that he might purchase 100 to 200 carloads of Idaho apples (per year) if he had joint competitive rates from Idaho through Delta (for processing) and that this would be new business for his company (Consol. R., I, 145). He does not operate his plant to capacity at the present time because of his inability to get sufficient quantities of fruit (Consol. R., I, 146). If he could run his plant another 30 to 60 days, particularly on apples, he could increase his capacity (Consol. R., I, 147), but the total of fruits now available to his processing plant is not enough to satisfy his demand (Consol. R., I, 147, 148). Because of the great difference in the type of fruit, he cannot use California fruit in his operations (Consol. R., I, 148).

LeRoy Snooks (Consol. R., I, 196 *et seq.*), Manager of the North Ogden (Utah) Fruit Exchange, a cooperative having about 70 members, testified that the members of his cooperative ship about 20-25 cars of cherries, 50-60 cars of apricots and 50-60 cars of peaches annually, and that a good portion of their apricots and peaches are shipped to witness Reed's processing plant at Delta, Colorado. They are trucked into Ogden and shipped by rail from there (Consol. R., I, 197). Two or three hundred tons of apricots were lost last season because of the high expense of trucking from Brigham to Ogden (18 miles) (Consol. R., I, 198). Fifty per cent of the peaches and apricots produced by the Exchange over a period of years are shipped to Delta (Consol. R., I, 201), but this year (1949) a portion was not marketed because that por-

tion could not be trucked to Ogden and shipped to Delta for processing at a profit (Consol. R., I, 201). This cooperative's problems would be solved by the establishment of joint competitive rates with the Union Pacific and Rio Grande via Ogden.

L. L. Belcher (Consol. R., I, 302 *et seq.*), Pueblo, Colorado, is President and General Manager of the Mountain Ice & Coal Company, which company has a cold storage plant at Pueblo with capacity of 75 carloads. He testified that he could store frozen foods (for example) from Oregon and Washington which moved over the Union Pacific if the Ogden gateway were opened at competitive joint rates (Consol. R., I, 304, 305). Because such through rates do not apply via Ogden and Pueblo, and because his destination (transit) territory is limited to points west of the Missouri River if the traffic moves via Union Pacific to Denver, thence via connecting lines to Pueblo, he does not presently obtain any of this traffic for storage in his plant. He also testified that if the Ogden gateway were opened, Pueblo would be in line of transit on traffic destined to Denver, which would be of advantage to his company (Consol. R., I, 305, 306, 307). He further stated that if the rates which complainant seeks were established, it would set up Pueblo as a point that would have transit and competitive rates to practically every place (Consol. R., I, 308).

Herbert P. Heidel (Consol. R., I, 412 *et seq.*), Pueblo, Colorado, testified that his company (The Lincoln Packing Division of the American Stores, Inc., Pueblo, Colorado) has a storage warehouse at Pueblo with a capacity of between 200 and 250 carloads (Consol. R., I, 412). He can store all kinds of perishable commodities, but the commodities that can be stored in transit at Pueblo when coming from Idaho, Oregon

and Washington via the Union Pacific are limited to apples, pears and other fruits. He cannot store turkeys, potatoes, onions and frozen foods which move from the Northwest via the Union Pacific because of the absence of through rates via Pueblo. In this regard he supported the testimony of Mr. Belcher (Consol. R., 1, 413).

J. L. Pease (Consol. R., II, 1069) testified for the United States Department of Agriculture. He stated that the Secretary of Agriculture intervened in behalf of the complainant according to certain United States statutes which require the Secretary to interest himself in transportation of the products of agriculture (Consol. R., II, 1069). Dr. Nelson (Consol. R., I, 177 *et seq.*) testified as to the industrial growth of the northwestern states. Mr. Pease prepared an exhibit as to agricultural products. The exhibit indicates the large volume of production and the need for as nearly unrestricted channels of distribution as possible. All areas of consumption are needed now for the disposal of agricultural production and all means of reaching these areas are important (Consol. R., II, 1070). Members of Idaho Potato and Onion Association have asked him for the past five years "When are we going to get the Ogden gateway open?" (Consol. R., II, 1074).

Pease stated that the Department of Agriculture is opposed to any routing restrictions on agricultural commodities (Consol. R., II, 1077). After consideration by all members of staff in his department they determined that it would be for the best interests of the agricultural community of the Northwest as a whole if the Secretary of Agriculture intervened in behalf of the complainant (Consol. R., II, 1079). In his opinion it would be better for agricultural producers if the joint rates were established (Consol. R., II, 1080, 1081).

In support of the position taken by the Secretary of Agriculture are numerous farm organizations. To mention a few of these, the Idaho Farm Bureau Federation composed of some 11,000 farm families in Idaho intervened in behalf of the complainant and *J. Cyril Lau*, President of the Federation, testified at Boise, Idaho (Consol. R., I, 551 *et seq.*).

Lau testified that he was directed by his board of directors to appear as a witness and stated that the Federation favored the complaint because of the better service, better car supply and more rail routes at equal rates that would be the result if complainant was successful. He stated that the Federation believed that the shipper should have the right to choose the roads over which to ship their products without penalty (Consol. R., I, 554). In the witness' opinion competition would improve the transportation service (Consol. R., I, 560).

Bert Higgins (Consol. R., I, 262 *et seq.*), a member of the Executive Committee of the Idaho State Grange, testified that the Grange was in favor of the complaint and desired to see the joint rates established. He stated that the Grange had 12,000 adult members in Idaho and that it was necessary to be a farmer before you could be a member of the Grange (Consol. R., I, 262). It was the opinion of the Grange members that transportation competition would improve the service and the car supply in Idaho (Consol. R., I, 267).

Cy Davis (Consol. R., I, 224 *et seq.*), Manager of the Idaho Falls Chamber of Commerce, stated that his organization supports the complaint. The Chamber has a membership of 618 and Idaho Falls is an important shipping point for agricultural products (Consol. R., I, 225). It is the position of the Chamber that all

rail facilities should be made available to the shipper at equal rates (Consol. R., I, 225).

Fred Simpson, Jr. (Consol. R., I, 405 *et seq.*), Colorado Springs, Colorado, whose company's name is Simpson & Company, and who is also affiliated with the Robinson Grain Company of Colorado Springs, is a shipper of dried beans and a transit operator at his warehouses in and adjacent to Colorado Springs (Consol. R., I, 405, 408). He brings beans from the West into his transit houses in straight carloads and ships out in various different packages and different or assorted varieties of beans. His destination territory is largely in the Southeast. For the year ending September 1, 1949, he shipped a total of 390 cars, each weighing 80,000 pounds.

He has lost business in many instances because he could not furnish Idaho red beans and Idaho Great Northern beans in his assorted cars from Colorado Springs (Consol. R., I, 407). He testified that, because of the rate situation (*i.e.*, because of the absence of the through rates which this complaint seeks), he never brings Idaho beans through Colorado Springs and consequently he cannot offer a full line of beans to the trade (Consol. R., I, 406, 407). If he purchased Idaho red beans or Great Northern beans in Idaho, and brought them through Colorado Springs via the Ogden gateway, he would pay a 39-cent higher rate to transit those beans at Colorado Springs (Consol. R., I, 407, 408).

Max Osborn (Consol. R., I, 408 *et seq.*), Fruita, Colorado, is a shipper of beans, operating under the name of The Osborn Bean and Elevator Company, and testified that his situation is substantially similar to that of Simpson (Consol. R., I, 411). He has run into difficulty in fulfilling the requirements of his trade for

mixed cars of beans. He cannot, on account of the combination of rates existing via Ogden, use Idaho beans in his transit operations at Fruita (Consol. R., I, 409). He trucks in Great Northern beans from Idaho (Consol. R., I, 409). He cannot handle peas from Idaho for the same reason as the one that prevents him from handling Idaho beans (Consol. R., I, 410). He would have to pay combination rates on the Idaho varieties which were transited at Fruita and went east, which would be prohibitive (Consol. R., I, 410). He handles between sixty and seventy 80,000-pound cars per year (Consol. R., I, 411).

C. A. Harris (Consol. R., I, 231 *et seq.*), a wheat farmer and implement dealer from Idaho, testified as to the restriction on the movement of wheat produced by him and other Idaho farmers into the Southwest markets, particularly at Wichita. He stated (Consol. R., I, 236) that there was a rate differential of 27½ cents over the Rio Grande as compared to the Union Pacific on wheat moving from Idaho to Wichita and that the gateways into the southern territory beyond Wichita were not open via any route (Consol. R., I, 237).

E. E. Kohlwes (Consol. R., I, 358 *et seq.*) represented and testified for a group of mills located in south-central Kansas. The interest of these mills lies in their inability to purchase wheat in the Pacific Northwest for movement into the specified milling points in Kansas for processing or storage, and subsequent reshipment from such processing or storage points in Kansas to Kansas City or beyond, on the basis of the direct through competitive rate (Consol. R., I, 359, 360).

He cited a specific example of a movement of nine cars of wheat from Idaho Falls, Idaho, to Moundridge,

Kansas. These cars moved Union Pacific to Denver, Rio Grande to Pueblo, Colorado, and Missouri Pacific to Moundridge. After being processed into flour the wheat moved from Moundridge to Pennsylvania. The through rate from Idaho to Pennsylvania aggregated $1.33½ per hundred. If the joint rates sought had been applicable the through rate would have been $1.21 per hundred (Consol. R., I, 360, 361). The Moundridge mill is thus penalized 12½ cents per hundredweight if Idaho wheat is to be used in producing flour at that point.

Kohlwes stated that the production of bakery products had become highly specialized and in order for these mills to meet the specifications that bakeries have established, it is necessary to originate and blend different grades, types and qualities of wheat in order to produce the desired quality flour. It is therefore necessary for the millers to procure a certain amount of wheat requirements in the Northwest (Consol. R., I, 361). The present rate situation restricts their ability to purchase wheat and limits their ability to move outbound with the finished product (Consol. R., I, 363, 364). His interest in the case is to obtain an equality of rates (Consol. R., I, 367).

L. R. Ginn (Consol. R., I, 369 *et seq.*), a grain buyer for the Kansas Milling Company, one of the companies which Kohlwes represented, testified as to the purchase of wheat for his company. He stated that wheat must be purchased according to the demands of the bakery trade and that some wheat mixes required 12 to 25 per cent of soft white wheat which is produced in the Pacific Northwest (Consol. R., I, 370). This was done to correct a lack of the desired element in Kansas wheat (Consol. R., I, 371).

In the purchase of wheat Ginn stated that he is lim-

ited by lack of joint through rates. He stated that he is often limited to a purchase of 5,000 bushels when he needs 25,000 bushels because of the lack of joint rates from Idaho into Kansas (Consol. R., I, 372). He stated that last year 385,000 bushels of this white wheat from the Northwest was purchased by his mill alone, but only 60,000 bushels originated on the Union Pacific. The balance of his purchases moved via Pueblo and originated on the Great Northern or the Northern Pacific (Consol. R., I, 373). Ninety to ninety-five per cent of his wheat must originate on a railroad other than the Union Pacific in order to overcome the freight rate disadvantage (Consol. R., I, 366).

The livestock organizations that were represented at the various hearings all supported the complaint and their witnesses testified as to the injury caused the livestock industry because of the present rate restrictions.

Roger S. Smith, of Denver, Colorado, Superintendent of Livestock operations of the Holly Sugar Corporation, testified that his company has sugar factories, among other places, at Delta and Swink, Colorado. He stated that there would be between 25 to 60 thousand tons of beet pulp available annually for feeding cattle and lambs at Delta, Colorado, located southeast of Grand Junction, Colorado, on the Rio Grande (Consol. R., I, 270). Also available are several thousand tons of molasses. He purchases livestock on the Union Pacific in Montana (440-450 head of cattle in 1948; 500 head in 1949) (Consol. R., I, 275, 276), but cannot move them to Delta for feeding in-transit at through competitive rates (Consol. R., I, 273). The livestock produced in the Northwest, "particularly in Idaho and Western Montana on the Union Pacific, is of excellent grade for use in our feeder operations on the D&RG and elsewhere" (Consol. R., I, 274). The higher basis of rates applicable from north of Ogden via the Rio

Grande hinders his operations on the D&RG and favors the operations of livestock feeders on the Union Pacific in Wyoming and Nebraska (Consol. R., I, 274).

He tries to buy his livestock as close to his feeding operations as possible, but at times has to reach way out to outlying districts (Consol. R., I, 279). He had buyers in western Montana territory this fall (1949) purchasing cattle at considerable less money than he had to pay for feeder cattle adjacent to the Delta factory (Consol. R., I, 281). These cattle, however, could not move to his Delta operation. In view of this, it is the desire of the Holly Sugar Corporation to have all possible routes open and available at competitive rates so that it can go to the purchasing areas where they can get the lowest price (Consol. R., I, 281).

Worth Stimets, Colorado Springs, Colorado, Chief Rate Clerk in the Traffic Department of the Holly Sugar Corporation, testified that the difference in rates, per cwt., on feeder cattle to Denver varies from a high of 35 cents from Divide, Montana, to a low of 31 cents from Idaho Falls, Idaho, over the direct Union Pacific rate when routed UP-D&RGW via Delta, Colorado (for feeding in-transit). He also testified that on sheep from Idaho and Montana points on the Union Pacific to Omaha, Kansas City, and Chicago, the rates via Union Pacific-Rio Grande-Union Pacific are 19 cents per cwt. higher than via Union Pacific direct from and to the same points (Consol. R., I, 288). Other examples of rate differences via the Rio Grande route were also shown by Mr. Stimets. On cattle from Divide, Montana, to Chicago, the difference in the rate is 57 cents per cwt. higher via the Rio Grande route (Consol. R., I, 289).

I. H. Jacob, Salt Lake City, Utah, is General Manager of the Producers Live Stock Marketing Associa-

tion and President and General Manager of the Wasatch Live Stock Loan Company. He has been connected with the livestock business all his active life. He has been in the livestock business since 1915 (Consol. R., I, 310). The Producers Live Stock Marketing Association is composed of producers (about 30,000 shippers) (Consol. R., I, 315) and markets its livestock, has its main office in Salt Lake City, operates in the eleven western mountain states, and has other offices in Ogden and North Salt Lake, Utah; Los Angeles, California; Denver, Colorado, and Billings, Montana. It is also affiliated with the National Live Stock Producers Association, intervener in support of complainant in this case. The Wasatch Live Stock Loan Company is an organization of livestock producers to take advantage of the discount facilities of the Federal Intermediate Credit Bank on loans to livestock producers, It has loans in Nevada, California, Utah, Idaho, Wyoming, Colorado and Arizona.

The Producers Live Stock Marketing Association handled the equivalent of 30,000 carloads of livestock, valued at about $110,000,000.00 in 1948, of which amount the witness testified that about 15,000 carloads moved by rail (Consol. R., I, 311). This witness testified (Consol. R., I, 317) that Colorado has an excellent summer pasture area to produce a certain type of lamb, the best source of supply for which has been the Northwest (Consol. R., I, 317, 318). It is the duty of his association, as a cooperative, to give the best service possible to its members (Consol. R., I, 318), and it is in the interest of his association to see that the stock it handles for its members moves in to feed or to range on the Rio Grande without penalty, that is, at the same rates as if they moved over the Union Pacific direct (Consol. R., I, 319).

T. Harry Benton, Burns, Colorado, is President and General Manager of the Benton Land and Livestock Company, which owns 16,000 acres and leases 30,000 acres of land in Western Colorado. It also has forest permits for grazing 970 head of cattle (Consol. R., I, 331). This company does not breed cattle, but buys its livestock wherever it can and fattens the stock thus obtained on their lands adjacent to the Rio Grande in the vicinity of Burns, Colorado (Consol. R., I, 331, 332). This witness testified that it would be advantageous to his operations if the Ogden gateway were opened, as he would then go into that territory (*i.e.,* Idaho, Oregon, Washington, Montana) and purchase the livestock on a "feed in transit" basis (Consol. R., I, 332, 333).

Benton also testified that he made a special trip to the Northwest this last season (1949) and endeavored to purchase cattle there. There had been a drought and grasshopper infestation in Montana and he thought he might be able to purchase some distressed cattle out there at a favorable price, but because of "not having through rates from that territory" he found that buyers from Iowa and St. Paul could afford to pay more for the cattle than he could (Consol. R., I, 334). Because of the gradual reduction in available grazing territory in the national forests, the grazers in his territory produce more winter feed and have gone into feeding operations on a larger scale, rather than to remain a breeding and grazing operation (Consol. R., I, 388). Opening of the Ogden gateway "would open up a territory for us to try and purchase our young stock in" (Consol. R., I, 337). Average outbound shipments from this witness's company at Burns in recent years have averaged 50 to 75 carloads of cattle (Consol. R., I, 339).

David G. Rice, Jr., Denver, Colorado, is Secretary of the Colorado Cattlemen's Association with 5,000

members (Consol. R., I, 344, 356), and testified that livestock feeders in Colorado have "to go more and more out of Colorado to purchase these animals" (*i.e.*, for their feeding operations) (Consol. R., I, 347). "A majority of the big operators go out of Colorado to buy at least a portion of their numbers which they feed" (Consol. R., I, 348). The forest service grazing areas being cut down made it a problem where "we would get our cattle to feed." This came up in connection with the development of the feeding program for the North Fork Valley, on the Rio Grande (Delta County, Colorado) (Consol. R., I, 348). Rice testified that "It was hard for them to purchase cattle in this area (*i.e.*, the Northwest) and be on a competitive basis, due to their feed in transit rates." His association is very much interested in the opening of the Ogden gateway because its members want to buy on a competitive basis for feeding in transit, especially for the Western Colorado areas and Arkansas Valley areas (Consol. R., I, 349, 350).

W. H. Hilbert, Denver, Colorado, is head of the sheep department at Denver for the Producers Livestock Marketing Association. Mr. Hilbert testified (Consol. R., I, 453) that, based on his 34 years' experience in the livestock business, the opening of the Ogden gateway would give livestock producers another important route without a rate disadvantage and would place them on a parity in the sale of their livestock as far as freight rates are concerned.

Herbert P. Heidel, of Pueblo, Colo., is with the Pueblo Division of the American Stores, Inc., Lincoln Packing Division, which is engaged at Pueblo in cold storage operations and in the slaughter of livestock. While Heidel testified under subpoena served by complainant, his testimony clearly shows that it is to the interest of the company he represents to have the joint

rates sought by the complainant. At the Pueblo plant there are regularly received carload shipments of lambs which originate in Idaho and Oregon on the Union Pacific, from which points competitive joint rates apply to Pueblo via the Union Pacific to Denver and thence Santa Fe, Colorado & Southern, or the Rio Grande to Pueblo, but do not apply via Ogden and the Rio Grande. The plant at Pueblo is served by the rails of the Rio Grande (Consol. R., I, 413). When the traffic moves via Ogden and the Rio Grande, the through charge based on combination of rates over Ogden is applied (Consol. R., I, 414). The aggregate of the combination through charge exceeds the through charge via the Union Pacific through Denver by from $70.00 to $80.00 per car. Despite that fact, Heidel testified that the lambs from points on the Union Pacific move through Ogden and the Rio Grande to Pueblo because the service via that route is more expeditious than via the route of the Union Pacific through Ogden and Denver and avoids the necessity of stopping the lambs to feed and the incident loss therefrom by shrinkage, etc. (Consol. R., I, 414, 415). When the lambs move through Ogden and the Rio Grande, the extra stop for feeding is not necessary; but such a stop is frequently necessary when the lambs move via the Union Pacific via Denver (Consol. R., I, 415). Even though the expense incident to the extra stop for feeding does not offset the extra transportation charge, ranging from $70.00 to $80.00 a car, exacted when the lambs moved through Ogden and the Rio Grande, that route is now used because the industry represented by Heidel finds the service through that route "more adequate" (Consol. R., I, 415). This is but another way of saying that from the shipper's standpoint the service of the Union Pacific through Denver to Pueblo on the livestock in question is inadequate.

Elmer J. Wagner, Lamar, Colorado, is the President of the Arkansas Valley Stock Feeders Association which has 215 members. This association is located and carries on its livestock feeding operations in the valley of the Arkansas River, east of Pueblo, Colorado, on the lines of the Santa Fe and the Missouri Pacific railroads. Its members wish to be able to purchase feeder livestock in Idaho, Oregon, Washington and Montana on a competitive basis with feeders of livestock in other localities, viz., Northern Colorado and Nebraska. At one time, for some years prior to 1932, livestock feeders in the Arkansas Valley could buy feeder lambs in large numbers in eastern Oregon because then, contrary to the general application of rates on all other traffic, the freight rates on livestock from certain points on the OWR&N were the same via OWR&N-OSL to Ogden, and thence via D&RGW and connecting lines to slaughter points on the Missouri River and east thereof (with feeding in-transit at Arkansas Valley points in Colorado) as via UP lines direct (Consol R., I, 488). Also, prior to 1932, it was the custom for Colorado range men to buy old ewes and lambs in Oregon, and summer them along the D&RGW in Colorado and then to move them into the Arkansas Valley for further fattening (Consol. R., I, 488, 489).

Since 1932, when competitive rates via the Rio Grande route were cancelled, feeders to the north of the Arkansas Valley, along the UP, can overbid the Arkansas Valley feeders. Witness Wagner states (Consol. R., I, 489), "We like the Northwest lambs and would like to buy them if we had the same freight rate advantage" (Consol. R., I, 489). He further testified (Consol. R., I, 490), "In 1928 we could compete with the Northern Colorado and Nebraska feeders. At the present time our freight rate on lambs from Baker, Oregon, to Missouri River points over the Union Pacific is $1.37.

per cwt. If we come down the Ogden gateway over the D&RGW and Santa Fe into the Arkansas Valley, our freight rate is $1.86 per cwt. This is 49 cents over the Colorado (Northern) and Nebraska feeders rate, or with tax and all, over $100.00 per car. That makes it impossible for us to compete" (Consol. R., I, 490, 491). In 1928 this association fed over 400,000 lambs in the Arkansas Valley. At present its members are feeding approximately 100,000 lambs (Consol. R., I, 491).

Angus McIntosh, Las Animas, Colorado, President of the Colorado Wool Growers Association, composed of 832 members, testified (Consol. R., I, 494) that "Ewe lambs are too valuable as 'killers or feeders' in the fall for Colorado sheepmen to hold over for herd replacements. He must and does look to other localities for such replacements where sheep raising does not produce fat lambs for immediate slaughter." Prior to 1932, a large part of the membership in the Colorado Wool Growers Association, having their operations along the Rio Grande, bought their herd replacements in the Northwest and enjoyed, at that time, through rates to Denver, Missouri River and eastern points via Ogden, thence Rio Grande and AT&SF, MP, CB&Q or CRI&P. Since 1932, the members of Mr. McIntosh's association can no longer compete with sheepmen in Wyoming and other states on the Union Pacific because of the lesser through rate via that line (Consol. R., I, 495). When this witness was purchasing sheep in Oregon (prior to 1932), he shipped via Ogden, thence via Rio Grande and AT&SF to Las Animas, and he had to feed only twice in transit via that route as against three and four feeds en route via Union Pacific to Denver, thence AT&SF (Consol. R., I, 496).

Don Clyde, Heber, Utah, is a livestock operator engaged principally in the production of sheep. He grazes his livestock on approximately 15 to 20 thousand acres

of private land, in addition to holding forest grazing permits. He operates about 4,000 breeding ewes and 200 head of cattle (Consol. R., I, 324). He estimates about 100,000 breeding ewes are in the vicinity of his operations. Most of the lambs produced by this witness move east to Denver and Kansas City. These ranges produce an extraordinary good fat lamb which are sold for slaughter. However, there is always a percentage of every sheepman's output which is sold as feeders. These usually go to midwestern states (Consol. R., I, 324).

Clyde brings in most of his herd replacements (breeding stock) from Idaho and Montana (Consol. R., I, 325). The ewes and lambs (pairs) are shipped in under a transit billing and then the billing is (later) picked up in sending lambs to market (Consol. R., I, 325). The buyers will reimburse the grower for the amount (of freight charges) he has already in the freight bill (Consol. R., I, 325, 326). An arbitrary charge of 19 cents (applicable via UP-Rio Grande through Heber to market) means that the returns to the Utah grower would be that much less than the returns to the grower located on the Union Pacific (Consol. R., I, 326). If the movement from this witness's location was to Kansas wheat pastures, combination rates would apply (Consol. R., I, 326).

Charles Redd, LaSal, Utah, testified in support of the complaint of the Rio Grande. His company had in late 1949 about 27 thousand head of sheep and about 2,000 head of cattle. He said that some of the best sheep in the country, for range purposes, come from eastern Oregon and western Montana, and the best fattening lambs come from Idaho. He would like to bring these sheep into Rio Grande territory on a transit basis (Consol. R., I, 375) at rates equal to those via Union Pacific (Consol. R., I, 376).

L. C. Montgomery, Heber, Utah, is engaged in the cattle business at that point, and is also Secretary of the Heber City Cattle Co. His individual operations and those of the latter company embrace about five thousand head of cattle (Consol. R., I, 442). Mr. Montgomery testified that his operations are substantially similar to those of Witness Clyde with this difference, Clyde operates mostly in sheep and he (Montgomery) in cattle (Consol. R., I, 442). He also testified as President of the Utah Cattle and Horse Growers Association (Consol. R., I, 444) which markets about 225,000 head of beef cattle each year. His association feels that opening the Ogden gateway would be beneficial to the producers in the State of Utah (Consol. R., I, 444) and that the burden of higher freight rates which they are now forced to pay in the movement of livestock from the Northwest via Ogden and D&RGW, when moving to eastern markets handicaps the growers and feeders on the Rio Grande (Consol. R., I, 444, 445). He further agreed that the handicap he has in mind is the difference between the combination rates applicable via the D&RGW and the through rates that exist via the Union Pacific (Consol. R., I, 445, 446).

Joe Fuller, Pocatello, Idaho, buys and sells livestock, principally sheep. At present he buys in Idaho, Oregon, Washington and Montana, and would like to do business in Colorado and Utah (Consol. R., I, 485, 486). He stated that he could not sell to Utah or Colorado sheep men on the same basis as he does to stockmen on the Union Pacific. He could enlarge his operation if rates were established via Ogden so that his entire purchase could be moved to Salt Lake or Ogden for sorting and grading, some going beyond to Colorado and Utah and some to California points (Consol. R., I, 486).

Roscoe C. Rich, of Burley, Idaho, engaged in the sheep business, spoke for the Idaho Wool Growers Association. He has been an officer in this organization, also the National Wool Growers Association and the American Wool Council. The Idaho Wool Growers filed a petition of intervention in behalf of complainant. Last year 8,000 sheep were sheared on his ranches and he stated that this was a low year (Consol. R., I, 509).

Rich stated that the demand for lambs is influenced by the availability of rail transportation. He stated that if lambs could move to Colorado with a feeding in transit arrangement at competitive through rates via Ogden it would benefit the growers of lambs in Idaho. This statement was based on his experience in this business which began in 1914. He stated that it would be to the best interests of Idaho to have all markets available at competitive freight rates (Consol. R., I, 512). He wanted to be able to ship any place where there is a logical market for his lambs at a competitive rate and cost (Consol. R., I, 515).

Lumber witnesses for the Rio Grande proved that they are restricted in their business operations because of their inability to ship lumber freely to and from the "closed door" territory. The Western Forest Industries Association intervened in behalf of its membership who ship lumber from mills in the Northwest and who are interested in a free and flexible routing to all points. The other three witnesses for the Rio Grande are located in Colorado and gave specific examples as to the restrictions placed on their businesses.

Reginald T. Titus (Consol. R., I, 215 *et seq.*), Executive Vice-President of Western Forest Industries Association, Portland, Oregon, testified for the membership of his organization. They are vitally interested

in having a flexibility of routing to all parts of the United States and believe they are discriminated against because they are unable to route lumber via Ogden and the Rio Grande from Union Pacific points at equal rates for shipment beyond. This factor affects their use of transit privileges at points in Utah and Colorado and other states. They believe that if the rates are granted it will increase the lumber consuming territory in which their products are marketed.

J. A. Hayley, Littleton, Colorado, Manager of the Monarch Lumber Company plant at Military Junction, Colorado, testified that he cannot, without competitive joint rates, transit lumber which originates on the Union Pacific and is handled by him at Military Junction, Colorado (Consol. R., I, 383). "Some of those mills we would like to buy from originate on the Union Pacific" (Consol. R., I, 383). He also testified that "As a business man he ought to be able to buy lumber off the Union Pacific at equal rates over available routes" (Consol. R., I, 385), and "We think we should be able to compete with competitors within 10 miles of us (*i.e.,* Denver) who are on a through rate on the Union Pacific (Consol. R., I, 386).

Floyde H. Hughes, Grand Junction, Colorado, is Purchasing Agent for the Independent Lumber Company which operates 14 retail lumber yards in Western Colorado, also (at Grand Junction) a wholesale distribution yard, a box factory, a lumber manufacturing plant, and a storing and drying yard covering about 13 acres. The Independent Lumber Company is also financially interested in the Crissey and Fowler Company at Colorado Springs, Colorado. Hughes testified (Consol. R., I, 518, 519) that in procuring lumber for his transit plant at Grand Junction, he prefers to purchase lumber on railroads other than the Union Pacific

because when the inbound routing on lumber is via these (other) lines, he enjoys competitive rates to Colorado common points and beyond. Cascade and Winchester, Idaho, and Burns, Oregon, were mentioned as typical points on the Union Pacific from which his company has procured lumber in the past, but could not do a transit business into such a point as Coloradio Springs or beyond with lumber originating at the Union Pacific points mentioned (Consol. R., I, 518, 519). He further testified that he gets about 300 carloads of lumber a year from the Northwest, that his plants can handle from 1 to 2 carloads a day, and he feels that the operation, in order to expand, must seek additional markets since his present market in Western Colorado is limited. If his inbound materials originate on the Union Pacific, he is limited to Western Colorado in his transit operations, and he feels that he should have the same rates as his competitors have to competitive areas of destination (Consol. R., I, 520, 521).

This witness also testified that, in some cases where the present rate on lumber to Grand Junction applies via Burlington Lines to Denver, thence Rio Grande, he would get a reduction in his present rate if the through competitive rates to Denver were established via the Rio Grande through Ogden. He showed that the 71-cent rate (to Denver) applied both via GN to Laurel, Montana, thence CB&Q or CB&Q-C&S to Denver, as well as via GN, Butte, UP. If the rate applied GN, Butte-UP, Ogden, D&RGW, the rate to Grand Junction would then become 71 cents instead of 80 cents which is now the rate via GN-CB&Q or CB&Q-C&S, Denver, D&RGW (Consol. R., I, 525).

Hughes also testified as to his company's need for partial unloading privileges at competitive rates (Consol. R., I, 523). He described an instance where, in

endeavoring to divide a carload of doors between Grand Junction and Colorado Springs, which car was to be shipped from Tacoma, Washington, via UP, he had to divert the car to the Great Northern out of Tacoma because the through rate via that line is not applicable via Union Pacific. The shipper charged him a penalty of $25.19 which was the amount the shipper figured he lost because of the inapplicability of the inbound Union Pacific transit credit at Tacoma (Consol. R., I, 523, 524). He also described a similar disability which he faced in trying to divide a carload of screen doors between Colorado Springs and Grand Junction which traffic originated at Hoquiam, Washington. He stated that he would probably have to crate the doors from Colorado Springs at Grand Junction and ship them by common carrier truck to their yard at that point (Consol. R., I, 524).

This company is sometimes forced to go to mills located on the Union Pacific for supplies at its Grand Junction plant because of price and quality (Consol R., I, 526) and when this is done, he cannot move such lumber out of storage to his yard at Colorado Springs except at combination rates because of the absence of joint through rates from Cascade and Winchester, Idaho, by way of Grand Junction. The Colorado Springs yard once had to procure 10 carloads from a competitor (at disadvantage) because it would have cost an additional 46 cents per cwt. to move Union Pacific lumber into Colorado Springs from Grand Junction storage (Consol. R., I, 526, 527).

Robert C. Johnson, of Denver, Colorado, is District Manager, Wood Preserving Division of the Koppers Company, which has plants at Salida, Colorado on the Rio Grande and at Denver served through a belt line by either the Rio Grande or the Union Pacific. The testimony of Johnson relates to the plant at Salida which

is engaged in the preservation and treatment of lumber (Consol. R., I, 417). The lumber treated at Salida originates in the States of Colorado, New Mexico, Utah, Washington and Oregon. The lumber that is shipped from Washington and Oregon moves via the Southern Pacific or the Western Pacific and the Rio Grande (Consol. R., I, 417). Johnson testified that about 60 per cent of the lumber treated at Salida moves to points east, south and southeast beyond the state of Colorado (Consol. R., I, 418). He also stated that this plant would use lumber from such points as Baker and Burns, Oregon, if the joint competitive rates sought in this proceeding were established (Consol. R., I, 418).

Since as stated about 60 per cent of the lumber treated at Salida moves eastbound beyond the state of Colorado, the Salida plant cannot purchase lumber at points served by the Union Pacific in Oregon or other states northwest of Oregon without the risk of paying combination rates. Johnson also stated that his company favors the establishment of the competitive rates sought, because the Salida plant needs a large range of flexibility in securing lumber for treatment at that point, and that with such flexibility the plant would gain in production and often in price if the joint rates involved were established (Consol. R., I, 417, 418). In other words, the Koppers Company would like to be in position to buy lumber for treatment at Salida regardless of the source of the lumber or the originating railroad (Consol. R., I, 419). The plant of the Koppers Company at Denver is not restricted in the same manner as is the plant at Salida, because, as already stated, it is served by the Union Pacific as well as by the Rio Grande and lumber may therefore be moved from points on the Union Pacific in Idaho, Oregon, etc., for treatment at Denver at competitive rates (Consol. R., I, 419).

J. Arthur Knudsen, of Salt Lake City, Utah, President and General Manager of Knudsen Builders Supply Company, receives 400 to 500 cars per year in the conduct of his business, 150 to 200 from the East. These cars contain roofing, insulation, wallboard and a full line of building material, originate at various points in the United States from Missouri on the west to the Atlantic Seaboard on the east and from Minnesota on the north to the Gulf on the south, and are consigned to various dealers and branches of his company in western Colorado, Utah and Idaho. Frequently these are pool cars, as in the case of Celotex moving from Louisiana. Such cars contain about 56,000 feet of this product and are stopped four or five times en route for partial unloading. He cannot always time his shipments for his western Colorado customers (Grand Junction, Colorado, for example) (Consol. R., I, 206) with cars that are *not* consigned north of Ogden, which precludes the possibility of servicing his Colorado customers in such cars (Consol. R., I, 204-207).

Knudsen testified (Consol. R., I, 207) that if the competitive rates were established he would be able to give better service to his customers in the western part of Colorado and effect savings for them on numerous occasions, would help to build up their financial capacity and their efficiency, which in turn would enable Knudsen to increase his business with them. He also testified that by the same token he cannot freely use the route of the Rio Grande on carloads consigned to certain customers at Salt Lake City because many of these cars are consigned to Pocatello and other points in Idaho and Oregon in the "closed door" territory and that when such reconsignments occur, the shipments would be subject to the excessive combination through rates instead of the competitive through rates.

Knudsen also testified (Consol. R., I, 210): "We have

to pass up business as far east as Glenwood Springs, Colorado, due to the fact that we couldn't so route the cars in order to accommodate those customers with the tonnages they could accept and pay for." He also said (Consol. R., I, 212, 213) that of the 150 cars moving from the east, the maximum number he would want to stop in transit to partly unload at points in Colorado on the D&RG would be 25 per cent.

M. S. Rosenblatt is President and General Manager of the Structural Steel and Forging Company of Salt Lake City, Utah. He testified in support of the complaint of the Rio Grande. His company has a warehouse and fabricating plant in Salt Lake City served by the Rio Grande. Steel is shipped into his plants from the Pacific coast, from Geneva, Utah, from Chicago, Pittsburgh and other points in the eastern United States (Consol. R., I, 221, 222). For the first ten months of 1949 he received 105 inbound cars from the east. He said that "all steel originating in the east comes over the Union Pacific Railroad and is transferred here at Salt Lake City for delivery at our plant" (Consol. R., I, 222). He stated that he routes all of the business to Salt Lake City via Union Pacific "primarily because we have no transit privileges for fabricating on any steel moving from eastern points via the D&RG. I mean by that, transit privileges into areas which take approximately 50 per cent of our business, Idaho particularly, and parts of Montana. It is impossible for us to use tonnage coming in on the D&RG, fabricating the steel, and then competing in the Idaho and Montana market," also, "when the steel is ordered, * * *, we have no way of knowing where the final destination is liable to be. Therefore, we can't take a chance on bringing in steel which we might have to fabricate and furnish in markets to which the D&RG tonnage would carry no fabrication in transit privileges" (Consol. R., I, 223).

Lorenzo J. Bott, of Brigham, Utah, testified in support of the complaint of the Rio Grande. He is a fabricator and wholesaler of granite and marble, chiefly used for monuments and tombstones (Consol. R., I, 388-397). Granite, which he sells, comes in semi-finished blocks from several points, one for example, being Tate, Georgia. He also gets marble from Vermont. He has a dealer in Grand Junction, Colorado, whom he cannot always supply with stone, marble or granite originating at these and other points in part carload lots, since the cars almost invariably contain some material for either Brigham or for other customers located in Utah, Idaho or Montana north and west of Ogden. If he can do so, he ships cars with some tonnage for Grand Junction in them, but the difficulty is that such cars must terminate on the Rio Grande and he can seldom do this. The only alternative is to ship to Grand Junction in LCL lots, the cost of which is prohibitive.

W. H. Snyder, Grand Junction, Colorado, a retail dealer in monuments, supported Bott's testimony (Consol. R., I, 398 *et seq.*)

Bott sells marble to Snyder, and other customers which originates, for example, at Tate, Georgia. Because of the cost of an entire carload of marble, or granite from Barre, Vermont, it frequently happens that Snyder has to forego the business because Bott cannot readily sell him a part-car (stop in transit at Grand Junction to partially unload) since the cars almost invariably contain tonnage for other Bott customers north of Ogden, including Bott's own operation at Brigham. Such part-car shipments as Snyder gets have to be included in cars which terminate on the Rio Grande. The alternative for Snyder is to pay LCL rates which are prohibitive (Consol. R., I, 399). If he had to ship everything LCL, he would close down (Consol. R., I, 403).

Kenneth G. Self, Salt Lake City, is the majority stockholder in the Inter-Mountain Tractor Sales Corporation, whose place of business at Salt Lake City is located on the tracks of the Rio Grande. He likewise supports the complaint of the Rio Grande. His concern is the distributor for Ford tractors and Dearborn farm equipment for Utah, southeastern Idaho and portions of Nevada and Wyoming (Consol. R., I, 458). He ships into Salt Lake City in carload lots and distributes from there to his dealers by his own truck (Consol. R., I, 459). Fifty per cent of his customers are located in Idaho. He originally purchased the truck during the post-war period when shortages made allocation of machinery necessary (Consol. R., I, 459, 460). Then it was necessary to limit dealers to a part of a carload and he found out that cars which were brought into Utah over the Rio Grande could not be stopped in transit at Salt Lake for partial unloading and reforwarded at the through rate to Idaho Falls for example (Consol. R., I, 460).

Rather than be faced with such situations, he bought a motor transport and has served his territory from Salt Lake since then by means of this equipment (Consol. R., I, 460). If he could partially unload in both states, he would use the railroads and discontinue his trucking (Consol. R., I, 460). He bought trucks for this operation because he did not have a competitive joint rate (via Rio Grande) from eastern points to points in Utah and Idaho (Consol. R., I, 460, 461). He serves Logan and Tremonton, Utah; Preston, Burley, Boise and Nampa, Idaho; all points on the Union Pacific north and west of Ogden (Consol. R., I, 461). He also serves some inland dealers adjacent to Price, Utah, on the Rio Grande (Consol. R., I, 464). He has no customers in Idaho today who would take over a partial carload (Consol. R., I, 464).

D. G. Adams, of Salt Lake City, Utah, is Branch Manager of the branch of the J. I. Case Company at that point. This branch is served by the tracks of the Rio Grande. The J. I. Case Company produces agricultural implements and farm machinery at points in Wisconsin, Illinois, Iowa and Alabama. The Salt Lake branch is the distribution point for these products in the intermountain territory. About 70 per cent of these products are destined to points in Utah north of Salt Lake City and to points in Idaho, and eastern Oregon, and about 30 per cent are destined to other parts of Utah and western Colorado (Consol. R., I, 543). Adams has only recently been put in charge of the Salt Lake branch and as yet is not entirely familiar with the potentialities of the territory in which his branch is interested (Consol. R., I, 549).

Although the Salt Lake City branch is served by the tracks of the Rio Grande, Adams testified that to be on the safe side all shipments from the East to Salt Lake City should be routed via the Union Pacific, and that most of them are, because if they are routed to Salt Lake City via the Rio Grande and are then reshipped to points on the Union Pacific in Idaho, northern Utah, etc., the combination rates will apply. However, Adams stated that his company recognizes that to route all shipments of the Salt Lake City branch via the Union Pacific would be unfair to the Rio Grande, and therefore on occasion shipments are routed to Salt Lake City via the Rio Grande (Consol. R., I, 550, 551).

Adams testified as to an example which hindered his operations and affected him adversely. A carload of plows moving from the east to Salt Lake City by the Rio Grande were needed badly at Idaho Falls. These plows could not be diverted to Idaho Falls at the competitive joint rates, so they were rebilled after arrival at Salt Lake to Idaho Falls, and it cost ap-

proximately $300.00 extra freight to do this (Consol. R., I, 545).

Another instance was given by Adams as to injuries suffered by his branch operations because of the lack of competitive joint rates which the complainant seeks. A carload of tractors was en route from the east to Salt Lake City which contained two tractors of the type needed by his Ontario, Oregon, dealer and Adams told the dealer he would unload all the tractors from this car at Salt Lake, except two, and then divert the car to Ontario. However, the car was moving to Salt Lake City via Rio Grande and the two tractors for Ontario were shipped by truck from Salt Lake City at a cost of about $50.00 apiece, which represents the loss to the J. I. Case Company (Consol. R., I, 545). Opening of the Ogden gateway at competitive rates would enable Adams to stop cars in western Colorado en route to Salt Lake, as well as en route to Idaho and reship them to Idaho, Oregon, etc., without the extra freight now imposed (Consol. R., I, 544).

Line No.	BETWEEN / and	ROUTES Following routing arranged for eastbound movement; for westbound movement use reverse routing.	MILEAGES UP Long-Haul	UP Short-Haul	UP To or From Ogden	Thru
1	Seattle . . . . Wash.	UP-Council Bluffs, Ia., C&NW	1954			2439
2	and	UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P		184		3541
3	Chicago . . . . . Ill.	UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			1027	2651
4		Union Pacific	2069			2069
5	Kansas City . . . Mo.	UP-Portland Ore., SP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P		184		2529
6		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P			1027	2269
7		UP-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL-Atlanta, Ga., ACL	2969			3303
8	Jacksonville . . . Fla.	UP-Portland, Ore., SP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL-Atlanta, Ga., ACL		184		3763
9		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL-Atlanta, Ga., ACL			1027	3503
	BETWEEN Centralia . . . Wash. and					
10		UP-Council Bluffs, Ia., C&NW	1862			2347
11	Chicago . . . . . Ill.	UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P		92		3450
12		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			935	2559
13		UP-Kansas City, Mo., Wabash	1977			2251
14	St. Louis . . . . . Mo.	UP-Portland, Ore., SP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash		92		2711
15		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash			935	2451
16		UP-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL	1977			2856
17	Atlanta . . . . . Ga.	UP-Portland, Ore., SP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL		92		3316
18		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL			935	3056
	BETWEEN Barnes . . . . . Ore. and					
19		UP-Council Bluffs, Ia., C&NW	1777			2262
20	Chicago . . . . . Ill.	UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P		7		3364
21		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			850	2474
22		UP-Council Bluffs, Ia., C&NW-Chicago, Ill., PRR	1777			2730
23	Pittsburgh . . . . Pa.	UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P-Chicago, Ill., PRR		7		3833
24		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q-Chicago, Ill., PRR.			850	2942
25		UP-Council Bluffs, Ia., C&NW-Chicago, Ill., NYC	1777			2547
26	Detroit . . . . Mich.	UP-Portland, Ore., SP-Ogden, Utah, UP-Council Bluffs, Ia., C&NW-Chicago, Ill., NYC		7		2873
27		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q-Chicago, Ill., NYC			850	2759
	BETWEEN Pendleton . . . Ore. and					
28		UP-Council Bluffs, Ia., C&NW	1560			2045
29	Chicago . . . . . Ill.	UP-Wallula, Wash., NP-Minneapolis, Minn., CStPM&O-C&NW		70		2120
30		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			633	2257
31		UP-Denver, Colo., AT&SF	1144			1876
32	Oklahoma City . Okla.	UP-Wallula, Wash., NP-Fargo, N.D., CMStP&P-Sioux Falls, S.D., CStPM&O-C&NW-Omaha, Neb., CB&Q-Kansas City, Mo., M-K-T		70		2602
33		UP-Ogden, Utah, D&RGW-Pueblo, Colo., AT&SF			633	1910
34		UP-Kansas City, Mo., Wabash	1674			1948
35	St. Louis . . . . . Mo.	UP-Spokane, Wash., SI-CP-Soo, Minneapolis, Minn., CRI&P-Des Moines, Ia., Wabash		227		2317
36		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash			633	2149

Line No.	BETWEEN	ROUTES Following routing arranged for eastbound movement; for westbound movement use reverse routing.	MILEAGES UP Long-Haul	UP Short-Haul	UP To or From Ogden	Thru
37	Connell . . . . Wash. and	UP-Council Bluffs, Ia., C&NW	1742			2227
38	Chicago . . . . . Ill.	UP-Spokane, Wash., SI-CP-Soo		119		2048
39		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			814	2438
40	New Orleans . . . La.	UP-Kansas City, Mo., KCS-Shreveport, La., L&A	1856			2728
41		UP-Spokane, Wash., GN-Minneapolis, Minn., CRI&P-DesMoines, Ia., Wabash-St. Louis, Mo., IC		119		2847
42		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC-Ft. Worth, Tex., T&P			814	2693
43	Ft. Worth . . . . Tex.	UP-Denver, Colo., C&S-Sixela, N.M., FW&DC	1326			2126
44		UP-Spokane, Wash., GN-Sioux City, Ia., C&NW-Omaha, Neb., CB&Q-Kansas City, Mo., MKT		119		2490
45		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC			814	2159
	BETWEEN Cheney . . . . Wash. and					
46	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1769			2254
47		UP-Spokane, Wash., SI-CP-Soo		17		1957
48		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			842	2466
49	Ft. Worth . . . . Tex.	UP-Denver, Colo., C&S-Sixela, N.M., FW&DC	1354			2154
50		UP-Spokane, Wash., SI-CP-Soo, St. Paul, Minn., CRI&P-Kansas City, Mo., M-K-T		17		2498
51		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC			842	2187
52	Oklahoma City . Okla.	UP-Denver, Colo., AT&SF	1354			2086
53		UP-Spokane, Wash., GN-Sioux City, Ia., C&NW-Omaha, Neb., CB&Q-Kansas City, Mo., M-K-T		17		2224
54		UP-Ogden, Utah, D&RGW-Pueblo, Colo., AT&SF			842	2119
	BETWEEN Colfax . . . . Wash. and					
55	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1756			2241
56		UP-Plummer, Idaho, CMStP&P		54		1888
57		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			829	2453
58	Oklahoma City . Okla.	UP-Denver, Colo., C&S-Sixela, N.M., FW&DC	1354			2154
59		UP-Spokane, Wash., GN-Sioux City, Ia., C&NW-Omaha, Neb., CB&Q-Kansas City, Mo., M-K-T		88		2295
60		UP-Ogden, Utah, D&RGW-Pueblo, Colo., AT&SF			829	2106
61	New Orleans . . . La.	UP-Kansas City, Mo., KCS-Shreveport, La., L&A	1871			2743
62		UP-Spokane, Wash., SI-CP-Soo-St. Paul, Minn., CB&Q-St. Louis, Mo., IC		88		2842
63		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC-Ft. Worth, Tex., T&P			829	2708
	BETWEEN and Lewiston . . Idaho					
64	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1772			2257
65		UP-Marengo, Wash., CMStP&P		132		2054
66		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			845	2469
67	New Orleans . . . La.	UP-Kansas City, Mo., KCS-Shreveport, La., L&A	1887			2759
68		UP-Spokane, Wash., GN-Minneapolis, Minn., CRI&P-DesMoines, Ia., Wabash-St. Louis, Mo., IC		193		2921
69		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC-Ft. Worth, Tex., T&P			845	2724
70	Ft. Worth . . . . Tex.	UP-Denver, Colo., C&S-Sixela, N.M., FW&DC	1356			2156
71		UP-Wallula, Wash., NP-Fargo, N.D., CMStP&P-Sioux Falls, S.D., CStPM&O-Omaha, Neb., CB&Q-Kansas City, Mo., M-K-T		143		2839
72		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC			845	2190

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SUPREME COURT, U.S.

Nos. 117, 118, 119, 332, 333 and 334

Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., Appellants,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, ET AL.

No. 119

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, Appellants,

vs.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CONSOLIDATED REPLY BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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THE ARGUS PRESS, SEATTLE

Nos. 117, 118, 119, 332, 333 and 334

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vs.

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vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CONSOLIDATED REPLY BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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Nos. 117, 118, 119, 332, 333 and 334

Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, Appellants,

vs.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CONSOLIDATED REPLY BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

PRELIMINARY RESTATEMENT OF THE POSITION OF THE PARTIES

By way of conforming to the spirit of the order of consolidation of this Court entered October 24, 1955, The Denver and Rio Grande Western Railroad Company (hereinafter sometimes called "the Rio Grande") duly filed its Consolidated Opening Brief covering the above-entitled series of appeals.

Appeals Nos. 117, 118 and 119 are from the United States District Court for the District of Nebraska.

Appeals Nos. 332, 333 and 334 are from the United States District Court for the District of Colorado.

These appeals deal with various aspects of a Report and Order of the Interstate Commerce Commission dated January 12, 1953, which upon complaint of the Rio Grande, supported by interested shippers, accorded relief to the Rio Grande and to the interested shippers with respect to through routes and joint rates as to certain named commodities. The Commission Order denied relief with respect to all other commodities, shipped to and from what is known as the "closed door" territory in northern Utah, Idaho, Montana, Washington and Oregon—as to which territory the Union Pacific Railroad Company claims the right to control the movement of all railroad freight traffic, to prefer certain of its favored railroad connections, and to exclude the Rio Grande from all such traffic moving to and from that area unless the shippers (the public) are willing to pay a higher price.

The position of the Rio Grande and its interveners, as set forth in its Consolidated Opening Brief, is that the

Colorado decision should be affirmed and the case remanded to the Commission with instructions that through routes via the Ogden gateway are in existence and that the Rio Grande is entitled to have the case considered and decided by the Commission, free of the limitations of Section 15(4) of the Interstate Commerce Act; that the Nebraska court should be reversed and the Commission's Order reversed in so far as it denies the relief prayed for by the Rio Grande; that in the alternative, in the event that the Colorado court is not affirmed, this Court should reverse the Nebraska decision and affirm the Commission Order.

The United States of America, the Interstate Commerce Commission and the Secretary of Agriculture (hereinafter sometimes called "the Government") also in conformity to the spirit of the order of consolidation, filed a Consolidated Opening Brief dealing with the issues in all of the above-entitled appeals. In that brief the above named appellants seek a reversal of the Colorado decision, a reversal of the Nebraska decision, and a restoration of the Commission Order of January 12, 1953. (It should be noted, however, that the Secretary of Agriculture is not a party to the appeal from the Colorado court—see Government brief, footnote 1, page 2.)

In Case No. 118 the Union Pacific Railroad Company, *et al.* (hereinafter sometimes called "the Union Pacific"), filed a separate opening brief seeking a reversal of the Nebraska decision and a reversal of the Commission Order; the Union Pacific also filed a sep-

arate opening brief in Case No. 333 seeking a reversal of the Colorado decision.

The Washington Public Service Commission, *et al.*, filed a separate opening brief in Case No. 118, joining the Union Pacific in seeking a reversal of the Nebraska decision, and filed a separate opening brief in Case No. 332 supporting the position taken by the Union Pacific with respect to reversal of the Colorado decision and a reversal of the Commission Order. The arguments made and the authorities cited in the brief of the Washington Public Service Commission, *et al.*, are so nearly identical with those set forth in the Union Pacific brief that they do not require any separate answer.

ADDITIONAL STATUTES INVOLVED

Due to the arguments advanced by the Union Pacific in its opening briefs, these appeals now involve the following additional statutes:

Title 28, United States Code, Sections 1336 (62 Stat. 931) and 1398 (62 Stat. 936), set forth verbatim in Appendix A hereto.

The Interstate Commerce Act, 24 Stat. 379, as amended, Title 49 U.S.C., part of Section 1(3)(a) and Sections 15(7), 17(3) and 20(11), set forth verbatim in Appendix A hereto.

COLORADO DECISION

Appeals Nos. 332, 333, 334

REVIVAL OF PROCEDURAL QUESTIONS HERETOFORE ARGUED

The Union Pacific in its opening brief on appeal from the Colorado court first revives and reargues certain procedural questions heretofore fully argued to this Court in special briefs filed in connection with a Union Pacific motion for summary reversal of the Colorado decision made and presented to this Court before probable jurisdiction was noted in these appeals. The Rio Grande at page 34 of its Consolidated Opening Brief referred to these procedural contentions of the Union Pacific as having been inferentially denied when this Court noted probable jurisdiction. These procedural questions (based upon motions originally made by the Union Pacific in the Colorado court but by no other litigant) will first be analyzed and answered before dealing with the substantive issues in the Colorado case.

ANSWER TO PROCEDURAL QUESTIONS AGAIN RAISED BY THE UNION PACIFIC

I.

The Colorado Court Had Jurisdiction to Set Aside the Order of the Commission

Section 1336 of Title 28, U.S.C. (62 Stat. 931), reads as follows:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul

or suspend, in whole or in part, any order of the Interstate Commerce Commission."

The proper forum for maintaining this action authorized by Section 1336 is prescribed by Section 1398 of Title 28, U.S.C. (62 Stat. 936), which provides:

> "Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

The principal office of the Rio Grande is situated in Denver, Colorado, in the District of Colorado. Accordingly, the United States District Court for the District of Colorado is the only proper judicial district in which the Rio Grande could institute an action to review the Commission's Order of January 12, 1953.

The Union Pacific asserts that the Colorado court erred in failing to dismiss the Rio Grande complaint because the matters complained of therein did not involve a Commission order or part of an order. In support of this contention the Union Pacific chiefly relies on *United States v. Atlanta, B. & C. R. R.*, 282 U.S. 522. The facts in that case are distinguishable from those in the instant case. That case involved a complicated accounting situation growing out of the receivership and reorganization of the Atlanta, Birmingham and Atlantic Railway Company, 117 I.C.C. 181 (supplemental report of the Commission in the same case 117 I.C.C. 439). The order of the Commission authorized the new company to issue preferred and common stock and imposed certain conditions with respect

to the accounting classification of "investment in road and equipment." When the new company set up its books it did not comply with those conditions. As a result of a further hearing and reconsideration of the questions involved, the Commission issued its report in *Atlanta, B. & A. Ry. Reorganization,* 158 I.C.C. 6, 13, 14, in which it stated the value of the property of the railroad for rate making purposes and prescribed accounting rules and regulations but entered no formal order whatsoever. The concluding paragraph of the last decision reads as follows:

> "Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,216,043.87. The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

It will be seen that the Commission merely stated that the company "will be expected" to adjust its accounts in accordance with the Commission's finding within 60 days from the service of its report. The finding there was neither in the form of an order nor did it purport to be a part of any order.

That decision should be compared with the recent decision of the Court in *Henderson v. United States,* 339 U.S. 816, which reversed with directions to remand the decision of the court below that sustained the decision of the Commission in *Henderson v. Southern Ry.,* 269 I.C.C. 73, 78, wherein the Commission found that under the revised rules of the Southern Railway, Hen-

derson had not been subjected to unreasonable prejudice and disadvantage. The Commission did not enter any order for the future. It merely dismissed the complaint. In that case the United States by brief and oral argument supported the appellant on the ground that it was clear that he had standing to institute the suit and to bring the proceedings, since he was an aggrieved party, free to travel again on the Southern Railway. This Court sustained that view, overruled the Commission by finding that Henderson was subject to undue prejudice in violation of Section 3 of the Interstate Commerce Act and remanded the case with directions. It will thus be seen that in the *Henderson* case this Court considered a decision of the Commission on which no order for the future had been entered, despite the earlier decision of the Court in the *Atlanta, B. & C. R. R.* case, 282 U.S. 522.

There is attached as Appendix A to the Rio Grande's Consolidated Opening Brief a copy of the Order of the Commission of January 12, 1953, in this case. It will be observed that the first paragraph of the Order specifically states that the Report containing the Findings of Fact and Conclusions of the Commission "is hereby referred to and made a part hereof; * * *." No such order was made in the *Atlanta B. & C. R. R.* case relied upon by the Union Pacific. This fact in itself renders that case wholly inapplicable here.

The Union Pacific in its brief stresses the fact that the Order of the Commission did not use the word "dismissed" in connection with its failure to find through routes and competitive joint rates on the commodities

involved in the litigation other than the limited number of commodities named in the Order. But the failure to use the actual word "dismissed" is of no significance since as was pointed out in the *Rochester Telephone* case, 307 U.S. 125 at page 142:

> "The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same."

The discussion of this general question by Mr. Justice Frankfurter at page 142 and other pages of the *Rochester Telephone* case is a complete answer to the contentions of the Union Pacific that that part of the decision of the Commission which denied the relief sought by the Rio Grande and which is involved in the instant appeal is not an order and therefore is not subject to review by this or any other court. The Commission in its Conclusions (which were expressly made a part of its Order) distinctly stated "That except as indicated in the preceding findings, the allegations made in the complaint are not sustained." This was the legal equivalent of a dismissal of these allegations.

The Union Pacific also relies to a large extent upon the so-called negative order doctrine of *Standard Oil Co. v. United States,* 283 U.S. 235, to support its position. In *United States v. ICC,* 337 U.S.426, 436, after referring to the negative order doctrine and to the *Standard Oil* case, the Court made the statement:

> "This doctrine was wholly abandoned in *Rochester Tel. Corp. v. United States,* 307 U.S. 125."

Another decision relied on by the Union Pacific is *Manufacturers Ry. v. United States,* 246 U.S. 457, a

decision based upon the now repudiated doctrine that only affirmative orders of the Commission are reviewable. The facts of that case are so different from the facts in the instant case as to make it wholly inapplicable. In *Manufacturers Ry. v. United States,* a failure by the Commission "to fix divisions" was held not to be subject to judicial review because it only involved a failure or refusal of the Commission to exercise its administrative authority. In the instant case the Commission exercised its administrative authority by granting the Rio Grande limited relief under Section 15(4) of the Interstate Commerce Act, but by reason of an erroneous interpretation of the law denied relief in all other respects.

It should be pointed out that both the *Atlanta B. & C. R. R.* case and the *Manufacturers Ry.* case above referred to, and so heavily relied upon by the Union Pacific, were decided prior to the *Rochester Telephone* case, and the *Henderson* case.

All of the foregoing cases were referred to and relied upon by the Union Pacific in its Statement and Argument on its Motion to Reverse filed in this Court prior to the noting of probable jurisdiction and were undoubtedly fully considered by this Court at that time.

The only additional case of consequence now relied upon by the Union Pacific is *Brady v. ICC,* 43 F.2d 847 (N.D.W.Va.), aff'd *per curiam* 283 U.S. 804. The legal situation and the facts in the *Brady* case are clearly distinguishable from those in the instant case. The *Brady* case involved a suit brought to set aside a reparation order, of no interest to the public at large, in which

it was sought to review in the courts the amount of damages allowed by the Commission, and thereby to secure a larger money judgment. There was no allegation there as to any basic error of law on the part of the Commission, or showing of irreparable injury to the complainant. A mere matter of dispute over the adequacy of damages has no analogy to a situation where basic issues of law are involved as alleged in the Rio Grande's complaint in the Colorado court.

There never has been any doubt but that where an issue as to the existence of through routes is involved, a court may examine into the matter and decide upon the whole record whether through routes are in existence as a matter of law. *Thompson v. United States,* 343 U.S. 549; *ICC v. Northern Pacific Ry.,* 216 U.S. 538.

The action of the Commission in failing to find that through routes are in existence via the Ogden gateway over the Rio Grande resulted in its making and entering an erroneous Order. When the Rio Grande, in its complaint in the Colorado court, assailed this Order as erroneous, that court had jurisdiction to hear and determine the matter.

II.

The Rio Grande Had Standing to Bring Suit to Set Aside the Order of the Commission

Procedural question II raised by the Union Pacific is based on the contention that the Rio Grande had no legal right or standing to maintain its suit in the Colorado court. In this connection, the Union Pacific harks back to the Rio Grande complaint before the Commission and erroneously attempts to make it ap-

pear that this complaint was filed for the sole purpose of improving the Rio Grande's financial position and securing pecuniary gain at the expense of the Union Pacific. To further distort this erroneous charge, the Union Pacific uses extravagant and theoretical figures regarding what the loss to the Union Pacific and the gain to the Rio Grande might be if the Rio Grande should prevail in its contentions. Any proceeding successfully maintained by one railroad against another to correct allegedly unjust, unreasonable, discriminatory or prejudicial rates inevitably results in some shift in pecuniary advantage.

The Rio Grande complaint before the Commission was based upon the relevant provisions of the Interstate Commerce Act which govern and require all railroads, even including the Union Pacific, to charge just, reasonable, non-prejudicial, and non-discriminatory rates over existing through routes. It was not, as the Union Pacific persistently contends, based upon the idea of the Rio Grande trying to deprive the Union Pacific of traffic to which the Union Pacific claims an inherent right. No railroad has an inherent right to traffic. The shipper alone has the right to determine how traffic shall flow over existing through routes (see Section 15(8)).

Actually, what the Union Pacific is attempting in connection with the denial by the lower court of its motion to dismiss is to bring in, as a part of its procedural attack, the language of Section 15(4) requiring the Commission in prescribing new through routes to "give reasonable preference to the carrier by railroad which originates the traffic" and providing that

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs." Section 15(4) and its applicability to the facts in the instant case are not properly involved in the procedural issues raised by the Union Pacific in the Colorado case, because the Rio Grande complaint in that case was not based upon the contention that new through routes should be established under that section, but rather upon the contrary proposition that through routes are already in existence.

It is important to point out that the Union Pacific from the beginning has attempted to force the Rio Grande to justify its standing to maintain its action by contending that the standing of the Rio Grande to sue in the Colorado case must be grounded on Section 15(4) with its restrictive provisions, and thus to defeat the complaint of the Rio Grande on that ground. But the Union Pacific is unable to argue that the limitations of Section 15(4) are applicable where through routes are already in existence as alleged by the Rio Grande in the Colorado case. The Union Pacific attempted to make such a contention, however, and in so doing has tried to obscure the real contention of the Rio Grande in the Colorado case, to-wit, that Section 15(4) is inapplicable in a case where through routes are already in existence. Having thus based its whole procedural attack on Section 15(4), the Union Pacific's entire argument as to the Rio Grande's standing to sue must fall. It is clear that the restrictive provisions of Section 15(4) cannot be successfully used to support the Union

Pacific motion to dismiss when the standing of the Rio Grande as shown by its complaint is chiefly based upon alleged violations of various provisions of the Interstate Commerce Act (other than 15(4)). The substance of these sections for convenience is set forth as follows:

Section 13(1) of the Interstate Commerce Act affirmatively provides that any person, firm, corporation, company, or association, *or any common carrier*, may file a complaint with the Commission against anything done or omitted to be done by any other common carrier subject to the provisions of the Act in violation of such provisions. (Thus the Rio Grande, as a common carrier, had the statutory right to complain against the Union Pacific and the other defendants for their violations of the provisions of the Interstate Commerce Act.)

Section 1(4) of the Act requires every common carrier railroad to furnish transportation upon reasonable request and to establish just and reasonable through rates, fares, charges and classifications.

Section 1(5) states that:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3(1) makes it unlawful for any common carrier subject to the Act

> "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association,

locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4) provides:

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, * * * ."

The cited provisions of the Interstate Commerce Act impose duties upon common carriers by railroad subject to that Act. The authority of the Commission to enforce obedience to those duties is found principally in Sections 13 and 15 of the Act. These sections confer the right to complain where railroads such as the Union Pacific and its preferred connections fail and refuse to comply with their statutory duties.

It, therefore, follows that where, as here, it is claimed by the Rio Grande that the Union Pacific violates the Interstate Commerce Act by its failure and refusal to

participate with the Rio Grande in the maintenance of reasonable and non-discriminatory joint rates, rules and regulations with respect to the operation of through routes and has failed and refused to accord reasonable, proper and equal treatment in the matter of rates and the interchange of traffic, such a complaint is grounded on the provisions of the Interstate Commerce Act, which confer statutory rights upon the Rio Grande for the violation of which the Rio Grande has a right to complain.

In addition to the decision in the *Rochester Telephone* case, there are numerous other decisions of this Court which support the standing of the Rio Grande to maintain this suit. In *Youngstown Sheet & Tube Co. v. United States,* 295 U.S. 476, 479, contentions similar to those made here by the Union Pacific were rejected by the Court, as follows:

> "The appellants were entitled to bring and maintain this suit to set aside the order. They were parties to the proceeding before the Commission, had a pecuniary interest in the rates and were affected by the order. The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were unreasonable or discriminated against them."

The court below had jurisdiction to review the order of the Commission under 28 U.S.C., Sections 1336 (62 Stat. 931) and 1398 (62 Stat. 936). The complaint of the Rio Grande in the Colorado court alleged that it not only has a pecuniary interest in the issues raised, but that the Order, unless remanded to the Commission for correction of errors, would cause the Rio Grande irre-

parable injury in that the alleged unjust, unreasonable and unjustly discriminatory rates, routes and practices of the Union Pacific would be perpetuated by the Commission's erroneous Order and Conclusions and would violate the statutory right of the Rio Grande to participate on equal terms in the revenues from through traffic at competitive joint rates over through routes under the provisions of the Interstate Commerce Act. These allegations are amply sufficient to sustain the Rio Grande's standing to sue in the Colorado court. The fact that the part of the Order of the Commission involved in the Colorado case is negative in form does not bar the right of the Rio Grande to maintain the suit.

In *Mitchell v. United States*, 313 U.S. 80, this Court considered the decision and order of the Commission in *Mitchell v. Chicago, R. I. & P. Ry.*, 229 I.C.C. 703, in which the Commission held that the treatment accorded Mitchell by the railroads which he claimed was unjustly discriminatory was neither that nor unduly prejudicial under the provisions of the Interstate Commerce Act. This Court did not hesitate to overrule the Commission and hold that the treatment accorded Mitchell was unjustly discriminatory and unduly prejudicial under the provisions of the Interstate Commerce Act. It clearly based its reversal on that ground and not on the constitutional ground mentioned in the decision. At page 93 of the opinion, the Court said:

> "He [Mitchell] presents the question whether the Act does forbid the conduct of which he complained."

See also *Henderson v. United States*, 339 U.S. 816. In *The Chicago Junction Case*, 264 U.S. 258, which

dealt with an order of the Commission that authorized, but did not require, the New York Central to purchase control of the Chicago Junction Railway, the Court sustained the right of the Pennsylvania Railroad, the Baltimore & Ohio, and other competitors of the New York Central to maintain a suit to set aside the order of the Commission. It was there claimed by the defendants that the plaintiffs, as competitors, did not have a sufficient legal interest to permit them to bring or to maintain the suit. In that case the Court was moved in part by the consideration that the plaintiff railroads would lose large sums of money by virtue of the control of the Chicago Junction by the New York Central. They were parties to the proceeding before the Commission and thereby acquired the right to sue, and also had such a right under Section 212 of the Judicial Code (28 U.S.C., Section 41(27) note). The Court stated, 264 U.S., at page 267, apropos of the large loss sustained by the railroad plaintiffs:

> "This loss is not the incident of more effective competition. Compare *Edward Hines Trustees v. United States,* 263 U.S. 143, 148. It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co. v. United States,* 236 U.S. 351."

The right of the Rio Grande to bring and to maintain the instant suit in the court below under the Interstate Commerce Act is also sustained by *United States v. ICC,* 337 U.S. 426, 435; *Barrett Line, Inc. v. United States,* 326 U.S. 179; *American Trucking Ass'ns v.*

United States, 326 U.S. 77; *ICC v. Parker,* 326 U.S. 60; *Alton R. R. v. United States,* 287 U.S. 229; *United States v. New River Co.,* 265 U.S. 533; *Skinner & Eddy Corp. v. United States,* 249 U.S. 557, and the revealing and comprehensive opinion by Judge Parker in *Anchor Coal Co. v. United States,* 25 F.2d 462 (S.D. W. Va.)

See also article by Kenneth Culp Davis in 49 Columbia Law Review 759-795 (1949), where at pages 772-73 he states:

> "In none of the Supreme Court decisions denying standing under the Interstate Commerce Act was the petitioner a carrier. Even a mere competitive interest of a carrier is sufficient for enforcing the Act or for challenging action of the Commission."

The Union Pacific in arguing its procedural point II refers to the Colorado decision as stating that the Commission's failure to grant the Rio Grande's demands "caused no pecuniary loss to the Rio Grande." This quotation is taken out of context and overlooks the fuller statement of the Colorado court with respect to the Rio Grande's pecuniary interest, which reads (Colo. R. 294) as follows:

> "If the Rio Grande, on its showing before the Commission and an application of the provisions of §1(4), §3(4), §15(1) and §15(3), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its op-

erating income, and, no doubt, in its net earnings. More succinctly stated, if the Rio Grande, under the facts established by the evidence before the Commission, and the application of the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande."

In this paragraph the court makes it clear (and this is axiomatic in any case of this character) that if a carrier bringing a complaint alleges that it is entitled under the law and the facts involved to the prescription of joint rates over existing through routes, then necessarily the denial of the appropriate statutory relief prayed for deprives the carrier of pecuniary gain, which denial it is entitled to have reviewed in a three-judge court. This is precisely the situation in the instant case.

THE GOVERNMENT'S POSITION

It should be noted that neither the United States, the Interstate Commerce Commission nor the Department of Agriculture supports the Union Pacific's contentions with respect to either of its procedural points.

SUBSTANTIVE ISSUES — COLORADO CASE

The Union Pacific opening brief in the Colorado case and the collaborating opening brief of the Washington Public Service Commission, *et al.*, contain so many erroneous statements and irrelevancies that a serious and prejudicial confusion of the issues here involved

may result unless clarification is undertaken. To help clarify and delineate the actual issues, some of the more flagrant misstatements and irrelevancies are now mentioned.

Erroneous and Irrelevant Statements in the Union Pacific Brief

1. At page 3 of its Colorado opening brief, the Union Pacific refers to the Rio Grande as a "chronically bankrupt" and "financial needs" short line railroad. Elsewhere in its brief, the Union Pacific seeks to discredit the Rio Grande as a railroad which is neither efficiently operated nor financially sound. These epithets and innuendos are untrue as shown by the undisputed testimony in the case—particularly that of Mr. Wilson McCarthy, late President of the Rio Grande, who testified at length regarding the present excellent physical and financial condition of that railroad (Consol. R., I, 42, *et seq.;* see also R. G. Consol. Op. Br. 77-79). Even Mr. P. V. Webb, a statistician on the staff of the General Auditor of the Union Pacific, testified that operating conditions on the Rio Grande compared favorably with operating conditions on the Union Pacific, and with the operating conditions on other leading transcontinental railroads (Consol. R., I, 876).

The Union Pacific's erroneous statements regarding the Rio Grande's financial stability and operating conditions are based upon conditions of many years ago, which existed not only with respect to the Rio Grande, but also with respect to the Union Pacific and many other railroads, and overlook the fact that the Union Pacific and many other presently sound and well-op-

erated railroads have passed through periods of financial distress and receivership.

In any event, these misstatements of fact are also wholly irrelevant, because so far as the question of the existence of through routes is concerned (the basic issue in the Colorado case), such statements have no bearing.

2. Again at page 3 of the Union Pacific brief, and also at pages 11, 13 and 35, the Union Pacific seeks to represent that if the Rio Grande prevails in its contentions with respect to the existence of through routes and competitive joint rates, the Union Pacific would suffer heavy financial loss and become impoverished.

First of all, this is an admission by the Union Pacific (though not intended) that there must be such great public need for Rio Grande service and such great dissatisfaction with Union Pacific service, that many shippers in the "closed door" territory would shift their freight business to the Rio Grande, thus diverting substantially all of the traffic of the Union Pacific, and seriously undermining its financial structure.

Such a statement on the part of the Union Pacific is not only a ridiculous speculation, but is completely irrelevant. The truth or falsity of the speculation has no bearing upon the actual issues in the case as to whether the Rio Grande is entitled to competitive joint rates and through routes. The financial results which may be claimed to follow compliance with or enforcement of the provisions of the Interstate Commerce Act do not

constitute a basis for the Commission or the courts to excuse violations of such statutory provisions.

3. For the purpose of making it appear that only the Rio Grande is interested in or complaining about the Union Pacific monopoly of railroad freight traffic to and from the "closed door" territory, the Union Pacific at page 12 of its Colorado opening brief makes the following misleading statement: "No complaint has ever been filed by shippers or the public or by any state public service commission demanding the longer through routes and joint rates sought by the Rio Grande." This suggests that no complaint of any kind has ever been made. Whether a formal proceeding had been brought before the Commission previous to the formal institution of proceedings by the Rio Grande is immaterial as to the issues in the instant case.

The fact is that numerous shipping organizations, flour milling companies, chambers of commerce, lumber and grain shippers and associations interested in the production of fruits and vegetables, public service commissions, and the United States Secretary of Agriculture complained either as interveners in support of the Rio Grande or testified in support of the Complaint of the Rio Grande (See the list of interveners and witnesses set forth at pages 26 and 27 of the Consolidated Opening Brief of the Rio Grande).

A very large number of additional individual witnesses also testified in support of the complaint of the Rio Grande (See Appendix F, attached to the Consolidated Opening Brief of the Rio Grande).

4. The Union Pacific asserts at various places in its

brief that the Rio Grande has no right to the traffic it is seeking. No railroad carrier has an inherent right to traffic. It is the shipper and not the carrier who determines how the traffic shall be routed. If the Rio Grande has no right to the traffic, neither has the Union Pacific, because, as is disclosed by the evidence of the shippers in the "closed door" territory, even in the face of the higher rates enforced by the Union Pacific, they route shipments over the Rio Grande (See summary of testimony of shipper witnesses, *infra* 36-39).

5. Misrepresentation and irrelevancy are also inherent in the oft-repeated, unsupported *ipse dixit* of the Union Pacific that "the order issued by the Commission grants the demand (of the Rio Grande) to the extent of about one-third of the traffic from which the Union Pacific earns over eleven million dollars annually." This is a mere self-serving speculation. No one can possibly determine or even estimate to what extent shippers in the "closed door" territory in routing their railroad freight traffic will prefer to use the through route over the Rio Grande via the Ogden gateway, instead of the through route over the Union Pacific. The exercise of any such preference will depend upon the usual factors involved in any competitive situation, largely upon the comparative excellence of treatment and service accorded respectively over the Union Pacific route and over the Rio Grande route (which route, of course, embraces the Union Pacific north of Ogden) and the economic need for service over the line of the Rio Grande. Surely, the Union Pacific with all the claims it makes as to the superiority of its service should not fear such competition. It should be borne

in mind, however, that service over the Rio Grande route, as stated by Vice-President Bradford of the Rio Grande, will depend entirely upon the service rendered by the Union Pacific north of Ogden. If it has the benefit of "on-time" performance by the Union Pacific, the Rio Grande with its established schedules will be able to render comparable service with that of the Union Pacific to many points. If, however, the Union Pacific is slow in making delivery to the Rio Grande at Ogden, the service over the Rio Grande route will be correspondingly slow (Consol. R., I, 168).

Instead of trying to speculate on the question of loss, it is more reasonable to forecast that due to the rapidly developing economic and industrial potential of the "closed door" territory, the establishment of competitive joint rates over the Rio Grande through the Ogden gateway will not reduce the tonnage being carried by the Union Pacific. This was pointed out by several responsible and experienced witnesses.

Mr. P. G. Batt, the owner of a one thousand acre farm in Idaho, engaged in raising and shipping fruits and vegetables, and other perishables, testified that in shipping to midwest and eastern markets over the Union Pacific, he has had many experiences with distressed cars, that is, with carload shipments which arrive at points where they can be reconsigned only at higher combination rates. Such points are known as "pocket markets." He testified that he did not think competitive joint rates over the Rio Grande would reduce the tonnage of the Union Pacific, but rather would open the "pocket markets" to Idaho products, increas-

ing their consumption by as much as would be diverted away from Union Pacific (Consol. R., I, 420-28).

J. E. Watson, vice-president and general manager of the J. C. Watson Company, operating a large business at Parma, Idaho, engaged in producing, packing and distributing fruits and vegetables, and shipping annually from 1500 to 2000 cars, testified that his company is constantly seeking new markets, and that the establishment of competitive joint rates via the Rio Grande would provide a freer flow of fruits and vegetables from Idaho to markets outside that State, especially in the southwest territory. This witness pointed out that because of the lack of such competitive joint rates, new markets cannot now be developed. Of course, the development of new markets would increase the total amount of freight traffic to be moved (Consol. R., I, 432-37).

Bert Higgins, a member of the Executive Committee of the Idaho State Grange, a state-wide organization consisting of 12,000 members (farmers, shippers, growers and dealers in potatoes and grain), testified that the establishment of competitive joint rates over the Rio Grande via the Ogden gateway would be to the best interest of Idaho as an agricultural state by enabling it to increase its markets (Consol. R., I, 262-69).

Many other witnesses testified that the establishment of competitive joint rates via the Rio Grande through the Ogden gateway would result in the development of new markets, and increase the tonnage of products to be shipped from the "closed door" territory.

For example, Mr. Donald L. Reed, president of the

Skyland Food Corporation, operating a frozen fruit plant at Delta, Colorado, engaged in the processing of fruits, testified that the plant has a capacity of fifteen million pounds annually, but is operated at only about fifty per cent of its capacity; that Idaho fruit is desirable, but it cannot be processed at Delta because of the lack of competitive joint rates via the Rio Grande. He stated that if such rates were available, his company could use fruits from the "closed door" territory to the extent of several thousand tons annually. Such testimony again indicates that the present situation serves to stifle the normal economic development of th "closed door" territory (Consol. R., I, 140, *et seq.*).

The nature and extent of the economic development and growth in the "closed door" territory was outlined in detail by Dr. El Roy Nelson, Director of the Bureau of Economic and Business Research of the University of Utah. Dr. Nelson testified (Consol. R., I, 177-195) that due to the availability of power from federally constructed hydro-electric projects in the area and the industries dependent upon cheap hydro-electricity, such as aluminum, chemicals, paper and products of electric furnaces, war expansion and the subsequent sales of war-built plants to private industry, the northwest area in less than a decade achieved a 30-40 year expectancy in industrial development. One of the most significant migrations in American history, according to Dr. Nelson, was the shift in population since 1940 to the northwest. During the decade 1940-1949, the population of the states of Oregon and Washington, percentage-wise, increased approximately four times as fast as did that of the nation as a whole. Idaho's pop-

ulation in that decade increased about the same percentage as did that of the nation as a whole. The unusual industrial expansion in the northwest area has resulted in increased importation of raw materials and other goods into the area, and a corresponding increase in the exportation of their agricultural products, raw materials and manufactured goods. This newly developed industrial territory needs all available rail facilities, services and routes at competitive joint rates to permit its continued and unrestricted expansion. The establishment of competitive joint rates via the Ogden gateway and the Rio Grande will have the effect of permitting a greater and unrestricted flow of traffic from and to that territory, thereby increasing the amount of railroad traffic and the need for increased railroad facilities.

Mr. J. L. Pease, a witness for the United States Department of Agriculture, supporting the application of the Rio Grande, stated that it is the position of that Department that the establishment of competitive joint rates via the Ogden gateway route of the Rio Grande will promote the increased distribution of agricultural products. This witness testified that he is a transportation specialist, and Assistant Chief of the Transportation and Warehousing Branch, Production and Marketing Administration, of the United States Department of Agriculture; also that he represented the Secretary of Agriculture, which Department of the Government had an interest in the proceedings because of two statutes—Section 201 of the Agricultural Adjustment Act of 1932, and various sections of the Agricultural Marketing Act of 1946. Mr. Pease testified

that the continued inability of shippers in the "closed door" territory to use the Ogden gateway at joint through rates is not in the interest of the general agricultural public (Consol. R., II, 1069-73); also, that the Department of Agriculture is opposed to the existing routing restrictions on agricultural commodities and is of the view that the small amount of tonnage the Union Pacific might lose, if competitive joint rates were applied through the Ogden gateway, would do no substantial harm to that carrier (Consol. R., II, 1080-81).

But again, whether the prognostications of the experienced witnesses above named are correct as to the amount of freight traffic that the Union Pacific might lose if competitive joint rates were prescribed via the Rio Grande, the estimates of the Union Pacific or others regarding this matter have no relevancy because whether the loss be great or small, or none at all, any loss that follows compliance with or enforcement of the provisions of the Interstate Commerce Act does not constitute a basis for the Commission or the courts to excuse violations of such statutory provisions.

6. The Union Pacific in its Colorado opening brief contemptuously refers to the Rio Grande as a "bridge route" to give the impression that the Rio Grande is not used or usable as a through route or a trunk-line route for transcontinental traffic generally. The Government in its brief, by an obvious *reductio ad absurdum* in the form of an exaggerated illustration at page 60, tries in its own way to convey the erroneous impression that the Rio Grande is an insignificant short line railroad.

Although traffic may be properly referred to as "bridge traffic" where a carrier performs intermediate services only, it is unlikely, if competitive joint rates were established over the through routes via the Ogden gateway and the Rio Grande, that shippers generally would use the Rio Grande merely as a "bridge route." The chief need and desire of the shippers in the "closed door" territory, as shown by their evidence, is not to use the Rio Grande as a "bridge route," in the sense that is implied by the Union Pacific and the Government, but to use it as a part of a through route from and to Colorado common points and points south and east thereof, and, of course, to avail themselves of numerous in-transit privileges on the Rio Grande (Consol. R., II, 1574-76; R. G. Consol. Op. Br. 137, App. F).

Just as the Union Pacific is in error under the evidence in the instant case in stating that the Rio Grande is a "chronically bankrupt" and "financial needs" railroad, so it is in error in stating that the Rio Grande is an insignificant "bridge route."

The Rio Grande is an essential, valuable and necessary link in transcontinental transportation, and as such, its facilities are essential to the maintenance of an adequate, and efficient and economic national transportation system. The Union Pacific, which is admittedly one of the largest railroads of the country, boasts that it has a total mileage of more than 5,000 miles in the "closed door" territory. The evidence in this case discloses that although the Rio Grande is not as large as the Union Pacific, it is nevertheless one of the large and important railroads of the country with over 2,400 miles of line, and that the improvements and replace-

ments made during the last twenty years are such that it is today one of the most up-to-date railroads in the country as to its physical lines and equipment, and one of the most efficiently operated and financially sound (Consol. R., I, 42-45, 80; R. G. Consol. Op. Br. 77-79).

The Rio Grande is not an orphan railroad and should not be so treated, or required to maintain standby through routes for the convenience of the Union Pacific and the Government, when for one reason or another they are disposed to utilize the existing through routes over its lines. Although it is true that the Rio Grande carries a substantial volume of so-called "bridge traffic," which has increased in recent years, the record likewise shows that the Rio Grande originates a large volume of traffic on its lines and is also the destination carrier for a large volume of traffic, and that in recent years, due to the increased industrial development on its lines, its services as an originating and destinating carrier have become increasingly important (Consol. R., II, 1546,1547).

7. At various places in its Colorado opening brief (pages 3, 10, 11, 13, 35, 38, 39, 77, and elsewhere) the Union Pacific undertakes to represent that the sole basis of the Rio Grande's complaint before the Commission is to enable the Rio Grande to achieve "pecuniary gain at the expense of the Union Pacific." This is another misstatement of fact.

A reference to the Rio Grande complaint will disclose that its allegations are not grounded on the idea of achieving "pecuniary gain." The complaint is in the usual form of any complaint filed before the Interstate Commerce Commission by one carrier to correct

alleged violations by another carrier (or carriers) of provisions of the Interstate Commerce Act. Any action based upon such a complaint, if successful, necessarily results in some shift of pecuniary advantage between the carriers involved. No carrier or its officials could justify themselves in the eyes of their stockholders with respect to the expense necessarily incurred in instituting and prosecuting such an action, unless as an incident thereto there is a prospect of "pecuniary gain." This is not to say that the basic purpose of such an action is to improve the carrier's financial position, or that any relief granted by the Commission is necessarily for the purpose of assisting the complainant to meet its financial needs. Every such complaint, as in the instant case, must be primarily based upon appropriate allegations of non-compliance by another carrier or carriers with provisions of the Interstate Commerce Act.

Hence, the Union Pacific's repeated reference to "pecuniary gain" on the part of the Rio Grande as a sole basis for its complaint is a distortion and a smoke screen.

There is a variety of other misstatements and irrelevancies in the Union Pacific's Colorado opening brief (others will be pointed out in connection with the Nebraska case), but those mentioned will suffice to indicate the attempt that has been made to confuse unnecessarily the real issues in the Colorado case.

Points III, IV, V and VI of the Union Pacific Colorado Opening Brief

Points III, IV, V and VI of the Union Pacific's opening brief in the Colorado case undertake to deal with substantive, as distinguished from procedural, issues. The arguments advanced under these points to some extent overlap each other and require a restatement of the substantive issues now before this Court. The Rio Grande believes that these substantive issues may be appropriately summarized as follows:

A. Whether the Colorado court was correct in holding that the Interstate Commerce Commission erred in failing to hold under the undisputed evidence that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific.

B. Whether the Colorado court was correct in holding that the Commission erred in narrowly limiting itself to a consideration of the case under the restrictions of Section 15(4) of the Interstate Commerce Act, thereby imposing upon itself restrictions as to its authority to establish joint rates, which obviously prejudiced its approach to the entire proceeding.

C. Whether the Colorado court, in setting aside the Commission's Order of January 12, 1953, insofar as it denied relief to the Rio Grande, erred in remanding the case to the Commission for further proceedings in conformity with that court's opinion.

In discussing the above questions, we shall endeavor not to repeat the arguments made in the Rio Grande Consolidated Opening Brief, which relate to and in

most respects directly answer the points now argued by the Union Pacific and argued in substantially identical form in the collaborating brief of the Washington Public Service Commission, *et al.* Because of the similarity of the arguments made in the brief of the Washington Public Service Commission, *et al*,, no special reference will be made to that brief, but where occasion requires, special reference will be made in this reply brief to certain of the Government's arguments in its consolidated opening brief.

I.

The Colorado Court Correctly Held That the Commission Erred in Failing to Hold That Through Routes Are in Existence as a Matter of Law Over the Rio Grande Via the Ogden Gateway in Connection with the Union Pacific

In arguing the question of the existence of through routes over the Rio Grande via the Ogden gateway in connection with the Union Pacific, it is indicated at page 56 of its Colorado opening brief that the Union Pacific is satisfied to rely upon the Commission's views with respect to the question of the existence of through routes. An examination of the Commission's views, as quoted at page 56 of the Union Pacific brief, discloses that so far as the scope of the question of the existence of through routes is concerned, the Commission dealt with it the same as did the Colorado court, and not on the basis that the Union Pacific now suggests in its brief — the fantastic basis of whether 113,100,000 through routes are involved. No such fantastic suggestion was contemplated by either the Commission or the Colorado court. Since the appeal here is from the

decision of the Colorado court, it is important to refer to the exact language of that court to determine the scope of what it held with respect to the existence of through routes. On this question, the Colorado court said (Colo. R. 292):

> " * * * In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond. * * * "

It is to be noted that the Colorado court meticulously confined its holding to the existence of through routes "to and from points on the Union Pacific," and because of the Commission's error in this respect remanded the case to the Commission for a new look, leaving to the Commission the question of how far through routes might or might not extend to and from points on other railroads, such as the Great Northern, the Northern Pacific, and the Milwaukee, with which the Rio Grande has no physical connection.

The Union Pacific, in attempting to follow through on its fantastic theory as to the scope of the matter here to be reviewed with respect to the existence of through routes, states that there is nothing in the record to show that the through routes, admittedly in existence between the Rio Grande and the Oregon Short Line Railroad Company, and the Oregon-Washington Railroad and Navigation Company extend to shipments to and from points on the Great Northern, the Northern Pacific, and the Milwaukee. There is nothing in the record to the contrary, but this question was not decid-

ed by the Colorado court and under the decision of that court is carefully left open for consideration and determination by the Commission upon the remand.

In attempting to show that the Colorado court erred in holding that through routes to and from points on the Union Pacific exist, the Union Pacific in its brief chiefly relies upon the *Thompson* case (343 U.S. 549) and the *Beaman* case (155 I.C.C. 313), and continues to belittle the number of shipments moving over the Rio Grande to and from points in the "closed door" territory via the Ogden gateway. In view of the exceedingly large differential between the higher non-competitive combination rates and joint through rates, the wonder is that so many shipments as shown at pages 13 to 17 of the Rio Grande Consolidated Opening Brief moved on *through bills of lading* from and to points in the "closed door" territory. The attempt to show that these shipments on through bills of lading were not substantial and not sufficient to satisfy the criteria of the *Thompson* and *Beaman* cases is clearly contrary to the realities of the transportation situation here involved—where substantial actual shipments were made over the through route of the Rio Grande via the Ogden gateway. In addition to the evidence of shipments made in the typical year of 1948 to and from the "closed door" territory, and the shipments of troops and military supplies during the war period, there was undisputed evidence that from November 2, 1942, to August 17, 1945, approximately 19,000 carloads of freight traffic moved via the Union Pacific and Rio Grande through route into the "closed door" territory. These 19,000 carloads, although originally routed via the Rio

Grande and the Western Pacific or the Rio Grande and the Southern Pacific, were in fact accepted and carried by the Union Pacific as through shipments, and so delivered by it to points in the "closed door" territory.

A persistent effort is made by the Union Pacific to exclude from consideration, as of no consequence, the through shipments of troops and military supplies and the through shipments of 4,208 carloads of freight moving over the Rio Grande because of storm conditions on the Union Pacific. In the final analysis, it seems to be the theory of the Union Pacific that the through routes over the Rio Grande should be treated as *standby* through routes only. Apart from the fact that there is no such concept under the law, it would be patently unfair and inequitable to establish any such doctrine, giving the Union Pacific all the benefits and conveniences of existing through routes but none of the burdens. Either through routes are in existence, or they are not. No carrier should be allowed to say they are in existence at such times and for such purposes as suits that particular carrier's convenience; then when no such convenience is to be served, be in a position to deny that the through routes which have been so used do not exist, but that their existence is subject to being revived again whenever it suits the convenience of the particular carrier. This is simply a neat device for excluding competition.

The same situation would exist with respect to the shipments of troops and military supplies, to-wit, that, according to the Union Pacific, through routes exist when it is desired that the Rio Grande accept its share of a competitive joint rate on through shipments of

troops and military supplies, but when the Rio Grande's service is not sought, the through routes over which such troops and military supplies moved are said to no longer exist. This theory, which also seems to be advanced by the Government in its opening brief, pages 57-74, would reduce the law as to the existence of through routes to a basis of "off again, on again, gone again, Finnegan."

The Government, at several places in its consolidated opening brief, particularly pages 69-70, suggests that shipments via the Rio Grande at higher combination rates, were so routed over the Rio Grande through "the ignorance or inadvertence of shippers or originating carriers." The fact is that various shippers knowingly use the Rio Grande and knowingly pay the higher combination rates because in view of their particular needs they definitely desire to use the through routes over the Rio Grande.

For example:

Mr. Herbert P. Heidel of the Lincoln Packing Division of the American Stores, Inc., which firm is engaged in cold storage operations and in the slaughter of livestock at Pueblo, Colorado, testified that his company purchases lambs at points in Oregon and Idaho on the Union Pacific and ships them to Pueblo via Union Pacific to Ogden, thence Rio Grande, at the combination rate because the service via that route is more expeditious than via the route of the Union Pacific (Consol. R., I, 414). The testimony of Mr. Heidel was substantiated by Rio Grande witnesses Joe Fuller (Consol. R., I, 486) and Roscoe C. Rich (Consol. R., I, 512).

Mr. Donald L. Reed, President of the Skyland Food Corporation, Delta, Colorado, testified that his firm, which operates a frozen food plant at that point, processing fruits primarily, shipping to Colorado common points and east, purchased apples in the Payette, Idaho, district in 1949 and shipped them to Delta, paying the combination rate over Ogden (Consol. R., I, 142, 143).

Mr. Kenneth G. Self, majority stockholder in the Inter-Mountain Tractor Sales Corporation, distributor for Ford tractors and Dearborn farm equipment at Salt Lake City for Utah, southeastern Idaho and portions of Nevada and Wyoming, testified that his company shipped a car of machinery from the east to Idaho Falls, Idaho, via the Rio Grande to Salt Lake City, Union Pacific beyond and paid the higher combination rate (Consol. R., I, 459, 460).

Mr. D. G. Adams, Branch Manager of the J. I. Case Company, Salt Lake City, Utah, testified that his firm shipped machinery to Idaho via the Rio Grande to Salt Lake City, thence Union Pacific, paying the combination rate through Salt Lake City (Consol. R., I, 545).

Apart from instances of individual shippers who used the through route of the Rio Grande and paid the higher combination rates knowingly and not through ignorance or inadvertence, the Rio Grande through routes were not used by the Union Pacific through ignorance or inadvertence when it used the Rio Grande because of storm conditions on its own lines; neither were the through routes of the Rio Grande used by the Government for its war-time shipments due to any ignorance or inadvertence. The Rio Grande through routes were used because they were there available to

be used. Neither did the Union Pacific accept the 19,000 cars of freight traffic, above mentioned, and share in the division of the rates applied thereto because of ignorance or inadvertence.

Thompson v. United States, 343 U.S. 549, misapprehended by the Union Pacific, and misapplied by the Commission in its Report in the instant case, dealt with a situation where the Commission had erroneously assumed the existence of a through route on grain from Lenora, Kansas, to Omaha, Nebraska, because the Missouri Pacific had interchange facilities at Concordia, Kansas, with the Burlington Railroad, and because there were joint rates and through routes on grain from the origin point to points on the Burlington Railroad intermediate to but short of Omaha. In such circumstances the Commission prescribed joint rates on grain from Lenora, Kansas, a typical origin on the Missouri Pacific, to Omaha, as just and reasonable rates, without finding that through routes existed and without other findings under Sections 15(3) or (15(4) of the Interstate Commerce Act.

This Court overruled the Commission principally on two grounds: (1) that there was no evidence in the case that any grain had ever moved from Lenora, Kansas, to Omaha via the Missouri Pacific and the Burlington via Concordia, and (2) that the mere fact that the Missouri Pacific and the Burlington maintained joint rates and through routes from Lenora to points on the Burlington intermediate to but short of Omaha did not establish the existence of a through route to Omaha. It is clear that in that case the Court was not called upon to define and did not place limits upon, the power of the

Commission to establish joint rates and through routes under the provisions of Section 15(3) and Section 15(4) of the Interstate Commerce Act.

Neither the *Thompson* case nor the *Beaman* case, nor any other case undertakes to specify the number of shipments on through bills of lading necessary to show the existence of a through route. In the *Thompson* case there had been no shipment whatsoever. The language of that case must be read and interpreted in relation to that basic fact. In the *Beaman* case there had been only one shipment, which later was admitted to have been made in error. On the basis of these decisions one might well conjecture as to whether five shipments are enough, or whether ten are required, and so on; but such observations have no place in the instant case because here the shipments ran into thousands of cars, and there is no evidence in the record that the Union Pacific ever refused to issue a through bill of lading when requested to do so for through carriage to and from points on its lines via the Ogden gateway and the Rio Grande. Accordingly it is clear that neither the *Thompson* case nor the *Beaman* case is contrary to the contention of the Rio Grande in the instant case.

Under the decisions in *Virginian Ry. v. United States*, 272 U.S. 658, and *Great Northern Ry. v. United States*, 81 F.Supp. 921 (D.C. Del.), aff'd *per curiam* 336 U.S. 933, as well as under the doctrine of the *Thompson* case and the *Beaman* case, the through route shipments shown by the uncontradicted evidence in the instant case, as summarized in the opinion of the Colorado court, established the existence of through routes to and from points on the Union Pacific in the north-

west area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways, and beyond.

The Union Pacific in its Colorado opening brief, pages 80-81 (but not the Government in its brief) takes the position that the *Thompson* case overrules the *Virginian* case. This untenable theory advanced by the Union Pacific is analyzed and shown to be without foundation in the detailed discussion of the *Virginian* and *Thompson* cases, appearing at pages 62 and 63 of the Rio Grande Consolidated Opening Brief.

The only answer that the Commission undertook to make is shown by the Commission's own statement in its Report (Consol. R., II, 1518, 1523) to the effect that "the Ogden gateway routes are not considered as open or through routes *commercially*, but as routes that are closed to shippers because of the higher rates applicable" (Emphasis supplied). The Colorado court correctly held that the Commission's view in this regard was contrary to law. For in *St. Louis Southwestern Ry. v. United States*, 245 U.S. 136, and *Virginian Ry. v. United States*, 272 U.S. 658, this Court expressly rejected the contention that routes which are "commercially closed" as a result of higher and discriminatory combination rates are not through routes within the meaning of the Interstate Commerce Act.

When the numerous irrelevant arguments in the Union Pacific brief are screened out, its chief argument with respect to the non-existence of through routes rests on the assertion and reassertion that a cancellation of joint rates effectuates a cancellation of through routes.

That this is not the law is shown by the cases cited at pages 54, *et seq.*, of the Rio Grande Consolidated Opening Brief.

The Union Pacific has not cited a single case which holds that the cancellation of joint rates results in a cancellation of through routes. However, in order to confuse the simplicity of the legal issue involved in its position, the Union Pacific indulges in a series of speculations (U. P. Colo. Op. Br. 62-82), theorizing as to what the Colorado court had in mind in deciding that through routes are in existence to and from points on the Union Pacific in the northwest area via the Ogden gateway and the Rio Grande. These speculations are numbered 1 to 9, pages 62 to 82 of the Union Pacific brief, and constitute mere "shadow boxing." They are based on a series of *ifs* as to what the lower court had in mind, but they are not tied directly into what the lower court said as shown by its opinion.

At one point, page 67, it is asserted by reference to some unidentified brief filed before the Commission, which is not a part of the record here, that the cancellation of joint rates was so effective in closing the through routes via the Rio Grande, that the Rio Grande complained to the Commission in the aforesaid brief that the commercial deterrent of higher rates in various ways prevented the movement of traffic through the Ogden gateway via the Rio Grande. There has never been any denial anywhere at any time that the action of the Union Pacific in cancelling the joint rates constitutes a commercial deterrent. Obviously it is on that account that these proceedings were instituted before the Commission. It is a clear distortion of the Rio

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April 24, 1956

Harold B. Willey, Esquire
Clerk, Supreme Court of the United States
Washington, D.C.

Dear Sir:

This letter is written for the purpose of correcting the following error that was inadvertently made on page 44 of the Consolidated Reply Brief of The Denver and Rio Grande Western Railroad Company in the Ogden Gateway Cases, Nos. 117, 118, 119, 332, 333 and 334.

The three cases listed in the first full paragraph on page 44 of that brief are not in the sequence intended and should be put in the following order:

Lumber Rates, Oregon and Washington to Eastern Points, 29 I.C.C. 609;

The Ogden Gateway Case, 35 I.C.C. 131; and

United States v. Union Pacific R.R., 28 I.C.C. 518.

This transposition of the three cases is necessary in order to make the discussion in the three paragraphs that immediately follow them conform to what was intended by the authors of the reply brief.

A copy of this letter has been sent to all counsel of record.

Very truly yours,

FRANK E. HOLMAN
DENNIS McCARTHY
ROBERT E. QUIRK

Attorneys for
THE DENVER & RIO GRANDE
WESTERN RAILROAD COMPANY

Grande's position to say or to imply that the Rio Grande admitted or recognized that the Union Pacific had effectually cancelled the through routes by merely cancelling the joint rates.

In claiming that the cancellation of joint rates was understood by the Rio Grande as a cancellation of through routes, the Union Pacific in its brief, pages 63 to 65, cites the following early ICC cases:

> *The Ogden Gateway Case,* 35 I.C.C. 131;
>
> *Lumber Rates, Oregon and Washington to Eastern Points,* 29 I.C.C. 609; and
>
> *United States v. Union Pacific R.R.,* 28 I.C.C. 518.

The first case above cited has nothing to do with the Ogden gateway or the Rio Grande. Through routes via the Ogden gateway over the Rio Grande were not involved in that case. The action is merely an illustration of the well-known proposition that where a carrier either undertakes to cancel a through route or a joint rate, or both, the power of the Commission may be invoked to investigate and to enter an order either approving or disapproving the cancellation of joint rates and/or through routes. In no respect is the case authority for the persistent assertion of the Union Pacific that the cancellation of joint rates effectuates the cancellation of through routes.

The second case above cited involved cancellation of joint *passenger* fares and had nothing to do with *freight* traffic. Moreover, the Commission was careful to make it clear that the cancellation of the joint passen-

ger fares and the imposition of higher rates left the through routes in existence as useable through routes.

In the third case above cited, the action was brought by an auditor of the Department of the Interior (apparently without authority from any executive or superior officer of that department) seeking through routes and joint rates, with no indication of any knowledge on the part of the complainant that through routes were ever in existence or had been used via the Rio Grande and the Ogden gateway. The opinion is sketchy. The Rio Grande was neither a party to the proceeding nor was it accorded any opportunity to be heard. In fact, so far as the appearances listed in the report indicate, it was a proceeding carried on solely between the auditor of the Interior Department and the Union Pacific without the knowledge or intervention of any other interested carriers. The case has no significance so far as the issues in the instant case are concerned.

All three of the foregoing cases cited by the Union Pacific are old and outdated Commission decisions, which antedate this Court's clarifying opinions in the *Virginian* case and the *St. Louis Southwestern Ry.* case to the effect that the cancellation of joint rates does not effectuate a cancellation of through routes.

At pages 69 and 70 of its Colorado opening brief, the Union Pacific asserts that there is nothing in Section 15(8) of the Act which prevents a shipper from routing his traffic over any series of connecting railroads where physical interchange is possible and the carrier has published local rates; that the choice accorded a shipper under 15(8) is a choice between competing lines of railroad and has nothing to do with the

existence or non-existence of through routes. This is a plain distortion of the statute, and disregards the express language of Section 15(8), which is that a shipper may, where "two or more through routes and through rates shall have been established * * * designate in writing by which of such through routes such property shall be transported to destination * * * : *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines, *constituting a portion of said through line or route* his freight shall be transported." (Emphasis supplied) The Union Pacific's interpretation would permit a shipper to zig-zag his freight all over the United States and over any number of different railroads, and under the guise of transportation use railroad equipment chiefly for warehouse purposes. The plain language of the statute gives a shipper a choice of a particular route only when two or more through routes exist.

Section 15(8) confers the statutory right upon a shipper to designate the route upon delivery of his freight to the origin carrier only where "two or more through routes and through rates shall have been *established* as in this part provided to which through routes and through rates such carrier is a party * * *." It is, therefore, clear that when the origin carrier issues a bill of lading to a shipper which designates the route of the shipment, that fact is conclusive evidence that there was a choice of two or more through routes and that the route selected is an established through route, since otherwise the shipper would have no statutory right t

designate the route. In *Through Routes and Through Rates,* 12 I.C.C. 163, at page 166, which decision was cited by the Supreme Court in the *Thompson* case, 343 U.S. 549, at page 557, the Commission held that " * * * whatever other facts or incidents may serve to prove the existence of a through route, a through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of a through route."

At pages 74 and 75 of the opening brief of the Union Pacific in the Colorado case, it criticizes the statement by the Colorado court to the effect that the Union Pacific and other participating railroads "have issued through bills of lading, thereby recognizing the through route status." That criticism is based upon the false premise that under Section 20(11) of the Interstate Commerce Act a railroad must issue a bill of lading on shipments accepted by it for through movement beyond its line, even though no through route has been established. The Union Pacific persists in misunderstanding the provisions of Section 20(11). That section provides that any common carrier, railroad, or transportation company subject to the provisions of this part *receiving property* for transportation " * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof * * *."

It will thus be seen that no railroad is required to issue a bill of lading under Section 20(11) and to assume liability for loss and damage on a shipment destined to points beyond its line until and unless it receives the property from the shipper. In other words, a railroad is not required to receive property for through movement to points beyond its line unless the railroad

is a party to through routes and has published applicable rates over such routes in accordance with Section 6(1) and other sections of the Act. Section 6(1) of the Act provides that every common carrier subject to the provisions of the Act shall file with the Commission tariffs showing all rates, charges, etc., for transportation:

> " * * * between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water *when a through route and joint rate* have been established. If no joint rate over the through route has been established, *the several carriers in such through route* shall file, print and keep open to public inspection as aforesaid, the *separately* established rates, fares and charges applied to the through transportation. * * * " (Emphasis supplied)

The Union Pacific stubbornly refuses to recognize the distinction between a through route via which the combination of rates may make the route commercially non-competitive and the through route itself. These distinctions are pointedly shown in the *Virginian Ry.* case, 272 U.S. 658, 660-661, and in *United States v. Great Northern Ry.*, 343 U.S. 562, 572. It will be observed that Section 6(1) of the Act provides that if no joint rate over the through route between different carriers has been established "*the several carriers in such through route* shall file, print and keep open to public inspection as aforesaid, the *separately* established rates, fares and charges applied to the through transportation." In other words, the provisions of Section 6(1) plainly show that railroads are not even required to publish separately established rates between points on

their own line for use in connection with through traffic except where *through routes* have been established.

The Union Pacific in its brief seems to base its entire position (after dealing in numerous roundabout theories) upon the proposition that there was nothing else it could do to cancel the existing through routes via the Ogden gateway and the Rio Grande, except to cancel the joint rates and publicize that fact. It claims that this action put the world on notice that the existing through routes were also cancelled. But, however roundabout its approach, the Union Pacific is always necessarily and finally met with the decisions of this Court which definitely hold that the cancellation of joint rates does not cancel through routes. *United States v. Great Northern Ry.*, 343 U.S. 562; *Thompson v. United States*, 343 U.S. 549; *Great Northern Ry. v. United States*, 81 F.Supp. 921 (D.C. Del.), aff'd *per curiam* 336 U.S. 933; *Atchison, T. & S. F. Ry. v. United States*, 279 U.S. 768; *Virginian Ry. v. United States*, 272 U.S. 658, and *St. Louis Southwestern Ry. v. United States*, 245 U.S. 136.

It is hardly believable that the Union Pacific is not aware of how existing through routes may be effectually closed or cancelled. Clearly a through route once in existence, as again and again pointed out, is not cancelled by a mere cancellation of the joint rates that may have applied to it. It can be cancelled, however, by the carrier in question declining to issue through bills of lading over the routes which it desires to cancel as through routes. The undisputed evidence shows that the Union Pacific never took this significant step. On the contrary it has allowed the through routes to con-

tinue to exist as "standby" through routes to be used by it when its convenience and its selfish purposes so dictate, for example, to enable it to accept valuable freight traffic and participate in substantial through revenues, as it did in connection with the 19,000 carloads hereinbefore referred to which were carried at joint rates over the Rio Grande-Union Pacific through routes into the "closed door" territory.

If, when a railroad cancels joint rates over through routes, it also wishes to close the through routes, it can do so legally and factually by simply publishing in its tariffs that it will not thereafter issue a through bill of lading or accept shipments which are routed by shippers over such previously existing through routes. As above indicated, the Union Pacific failed to take this significant and essential step for effectually closing the through routes over the Rio Grande via the Ogden gateway.

Of course, when a railroad does undertake to close through routes by publishing that determination in its tariffs, and thereafter refuses to accept through shipments, any interested party may protest such action before the Interstate Commerce Commission, and upon investigation and hearing by the Commission, may obtain a ruling as to whether the railroad may close the through routes involved. This remedy is provided by Sections 15(3) and 15(7) of the Interstate Commerce Act. In a proceeding thereunder, the burden of justifying the closing of the through routes rests upon the carrier.

II.

The Error of the Commission as to the Existence of Through Routes Prejudiced the Entire Proceedings to the Injury of the Rio Grande

At pages 87, *et seq.*, of its Colorado opening brief, the Union Pacific asserts that even if the Commission erred in its failure to find that through routes existed via the Ogden gateway and the Rio Grande, and even if this is an error of law, that the error is irrelevant and in no way prejudices the Rio Grande, because no one can demonstrate that the error had any effect or influence upon the conclusion of the Commission with respect to its failure to grant the Rio Grande fuller relief. This is an astonishing assertion and requires only a brief examination to expose its fallacy.

If through routes are in existence as a matter of law as found by the Colorado court, then in considering the relief to be granted to the Rio Grande the Commission has no occasion to give any heed to the restrictive provisions of Section 15(4). Having erroneously failed to find that through routes are in existence, the Commission by this self-imposed restriction was required to determine whether the criteria of proof required by Section 15(4) were satisfied. It is almost too simple to require argument that the Rio Grande had the legal right to maintain before the Commission that through routes are in existence and if it was entitled as a matter of law to have the Commission so find, then the only question for the Commission to determine was whether the rates applicable to through routes already in existence were unjust, unreasonable, discriminatory, or prejudicial, or not in the public interest. Questions of

long haul and short haul; adequate and more efficient or more economic transportation; and preference to the originating carrier, as specified in Section 15(4) would not then have been the crucial issues before the Commission.

The Union Pacific again and again stresses the fallacy that the Rio Grande suffered no prejudice through the Commission's failure to find through routes in existence via the Ogden gateway over the Rio Grande, by suggesting that even if the case is remanded to the Commission, the Commision has already given full consideration to the Rio Grande's contentions as to its right to competitive joint rates to the same extent as if the Commission had not considered itself bound by the limitations of Section 15(4). Obviously, where a commission, or a court, or other tribunal has acted under some special statutory limitation, because it has committed an error of law in concluding that its power was limited by such a statute, there can be little doubt that its consideration of the matter was prejudiced by its own erroneous conclusion as to the necessity of limiting its power.

What the exact extent of that prejudice is cannot, of course, be accurately determined, and it need not be at this time. No one can undertake to pre-judge, and the Colorado court itself did not pretend to do so, what the nature and extent of the Commission's administrative findings will be when it considers the case free of the limitations of Section 15(4). However, apart from what the Commission may or may not do in the future as to rates, the Rio Grande is entitled to have the case remanded to the Commission so that any doubt that has

heretofore prevailed as to the existence of through routes will be adjudicated and settled. This in itself is a substantial and valuable right inhering not only in the Rio Grande, but in the shippers. It is important for the shippers to have the question settled so they may have an undisputed right to choose as between two through routes as permitted by Section 15(8). It is equally important to the Rio Grande that the shippers, both within and without the "closed door" territory, have such a right of choice. However small or large the revenue which may come to the Rio Grande from the shippers exercising such choice, there is no doubt that there will be some such revenue, as indicated by the shipments that have heretofore moved over the Rio Grande by shippers exercising their choice on the assumption that through routes exist.

The question of the existence of through routes via the Rio Grande through the Ogden gateway in connection with the Union Pacific was from the beginning the first and basic issue in the litigation. The Rio Grande as original complainant alleged the existence of such through routes (Colo. R. 6). The Commission admitted that the existence of through routes was the first issue to be decided, but never clearly decided it. The Colorado court recognized the existence of through routes as the first and basic issue, and decided it in favor of the Rio Grande as a matter of law. It goes without saying that for the Commission to fail to decide this issue, or to decide it incorrectly, and as a result operate under the highly restrictive provisions of Section 15(4) prejudiced the whole proceeding as the Colorado court held.

The Union Pacific in its brief (pages 93, *et seq.*) particularly charges the Colorado court first with "commingling and confusing" the provisions of Sections 1(4), 3(4), 15(4) and 15(3) of the Act, and later with undertaking to make administrative findings under those sections.

In quoting from the Colorado court's decision regarding these matters, the Union Pacific overlooks the fact that the quotations are from that part of the court's opinion dealing with the procedural issues raised by the Union Pacific's Motion to Dismiss, and that the court was following the normal judicial process of pointing out that *if* the allegations and contentions of the complainant were true, then the Rio Grande had standing to maintain the action as against the procedural attack. For such a purpose the allegations of a pleading are deemed to be true. The proper way to approach such a problem is to use a series of "ifs" to indicate that the court is merely hypothesizing the truth of the allegations.

An examination of the Colorado court's opinion on the merits will disclose that the court carefully refrained from invading the administrative province of the Commission, and limited its decision to two propositions of law, namely, (1) that under the undisputed evidence in the case, the Commission erred in failing to hold that through routes are in existence over the Rio Grande via the Ogden gateway in connection with the Union Pacific, and (2) that in passing on whether the defendant should be required to establish or maintain future just, reasonable, and non-discriminatory competitive joint rates, the Commission is to apply the

provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act, free from the limitations imposed by Section 15(4).

III.

The Colorado Court Was Correct in Remanding the Case to the Commission for Further Proceedings in Conformity with the Court's Opinion

The Union Pacific in its Colorado opening brief at page 98, *et seq.*, undertakes to suggest that the District Court exceeded its power in remanding the case to the Commission for further proceedings in conformity with its opinion. An attempt is made to support the foregoing proposition—on the theory that the Colorado court in its remand undertook to make administrative findings favorable to the Rio Grande. As we have already pointed out, the Colorado court meticulously avoided invading the administrative field and remanded the case solely for the purpose of permitting the Commission to correct its error with respect to its failure to find through routes in existence, and thereafter to reconsider the case free from the limitations of Section 15(4).

In this instance, as in many others in its opening brief, tying the argument to some initial fallacy as to what the Colorado court decided, the Union Pacific then undertakes to say that since the word "remand" does not appear anywhere in the statute (28 United States Code, Section 1336), authorizing court review of Commission orders, that a court may not remand a case to the Commission for the correction of its errors of law. A mere statement of this proposition is suffi-

cient to demonstrate the absurdity of the position of the Union Pacific in this regard. Courts have never hesitated to remand cases to the Commission where, as in the instant case, it was necessary to send the case back to the Commission to correct an error of law. Thus in *Henderson v. United States*, 339 U.S. 816, this Court reviewed a judgment of a three-judge district court in connection with an Interstate Commerce Commission decision, and concluded at p. 826 as follows:

> "The judgment of the District Court is reversed and the cause is remanded to that court with directions to set aside the order of the Interstate Commerce Commission which dismissed the original complaint *and to remand the case to that Commission* for further proceedings in conformity with this opinion." (Emphasis supplied)

See also *Mitchell v. United States*, 313 U.S. 80, 97.

Finally to summarize again what has been pointed out earlier in this reply brief, both the Union Pacific brief and the brief of The Washington Public Service Commission, *et al.* confuse and complicate the actual issues before this court upon this appeal. These actual issues (leaving out the one raised with respect to the right to remand, which is palpably too fallacious to be further considered as an issue) may be restated as follows:

A. Whether the Commission erred in failing to hold that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific.

B. Whether in narrowly limiting itself to a consideration of the case under the restrictions of Section

15(4) of the Interstate Commerce Act, the Commission imposed upon itself a restriction upon its authority to establish joint rates which prejudiced the entire proceeding to the injury of the Rio Grande.

Both of these issues were resolved in favor of the Rio Grande by the Colorado court. The action of the Colorado court is clearly supported by the law and by the evidence in this case.

CONCLUSION

For the reasons stated, the judgment of the United States District Court for Colorado should be affirmed and the case remanded to the Commission to proceed in conformity with the opinion of that court.

NEBRASKA DECISION

Appeals Nos. 117, 118, 119

The decision in the Nebraska case was unsatisfactory to all parties. The Denver and Rio Grande Western Railroad Company is the appellant in No. 117; the Union Pacific Railroad Company, *et al.*, and the Washington Public Service Commission, *et al.*, are appellants in No. 118; the United States of America, the Interstate Commerce Commission and the Secretary of Agriculture are appellants in No. 119. In No. 117 and No. 119, the appellants (the Rio Grande and the Government) seek a reversal of the Nebraska decision and a restoration of the Commission Order of January 12, 1953. In No. 118, the Union Pacific Railroad Company, *et al.*, and the Washington Public Service Commission, *et al.*, seek both a reversal of the Nebraska decision and

a reversal of the Commission Order. The brief of the Washington Public Service Commission, *et al.*, is largely a paraphrase of the Union Pacific brief and so nearly identical that it does not require separate attention or answer.

UNFOUNDED INFERENCES, MISSTATEMENTS AND IRRELEVANCIES IN THE NEBRASKA OPENING BRIEF OF THE UNION PACIFIC

The Union Pacific Nebraska opening brief contains so many unfounded inferences, misstatements and irrelevancies that it must be read with great caution before determining the extent to which reliance upon the factual statements therein is possible. Among the more serious of the irrelevant or erroneous statements are the following:

1. The Union Pacific erroneously states or infers (pp. 3, 17, 19 and elsewhere) that the relief granted the Rio Grande by the Commission involves an annual diversion of traffic "* * * resulting in a potential estimated revenue loss to the Union Pacific alone of more than $11,000,000 annually, * * *." This estimate is apparently based on the fantastic assumption that the Union Pacific would lose in its entirety all of the traffic covering the named commodities. No attempt has been made to explain why the allegedly adequate, efficient, shorter and cheaper (See U.P. Neb. Op. Br. 5 and numerous other places) Union Pacific will lose substantially all of its traffic to the slower, more expensive and more onerous (See U.P. Neb. Op. Br. 9 and numerous other places) Rio Grande, when the rates over the Rio Grande will be no lower than those over the Union Pa-

cific. It is, of course, ridiculous for the Union Pacific to assume or claim that it will lose all of this traffic or any substantial portion thereof with the establishment of equal rates via Ogden and the Rio Grande.

Witness Lynch of the Union Pacific admitted that the Union Pacific based its case all the way through on the assumption that it would lose all of the estimated potential traffic (Consol. R., I, 735). Witness Burns of the Union Pacific became more enthusiastic and testified that the Union Pacific would suffer a revenue loss of approximately $50,000,000 per year on such traffic (Consol. R., I, 782, 865; Consol. R., II, 1568). While the Union Pacific, as it has consistently done throughout its opening brief, gives no basis for the loss of $11,000,000 annually, it is a logical assumption that the loss was computed in a manner similar to that used by Witness Burns when he estimated the Union Pacific would suffer an annual loss of approximately $50,000,000 on the total potential.

On the other hand, Witness Hogue of the Rio Grande testified that the Rio Grande's present participation in transcontinental traffic is only about 10% of the potential and that, as a result, in his opinion the Union Pacific's estimated revenue loss of approximately $50,000,000 per year is excessive by at least 90% (Consol. R., II, 1134, 1135, 1543, 1544). Moreover, Witness Pease of the United States Department of Agriculture stated in his opinion that if the Rio Grande obtained 1,000 carloads per year "they would be doing pretty well" (Consol. R., II, 1080, 1544).

As concluded by the Commission, based upon all the

evidence presented, it is impossible to "find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made" (Consol. R., II, 1570).

2. The Union Pacific repeatedly and disparagingly refers to the Rio Grande as a "bridge route" because it handles "bridge traffic," which involves shipments as to which a carrier performs intermediate service only. At pages 16, 17, 18, 21, 22, 32, 33, 43-47, 75, 125, 126 and 172, and particularly at page 46 of its opening brief, the Union Pacific undertakes to claim that the handling of "bridge traffic" characterizes a railroad as a "financial needs" railroad. There are many well-known railroads in the United States which are "bridge" lines. The Union Pacific, for example, depends upon "bridge traffic" to a very great extent. It "bridges" traffic between points east of the Missouri River and Salt Lake City, in connection with the Western Pacific and between such eastern points and Ogden, in connection with the Southern Pacific, and points on its preferred connections in the "closed door" territory, as well as between various other points located on its lines and connections. Contrary to the inference of the Union Pacific, there is nothing reprehensible about "bridge traffic." The fact that the Rio Grande, one of seven available transcontinentals, now carries 10% of the annual transcontinental "bridge traffic" testifies to the public need for competitive and reasonable rates over its lines (Consol. R., I, 163).

3. Expressly at page 56 of its Nebraska Opening Brief the Union Pacific states that the Commission found " * * * that service over Union Pacific's shorter and faster routes is not only equal but greatly superior in every way to service via the Rio Grande for the through traffic concerned." This quotation is taken out of context and is therefore misleading. What the Commission actually found, after a general discussion, of which the quoted statement is only a fragment, was that "While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated." On such traffic the Commission found that " * * * the defendants' routes are inadequate and less economical than are the Rio Grande routes" (Consol. R., II, 1574, 1575).

4. The Union Pacific in its Nebraska Opening Brief at page 3, and again, inferentially, at pages 18, 32, 96 and 115, states that the establishment of competitive joint rates via Ogden in connection with the Rio Grande " * * * would short haul Union Pacific routes 925 miles * * * ." This statement is apparently based upon the examples cited by the Commission as to the hauls from Lewiston, Idaho and Centralia and Seattle, Washington (Consol. R., II, 1538). However, where traffic is routed beyond Denver over the Union Pacific, the Union Pacific receives a further haul of 560 miles to Omaha and 640 miles to Kansas City (Consol. R., II, 1537-1538), thereby substantially reducing the Union Pacific loss in mileage. Furthermore, the hauls of the

Union Pacific of 847, 937 and 1029 miles to Ogden from Lewiston, Centralia and Seattle, respectively, are substantially longer than many of the short hauls the Union Pacific accepts to junctions with its preferred connections (Consol. R., II, 1538, 1539; see also R. G. Consol. Op. Br. 133, App. C, 171, 172, App. G). Thus the Union Pacific statement in this regard is again misleading.

5. The Union Pacific at numerous places in its brief expressly or inferentially complains that it is entitled to protect its long haul (pp. 18, 21, 30, 31, 50, 67, 143, 144, 156, 157, 174, 203), that it has done so for 75 years (pp. 8, 17, 18), that as originating carrier it has an inherent right to its long haul (pp. 14, 31, 41, 229-232) and that in-transit privileges cannot be used to deprive it of its long haul (pp. 10, 11, 37, 59, 92-96, 121, 130, 198-205). As a matter of fact, the Union Pacific has not been particularly zealous in protecting its long haul in dealing with its railroad connections other than the Rio Grande.

Appendices C and G of the Rio Grande Consolidated Opening Brief (pp. 133, 171, 172) based on Section F of Exhibit 3, by Witness Earley, and the testimony of Witness Earley (Consol. R., I, 101-11) show numerous typical examples of distances and routes over which the Union Pacific, as well as its preferred connections, take less than their respective long hauls. These appendices and the testimony of Witness Earley disclose that the Union Pacific freely joins its preferred railroad connections in competitive joint rates covering through routes that traverse the northern and southern portions of the United States, as well as in routes

which involve hauls of hundreds of miles through Canada. In other words, the Union Pacific singles out the Rio Grande, and in the exercise of its monopoly in the "closed door" territory, undertakes to prevent any traffic from moving on through routes via the Ogden gateway over the Rio Grande at anything except the higher non-competitive combination rates.

6. At pages 118 and 119 of its opening brief, the Union Pacific asserts that the Rio Grande and not the Union Pacific should be "punished" for maintaining the existing higher combination rates which were found by the Commission to be discriminatory, unreasonable and prejudicial. It was clearly understood by the Commission that the existing combination rates are the result of the discrimination, prejudice and unreasonableness practiced by the Union Pacific in favor of its own lines and those of its preferred connections, in refusing to accord the Rio Grande the same joint rate treatment as that accorded to its railroad connections other than the Rio Grande, and not the result of any wrongful act of the Rio Grande in connection with the maintenance of combination rates (Consol. R., II, 1570-1579).

It should be noted at this point that throughout its brief there is a basic confusion on the part of the Union Pacific of three entirely independent issues. First, the Rio Grande is not complaining that any of the local rates (either of the Union Pacific or the Rio Grande) are discriminatory, prejudicial or unreasonable, but that the discrimination, prejudice and unreasonableness of the practices of the Union Pacific lie in its refusal to accord joint rates, via the Ogden gateway over the Rio

Grande, to the Rio Grande and to the shippers in the "closed door" territory. The other two issues as to whether through routes are already in existence or if not, whether new through routes should be established under Sections 15(3) and 15(4), are separate issues to be resolved independently of questions of discrimination, prejudice or unreasonableness as to rates.

Unnecessary confusion has been injected into this litigation by the constant commingling of issues by the Union Pacific and the making of broadside arguments on all the issues under whatever point or points the Union Pacific undertakes to discuss the case.

7. The Union Pacific at page 118 of its opening brief argues that since neither it nor its preferred connections demand or collect rates that exceed their own joint rates for the transportation of the specified commodities, they are being improperly ordered to cease, desist and abstain from publishing demanding or collecting rates that exceed their own joint rates and that the Commission erred in requiring them to so cease, desist and abstain from doing what they are not doing.

This is but one of many examples of an attempt to distort what the Commission actually did or said. No one charges the Union Pacific with collecting a rate in excess of its own joint rates on through shipments moving over its own lines. The complaint is that it does demand and collect rates that exceed its own joint rates on through shipments via the Ogden gateway over the Rio Grande. This was the issue before the Commission which the Commission resolved by prescribing competitive joint rates. There was no issue before the Com-

mission as to wrongful conduct of the Union Pacific in the rate schedules applicable to its own lines.

8. A further obvious confusion of the issues appears in the Union Pacific brief (page 119) where it is suggested that shippers in the "closed door" territory cannot be said to be debarred from effective participation in national markets because they get better service over the lines of the Union Pacific than they could over the Rio Grande. This ignores the Commission Finding that in order to participate effectively in national markets shippers to and from the "closed door" territory need as wide-spread and as flexible through routing opportunities as possible (Consol. R., II, 1574, 1575). That Finding is based upon the undisputed evidence that shippers of the commodities specified in the Order of the Commission need to be able to "feel out" the markets along the routes of the Rio Grande, and to be able effectively to avail themselves of in-transit and reconsignment privileges along the Rio Grande. This accords with the principle of "adequate, and more efficient or more economic, transportation." It enables shippers to avail themselves of in-transit and reconsignment privileges, both along the lines of the Rio Grande and its connections as well as long the lines of the Union Pacific. Shippers who want to "feel out" markets in Rio Grande territory obviously cannot ship competitively with those desiring to "feel out" markets via the Union Pacific (see R.G. Consol. Op. Br. 137, App. F).

9. At twelve points in its opening brief (pp. 6, 10, 34, 35, 36, 55, 56, 60, 61, 107-113, 121, 130) the Union Pacific injects the idea that the Commission found that competitive joint rates were needed *solely* because the

Union Pacific does not serve Rio Grande territory, and claims that on this basis the long haul protection of Section 15(4) is in effect done away with. This is a further attempt to confuse the issues by charging the Commission with making a Finding which it never made.

10. The Union Pacific erroneously states (U.P. Neb. Op. Br. 11, 26, 35, 61, 63) that the Commission improperly based its Conclusion that relief was needed in order to provide adequate and more economic transportation upon its Finding that the proposed Rio Grande route is inadequate and also inefficient and uneconomical; whereas, what the Commission actually found was that *the conduct of the Union Pacific* in not according shippers competitive joint rates over the Rio Grande resulted in inadequate, inefficient and uneconomic transportation. This is another illustration of the repeated efforts of the Union Pacific to confuse and twist to its own purposes the actual Findings and Conclusions of the Commission.

11. Although the matter has no relevancy, the Union Pacific in its brief repeatedly states (pp. 5, 17, 18, 127, 165) that the Rio Grande has no trackage in the "closed door" territory and proposes to render no service in that territory. This is not only irrelevant but confusing. By the same token, the Union Pacific has no trackage in Illinois and in many other states, nor does it render any service in such areas. Yet, it vigorously asserts its right to the benefit of the competitive joint rates that apply between the "closed door" territory and points in Illinois and other points in the east and points in the south, where it has no lines.

12. The Union Pacific again and again in its brief makes statements, unsupported by any record reference, (see *e.g.* pp. 15-19) and other statements (see *e.g.* pp. 50, 96, 117, 230, 231) wherein it relies on various cost figures in no way supported by any underlying or particularized studies covering the respective routes involved in this litigation. The Commission clearly recognized that these cost figures, introduced and relied upon by the Union Pacific, were of little or no value because after considering them it specifically pointed out that they "were not based on studies of particular movements of traffic over the respective routes" (Consol. R., II, 1571).

13. The Union Pacific, throughout the proceedings and again in its opening brief in this Court, has undertaken to graphically indicate the alleged differentials in mileage between its routes and the Rio Grande routes by a map or chart (attached to both its opening briefs as Appendix A) showing the claimed differentials in oblongs thereon. This map is unreliable in that it does not fairly represent the differentials or comparative distances that actually exist with respect to the through routes over which Union Pacific traffic normally and ordinarily moves. The differentials, ranging from a minimum of 33 miles to a maximum of 219 miles (from which differentials the Union Pacific compiles many of its other alleged mileage differentials), are in various instances based upon routes which are not the long haul routes customarily used by the Union Pacific and actually required by the tariffs.

Specific errors of the Union Pacific's map or chart in this regard are set forth in detail in the Rio Grande's

Consolidated Opening Brief at pages 21, 22 and 23 where it is shown that the customary through route of the Union Pacific is actually longer—for example, to a point like New Orleans—than the customary through route of the Rio Grande.

Without indulging in unnecessary repetition, reference will be made here only to the last named situation at New Orleans, where the claimed differential in mileage in favor of the Union Pacific route is shown on its map as 33 miles, but where the actual differential in mileage is in favor of the Rio Grande by 35 miles.

In the case of New Orleans traffic from and to the "closed door" territory customarily moves and is required to move in most instances over the Union Pacific via its long-haul route through Kansas City, thence over connecting railroads, such as the L&A to Shreveport, Louisiana, and KCS to New Orleans, which long-haul route via the Union Pacific is 35 miles longer than the route over the Rio Grande and the latter's connections (UP-Ogden, Utah; Rio Grande-Pueblo, Colo.; C&S-Sixela, N.M.; FW&D-Ft. Worth, Tex.; T&P) to New Orleans (Consol. R., I, 132-35; Earley Exhibit 3, Sec. K, pp. 2, 3, 5-15, line 12).

14. The Union Pacific (pp. 158 to 173 of its opening brief) in dealing with what it calls "the overwhelming preponderance of evidence against the Rio Grande" makes particular point of the fact that the Union Pacific had 120 public witnesses, and at pages 167 and 168 announces the novel proposition that there is no good reason why the Commission should have accepted the testimony of the 50 witnesses supporting the Rio

Grande and not have *equally* accepted the testimony of the 120 witnesses who testified for the Union Pacific. If a commission or a court accepted *equally* the testimony for and against the factual issues in any controversy, there would be a stalemate and no decision could be rendered one way or another. Moreover, a mere superiority in the number of witnesses does not give one side the right to claim it has the preponderance of evidence. Of course the Union Pacific's witnesses testified in behalf of the Union Pacific and insisted there were no "pocket markets," and that there was no need for through routes over the Rio Grande for vegetables and perishables, etc.; but the witnesses in behalf of the Rio Grande testified to the contrary. The Commission was in the best position as a part of its administrative function to determine the intelligence, the responsibility, and the over-all credibility of the witnesses.

15. At eight different points in its Opening Brief (U.P. Neb. Op.Br. 10, 11, 37, 59, 92-96, 121, 130, 198-205) the Union Pacific argues that the Commission has no power to establish through routes or to prescribe competitive joint rates for the purpose of making in-transit privileges effective. The contention that in-transit privileges are not embraced in the statutory definition of transportation, is an unjustifiable distortion of the statutory language. Section 1(3)(a) reads in part as follows:

> "* * * The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and *all instrumentalities and facilities of shipment or carriage,* irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with

the receipt, delivery, elevation, and *transfer in transit*, ventilation, refrigeration or icing, storage, and *handling of property* transported. * * * *" (Emphasis supplied)

The language "all instrumentalities and facilities of shipment or carriage," and the language "transfer in transit," and the language "handling of property transported," sufficiently negative the contention of the Union Pacific. The Commission has frequently dealt with in-transit privileges as being a part of transportation service as defined in Section 1(3)(*a*) of the Act.

Further reference to the many other unfounded inferences, misstatements and irrelevancies in the Union Pacific Nebraska opening brief is deemed unnecessary in order to demonstrate that the statements and inferences in that brief must be approached with great caution.

SUBSTANTIVE ISSUES — NEBRASKA CASE

The Nebraska opening brief of the Union Pacific *et al.*, in No. 118 consists of 243 printed pages.* That brief presents five main points in which it is claimed the Nebraska court erred in declining to reverse the Order of the Commission *in toto*. In addition there are numerous breakdowns and sub-points which are interrelated to the five principal points. Since the issues in the Nebraska case are comprehensively stated and ar-

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* As heretofore indicated, the Nebraska Opening Brief of the Washington Public Service Commission, *et al.*, is merely a paraphrase of the points and arguments advanced by the Union Pacific in its opening brief, and therefore requires no separate answer.

gued at pages 85-115 in the Consolidated Opening Brief of the Rio Grande, an appellant in No. 117, it would not only be an imposition on this Court, but it is unnecessary to repeat these arguments here.

The following portion of the Rio Grande Consolidated Reply Brief will deal with the arguments which the Union Pacific advances in its opening brief in the Nebraska case.

I.

The Rio Grande Did Not Institute the Proceedings to Assist It in Meeting Its Financial Needs, and the Commission Properly Excluded Any Such Consideration from Its Determination of the Issues

In its first point the Union Pacific alleges that the Nebraska court erred in failing to hold that the complaint of the Rio Grande was filed with the Commission for the purpose of enabling the Rio Grande to meet its financial needs and in these circumstances the Commission was prohibited from prescribing joint rates and through routes on the commodities named in its Order via the Rio Grande and between the territories described. The prohibition relied upon by the Union Pacific is set forth in Section 15(4) of the Interstate Commerce Act, which provides:

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

Section 15(4) must be considered in connection with Section 15(3) and other provisions of the Interstate Commerce Act, and in connection with the basic policy of the Act. The Order of the Commission assailed by

the Union Pacific in its appeal found, *inter alia* (Consol. R., II, 1578):

> "That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City in connection with the Rio Grande [on the commodities involved] * * *."

The Commission also found that the rates assailed on the commodities and from and to the points described are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that such rates exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes. These findings were made in the Report of the Commission, 267 I.C.C. 611, at page 659 (Consol. R., II, 1579).

In its decision which prescribed joint rates and though routes on the traffic involved, the Commission said (Consol. R., II, 1529):

> "Consistently throughout the proceeding, the complainant [the Rio Grande] disclaimed any intent to prosecute the complaint for the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion [to dismiss] is overruled."

It will be observed that—

(a) the clause in Section 15(4) provides that

"No through route and joint rates * * * shall be established by the Commission for the purpose of assisting any carrier * * * to meet its financial needs."

(b) the Commission properly found that the prohibition in that clause is directed to the Commission and not to the complaining carrier, and that

(c) in reaching its conclusion no consideration was given by the Commission to the financial needs of the Rio Grande.

The argument of the Union Pacific is based upon a false premise and a misconception of the language of the clause in Section 15(4). Its argument assumes that the prohibition in the clause concerning financial needs is directed at the complaining carrier, which, as we have just indicated, is not true. Even if in the instant case the Rio Grande filed its complaint with the Commission to enable it to meet its financial needs (and it did not do so), the clause in question would not be applicable unless the Commission prescribed the relief sought on that basis.

The record shows that the Rio Grande is in a sound financial condition and that at no time has it claimed that the relief sought before the Commission was for the purpose of aiding it to meet "its financial needs." While Mr. Wilson McCarthy, the late President of the Rio Grande, admitted on the witness stand that the stockholders would naturally be interested in improving the financial condition of the Rio Grande, neither he nor anyone else stated or claimed that the financial

needs of the Rio Grande are the reasons for seeking the establishment of competitive joint rates. It is one thing to admit, as Mr. McCarthy did, that should the relief sought by the Rio Grande be granted one result would be to improve revenues of the Rio Grande and an entirely different thing to rely upon "financial needs" as the ground for the relief sought.

In its Nebraska opening brief at pages 43 and 44, the Union Pacific selected two questions out of the numerous questions asked on cross-examination and the answers made to those questions by Mr. McCarthy. The two questions and answers as quoted in the brief of the Union Pacific are:

> "Q. That is, from the standpoint of what I will say the treasury of the Rio Grande and the stockholders, that would be the purpose?
>
> A. Yes, we hope to improve our condition if we can get these through rates.
>
> Q. Insofar as the corporate management and the stockholders of the Rio Grande are concerned, that would really be the only immediate purpose to them, would it not?
>
> A. Yes—that they would want to improve the financial condition of our railroad."

The third question and answer which immediately followed the two questions quoted was omitted from the brief of the Union Pacific. That question and answer are here quoted (Consol. R., I, 48):

> "Q. Yes. That, of course, is apart from what you anticipate or what you have said would be some additional transportation conveniences that you would expect the public to derive?
>
> A. That is right."

That question and the answer by Mr. McCarthy, which the Union Pacific did not see fit to quote in its brief filed in this Court, together with the affirmative position of the Rio Grande in the proceeding before the Commission and as an intervening defendant in the Nebraska court, clearly reveal that in filing the complaint with the Commission the aim of the Rio Grande was and is to obtain equal treatment with the Union Pacific and its other connections by persuading the Commission to prescribe the same basis of competitive joint rates on traffic to and from the "closed door" territory via the Union Pacific, as apply not only via the Rio Grande through Ogden, Salt Lake City and Provo to and from California, western Oregon and Washington points and the Union Pacific, but also apply generally via transcontinental railroads between points in western territory and points in the east and southeast (Consol. R., I, 92).

If the Union Pacific is right in its contentions, no common carrier could ever seek an order from the Commission for competitive joint rates and through routes via its connecting railroads if the granting of such relief would increase the revenues or improve the financial condition of the complaining carrier. Section 13(1) of the Interstate Commerce Act specifically provides that any common carrier has the right to file a complaint with the Commission against other common carriers of anything done, or omitted to be done, by any common carrier subject to the Act in contravention of the provisions thereof. The complaint of the Rio Grande alleged that the failure and the refusal of the Union Pacific, *et al.*, to establish competitive joint

rates applicable to the traffic and between the points involved via the route of the Rio Grande through Ogden constitute violations of various provisions of the Interstate Commerce Act. In *The Chicago Junction Case*, 264 U.S. 258, at page 267, the Court after distinguishing that case from another case said that the issue before it involved:

> "* * * injury inflicted by denying to the plaintiffs equality of treatment. To such treatment *carriers* are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co. v. United States*, 236 U.S. 351." (Emphasis supplied)

The fact that the Order of the Commission which prescribed competitive joint rates and through routes on particular commodities may cause some loss of revenue to the Union Pacific and some increase in revenue to the Rio Grande, if the rates prescribed are established, is an incident to the exercise by the Commission of valid statutory powers. This Court has repeatedly held that the mere fact that an order of an administrative tribunal may result in loss of revenue to some of the litigants and gain to others does not constitute the taking of property contrary to the Fifth Amendment nor is it a bar to the proper exercise of the authority to prescribe rates, routes or regulations. *Baltimore & O. R. R. v. United States*, 345 U.S. 146; *American Trucking Ass'ns v. United States*, 344 U.S. 298, 322; *United States v. Berwind-White Coal Mining Co.*, 274 U.S. 564, 583, 584; *Atlantic Coast Line R. R. v. North Carolina Corp. Comm'n*, 206 U.S. 1; *Chicago, B. & Q. Ry. v. Illinois*, 200 U.S. 561; *United States v. Lynah*, 188 U.S. 445, and *Legal Tender Cases*, 12 Wall. 457, 550.

Under the "financial needs" clause of Section 15(4) and the decisions cited, the question whether the relief granted by the Commission would increase the revenues of the Rio Grande and thereby improve its financial condition is irrelevant. However, the great improvements in the physical properties of the Rio Grande, in its efficiency of operation during the last twenty years and the soundness of its financial condition are such as to brand as absurd the claim by the Union Pacific that the complaint of the Rio Grande was filed with the Commission to obtain an order to enable the Rio Grande to meet its "financial needs."

The testimony of Mr. McCarthy referred to on pages 77-79 of the Rio Grande Consolidated Opening Brief reveals that the Rio Grande acquired from the trustees on April 11, 1947 the property since operated by it (*Denver & R. G. W. R. R. Reorganization,* 267 I.C.C. 862); that during the trusteeship approximately $73,000,000 were expended to improve the property; that since the Rio Grande acquired the property on April 11, 1947, many additional millions have been expended for that purpose. These improvements include large sums for additions and betterments, the acquisition of diesel power and other modern and up-to-date equipment, the establishment of centralized traffic control, the installation of automatic signalling, new and heavier rails, improved ballast and other physical improvements. Moreover, since 1935 the main line of the Rio Grande between Ogden, Salt Lake City and Provo, Utah, and Denver, Colorado, has been substantially shortened and virtually rebuilt (Consol. R., I, 42 *et seq.*).

As the result of these improvements and the large

expenditure of money, the Rio Grande has shown proportionately greater gains in increased revenue and in the reduction of operating expenses than many other Western District Class I railroads. The Union Pacific presentation of one phase of its case to the Commission confirmed the foregoing fact (Consol. R., II, 1651, 1652). In 1949 and 1951 the operating ratio, the total maintenance ratio, and the transportation ratio of the Rio Grande were in each category lower than the same ratios of the Union Pacific (Consol. R., II, 1652). Among other things, Exhibit 28 of Witness Webb of the staff of the General Auditor of the Union Pacific shows that while Class I railroads in the Western District had an increase in operating revenues of 178.31 per cent in 1949 over 1930 and that four transcontinental lines, including the Union Pacific, had an increase of 191.62 per cent in 1949 over 1930, the Rio Grande had an increase of 220.82 per cent in 1949 over 1930 (Consol. R., I, 872-73). Mr. Webb's testimony discloses that the operating conditions on the Rio Grande are comparable with operating conditions on other leading transcontinental railroads (Consol. R., I, 876).

The Commission properly understood that the "financial needs" clause of Section 15(4) of the Interstate Commerce Act is directed to the Commission and not to a complaining carrier. It specifically held that it did not consider the "financial needs" of the Rio Grande in issuing its Order and in denying the motion of the Union Pacific to dismiss the complaint on the grounds that the complaint of the Rio Grande was filed to meet its "financial needs." Nor did the Nebraska court err in refusing to annul the Order of the Commission on the

foregoing ground as urged by the Union Pacific. In the Consolidated Opening Brief of the Rio Grande it was shown that where the Nebraska court did err was in narrowing the scope of the Order of the Commission, by cutting down the relief granted the Rio Grande by the Commission.

II.

The Nebraska Court, Insofar As It Sustained the Relief Prescribed, Correctly Reviewed the Commission Order of January 12, 1953

In its second main point the Union Pacific contends that the Nebraska court erred in failing to judge the Order of the Commission by the standards the Commission invoked and in substituting its own standards for those used by the Commission, and that the court also erred in refusing to hold that the Order of the Commission is entirely void because the Commission allegedly misconstrued and failed to observe and make the findings required by the controlling statutory standards.

On the reasons and facts stated at pages 85-115 of the Consolidated Opening Brief of the Rio Grande it was shown that the Nebraska court erred in substituting its judgment for the judgment of the Commission, in that it cut down and narrowed the decision of the Commission by assuming that it was in a better position to determine the extent of the relief that should be granted in the case than was the Commission. On the other hand, the contention of the Union Pacific that the Nebraska court erred in refusing to decide that the Order of the Commission is void in its entirety amounts to saying that the Nebraska court in all respects should have substi-

tuted its judgment for the administrative discretion and experience of the Commission.

As is shown in the Rio Grande Consolidated Opening Brief, as well as in the brief of the United States, the Interstate Commerce Commission and the Secretary of Agriculture, the Commission did not ignore or violate the standards which should be followed by an administrative agency when it decided that the competitive joint rates and through routes prescribed by it on the commodities covered are necessary and desirable in the public interest in order to provide adequate and more economic transportation; and that when it decided that the rates assailed by the Rio Grande on the commodities involved in the Order from and to the points described are and for the future will be unjust and unreasonable and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and also unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that such rates exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

In relying upon the decisions of this Court in *SEC v. Chenery Corp.*, 332 U.S. 194, and *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, the Union Pacific, wittingly or unwittingly, hoisted itself on its own petard. In the *Chenery* case the Court was called upon for the second time to decide the validity of an order of the Securities and Exchange Commission. In its first decision in that case, 318 U.S. 80, 87, it had held that the grounds upon which the order of the Securities

and Exchange Commission was based could not be sustained. In its second decision this Court sustained the order of that Commission and, in doing so, held, among other things, 332 U.S., at page 209:

> "The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process."

The language just quoted is equally applicable in the instant case.

In the *Carolina Freight Carriers* case, 315 U.S. 475, the Court considered the validity of an order of the Commission which, in granting "grandfather" rights to the Carolina Freight Carriers Corporation, restricted the certificate in a manner that excluded commodities which the motor carrier had held itself out to transport. The issues and the facts, as well as the law, before the Commission and before this Court in that case are clearly distinguishable from the issues, the facts and the law applicable to the case at bar.

Under Section 15(3) of the Interstate Commerce Act the Commission is given the authority to require the establishment of joint rates and through routes whenever the Commission considers that such rates and routes "are necessary or desirable in the public interest." This authority implements the duties imposed upon railroads by Section 1(4) and Section 3(4) of the

Interstate Commerce Act which require railroads to establish reasonable through routes and reasonable rates, as well as reasonable interchange facilities and arrangements, for the handling of through traffic.

Section 15(4), which places certain limitations on the power of the Commission to establish through routes, also contains six exceptions which exclude the limitations. The exceptions here pertinent are that the limitations on the power of the Commission to prescribe through routes do not apply where the Commission finds that undue prejudice, preference and discrimination exist or that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation. As shown in its Order in the instant case, the Commission found that the rates assailed in the complaint of the Rio Grande were unduly prejudicial, as well as unreasonable, and also that the rates and routes prescribed are necessary and desirable in the public interest in order to provide adequate and more economic transportation. In *D. A. Stickell & Sons, Inc. v. Alton R. R.*, 255 I.C.C. 333, 343, the Commission held that "adequate transportation" is a concept which concerns the needs of the shipping public while the phrase "more efficient or economic transportation" may well embrace the interests of both shippers and carriers. That decision was sustained by this Court in *Pennsylvania R. R. v. United States*, 323 U.S. 588, 592-593.

The Union Pacific at page 65 of its Nebraska Opening Brief (and at other pages of that brief) cites the *Pennsylvania R. R.* case (affirming the *D. A. Stickell &*

Sons decision by the Commission) as authority for the proposition that the Commission must, in considering any Section 15(4) case, find that through routes are needed for efficient *and* economic transportation as well as adequate transportation, and that the word "or" in the statute must be read as "and". Examination of these decisions discloses that neither the Commission nor the Court discussed this particular question or held that the word "or" must be construed as "and". It happened that in the *Pennsylvania R. R.* case the Commission found that through routes were needed for both "more efficient" and "more economic" transportation. But it used these words in the conjunctive only in connection with the observation (which was the real holding in the case) that any material finding under the language of Section 15(4) must, insofar as the question of *need* is concerned, be related both to the carriers and the shippers.

The language of the statute involved was not carelessly written. The history of the enactment discloses that Congress was carefully concerned with the language used as it always is where it is spelling out a provision empowering the Commission to act under what may be described as an exception to an exception. The actual language of Section 15(4)(b), which is the part of Section 15(4) here involved, applies to the establishment of through routes and not to the prescription of joint rates. It says that a through route may be established if "needed" (which obviously is equivalent to "necessary") "to provide adequate, and more efficient or more economic, transportation." This language, in view of the placement of the commas, is the same as

"adequate and more efficient transportation" or "adequate and more economic transportation."

Equally erroneous is the position of the Union Pacific under the two foregoing cases or any other cases, that Congress intended that the word "adequate" and the words "more efficient or more economic, transportation" in Section 15(4) should be restricted to a comparison between two particular railroads, to-wit, the Union Pacific and the Rio Grande. As held in the *Pennsylvania R.R.* case, 323 U.S. 588, the words of the statute are intended to be considered from the point of view of the shippers and the general public, at least as much as from the point of view of the carriers.

Nor are the words restricted to a consideration of the physical adequacy, the mechanical efficiency or the economical operation of one railroad as compared to another. Neither the dictionary nor the law defines "economic" as meaning merely "economical." It is not a question of cheapness of operation of one railroad as compared to another (Rio Grande and Union Pacific) but more a question of whether with the establishment of the new through route, the transportation would be better for the economy of the area involved and the country as a whole.

The above stated views regarding the meaning and intent of the statute are fully supported by the cases cited at page 101 of the Rio Grande Consolidated Opening Brief.

In its brief the Union Pacific cites the decision of this Court in *ICC v. Northern Pacific Ry.*, 216 U.S. 538, nine times. That decision was rendered in March 1910. At

that time the authority of the Commission to establish through routes and joint rates was conditioned upon the proviso in the Act that "No reasonable or satisfactory through route exists" (Chap. 3591, Section 4, 34 Stat. L. 589). The power of the Commission to prescribe joint rates and through routes has been enlarged since that time. In that case this Court held that the Commission had no power to make the order establishing through routes via routes other than the Northern Pacific if the route of the Northern Pacific was a reasonable and satisfactory through route. The Court sustained the lower court, which held that the route of the Northern Pacific between the points involved was a reasonable and satisfactory through route.

The standard for action in that case should be contrasted with the standard for action in Section 15(3) of the Interstate Commerce Act which now provides that the Commission may establish joint rates and through routes whenever after a hearing it finds that such rates and routes are deemed by it "to be necessary or desirable in the public interest." The Commission has held that the phrase "necessary or desirable in the public interest" does not mean that an absolute public necessity for a through route or joint rate is required and that these words "do not in either case connote indispensability." *D. A. Stickell & Sons, Inc. v. Alton R. R.*, 255 I.C.C. 333, 338.

The Commission acted within its statutory authority and upon sufficient evidence in prescribing competitive joint rates via the route of the Rio Grande through Ogden on the level of rates applicable generally on transcontinental traffic, and applicable via the Rio Grande

on traffic generally except to and from points in the states of Montana, northern Utah, Idaho, Oregon and Washington, via the Union Pacific. The fact that some of the rates have been influenced by competitive forces is of no significance. In *Hormel & Co. v. Atchison, T. & S. F. Ry.*, 263 I.C.C. 9, at page 43, the Commission said apropos of this question:

> "Defendants criticise the mountain-Pacific comparisons of complainants by labeling them depressed rates, usually truck compelled. It is noted, however, that these so-called low mountain-Pacific rates instanced by complainants apply between practically all points between which the traffic moves. They, therefore, represent the normal rate structure in that territory and afford a proper guide for determining a just and reasonable rate level for the future from the Midwest to mountain-Pacific territory."

Rate making is not an exact science. The Commission and the courts have repeatedly stated that there is no such thing as a mathematically reasonable rate or any rule of thumb for the determination of the reasonableness of a rate or rates and that the question requires the exercise of an informed and sound judgment based upon the facts in a particular case. These principles were recognized by this Court in *Atlantic Coast Line R. R. v. North Carolina Corp. Comm'n*, 206 U.S. 1, 26, where it referred to the "flexible limit of judgment which belongs to the power to fix rates," and in *Baltimore & O. R. R. v. United States*, 345 U.S. 146, *State of New York v. United States*, 331 U.S. 284, and *Georgia v. Pennsylvania R. R.*, 324 U.S. 439, 461.

III.

The Commission's Order of January 12, 1953, to the Extent That It Grants Relief, Is Amply Supported by the Findings and Conclusions of the Commission

In its third main point the Union Pacific contends that the Nebraska court erred in refusing to hold that the entire Order of the Commission is void because the basic facts found by the Commission contradict and are inconsistent with its Conclusions and therefore afford no rational or valid basis for the ultimate Conclusions and the Order.

The argument of the Union Pacific in support of its third point is rambling and fallacious. It is based largely upon false premises and upon decisions of this Court and of other courts which are not pertinent to the points discussed. It is also based upon the notion that the limitations on the power of the Commission to prescribe through routes in Section 15(4) of the Act, which are exceptions to the general policy of the Act, should dominate the viewpoint and action of the Commission. The argument made by the Union Pacific is lacking in substance.

The aim of the Interstate Commerce Act and its policy are to bring about a national system of transportation to the end that the commerce of the country may freely move between all points over available rail routes at rates that are neither unreasonable nor discriminatory as between shippers and railroads or as between connecting railroads. *Railroad Comm'n v. Chicago, B. & Q. R. R.*, 257 U.S. 563; *Borough of Edgewater,*

N.J. v. Arcade & A. R. R., 280 I.C.C. 121, 134, and *Missouri & Illinois Coal Co. v. Illinois Cent. R.R.*, 22 I.C.C. 39, 46. In the *Borough of Edgewater* case, sustained in *Baltimore & O. R.R. v. United States*, 100 F. Supp. 1002 (S.D. N.Y.), the Commission stated, 280 I.C.C., at page 123, that the provisions of Section 15(4) which recognize the right of a railroad to its long haul are subordinate to the provisions of Section 3 of the Act which, among other things, prohibit any undue or unreasonable prejudice or disadvantage. Moreover, the limitations on the power of the Commission to prescribe through routes in Section 15(4) are by the very terms of that section set aside where a Section 3 violation of the Act is found, as was the situation in the instant case.

However, the Union Pacific argues that the finding of undue prejudice and preference made by the Commission as to shippers is precluded in the absence of evidence showing that transportation conditions affecting them are substantially similar, and it argues that such a finding is also precluded by the statement of the Commission that transportation conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific (Consol. R., II, 1575). The Commission found (Consol. R., II, 1575, 1576) that the differences in operating conditions and lengths of haul over the Union Pacific routes as compared with the Rio Grande routes via the Ogden gateway are substantial for hauls between the "closed door" territory, on the one hand, and points in Colorado east of and including Colorado common points, such as Denver, Pueblo, etc., Kansas (west of points on the Missouri River), Nebraska (except

Omaha), the Dakotas, Minnesota, Wisconsin, Iowa and Illinois (north of points on the route of the Union Pacific and Chicago & North Western between Omaha and Chicago) on the other hand. But the Commission also found—

> "that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general, spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar." (Consol. R., II, 1576)

The Union Pacific repeatedly and erroneously states, or infers in its opening brief (see e. g. pp. 5, 18, 31, 32, 96, 114) that the Commission found that routes via the Rio Grande " * * * would range from 33% to more than 50% longer than many of the Union Pacific routes * * * ." This is a misstatement of the Finding made by the Commission in this respect. The Commission stated (Consol. R., II, 1576):

> "From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 per cent, and range up to more than 50 per cent, than the short routes."

It will be noted that the Commission did not say that

the routes via the Rio Grande are in any instance 33% to 50% longer than the routes of the Union Pacific itself. The comparison was confined to the Rio Grande route as against the short routes in the territory north of the Omaha-Chicago line of the Union Pacific and Chicago & North Western, from and to which territory, as pointed out by the Commission, the short routes run over the Northern Pacific, Great Northern or Milwaukee.

Moreover, as shown by the Rio Grande Consolidated Opening Brief, pages 21, 22, 23, in a number of specific instances (contrary to the Union Pacific's contention), the Rio Grande through routes are actually shorter than the through routes via the Union Pacific and its connections.

It will thus be seen that the Commission made appropriate findings based upon the evidence with respect to the competitive joint rates and through routes prescribed by it which are involved in the Order of the Commission, since that Order applies only to the limited territory described in the Findings of the Commission above quoted and shown as the open territory on the map, Appendix E, of the Rio Grande Consolidated Opening Brief, at page 135. The Commission did not establish through routes or prescribe competitive joint rates on the named commodities with respect to freight traffic from and to the "closed door" territory and the areas within the cross-hatched territory shown on such Appendix E.

Moreover, in *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, the Court sustained the order

of the Commission in *Chicago & Wisconsin Points Proportional Rates,* 17 M.C.C. 573, 580. In the latter case, the Commission found that the proportional rates investigated, which were lower than the local rates, were unduly preferential of proportional rate traffic in violation of the anti-discrimination provisions of Section 216(d) of the Act despite the fact that the unchallenged evidence in that case showed that transportation conditions and the unit costs were more favorable as to traffic handled by the trucks under proportional rates than as to traffic handled by the motor carriers under local rates.

The Court recognized these differences and the arguments made with respect to them as weighty, but held that weighty as the arguments were, it found no reason to set aside the order of the Commission, despite the fact that the discrimination found to exist was based upon differences in costs, etc., which favored the services under the proportional rates of the motor carriers which were under investigation.

The Findings of the Commission in the instant case are not contradictory or inconsistent. Even if they were, that fact would not be a valid basis for enjoining the Order. This Court has said on many occasions that it is not concerned "with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." *Virginian Ry. v. United States,* 272 U.S. 658, 665-666.

The Commission weighed the testimony of the numerous shippers who testified in support of the com-

plaint of the Rio Grande and the shippers who supported the Union Pacific, and considered the nature, the extent and the functioning of the intricate and far-flung commodity marketing system, as well as the growth of the population in the northwestern states and the development of that part of the country that has required a constantly expanding flow of diverse commodities. It found that adequate transportation facilities and services are required for the proper functioning of the marketing system, especially with respect to commodities of a perishable nature, such as food articles, fresh fruits and vegetables, frozen poultry, frozen foods, butter and eggs, ordinary livestock and dried beans. It held that the marketing and the transportation of such commodities require that as much flexibility as possible, such as the necessity of reconsignment and other in-transit privileges, be permitted in the transportation incident to the distribution process (Consol. R., II, 1574).

Consistent with the foregoing findings, the Commission made the ultimate finding (Consol. R., II, 1574, 1575) to the effect that, because of the higher combination rates and lack of effective in-transit privileges over the Rio Grande, the shippers here involved are debarred from effective participation in the national markets.

The foregoing approach is orderly and logical, and furnishes ample support for the Conclusions and Order of the Commission.

IV.

The Commission Order, Insofar As It Prescribes the Relief Sought, Is Amply Supported by the Evidence

In its fourth main point, the Union Pacific contends that the Nebraska court erred in refusing to enjoin the Order of the Commission in its entirety because it says the ultimate Findings and Conclusions of the Commission are not supported by evidence and are contrary to the preponderance of evidence.

The argument of the Union Pacific in support of its fourth point is even more confused than is its argument made in support of its third point. In dealing with point III it has already been shown that the Order of the Commission involved in the appeals from the Nebraska court is supported by substantial evidence and appropriate findings.

The Union Pacific challenges the probative weight which the Commission gave to the testimony of numerous witnesses representing shippers, chambers of commerce, livestock and other organizations of shippers whose members testified as to their respective needs for competitive joint rates via the route of the Rio Grande between the territories involved (R.G. Consol. Op. Br. 137, App. F). That challenge appears to be based upon the ridiculous charge that the Rio Grande improperly solicited these various witnesses to testify and influenced them to take part in the proceedings by improper means. The Union Pacific goes so far as to charge that the witnesses were procured and that the Rio Grande is guilty of champerty. That charge was made before the Commission in a special brief and was also made before the Nebraska court and the Colorado court.

The charge is frivolous and ridiculous. When the complaint of the Rio Grande was filed it received wide publicity and shippers, chambers of commerce, farmers, industrialists, brokers and persons engaged in various commercial activities were obviously and instantly interested in the successful outcome of the complaint which sought competitive joint rates over routes of the Rio Grande via which unreasonably higher combination rates applied. These shippers and others needed no prodding or stimulation to be urged to support the complaint. On the other hand, because of the vigorous activities and the great influence of the Union Pacific in all of the interested western states, the Rio Grande was required to spend a substantial amount of time and energy after its complaint was filed with the Commission in order adequately to deal with the numerous unjustified, misleading and prejudicial oral statements repeatedly made in the press, in speeches or in typewritten statements released to the public by a plethora of agents and representatives of the Union Pacific against the complaint of the Rio Grande, and to attempt to prepare appropriate replies to charges daily made against the complaint of the Rio Grande in the propaganda initiated and perpetuated by officers and agents of the Union Pacific.

During the hearings before the Commission, the Union Pacific did not object to the testimony of any of the witnesses who supported the complaint of the Rio Grande on the grounds now stated in its opening brief in this Court. The Union Pacific cross-examined the witnesses at great length and sought by such examina-

tion to impeach them and generally to attack their credibility. However, in that objective it utterly failed. Such cross-examination of the witnesses having proved futile, the Union Pacific has no right to challenge their credibility or their competency in this Court. *New York Cent. & H. R. R. v. ICC*, 168 Fed. 131, 138 (C.C.S.D.N.Y.); *Poole v. Poole*, 96 Kan. 84; *Stair v. McNulty*, 133 Minn. 136, and *Edwards v. Lattimer*, 183 Mo. 610.

The Commission dealt with the various contentions of the Union Pacific with respect to the alleged procurement of witnesses in the following sensible manner:

> "The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled '20 Questions' as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representatives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimu-

lated in any questionable manner." (Consol. R., II, 1547)

The quoted statement of the Commission is an abbreviated paraphrase of similar findings by Hearing Examiner Mullen, who presided at all of the hearings and heard all of the witnesses and was in the best position to judge their demeanor, their truthfulness and their general credibility.

In disposing of these frivolous and specious charges made by the Union Pacific, the Nebraska court said:

> "Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the Rio Grande's case before the Commission. We do not find justification for serious consideration of that question." (Neb. R. 165)

In *State of New York v. United States*, 331 U.S. 284, similar claims of alleged improper conduct were made before the Interstate Commerce Commission, before the lower court, and before this Court. The lower court in *State of New York v. United States*, 65 F.Supp. 856 (N.D. N.Y.), at page 874, considered the question but held in effect that it lacked substance. The attention of this Court is also invited to its decision in *Bridges v. California*, 314 U.S. 252, where the Court rejected as without substance similar unfounded charges. In that case, speaking with reference to the public's right to interest itself in judicial proceedings of general importance, and to express itself with regard thereto, this Court, at page 270 stated:

"For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."

and at page 278 continued:

"The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: 'I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.'. *Toledo Newspaper Co. v. United States, supra,* 247 U.S. 425."

V.

The Commission Properly Prescribed Relief to Correct the Preference and Prejudice Existing As Against Shippers and the Public in General

In its fifth and last main point the Union Pacific contends that the Nebraska Court erred in refusing to enjoin and annul the Order of the Commission on the ground that the Commission acted arbitrarily in prescribing competitive joint rates and through routes on the theory that "because shippers had intervened the Rio Grande's complaint became a shipper complaint."

The Union Pacific says that in its complaint the Rio Grande did not allege that the rates assailed were unduly prejudicial and preferential with respect to shippers and that the Rio Grande did not allege that through routes at competitive joint rates via its line are necessary or desirable in the public interest. Para-

graph XV of the complaint of the Rio Grande filed with the Commission reads as follows (Consol. R., I, 10):

> "That by reason of the facts stated in the foregoing paragraphs, the failure and refusal of the Union Pacific and the other defendants to establish competitive joint through rates and charges applicable to the freight traffic and between the points hereinbefore described constitutes violations by defendants of Section 1(4), Section 3, Section 15(1) and Section 15(3) of the Interstate Commerce Act, is contrary to the National Transportation Policy, and deprives the public and the complainant of the use of available and reasonable through routes at reasonable and non-discriminatory through joint rates which are necessary and desirable in the public interest."

It will be observed that contrary to the contentions of the Union Pacific the quoted paragraph from the complaint affirmatively alleges that by reason of the facts stated in the previous paragraphs of the complaint, the refusal of the Union Pacific and the other railroad defendants to establish competitive joint rates and charges, etc., constitutes violations by them of "Section 1(4), Section 3, Section 15(1) and Section 15(3) of the Interstate Commerce Act, is contrary to the National Transportation Policy, and deprives the public and the complainant of the use of available and reasonable through routes at reasonable and non-discriminatory through joint rates which are necessary and desirable in the public interest."

The contentions of the Union Pacific that the Rio Grande complaint did not contain proper allegations were made before the Commission, the Nebraska court

and the Colorado court, and were rejected by each of them. Even if the pleadings in the complaint of the Rio Grande did not recite the precise language of each of the statutes alleged to be violated, that omission would not be fatal. This Court has held that it is no more necessary to plead the exact words of a statute or the statute itself in a proceeding before the Commission than it is in a judicial proceeding. *Chicago, R. I. & P. Ry. v. United States,* 274 U.S. 29, 37.

Equally without merit is the contention that the Rio Grande has no standing to allege that its own rates were unreasonable. The Rio Grande did not allege that its own rates were unreasonable, and it is surprising that the Union Pacific would repeat in this Court such a contention, which was rejected as unsound by the lower courts and the Commission. The Rio Grande alleged that the aggregate of the through charge, made by adding together for example the local rate of the Union Pacific (from origin points to Ogden), the rate of the Rio Grande (from Ogden to Pueblo or Denver) and the rate of the Missouri Pacific, the Sante Fe, the Rock Island, and the Burlington (from Denver and Pueblo to Chicago, St. Louis, New Orleans and other destination points in the east and southeast) is unjust and unreasonable as well as unduly prejudicial as compared with the lower joint through rates maintained by the Union Pacific in connection with the other railroad defendants.

Under Section 13(1) of the Interstate Commerce Act the Rio Grande, as a common carrier, has a right to complain to the Commission of anything done in contravention of the provisions of the Act. The fact that one

link in the chain of the combination of intermediate local rates includes the local rate of the Rio Grande from Ogden to Pueblo and Denver, etc., does not deprive the Rio Grande of its statutory right to complain against the Union Pacific and the other railroad defendants, since it is their refusal to join with the Rio Grande in establishing reasonable, non-prejudicial and non-discriminatory competitive joint rates which constitutes the violation of the provisions of the Interstate Commerce Act.

The Union Pacific contends that the finding by the Commission that the rates assailed are unduly prejudicial to shippers and receivers using or desiring to use the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent they exceed or may exceed the joint rates maintained on the commodities involved from and to the same points over the Union Pacific routes, should have been annulled by the Nebraska court because (it is stated) the complaint of the Rio Grande gave shippers no standing to seek such relief. This contention is without substance or merit. Section 13(1) of the Interstate Commerce Act confers a statutory right to complain upon "any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier * * * ."

Moreover, the Union Pacific overlooks the express language of Sections 15(1) and 15(3) to the effect that the Commission may prescribe relief "either in exten-

sion of any pending complaint or without any complaint whatever" whenever it finds unjust, unreasonable, discriminatory or unduly preferential or prejudicial practices and whenever "deemed by it to be necessary or desirable in the public interest." The language just quoted empowers the Commission to prescribe relief as required by the Interstate Commerce Act regardless of whether the complaint of the Rio Grande or of any shipper requests such relief.

In keeping with the language and the spirit of the law itself (Section 17(3), 49 U.S.C.) the General Rules of Practice of the Commission authorize the filing of petitions of intervention with the Commission by any person or other groups named in Section 13(1) of the Act. Numerous such persons were allowed to intervene in the action of the Rio Grande before the Commission as intervening complainants, and numerous other persons, consisting of farmers, shippers, representatives of chambers of commerce, livestock associations, and others, testified as witnesses for the Rio Grande without formal intervention. In *The Chicago Junction Case*, 264 U.S. 258, 267-269, this Court held that the Baltimore & Ohio and the other plaintiffs, in that case which involved an order of the Commission that authorized, but did not require, the New York Central to acquire control of the Chicago Junction Railroad, had standing as complainants to maintain the suit since they were intervening parties in the proceeding before the Commission out of which the order arose. The Court also said, at page 268, that the fact that interventions were allowed by the Commission

"implies a finding by the Commission that the

plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the granting of the application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to paragraph 1 of §17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel."

In *Youngstown Sheet & Tube Co. v. United States*, 295 U.S. 476, 479, the plaintiffs who were interveners in a proceeding before the Commission were held to be entitled to bring and to maintain the suit to set aside the order of the Commission, since they were parties to the proceeding before the Commission, had a pecuniary interest in the rates and were adversely affected by the order. See also *ICC v. Oregon-Washington R. R. & Nav. Co.*, 288 U.S. 14, 26-28.

The general rule is that an intervener in a pending action ordinarily acquires rights and is subject to obligations equal to or as broad as those of the plaintiff or the other parties. *Gates v. Hepp*, 95 Colo. 285, 35 P.2d 857, 860; *Fitch v. United Royalty Co.*, 143 Kan. 486, 55 P.2d 409, and 67 C.J.S., *Parties* §§58-70 (1950).

Since an administrative agency such as the Commission operates under rules of procedure which are more flexible than the more technical rules that govern courts, it follows that intervening complainants before that Commission acquired the right to complain of any violation of the Interstate Commerce Act which is involved in the pleadings filed. Moreover, under Section 13(1) of the Interstate Commerce Act the Commission

is authorized to investigate complaints where there are reasonable grounds for the investigation. Therefore, every complaint before the Commission is also an investigation. In the course of such an investigation the Commission has the authority, as well as the duty, to see to it that all violations of the Interstate Commerce Act revealed by the evidence and the pleadings in the investigation shall be corrected. *Beaumont, Tex., Port Comm'n v. Beaumont, S. L. & W. Ry.*, 229 I.C.C. 119, 121, and *Eastern Interior Iowa Industrial Ass'n v. Chicago & N. W. Ry.*, 210 I.C.C. 197, 203.

VI.

General Comments

The Union Pacific contends at 34 different places in its brief that since its facilities are adequate, this precludes a finding by the Commission that through routes and competitive joint rates are needed for adequate transportation. In this connection, the Union Pacific disregards the fact that while its own lines may be adequate and its operating conditions efficient, and even less onerous than those of the Rio Grande, at the same time transportation over the Rio Grande is necessary and desirable in the public interest for an adequate national transportation system. Again, the meaning and scope of the word "adequate" in the Act is not to be tested by the adequacy of one particular railroad with reference to the territory through which its lines run only. Neither does it follow, as the Union Pacific repeatedly contends, that the availability of through routes over two competing railroads constitutes economic waste, if the route of one railroad happens to be shorter

than the other, or if a particular railroad is adequate in the sense that it is presently moving the traffic.

The Union Pacific furnishes no support in law or fact for its dogmatic statement that the relief prescribed will result in waste or be contrary to national transportation policy.

The Union Pacific persists in misinterpreting and confusing the basis upon which the Commission found that the Rio Grande routes are necessary for adequate transportation, which was that in order to accord shippers adequate transportation with respect to the national markets, the Rio Grande routes are necessary.

The Union Pacific contends that the Commission acted arbitrarily in failing to give any effect to the clause in Section 15(4) of the Act which provides

> "That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic."

It will be observed that the quoted clause is not unqualified. At most, it is an admonition. It does not restrict the power of the Commission to prescribe through routes if it finds that adherence to the clause would not be consistent with the public interest; if the inclusion of controlled lines in an existing route would make the through route unreasonably long as compared with another practical through route which could otherwise be established, or if the Commission finds that the through route is needed in order to provide adequate and more efficient or more economic transportation.

Moreover, by its argument, which is tenuous, the Union Pacific desires to eat its cake and have it, too. The Union Pacific does not serve such Colorado common points as Colorado Springs, Pueblo, Trinidad and Canon City, which points are served by the Rio Grande. Any shipper served by the Rio Grande at those points who desires to make a shipment to a point on the Union Pacific north of Ogden, Utah, in the "closed door" territory must route the shipment via the Rio Grande to Denver and thence Union Pacific to destination territory in order to avoid the higher combination rates. Thus under existing practices the Rio Grande, the originating carrier, is short hauled by the Union Pacific. In these instances the Rio Grande is the originating carrier, but if a shipment should be routed Rio Grande to Ogden and thence Union Pacific to the "closed door" territory, the charges would be based upon the substantially higher combination rates. It is obvious that under the language of the clause referred to, the Rio Grande is as much entitled to its long haul from Colorado Springs, Pueblo, Trinidad and Canon City to Ogden as is the Union Pacific to Denver on shipments moving from points on its line in the "closed door" territory destined to Colorado Springs, Pueblo, Trinidad and Canon City.

The Union Pacific vigorously argues at several points in its brief to the general effect that the Commission used its powers under Sections 15(3) and 15(4) to correct violations of Sections 1 and 3 of the Interstate Commerce Act, in order to avoid the necessity of handing down an alternative decree (U.P. Neb. Op. Br. 102-104). The claim of the Union Pacific that the Order of the

Commission had to be in the alternative is based upon *Texas & Pac. Ry. v. United States*, 289 U.S. 627.

Examination of this case reveals that in footnote 39 on page 650 of that decision this Court stated that an alternative order is not required where the Commission prescribes maximum or minimum reasonable rates. In the instant case the Commission not only found that the rates assailed are unduly prejudicial to the complaining shippers desiring to use the Rio Grande but also are unreasonable. It will thus be seen that the Union Pacific has failed to appreciate the full import of the decision in the *Texas & Pacific* case and that in the light of the findings of the Commission an alternative order was not required.

Moreover, in *State of New York v. United States*, 331 U.S. 284, at pages 341 and 345 the Court clearly indicated that it is not necessary for the Commission in all cases to prescribe an alternative where discrimination is found to exist. At page 341 of its decision in the *State of New York* case, the Court said:

> "A proper finding of unlawful discrimination under § 3(1) thus enables the Commission not only to direct the carriers to eliminate the practice but also, pursuant to § 15, to prescribe the alternative."

At page 345 the Court resolved all doubt on the matter when it said:

> "Once the Commission has found rates to be 'unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial,' it is empowered to prescribe rates which are 'just and reasonable' or 'the maximum or minimum, or maximum and minimum, to be charged * * *.' §15(1)."

The Order of the Commission here involved, as has

been demonstrated, is neither indefinite nor vague. Therefore the decision of this Court in *American Express Co. v. Caldwell*, 244 U.S. 617, and the other similar decisions cited by the Union Pacific are inapplicable and beside the point.

VII.

The Order of the Commission of January 12, 1953, Should Be Affirmed and the Judgment of the Nebraska Court Should Be Reversed Insofar As It Reduced the Relief Granted to the Rio Grande by the Order of the Commission

For the reasons stated the Findings of the Commission in its Order of January 12, 1953, that through routes and competitive joint rates via the Ogden gateway over the Rio Grande, are necessary and desirable in the public interest, in order to provide adequate and more economic transportation, in order to establish just and reasonable rates, and in order to eliminate preference, prejudice and discrimination, are in accord with the purposes and requirements of the Interstate Commerce Act.

Similarly the Order of the Commission of January 12, 1953, prescribing competitive joint rates and through routes as to certain named commodities via the Ogden gateway over the Rio Grande from and to points on the Union Pacific and its preferred connections in the "closed door" territory is supported by substantial evidence.

The Nebraska court erroneously substituted its judgment for the administrative judgment of the Commis-

sion in restricting the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande to be accorded in transit privileges at such points and to be later shipped to points beyond the Rio Grande.

Finally, the Nebraska court erred in interpreting and applying Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, and particularly in holding that Section 3(1) prohibiting any carrier from giving undue preference to any person, locality, etc., or subjecting any person, locality, etc., to any undue prejudice, does not apply where the persons and localities affected by the preference or prejudice are located on different railroad lines, and where, as in this case, the defendant railroads involved (the Union Pacific and its preferred connections) clearly have the power to eliminate the preference and prejudice complained of.

CONCLUSION

In conclusion, The Denver and Rio Grande Western Railroad Company respectfully submits:

That the judgment of the United States District Court for the District of Colorado in Appeals Nos. 332, 333 and 334 should be affirmed, and in accordance therewith that the case be remanded to the Interstate Commerce Commission, to proceed to a determination of the issues on the basis that through routes via the Ogden gateway are in existence, and that the case be considered and decided by the Commission free of the limitations of Section 15(4) of the Interstate Commerce Act; that the judgment of the United States District Court

for the District of Nebraska in Appeals Nos. 117, 118 and 119 should be reversed insofar as it denies the relief prayed for by the Rio Grande, that in the alternative in the event that the judgment of the United States District Court for the District of Colorado is not affirmed, this Court should reverse the judgment of the United States District Court for the District of Nebraska and affirm the Commission Order.

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April 12, 1956

APPENDIX A

ADDITIONAL STATUTES INVOLVED

Section 1336—Title 28

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Section 1398—Title 28

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

Section 1(3)(a) [in part]—Title 49

" * * * The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * * "

Section 15(7)—Title 49

"Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once,

and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940,

the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 17(3)—Title 49

"The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof; which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commisioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the Commission, a divi-

sion, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest."

Section 20(11)—Title 49

"Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to re-

cover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided;* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water, the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying pasengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as

the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State Court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided*

further, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided."

Office - Supreme Court, U. S.
FILED
JUN 23 1955
HAROLD B. WILLEY, Clerk

Nos. 117, 118 and 119

In the Supreme Court of the United States

OCTOBER TERM, 1955

NO. 117

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

NO. 118

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

NO. 119

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MOTION TO AFFIRM IN NOS. 117 AND 119 AND REVERSE IN NO. 118

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Nos. 117, 118 and 119

In the Supreme Court of the United States

OCTOBER TERM, 1955

NO. 117

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
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v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

NO. 118

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

NO. 119

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA[1]

MOTION TO AFFIRM IN NOS. 117 AND 119, AND REVERSE IN NO. 118

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Washington Public Service Com-

1 The appeals were filed in this Court on May 31, 1955, and originally assigned Docket Nos. 837, 838, and 839, respectively.

mission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, appellees in Nos. 117 and 119, and appellants in No. 118, move that the portion of the judgment of the district court enjoining the order of the Interstate Commerce Commission in part, from which portion of the judgment the appeals were taken in Nos. 117 and 119, be affirmed, and that the portion of the judgment sustaining the order in part, from which the appeal was taken in No. 118, be reversed,[2] and the case remanded to the district court with direction to issue the injunction and relief prayed by the plaintiffs in that court.

STATEMENT

These are direct appeals from a final judgment entered December 20, 1954, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, sustaining "in part" and enjoining "in part" an order of the Interstate Commerce Commission requiring the railroad appellants herein and numerous other railroads to establish and maintain through routes and joint rates in connection with The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") "the same" as the joint rates maintained by appellants and other railroads over transcontinental routes embracing the lines of Union Pacific Railroad Company and others on certain commodities that move by railroad between points in the four northwestern states, Washing-

2 As a precedent for this part of this motion, see *Williamsport Co. v. United States*, 277 U.S. 551, 556-557, and *U.S. v. Pan American Corp.*, 304 U.S. 156, in which a motion to reverse was filed, although not mentioned in this Court's decision.

ton, Oregon, Montana and Idaho, and points in the eastern and southern parts of the United States described in the order.[3]

The Commission's order (Appendix C to Statement as to Jurisdiction in No. 118) was issued upon a complaint filed with the Commission by the Rio Grande demanding that the defendants named in the complaint be ordered to establish and maintain in connection with the Rio Grande joint rates "the same" as the joint rates maintained by those defendants over many hundreds of thousands of through routes over their connecting lines between points in the areas just described. The joint rates are substantially lower than the combination or sum of the local rates that would apply if the traffic moved via the Rio Grande.

The Rio Grande has been a chronically bankrupt and "financial needs" railroad during most of its existence. Its President testified frankly that the purpose of the complaint in this case was to improve the Rio Grande's financial position by diverting for a "bridge" haul over its line as much as possible of some 172,000 carloads of traffic annually hauled for many years over Union Pacific routes.[4]

The Commission evaded the "financial needs" prohibition of Section 15(4) of the Interstate Commerce Act by asserting in its report that it gave no consideration to the Rio Grande's "financial needs". It found that the traffic the Rio Grande seeks to divert to its line or-

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3 See map showing lines and termini of the Union Pacific, the Rio Grande and other pertinent data, Appendix A to Statement as to Jurisdiction of these appellants, No. 118.

4 See footnotes pages 13-14, Jurisdictional Statement in No. 118.

dinarily moves over the Union Pacific routes through Wyoming because those routes have lower rates and are from 33 to 219 miles shorter than any route that could be made by including the Rio Grande and are more than 50% shorter than many of the routes demanded by the Rio Grande.[5] The Commission also found that diversion of the traffic to the Rio Grande would short haul existing Union Pacific routes at least 925 miles on each shipment so diverted, and that movement of the traffic via the Rio Grande would require at least 24 hours more time in transit and one or two more interchanges of traffic between connecting carriers.

The Commission further found that Union Pacific routes are efficiently operated, furnish good service and are adequate to move "the present volume of traffic and any additional volume that may be anticipated in the foreseeable future." It also found that operating conditions on the Rio Grande's mountainous route between Ogden and Denver are "more onerous" than those on the lines of the Union Pacific or any other western line and that dissimilarities in transportation and operating conditions were so substantial and unfavorable to the Rio Grande as to prevent a finding of discrimination against the Rio Grande resulting from refusal of lines comprising Union Pacific routes to make their joint rates applicable over the Rio Grande.

Notwithstanding those findings, the Commission held that the Rio Grande's's combination rates were unreasonable and unduly prejudicial to shippers using its line and ordered the railroad appellants herein and other

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5 The Commission's findings are summarized at pages 18-23, Jurisdictional Statement in No. 118, and its report is printed as Appendix B to that Statement.

railroads to make their joint rates applicable via the Rio Grande on the several articles named in the order, which articles comprise about 57,000 carloads annually, or one-third of the traffic the Rio Grande seeks to divert to its line.

The Commission, further disregarding its own findings as to the efficiency, surplus capacity and shorter mileage and transit time of Union Pacific routes compared to the Rio Grande, nevertheless, asserted that shippers of perishable food products from the northwest area to markets in the eastern and southern parts of the country are "debarred from effective participation" in the marketing system for such products because they would have to pay higher rates if they shipped via the Rio Grande than they pay when shipping over the shorter and faster Union Pacific routes from the same origins to the same destinations, and condemned Union Pacific routes as "inadequate" and less economical than the Rio Grande route, because "at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available and higher rates apply".

The Commission rejected the Rio Grande's contention that through routes for the traffic concerned were already in existence via its line and that the joint rates it demanded should be required without regard to the short haul prohibition of Section 15(4) of the Act. The Commission held that prescription of any of the joint rates demanded by the Rio Grande would have to be grounded upon clause "(b)" of Section 15(4), which permits the Commission to short haul existing routes only if it finds that "the through route *proposed* to be established is

needed in order to provide adequate, and more efficient or more economic, transportation".[6]

The district court (Circuit Judge Johnsen dissenting on the ground that the Commission's order was void and should be enjoined in its entirety) held that the order is valid only to the extent that it embraces shipments of the articles named therein to stop for processing, milling, grazing cattle in transit and other commercial operations known as "transit privileges", at points on the Rio Grande and later reshipped to destinations beyond its termini. (App. D, Jurisdictional Statement, No. 118.) In sustaining the order to that extent, the court adopted a different theory or basis from that on which the Com-

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6 Section 15 (4) provides

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

mission rested its order. The Commission had correctly held that it could not order through routes via the Rio Grande short-hauling Union Pacific routes unless it could first find that Union Pacific routes were "inadequate", and, as stated above, it found them inadequate because they were not available at points served exclusively by the Rio Grande, and because higher rates apply over the Rio Grande.

The majority of the court held that the evidence does not support or justify the Commission's finding that service over Union Pacific routes is inadequate or less economical than Rio Grande routes. But the court proceeded to hold that transportation service for the involved traffic over the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" and that the through routes and joint rates ordered by the Commission are justified for shipments stopped for in-transit privileges at points on the Rio Grande and later reshipment to points beyond its termini. For shipments *not* stopped for in-transit privileges on the Rio Grande, the court held the order invalid.

ARGUMENT

The Part of the Judgment of the District Court Involved in Nos. 117 and 119 Should Be Affirmed

The appeals in Nos. 117 and 119 are from that part of the judgment of the district court which enjoins the order in part, and rejects and nullifies the Commission's condemnation of Union Pacific routes as "inadequate and less economical" than the Rio Grande route, on the novel and fantastic grounds, (1) that "at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available and higher rates

apply", and (2) that shippers of perishable food products from the northwest area to markets in the eastern and southern parts of the country are "debarred from effective participation" in the marketing system for such products because freight rates are lower over Union Pacific routes than the same shippers would have to pay if they routed their products for a "bridge" haul over the Rio Grande from the same northwest origins to the same far eastern and southern destinations.

The Commission's condemnation and short-hauling of the shorter and faster Union Pacific routes on these grounds is so manifestly erroneous as to vitiate and nullify the entire order, and we submit that to the extent the judgment below enjoins and annuls the order, the judgment should be affirmed without awaiting oral arguments and briefs. A similarly frivolous and untenable reason for condemning and short-hauling a shorter existing route under Section 15(4) of the Act was flatly rejected by this Court, *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, in the first short-hauling through routes case considered by this Court after Congress conferred the through routes powers on the Commission.

The majority opinion below (App. D to Jurisdictional Statement, No. 118) correctly holds that transportation service over the shorter, faster and efficient Union Pacific route is clearly adequate, and as "economical" as it would be via the Rio Grande under the order because the joint rates ordered by the Commission for application via the Rio Grande would only *equal* the joint rates now applicable to the same traffic moving over Union Pacific routes. Those conclusions of the court are inescapable from the Commission's own findings (see pp. 18-23,

Jurisdictional Statement, No. 118), and upon them the court was clearly right to the extent it enjoined the order.

In the face of its own findings, the Commission's conclusion that the required through routes and joint rates via the Rio Grande are "necessary and desirable in the public interest" is but an assertion that "public interest" requires that the traffic be diverted to and move over the longer Rio Grande as a "bridge" line instead of the shorter and direct Union Pacific line for part of the distance between the far northwest and the eastern and southern parts of the country. A similar misinterpretation by the Commission of the term "public interest", in an effort to deprive the Missouri Pacific Railroad of a 300-mile haul and leaving it a 46-mile haul by ordering through routes for the benefit of a 40-mile, financially weak railroad, was rejected in *Missouri Pac. R. Co. v. United States,* 21 F. (2d) 351. The three-judge district court unanimously nullified the order, and held that public interest "does not justify the taking of a part of petitioner's [Missouri Pacific] line and using it as an instrumentality for producing income for the Subiaco [railroad] in competition with and to the detriment of the petitioner". The judgment of the district court was unanimously affirmed in *United States v. Mo. Pac. R. Co.,* 278 U. S. 269, in which this Court held (p. 277) that the short haul prohibition in Section 15(4):

> "* * * lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. *The purpose is to protect the long haul routes of carriers.*" (Italics added.)

The addition in 1940 of clause (b) to Section 15(4) did not, as the Commission apparently thinks, abandon the steadfast purpose of Congress to protect the long hauls of carriers. In *I. C. C. v. Columbus & Greenville Ry.*, 319 U. S. 551 (decided June 7, 1943), this Court quoting Section 15(4) as amended in 1940, held at page 555:

> "Disregard of the statutory requirements for the establishment of joint tariffs may have important substantive consequences. The Interstate Commerce Act contemplates that joint railroad rates shall be established only by concurrence of the participating carriers or by the Commission in proceedings under §15. In the exercise of its power under §15 to fix joint rates without the concurrence of the participating carriers, *the Commission is required by §15(4) to protect, in stated circumstances, the long hauls of participating carriers, and to give reasonable preference to originating carriers.*" (Italics added.)

The more recent decision (June 2, 1952) of this Court, in *Thompson v. United States*, 343 U. S. 549, plainly shows that the Commission is not justified in construing the 1940 addition of clause "(b)" as, in effect, repealing the short haul prohibition. At page 555, this Court said:

> "The Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes was rejected by this Court in *United States v. Missouri Pacific R. Co.*, 278 U. S. 269 (1929). Following this decision, the Commission asked Congress to delete completely the short-hauling restriction. In the Transportation Act of 1940, Congress refused to eliminate the restriction against short hauling, but adopted a compromise under which the restriction against short hauling was retained subject to a new exception applicable only where the Commission makes the special findings listed in the amended Section 15(4)."

The Commission's holding in the instant case that the 1940 addition of clause "(b)" as an exception to the short haul prohibition empowers it to short haul the adequate, shorter, faster and cheaper Union Pacific routes is exactly contrary to the Congressional intent as shown by the history of legislative action leading to the enactment of clause "(b)". In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

> "Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available* * * * The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate*. If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

That the Congressional purpose to protect the long hauls of carriers and to prevent the Commission from depriving them of long hauls by diverting traffic to financially weak short lines, was not abandoned by the 1940 enactment of clause "(b)" is plainly demonstrated by the fact that in the same enactment it added to Section 15(4) the provisions:

> "That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

On its own findings that the Union Pacific routes are shorter, faster, efficient and adequate to haul any foreseeable volume of involved traffic at lower rates than those maintained over the longer, more onerous, Rio Grande route, the Commission clearly was precluded from condemning the Union Pacific routes as "inadequate and less economical" than the Rio Grande, and the lower court was correct in so holding.

A second and equally erroneous and untenable basis on which the Commission attempts to rest its order is the Commission's newly invented criterion that short-hauling the Union Pacific routes is justified on the ground that the marketing system for perishable food articles requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible". The Commission invented this new criterion in the face of the statutory standard of Section 1(4) of the Act which, by its own terms, and as held by this Court in the *Thompson* case, p. 558, requires carriers to establish *only* "reasonable through routes". The Commission's new criterion nullifies not only the statutory standard and the short haul prohibition, but also the rule and norm of its prior decisions[7] that when sufficient through routes have been established adequately and efficiently to move the traffic from origin to destination, additional through

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7 In *Sec'y of Agriculture v. United States*, 347 U.S. 645, 653, this Court refused to sustain an order because of the Commission's unexplained departure from the "norms" of its prior decisions, and its failure to spell out the "legal basis" of its decision.

routes are not justified, to say nothing of as many routes "as possible" to short haul admittedly adequate, more efficient, and shorter existing routes by requiring longer and more onerous routes.[8]

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8 Examples are:

In *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I.C.C. 331, 333-334 the Commission said:

"Section 15(4) of the act has been in its present form since September 18, 1940. In several proceedings since then, reasonable through routes which short haul one or more carriers have been prescribed. See *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I.C.C. 333 (sustained in *Pennsylvania R. Co. v. United States*, 323 U.S. 588); *Allied Mills, Inc., of Virginia v. Alton R. Co.*, 272 I.C.C. 49; *California Milling Corp. v. Atchison, T. & S. F. Ry. Co.*, 269 I.C.C. 725 and 274 I.C.C. 120. In the first two of those proceedings it appeared that the routes required to be established eliminated expensive out-of-line hauls, and in the latter proceeding the routes required were shown to be shorter in many instances than those which had existed. In all of those proceedings the routes required were at least as economical, from the standpoint of the carriers as well as of the shippers, as were most of the existing routes.

"The instant situation differs. All of the routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation. In addition, because of the circumstances here present, we believe a requirement that the routes sought be established would not 'give reasonable preference' to the originating carrier."

In *Kansas City Hay Dealers Asso. v. C.G.W.R.R.Co.*, 49 I.C.C. 372, at page 377, the Commission held:

"To compel the application of short-line rates over indirect and longer routes, merely as a means of providing a channel of doubtful benefit to comparatively few shippers, would lay an unnecessary expense upon the railroads *against the interest of the public as a whole*. When joint rates that are neither unreasonable nor unduly prejudicial are maintained over direct routes *adequate response is made to the reasonable requirements of the public*, and carriers should not be required to perform wasteful transportation by maintaining the same rates over indirect and more circuitous routes." (Italics added.)

In *C. & C. Traction Co. v. B. & O. S.W.R.R.Co.*, 20 I.C.C. 486, 492, the Commission said:

"* * *we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates* * *"

A third patently erroneous basis for the order is that the Commission, though positively declaring that any order requiring through routes and joint rates via the Rio Grande in this case must be grounded on the provisions of Section 15(4)(b), thoroughly mutilated, departed from and declined to make the findings required by clause "(b)", which requires findings that "the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation", and which this Court held in the *Thompson* case, p. 555, to be "applicable only" where the Commission makes the "special findings" so required. The Commission here departed from the standards of that clause, first, by asserting a necessity for "more" adequate transportation, and, second, by finding the Rio Grande route "necessary and desirable" *only* to provide "adequate and more economic transportation". It did not find, as required by clause "(b)", that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes. And, although it found that the Rio Grande route was necessary to provide "more economic" transportation, this is obviously an arbitrary and incorrect assertion for, as pointed out by the majority opinion below, the transportation via the Rio Grande could not be "more economic" because the rates ordered via the Rio Grande are "the same" as, and would only "equal" present rates via Union Pacific routes, and wasteful and uneconomical transportation would necessarily result from the fact that every carload that might be diverted to the Rio Grande would require from 33 to 219 more miles of transportation effort and at least 24 hours more time than if moved via Union Pacific routes. Clearly, the requirement in clause "(b)" of a finding that the *proposed* new route will provide "more economic" transportation may not be satisfied merely by reducing

the higher rates of the Rio Grande so as to equalize them with rates via Union Pacific routes, and this would be so even if the Rio Grande route were not more onerous and longer than Union Pacific routes.

Contrary to the positive declaration in the Commission's report that any requirement of through routes and joint rates via the Rio Grande must be grounded on findings as specified in Section 15(4)(b), the Jurisdictional Statement of the Government asserts at pages 10 and 11 that the Commission's finding that the combination rates via the Rio Grande were unreasonable and unduly prejudicial to shippers using that line constitutes "an independent basis of the Commission's order establishing through routes". The Rio Grande's Statement makes the same assertion at page 13. Thus, both of those appellants would justify the order on a different statutory basis than that on which it rests, by having this Court ignore the Commission's direct powers to cure unreasonable rates under Section 1 and unduly prejudicial rates under Section 3(1) and hold that the Commission has power to order joint rates over the longer, more onerous Rio Grande route that would exactly equalize rates maintained over shorter, adequate and more efficient Union Pacific routes; upon the Commission's mere assertion that equalization of the rates over the two routes is necessary and desirable in the public interest because it has found the Rio Grande's higher rates unreasonable and unduly prejudicial. No decision can be found to support such contentions, and they are clearly erroneous and squarely in conflict with the statutory pattern and specific independent provisions thereof, and with decisions of this Court. The decision in *Central R. R. Co. v. United States*, 257 U. S. 247, 257, holds that the Commission has

ample direct powers to remedy unreasonable rates and to cure undue prejudice and discrimination, and that the Commission may not "accomplish by indirection" that which it has direct power to accomplish; *Thompson v. United States, supra,* makes it plain enough that the Commission may not use its power to prescribe reasonable rates as a means of evading or circumventing the short haul prohibition in Section 15(4); *Texas & Pacific Ry. Co. v. U. S.,* 289 U. S. 627, at page 650, lays down the positive rule that, where undue prejudice or discrimination is found, the most the Commission can require is that the violation be eliminated and that "an actual alternative" be given the offending carriers to abate the violation; and *United States v. Mo. Pac. R. Co.,* 278 U. S. 269, plainly precludes any interpretation or use of the Commission's through routes powers for the financial benefit of the Rio Grande, or any purpose not clearly within the legislative intent.

At page 11, the Government's Jurisdictional Statement argues:

> "The Commission found that the Union Pacific, by refusing to establish through routes and joint rates with the Rio Grande, has subjected shippers who use the latter's route to undue prejudice, and, by the same token, has given undue preference to their competitors who use the Union Pacific routes. Such action would appear to violate the statutory prohibition against a carrier subjecting any person to preference or prejudice 'in any respect whatsoever.'"

The Rio Grande's Jurisdictional Statement at page 13 asserts that the Commission's findings of undue prejudice in violation of Section 3 against shippers using the Rio Grande affords a legal basis for the Commission's

requirement of through routes and joint rates and that, in view of the Section 3 finding, the restriction in Section 15(4) on the Commission's power to require short-hauling through routes does not apply.

While Section 15(4) provides that in establishing through routes, the Commission shall not, "except as provided in Section 3," require a carrier to short haul itself, there is no "provision" in Section 3 which even hints that the Commission has power to short haul existing routes by requiring an additional route to remedy undue prejudice in violation of Section 3. As pointed out by the Commission itself in *Nicholson Universal S. S. Co. v. Pennsylvania R. Co.*, 203 I. C. C. 637, at page 647, the Commission's power to require through routes and joint rates has been enlarged since its original enactment in 1906, while the wording of Section 3 enacted in 1887, "has remained substantially the same and does not include within its terms any reference to routes." Since that decision was issued, Congress expanded Section 3 to prohibit undue preference or advantage to any port, region or territory, but at the same time it added to that section the restrictive proviso—

> "* * * this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

From our discussion above and authorities there cited, this Court will find no occasion to give serious consideration to contentions of the Government and the Rio Grande that a finding of violation of Section 3 emasculates and renders ineffective the short-hauling prohibition in Section 15(4). Their arguments that a Section 3 finding justifies the short-hauling order in this case are pressed, apparently because their counsel recognize that the Com-

mission's own findings of fact afford no basis or support whatever for its order requiring through routes and joint rates via the longer and more onerous Rio Grande route, and in recognition of the further fact that in attempting to justify the short-hauling order under clause "(b)" of Section 15(4) the Commission mutilated, departed from and failed to make the jurisdictional findings required by that clause, as we have already noted above.

Plainly, the order is entirely vitiated and nullified by the Commission's failure to make the jurisdictional findings required by the standards and criteria of Section 15(4)(b), upon which its report definitely states that its order is based, and counsel may not substitute a new and different basis in their efforts to defend the order. The majority of the district court was clearly right in holding that if the Commission may order new through routes and joint rates that short haul existing routes as a remedy for undue prejudice and preference in violation of Section 3(1), "the prohibition of Sec. 15(4) would be practically emasculated."

Efforts of the Government and the Rio Grande to transform this case into an interterritorial case of undue preference and prejudice among shippers by emphasizing this Court's decision in *New York v. United States*, 331 U. S. 284, are unavailing and merit no consideration by this Court. That decision did not involve, as here, the case of an impecunious short line railroad attempting by its own complaint, to substitute its longer line for a "bridge" haul of traffic to be diverted from shorter, more efficient routes for the admitted purpose of improving its financial position. Instead, the decision involved an order resulting from an investigation covering most of the nation by the Commission pursuant to statutory

command, and requiring removal of undue preference and prejudice found as between interterritorial class rates paid by shippers.

The *New York* case did not involve the Commission's power to order through routes or joint rates, and it is entirely erroneous to suggest that the decision affords the slightest support for a contention that the Commission may lawfully order through routes and joint rates that short haul existing routes upon a finding of undue preference and prejudice in violation of Section 3. This is also true of the other cases cited, in the Jurisdictional Statements of the Government and the Rio Grande.

The suggestion at page 5 of the Government's Statement that the through routes required by the order are partly justified by the Commission's statement in its report that shippers of perishable products from the northwest territory "are debarred from effective participation" in the markets for such articles, merits no consideration because, first, the Commission's own statement is clearly fallacious since those same shippers of the same articles from the same points in the northwest area to the same destinations have the shorter, faster Union Pacific routes available at lower rates and have always shipped their products over those routes without complaint of any kind, second, because those shippers market their products in all 48 states and several foreign countries and, third, the order includes ordinary livestock and tombstones—articles that could not by any stretch of imagination be classified as perishable food products.

In short, so long as the Union Pacific routes are adequate to haul the traffic efficiently and economically, there can be no possible legal justification for requiring this

traffic to pass over the longer, more onerous Rio Grande route in its movement from the northwest area to the large consuming markets, such as Chicago, New York, Boston and others in the east and southeast portions of the country.

Contrary to the Rio Grande's suggestion at page 11 of its Statement, diversion of the traffic from the Union Pacific to the Rio Grande at Ogden for a bridge haul over the Rio Grande to Denver instead of through movement over the Union Pacific will not correct or relieve such isolated and hypothetical instances as there indicated at points in Kansas and Oklahoma which are several hundred miles from the eastern termini of the Rio Grande's line. The remedy for such situations, if any exist, is simply to remove pertinent restrictive routing provisions from the tariffs of carriers publishing *existing* through routes and joint rates, and not the establishment of new routes via the Rio Grande's longer line that short haul the shorter Union Pacific routes.

The Part of the Judgment of the District Court Involved in No. 118 Should Be Reversed

The appeal in No. 118 is from that part of the judgment of the district court which sustains the validity of the Commission's order insofar as it requires through routes and joint rates on shipments of the specified articles stopped for in-transit privileges, such as processing, storage, milling and grazing cattle, at points on the Rio Grande and later reshipment beyond its termini. In sustaining the order to that extent, the district court committed fundamental errors so obviously requiring reversal as to make it unnecessary for this Court to hear further argument.

First: Having correctly held that the evidence does not support or justify the Commission's finding that Union Pacific routes are inadequate and less economical than the Rio Grande, and, thus, rejecting and nullifying the fantastic and untenable grounds (*ante*, pp. 7-8), on which that finding and the whole order rests, the court plainly erred in refusing to annul and enjoin the entire order instead of enjoining it only as to shipments of the specified articles *not* stopped for in-transit privileges at points on the Rio Grande. For, if, as the court correctly held, the basic jurisdictional finding and fundamental premise on which the Commission based the order are legally, factually and rationally erroneous and untenable, then certainly the entire order is null and void, and the court clearly erred in refusing to enjoin and set it aside, instead of exceeding its own powers by devising a different but equally erroneous legal and factual basis for the order, as will be shown presently, in its efforts to save a part of it.

Second: The majority opinion of the district court clearly shows that the court proceeded on the wholly erroneous assumption that there are no transit privileges available on the Rio Grande, that the absence or lack of such privileges affords a legal basis for a finding that transportation service via the Rio Grande is "inadequate", and that the Commission's requirement of through routes and joint rates is justified in order to make such privileges available on the Rio Grande (App. D, pp. 11-12, Jurisdictional Statement, No. 118). But the fact is that all such privileges *are available* on the Rio Grande, as expressly stated in its complaint to the Commission, in the Commission's report and in the Rio Grande's Jurisdictional Statement at page 7, where it is plainly shown that the Rio Grande's complaint is not the absence or lack of in-transit

privileges on its line but the fact that shippers make no use of those privileges at points on its line for the traffic concerned because rates via the Rio Grande are so much higher than rates via the Union Pacific routes.

If, as the district court erroneously assumed, an absence or a lack of transit privileges on the Rio Grande's line were the cause of its inability to divert the traffic and revenues to its line, then no complaint to or order of the Commission was necessary, for it is settled by decisions of this Court and the Commission that establishment of a transit privilege is "a matter local to the railroad on which the transit point is situated", and that "[w]hether the privilege shall be granted or withheld is determined by the local carrier." *Central R. R. Co. v. United States*, 257 U. S. 247, 255.

As the majority decision below, in sustaining the validity of the order insofar as it requires through routes and joint rates on shipments of the specified articles stopped for in-transit privileges at points on the Rio Grande rests entirely on the false or erroneous assumption that those privileges are not now available on that line, we submit that, insofar as it sustains the order for such shipments the judgment is so clearly erroneous as to warrant no further argument for its reversal.

Third: The district court committed plain error in holding that as to shipments stopped for transit privileges at points on the Rio Grande, the order is valid because of its own finding that transportation via the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical," and, further, in sanctioning the Commission's use of its through route powers to

force a reduction in the Rio Grande's rates to equalize them with rates via Union Pacific routes. (App. D, pp. 12-13, Jurisdictional Statement, No. 118.)

The clear and unambiguous purpose of clause "(b)" of Section 15(4) (*ante*, p. 6, footnote 6), on which the Commission based the order, is to permit short-hauling *existing* routes where they do not furnish service that meets all of the tests specified in that clause and where improved service which meets the specified tests will be provided by a *proposed new route*. As correctly held by both the Commission and the district court, the *proposed* Rio Grande route could not be ordered without findings by the Commission that service furnished by *existing* Union Pacific routes does not meet the tests specified in clause "(b)", and that the *proposed* Rio Grande route is "needed" to provide service which would meet those tests. Unless the evidence justifies the "special findings" listed in clause "(b)", the authority there granted to short haul *existing* routes is not "applicable" and may not be used, *Thompson* case, *supra*, p. 555.

The Commission concluded erroneously, we submit, that *existing* Union Pacific routes are "inadequate" because they are "not available" at points on the Rio Grande and because higher rates apply at points on that line than at points on the Union Pacific routes. But the court, although holding that the evidence does not support the Commission's finding that transportation service via Union Pacific routes is inadequate or less economical than service via the Rio Grande and enjoining the order as to shipments *not* requiring stoppage at points on the Rio Grande for transit privileges, proceeded on the theory that the order could be justified as to

shipments requiring stoppage for transit privileges at points on the Rio Grande, if it could be found that transportation service via the *proposed* Rio Grande route is inadequate, and, thereupon, made its own finding that for such shipments the service via the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical", and sustained the order for such shipments. (App. D, pp. 12-13, Jurisdictional Statement, No. 118.)

The court thus not only reverses and substitutes its own, for the Commission's approach and basis for its order but also reverses and distorts the statutory pattern and circumstances under which short-hauling *existing* routes is permitted under clause "(b)". In other words the court condemns the very route *proposed* to be established as "needed" to provide the "adequate, and more efficient or more economic, transportation", contemplated by clause "(b)".

While the court was clearly correct in holding that the Union Pacific routes, being shorter, faster and having lower rates than the proposed Rio Grande route, may not be condemned as inadequate and less economical than the Rio Grande route and that there is no basis in law or fact for the Commission's condemnation of the Union Pacific routes, we submit that upon that correct holding the court clearly erred in failing to enjoin and annul the order in its entirety, and, further, that the court grossly misconstrued clause "(b)" and proceeded upon a palpably erroneous and untenable theory in holding that clause "(b)" permits short-hauling the adequate, efficient and economic Union Pacific routes because it finds from the evidence that service via the Rio Grande "is inadequate and also inefficient and uneconomical."

It is clear beyond a shadow of doubt that the statute does *not* permit short-hauling the shorter, adequate, efficient and more economic Union Pacific routes for the purpose of equalizing their lower rates with the Rio Grande's higher rates, or for the purpose of improving the Rio Grande's service, or reducing the cost of it to shippers.

If the Commission is correct in its view that Union Pacific routes may be condemned as inadequate and less economical and short hauled by establishment of a longer route via the Rio Grande because higher rates apply on that line, and because the shorter Union Pacific routes with their lower rates are not available at points on the Rio Grande, then the Commission is at liberty to condemn and short haul every railroad and every through route in the country as inadequate and uneconomical and require them to short haul themselves by joining in through routes that pass through every point on every railroad in the country on the theory that such disregard of the short haul prohibition in Section 15(4) is necessary to provide adequate and more economic transportation.

If the court is correct in its view that the shorter, efficient, and adequate Union Pacific routes may be short hauled because service for shipments requiring transit at points on the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical", then every *existing* through route may be short hauled wherever the Commission can find a railroad that has higher rates and is inadequate, inefficient and uneconomical.

Neither of these plain distortions of the Act can afford any possible legal basis for the part of the order

sustained by the court, and, because both completely nullify the short-hauling prohibition of Section 15(4), and ignore the adequate, efficient and economic service admittedly provided by existing Union Pacific routes, the order clearly is void and must be annulled. *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538; and *United States v. Mo. Pac. R. Co.*, 278 U. S. 269.

Fourth: Although the court correctly holds that transportation service is as economical via the Union Pacific routes as it would be via the Rio Grande under the Commission's order for traffic *not* requiring stoppage for transit at points on the Rio Grande, because the joint rates prescribed would *only equal* the joint rates via Union Pacific routes, it, nevertheless, holds that for shipments stopped for transit privileges at points on the Rio Grande, the through routes and joint rates prescribed by the Commission are necessary "to provide adequate and more economic transportation" and "will result in more economical transportation" (Appendix D, pp. 19 and 13, Jurisdictional Statement, No. 118). It is impossible, we submit, that "more economic" transportation than that provided by the shorter Union Pacific routes can be provided via the Rio Grande over its longer and more onerous route by simply reducing its higher rates to the exact level of rates maintained over Union Pacific routes. And, while reducing the rates via the Rio Grande will make transportation over that line cheaper for shippers than it is under its present combination rates, plainly a mere equalization of its rates with rates of Union Pacific routes will not provide "more economic" transportation within the meaning of clause "(b)", nor does it justify short-hauling Union Pacific routes. *Thompson* case, *supra*.

Fifth: In sustaining the Commission's finding that the Rio Grande route is "necessary and desirable in the public interest, in order to provide adequate and more economic transportation," the court sanctions and upholds jurisdictional findings by the Commission which clearly depart from and fail to comply with the statutory standards and criteria of clause "(b)", on which the Commission states its order is based. Under that clause, as noted above, *existing* routes may be short hauled if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation," but the clause is "applicable only" where the Commission makes "the special findings" listed therein, *Thompson* case, *supra*, p. 555. The Commission in this case did not make "the special findings." It made only a part of them. It did not find that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than that provided by Union Pacific routes. The Commission clearly may not select one or more of the several criteria from the statutory standard of clause "(b)" and disregard the others, for this Court, in dealing with the language of clause "(b)", said in *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, 592-593, that, "if the Commission is asked to abrogate the general rule with regard to the short-haul, the statute says it must have regard to several matters," the first of which is "adequacy of transportation" and the second and third are "efficient and economic transportation."

CONCLUSION

For the foregoing reasons, we submit that there is no warrant for the delay and expense of printing the record in these cases or for briefs and oral arguments, and that this Court should affirm the judgment of the dis-

trict court involved in the appeals in Nos. 117 and 119 and reverse the portion of the judgment below from which the appeal is taken in No. 118, and remand the case to the district court with direction to issue the injunction and relief prayed by the plaintiffs in that court.

Respectfully submitted,

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PROOF OF SERVICE

I, ELMER B. COLLINS, one of counsel of record for Movants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 29th day of June, 1955, I served, on behalf of all Movants herein, copies of the foregoing Motion on the several adverse parties in Nos. 117, 118 and 119, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
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Washington 25, D. C.

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and with first-class postage prepaid to:

Donald R. Ross, Esq.
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2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq., Asst. General Counsel
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3. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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4. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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5. On Idaho Farm Bureau; Public Service Commission of Utah; Committees of Railroad Brotherhoods who work for The Denver and Rio Grande Western R. R. Co., and National Live Stock Producers Association, by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

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Nos. 117, 118, 119, 332, 333, 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

The Denver & Rio Grande Western Railroad Company, Appellant,

v.

Union Pacific Railroad Company, et al.

No. 118

Union Pacific Railroad Company, et al., Appellants,

v.

United States of America, and Interstate Commerce Commission.

No. 119

United States of America, Interstate Commerce Commission, and Secretary of Agriculture, Appellants,

v.

Union Pacific Railroad Company, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

Washington Public Service Commission, et al., Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

No. 333

Union Pacific Railroad Company, et al., Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

No. 334

United States of America and Interstate Commerce Commission, Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

SUPPLEMENTAL MEMORANDUM FOR UNION PACIFIC RAILROAD COMPANY, ET AL., WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.

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Appendix A—Statement of A. J. Stilling, Asst. Freight Traffic Mgr., Union Pac. R. R. Co.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, APPELLANTS,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.,
APPELLANTS,

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL.,
APPELLANTS,

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SUPPLEMENTAL MEMORANDUM FOR UNION PACIFIC RAILROAD COMPANY, ET AL., WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.

This Supplemental Memorandum is filed pursuant to suggestions of the Court made during the oral arguments April 23rd and 24th that additional information be furnished the Court concerning certain questions and particularly the question whether the tariffs published in 1906 to 1912 cancelled the through routes previously published in connection with the Rio Grande via Utah gateways and the Union Pacific; whether the tariffs publishing joint rates for the involved traffic when the Rio Grande filed its complaint with the Commission August 1, 1949, published any provisions concerning through routes in connection with the Rio Grande, and whether the tariffs publishing local rates of the Union Pacific publish any notice, statement or "holding out" of through routes or through service by the Union Pacific in connection with the Rio Grande at the combination or sum of the local rates.

In approaching the through routes question and the Rio Grande's contention that through routes for the traffic concerned now exist and for many years have existed via its line, the following facts and circumstances should be kept in mind:

Although the Rio Grande's complaint to the Commission alleged (Vol. I, p. 6) that "through routes now exist and have for many years existed for the interchange of traffic by complainant [Rio Grande] with the Union Pacific" at points in Utah and with the Union Pacific

and certain other defendants at Denver and other points in Colorado, the Rio Grande did not allege and has never attempted to state or show by evidence or otherwise what through routes it contended to be in existence via its line for the involved traffic from and to the northwest nor what the termini of the claimed through routes are, or for what commodities the through routes are claimed to exist or what carriers comprise the claimed through routes for the traffic it seeks to divert for a "bridge" haul over its line between points in the northwest area and points in the eastern and southern parts of the country; nor did the Colorado court indicate what through routes between what termini for what commodities or what carriers form the through routes it held to be in existence in connection with the Rio Grande (Colo. R. Nos. 332, 333 and 334, page 292). In short, the Rio Grande and the Colorado court both claim that through routes are in existence via the Rio Grande's line for the traffic concerned but apparently base their conclusion solely on the fact that traffic can be physically interchanged between the Union Pacific and the Rio Grande at Ogden and at Denver, and from that fact they erroneously conclude that the Rio Grande automatically becomes a part of all or some unnamed and unspecified through routes out of the millions of routes that exist for the transcontinental traffic moving between the 2,900 stations in the northwest area and the 39,000 stations in the eastern and southern parts of the country (see brief of Union Pacific and other railroads in No. 333, pp. 53-86).

Since a through route is necessarily definitely and specifically described or determinable from tariffs by naming its termini, the commodity or commodities for which it exists, the connecting carriers which form the

through route, it is and would be impossible for the Union Pacific and other railroads, or for the Commission to give practical application to the contention of the Rio Grande and the holding of the Colorado court that unnamed, unspecified and undescribed through routes are in existence between the Union Pacific and the Rio Grande for the traffic concerned.

WHETHER OR NOT THROUGH ROUTES FOR THE INVOLVED TRAFFIC WERE ALREADY IN EXISTENCE VIA THE RIO GRANDE IS A MOOT QUESTION WHICH HAS NO BEARING UPON THE VALIDITY OF THE ORDER ISSUED BY THE COMMISSION.

Although the Rio Grande has argued on brief and orally to this Court that the question whether through routes were already in existence via its line for the involved traffic is "crucial" to the decision to be made in this case, and the Colorado court held that the Commission's finding that the through routes claimed by the Rio Grande were not already in existence via its line "obviously prejudiced the entire proceeding" before the Commission (Colo. R. 288), neither the Rio Grande nor the Colorado court indicates how or in what manner the Commission's finding on the through routes question is now relevant or in what manner that finding prejudiced the Rio Grande.

The Rio Grande, of course, claimed that through routes already existed via its line for the involved traffic in the hope of avoiding the short-haul restriction upon the Commission's authority to order an additional through route which short hauls existing through routes, and its pursuit of that question through the Colorado court and before this Court clearly is for the purpose of forcing

the case back upon the Commission, insofar as it failed to grant the full demands, in the further hope of obtaining the financial benefit of joint rates on still other commodities, while precluding the Commission from reconsidering that part of the "prejudiced" proceedings which gives the Rio Grande the financial gain the order confers.

We submit that all of the talk both in briefs and in the oral arguments concerning the question whether the five-to-five decision of the Commission was a "clear-cut" holding that through routes already exist via the Rio Grande for the involved traffic, and the discussion as to whether such routes did exist in fact or in law, is idle and futile, because, for the reasons set forth at pages 36-38 of the brief of Washington Public Service Commission, et al., No. 332, and at pages 87-98 of the brief of Union Pacific Railroad Company, et al., No. 333, the question whether through routes already existed via the Rio Grande became and has been moot, since the Commission, although finding that through routes via the Rio Grande were not in existence, nevertheless found that they were necessary in the public interest to provide adequate and more economic transportation.

With the latter finding, the short-haul prohibition of Section 15(4) became impotent and was no longer an obstacle to the Commission's ordering the joint rates demanded by the Rio Grande to the extent they were justified by the evidence. This is indisputable for the reason that as argued at page 17 of the brief filed in this Court by The American Short Line Railroad Association in Nos. 332, 333 and 334, "the mere finding that through routes existed, as was alleged by the Rio Grande in its complaint to the Commission, would not grant the relief" sought by the Rio Grande, because "it is the level of

rates which is the impediment to full utilization of the routes." Contrary to the contention there made, the "degree this impediment is to be removed" is a question already answered by the Commission by its finding that joint rates via the Rio Grande equal to those maintained over Union Pacific routes were necessary in the public interest, but, upon the showing made by the evidence, only for the articles named in the order.

Having eliminated the obstacle of the short-haul prohibition by its finding that through routes via the Rio Grande were necessary in the public interest, the Commission then had only the problem of determining for what commodities the evidence showed joint rates to be necessary in the public interest. Having given full effect to the evidence by its finding that public interest required joint rates only on the commodities named in the order, the Commission has exhausted the so-called "relief" it could grant the Rio Grande. Obviously, it would have benefited the Rio Grande none at all if the Commission had found that through routes were in existence via the Rio Grande for all commodities—but that the evidence failed to show that public interest required equal joint rates on any commodity.

The impotency and "straw-man" nature of the question whether through routes already existed via the Rio Grande for the involved traffic is sharply demonstrated by the fact that the Chief Examiner found in his proposed report (sheet 5) the routes did not exist but were necessary in the public interest for all commodities, and by the fact that Commissioner Patterson held that in his view the evidence justified joint rates on "lumber and articles taking lumber rates" and that those articles should also be included in the order, whereas Commissioner Arpaia held that through routes were already in exis-

tence via the Rio Grande for the involved traffic but that the evidence of public interest warranted joint rates "only" on the commodities for which relief is included in the majority report" (Nebr. R. Nos. 117, 118, 119, pp. 78-79).

Therefore even if the case be remanded to the Commission as ordered by the Colorado court, or upon decision of this Court holding that through routes were already in existence via the Rio Grande for the involved traffic, such remand could not direct the Commission to abandon its exclusive administrative function of appraising the extent to which the evidence of public interest requires joint rates. Thus, such remand would be futile since the Commission has already determined that the evidence justifies joint rates in the public interest only for the commodities named in its order.

However, if this Court should disagree with the foregoing views, it still could not, or should not, reach the question whether through routes via the Rio Grande already exist unless and until it has considered and overruled the contentions in our opening briefs in the Colorado case:

(1) That the Commission's *failure* to compel through routes and joint rates for commodities not named in the order is neither an "order" nor a part of the order issued and therefore there is no jurisdictional basis for the Colorado court's action, and,

(2) That, as the Rio Grande has no semblance of a legal right to the traffic it seeks to divert to its line, it was without standing or legal right to maintain its suit in the Colorado court.

These contentions are discussed, respectively, at pages 31 and 18 of the brief of Washington Public Service Com-

mission, et al., No. 332, and at pages 27 and 35 of the brief of Union Pacific Railroad Company, et al., No. 333.

THE THROUGH ROUTES ESTABLISHED IN CONNECTION WITH THE RIO GRANDE IN 1897 DURING THE RECEIVERSHIPS WERE EXPLICITLY CANCELLED BY TARIFFS PUBLISHED AFTER THE RECEIVERSHIPS ENDED.

The history of through routes and joint rates, which existed for a short period more than 50 years ago, in connection with the Rio Grande for through traffic between the northwest area and the eastern part of the country is short and simple:

Having invested hundreds of millions of dollars during the 1870's in constructing and acquiring lines in the northwest to develop and serve that area, the Union Pacific, desiring to protect and retain its long haul to and from the Missouri River on traffic from and to the northwest, refused to establish through routes and joint rates with the Rio Grande for that traffic.

Union Pacific lost control in 1897, through separate receiverships of its lines and those of its northwest subsidiaries, the Oregon Short Line Railroad and Oregon-Washington Railroad & Navigation Company. In that year, the Short Line and the Navigation Company established through routes and joint rates with the Rio Grande via Utah gateways for traffic betwen the northwest and the east. (Neb. R. Nos. 117, 118, 119, p. 35.)

When the Union Pacific regained control after the receiverships ended, it proceeded with a program to regain and safeguard its long haul on the traffic originated and terminated on its lines in the northwest. This it accomplished by publishing tariffs which *eliminated* the Rio

Grande from the through routes by *cancelling* parts of some of the old tariffs and by issuing new tariffs in which the Rio Grande was *omitted* from the through routes over which joint rates were applicable.

At the hearings before the Commission in the instant case the Rio Grande's traffic witness Earley cited the new tariffs (thus making them a part of the record before the Commission) which cancelled and superseded the old tariffs in which through routes had been established in connection with the Rio Grande. He stated that the new tariffs cancelled joint rates via the Rio Grande (Vol. I, 87-88), but neglected to state the fact that what actually and in reality was accomplished by the new tariffs was the *elimination* of the Rio Grande as part of the through routes over which the joint rates would apply. This was done by issuing new tariffs cancelling the parts of the old tariffs that named the Rio Grande as a part of the through routes over which joint rates would thereafter be applicable.

The Rio Grande now erroneously argues at this late date that the new tariffs cancelled the joint rates but did not cancel or close the through routes, or, in other words, that the new tariffs accomplished exactly the reverse of what they intended, and quite clearly and undeniably accomplished.

Cancellation of old through routes via Rio Grande

Pursuant to the Court's permission to file a memorandum covering this history of the through routes and joint rates via Utah gateways in connection with the Rio Grande, there is attached hereto as Appendix A, a sworn statement personally prepared by A. J. Stilling, Assistant Freight Traffic Manager, with 39 years experience in

freight tariff and traffic work with the Union Pacific. His statement quotes the pertinent parts of the tariffs cited by witness Earley in the record before the Commission, and the quotations show beyond dispute that the tariffs published by Union Pacific in 1906 and 1912 quite explicitly *cancelled* the old through routes with the Rio Grande.

The excerpts quoted by Mr. Stilling from the tariffs of 1906 and 1912 cited by Witness Earley expressly show:

(1) "CANCELLATION" notice was issued, effective August 25, 1906, to "CANCEL representation of the * * * Denver and Rio Grande R. R. from title page of tariff", I. C. C. No. 1970, which had published the Rio Grande as a participating carrier in the through routes over which the joint rates applied.

(2) That I. C. C. tariff No. 1583 which published specific routes via Utah junctions with the Rio Grande was cancelled in full by notice effective November 24, 1906, published in tariff I. C. C. No. 1976, stating that "U. P. I. C. C. No. 1976 Supersedes I. C. C. No. 1583." The new tariff, I. C. C. No. 1976, *omitted* all through routes over Union Pacific via Utah junctions with the Rio Grande which had been advertised or held out to the public in the previous tariff, I. C. C. No. 1583, thus, eliminating the Rio Grande and closing the through routes previously offered shippers in connection with that railroad.

(3) That Westbound Tariff I. C. C. No. 942 which published through routes via Denver and other Colorado gateways in connection with the Rio Grande and other named railroads, through Salt Lake City, Huntington

and Portland, Oregon, and other northwestern gateways, in connection with the Union Pacific, Oregon Short Line, Oregon-Washington Railroad & Navigation Company, was amended by Supplement No. 12, thereto, effective November 4, 1912—

"by ELIMINATING Gateways 43 D, 44, 45, 46 and 47 (and all references thereto shown in the tariff), reading as follows:"

Then follows the paragraphs quoted in Mr. Stilling's memorandum, pages 3-5, under "No. 3", in which the gateways and railroads via which through routes were "ELIMINATED" are specified by name. In each paragraph under each of the numbered "gateways" the "Denver & Rio Grande RR" is "ELIMINATED". These included all routes that existed via Utah junctions in connection with the Rio Grande and with the elimination of through routes via those gateways in connection with the Rio Grande the routes were closed and the Rio Grande ceased to be a part of the through routes that previously existed.

(4). Through routes via Utah gateways in connection with the Rio Grande and other lines had been published in Eastbound Tariff 2-H, R. H. Countiss, I. C. C. No. 930, as shown in the excerpts quoted in Mr. Stilling's memorandum under "No. 4" pages 5-8. That tariff was cancelled "in full" by cancellation notice effective December 16, 1912, in Eastbound Tariff 2-I, I. C. C. No. 958, reading as follows:

"LIST OF TARIFFS CANCELLED IN FULL BY THIS TARIFF

ICC No.	Agent	Tariff	Cancellation
930	R. H. Countiss	2-H	In full"

The routes or gateways previously published in Tariff 2-H, ICC No. 930, were not brought forward or republished in Tariff 2-I, ICC 958, and were therefore cancelled effective December 16, 1912, when the Rio Grande ceased to be a part of the through routes.

In view of the foregoing indisputable facts showing the Union Pacific's repeated publication of notices in the tariffs "eliminating" the Rio Grande from the old tariffs which published through routes via its line; "cancelling" the name of the Rio Grande from the old tariffs and "superseding" the old tariffs by new tariffs that "omitted" the Rio Grande pursuant to the very purpose and declaration of the published cancellation notices, we submit that the Rio Grande's assertion at page 54 of its opening brief, and throughout this litigation that Union Pacific cancelled the joint rates with the Rio Grande in 1906 and 1912 but that "no specific action was taken to cancel the through routes"—is simply not true. The excerpts quoted from the tariffs prove that exactly the reverse is true, and that the Rio Grande's reiteration of its false contention misled the Colorado court to say "nothing was ever done to close the routes" (Colo. R. Nos. 332, 333 and 334, page 291).

Neither the Interstate Commerce Act, or any other statute, nor any decision, rule or regulation promulgated or stated, formally or informally by the Commission or the courts, specifies, prescribes or suggests what a railroad must do to cancel or close a through route. Any language sufficiently clear to be understood suffices to notify the public that a previously existing through route is "closed" for the future, and, we submit, that the language of the tariffs quoted in Mr.

Stilling's memorandum is so explicit in terms, and so clear in meaning as to preclude any rational mind from an honest belief that the language fails to serve notice that through routes with the Rio Grande are thereby "closed".

While the Rio Grande has argued to this Court that the Union Pacific could have published a "notice" in its tariffs stating that it would refuse to accept any through or "bridge" shipment tendered for movement over the Rio Grande—even at the combination or sum of the local rates—it has never even hinted that there is any law, rule or regulation requiring such action to close or cancel a through route.

Such contention is absurdly erroneous, particularly in view of:

a. Section 6 of the Act requiring railroads to publish rates between points on their respective lines.

b. Section 1(4) of the Act, which declares that: "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor."

c. Section 20(9) of the Act conferring power upon the federal courts—

> "to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Act, or any of them."

The Rio Grande's contention that to retain any protection against being short hauled under Section 15(4) the Union Pacific must violate its statutory duty to provide transportation upon "reasonable request" and its

duty under Section 20(11) to accept and issue a bill of lading for property tendered for transportation is so patently untenable as to merit neither discussion here nor consideration by the Court. (See Union Pacific brief in No. 333, pages 74-76.)

In its desperation to support its through routes contention, the Rio Grande has argued to this Court that, since Section 15(8) of the Act assures shippers the right to select their choice of routes where "two or more through routes and through rates shall have been established", it necessarily follows that through routes within the meaning of Section 15(3) and (4) already exist via its line for the involved traffic because a few shippers have elected to route some isolated shipments via its line even at the extra expense of its higher combination of local rates. But this is a clear distortion of Section 15(8), for that section does not purport to cover the myriad of situations where no through route exists. It merely prevents a carrier from depriving the shipper of his selection of the route over which he wants his traffic to move, if and where there are two or more established through routes. The rights of shippers to route their traffic where two or more through routes with through rates have not been established are not declared or covered by this section.

Section 15(8) was added to the Act in 1910 (36 Stat. 553) as a part of the expansion of Section 15 with reference to the establishment of new through routes. As an accompanying part of that expansion, Section 15(8) was clearly intended as protection to shippers in the routing of their traffic where a duplication of routes might result from the Commission's expanded authority to order additional routes, and to prevent carriers from controlling the routing for their own selfish interests.

Moreover, since there is no provision in the Act preventing a shipper from routing his traffic over any series of connecting railroads wherever physical interchange is possible and the carriers have performed their duty of publishing local rates on their respective lines, a shipper may exercise his right to route his traffic over the lines of any such connecting carriers if he is willing to pay the rates published over the route he chooses, regardless of whether the rates are combinations of local rates or joint rates. But the fact that he may do so obviously could not result in the creation of a new through route where none had been established within the meaning of the Act, for, if so, the Commission's restricted power under Section 15(3) and (4) to order through routes that short haul existing routes would be reduced to meaningless surplusage.

The language of tariffs effective when the Rio Grande filed its complaint with the I. C. C. August 1, 1949.

Since through routes via the Rio Grande for the traffic concerned were explicitly cancelled in 1906 and 1912, as shown above, the tariffs published since that time have not repeated that cancellation of the Rio Grande from the through routes for such repetition is no more necessary than it would be to repeat an obituary notice continuously after its first publication.

As pointed out in Mr. Stilling's memorandum, page 8, the joint rates apply only over the routes and through junctions of carriers published in the tariffs. As the Rio Grande has not been a part of the through routes since 1906 and 1912, the tariffs effective at the time the Rio Grande filed its complaint with the Commission and those effective at the present time do not mention the Rio Grande or any other carrier or carriers whose lines

do not form a part of the through routes over which the joint rates are applicable. In other words, the Rio Grande and other non-participating carriers are excluded from the through routes simply by omitting them from the tariffs in which the through routes over which the joint rates apply, and there can be no through routes in connection with the Rio Grande unless and until the Union Pacific republishes the routes and gateways which it cancelled in 1906 and 1912.

In addition to the complete absence of routes or gateways via Utah junctions with the Rio Grande in the present tariffs of the Trans-Continental Freight Bureau to and from the northwest area, the Union Pacific publishes the following routing prohibition as a further safeguard against being short hauled:

> *Publishing Agent W. J. Prueter's ICC No. 1563, Item 90* (Mr. Prueter is the present-day publishing agent for railroad freight rate tariffs that were issued by Agent Countiss in 1912.)
>
> "Westbound rates to points subject to the Western Gateways named herein do not apply on traffic delivered to the UP by connecting lines at junction points in the State of Utah.
>
> "Eastbound rates from points subject to the Western Gateways named herein do not apply on traffic delivered by the UP to connecting lines at junction points in the State of Utah."

Inasmuch as through routes via Utah junctions in connection with the Rio Grande were cancelled some 50 years ago, the language just quoted from the present tariff serves notice to the public that the joint rates will not apply to shipments to and from the northwest area delivered to the Union Pacific by connecting lines and

shipments delivered by the Union Pacific to connecting lines at Utah junctions. The quoted tariff provisions thus safeguard the Union Pacific's haul from and to the Missouri River on traffic moving between points on its lines in the northwest area and points in the eastern part of the country.

Union Pacific tariffs publish no "offer" of through transportation in connection with the Rio Grande.

Questions from the Court during the oral arguments suggested the possible thought that after the through routes in connection with the Rio Grande were cancelled some 50 years ago the Union Pacific might have continued to "advertise" or hold out an offer of through transportation of the traffic concerned in connection with the Rio Grande at the combination or sum of the local rates. Mr. Stilling points out at page 9 of his memorandum that no tariff of the Union Pacific publishes or has published or contained any statement or provision advertising or offering to perform through transportation of the involved traffic in connection with the Rio Grande at the combination or sum of the local rates. The absence of any such offer in the Union Pacific tariffs necessarily negatives any holding out by the Union Pacific of any "course of business" in connection with the Rio Grande for the through traffic concerned.

The fact that the Union Pacific and the Rio Grande both publish rates between local points on their respective lines and that traffic can be physically interchanged between the two carriers may not be construed as a "holding out" or offer of through service or the establishment of a through route within the meaning of the Act, in view of this Court's holding in *Thompson v. United States*, 343 U. S. 549, at page 558, that:

"The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route since the power to establish through routes under Section 15(3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines."

THE ORDER IS VOID AND SHOULD BE SET ASIDE BECAUSE THE COMMISSION WAS PRECLUDED FROM ISSUING IT BY THE "FINANCIAL NEEDS" PROHIBITION OF SECTION 15(4) OF THE INTERSTATE COMMERCE ACT.

This is the first ground upon which the railroads and the five States contend that the Commission's order is void and should be set aside. The contention is thoroughly discussed at pages 42-51 of the brief of the Union Pacific and other railroads and at pages 55-60 of the brief of Washington Public Service Commission, et al., both in No. 118. The crucial significance of this contention was quickly recognized by Mr. Justice Frankfurter at the oral arguments. We venture to refer again to this contention since its acceptance by the Court would dispose of this entire litigation.

Motion was made to the Commission to dismiss the Rio Grande's complaint on the ground that its case was a "financial needs" case and the so-called "relief" demanded by that perenially bankrupt railroad could not be granted in view of the "financial needs" prohibition in Section 15(4) of the Act. The Commission denied the motion, saying that in reaching its conclusions, "no con-

sideration has been given to the financial needs" of the Rio Grande (Nebr. R. 34). At the oral argument before this Court counsel for the Government also denied that this is a "financial needs" case, saying that the record does not contain sufficiently complete financial data on which a financial needs determination could be made.

In making that statement, Government counsel undoubtedly overlooked the testimony of the Rio Grande's own President (Vol. I, 48-50) that its sole purpose in filing the complaint with the Commission was to improve its financial condition; the testimony of its Vice President Hogue (Vol. I, 69) that the decline in traffic along the Rio Grande Railroad forced it to turn to "bridge" traffic and that in no other way could it have "survived;" and the testimony of the Rio Grande's Freight Traffic Manager, Witness Earley (Vol. I, 81-82) emphasizing the financial importance to the Rio Grande of overhead or "bridge" traffic, and reciting at pages 89-90, the almost continuous bankruptcy of the Rio Grande for the last several decades.

The Commission emphasizes early in its report the passing of the Rio Grande "through various hands and receiverships" and its almost continuous bankrupt condition until its last reorganization was completed April 11, 1947 (Nebr. R. 34, 36). In addition to the testimony of record referred to in our opening briefs and just mentioned above, the Rio Grande's tragic financial history is, as suggested by Mr. Justice Frankfurter at the oral arguments, a matter of public knowledge, and of particular knowledge to the Commission and to this Court. See *Reconstruction Finance Corp. v. Denver & R. G. W. R. Co.*, 328 U. S. 495; *Denver & Rio Grande Investigation*, 113 I. C. C. 75; *Commercial Club, Salt Lake*

City v. A., T. & S. F. Ry. Co., 19 I. C. C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486; *Livestock-Western District Rates*, 176 I. C. C. 1, 98, and 190 I. C. C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S. F. Ry. Co.*, 218 I. C. C. 663.

The "financial needs" prohibition was added to Section 15(4) by the Transportation Act of 1940, 54 Stat. 911-912, 49 U. S. C. § 15(4), to stop the Commission once and for all from attempting to use its through routes powers to divert traffic from the trunk line railroads for the financial benefit and maintenance of impecunious short lines, for which purpose the Commission had continuously sought to use its through routes power. See *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *Thompson v. United States*, 343 U. S. 549, 555-556, and numerous footnotes in that opinion concerning the purpose and legislative history of the short-haul prohibition of Section 15(4) as amended.

It is no answer to say, as the Rio Grande and counsel for the Government said in the oral arguments, that the Rio Grande is not presently in financial distress or in need of financial aid through the diversion of traffic from other railroads, for obviously, as the financial needs prohibition prevents the Commission from diverting traffic from other lines to aid a financially distressed short line railroad, then the prohibition, *a fortiori*, precludes the Commission from using its through route powers to divert traffic from other routes to improve the financial condition of the Rio Grande in its presently solvent financial condition.

Our discussion of this contention in our opening briefs mentioned above, clearly shows that the record, the facts and all of the circumstances recited and recog-

nized in the Commission's own report plainly contradict its assertion that in issuing the order there it gave no consideration to the financial needs of the Rio Grande.

At the oral arguments, Mr. Justice Frankfurter quickly recognized the compelling significance of the "financial needs" contention and remarked that the financial needs prohibition seemed to be rather crucial to this controversy. We think it is crucial and decisive of the invalidity of the Commission's order, and we submit that this Court should hold that because the order is prohibited by the "financial needs prohibition" of Section 15(4), this Court should set it aside and end its consideration of the entire litigation right there.

ADEQUACY, EFFICIENCY AND ECONOMY OF UNION PACIFIC ROUTES

During the oral arguments on April 23 and 24, an inquiry from the Court concerned the question whether the Commission found the Union Pacific routes "adequate" for the traffic concerned.

At page 62 of the Record in the Nebraska case (Nos. 117, 118 and 119), concerning Union Pacific routes the Commission made the following findings:

> "* * * It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.
>
> "Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the

railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line."

The majority of the three-judge Nebraska court held (Nebr. R. Nos. 117, 118, 119, page 160) that:

"There is no evidence to suport a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are inadequate."

That court further held (Nebr. R. 161-162):

"But, again, there is no evidence that the service is inadequate or that more economical transportation service will result with respect to shipments from the northwest area to points between Ogden and Provo served by both the Union Pacific and the Rio Grande and to be reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established."

The first Finding of Fact made by the Nebraska court (Nebr. R. 165) was as follows:

"The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points

of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points."

The table set forth in the Commission's report (Nebr. R. 40) shows that Union Pacific routes are from 33 to 219 miles shorter than any routes that could be made over the Rio Grande between the northwest area and principal consuming markets in the east and south. At page 71 of the Nebraska Record, the Commission finds that between the northwest area and many destinations "the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent" than present routes between the same points.

At page 65 of the Nebraska Record, the Commission stated:

"A large number of shippers and representatives of communities served by the Union Pacific, and traffic associations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commission of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock."

The Commission then found that:

"* * * Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and

satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. * * *"

As shown in our briefs filed in this Court, 120 public and shipper witnesses testified positively and affirmatively to the adequacy, efficiency and economy of the shorter, faster Union Pacific routes. In our reply brief, filed April 19, 1956, it is shown in Appendix B thereto that the Public Service Commissions of Washington, Montana and Oregon vigorously opposed the Rio Grande's complaint before the Interstate Commerce Commission; that 14 witnesses from the State of Washington testified in opposition to the Rio Grande and that no witness from that State supported its complaint; that 5 witnesses from Montana opposed the Rio Grande's complaint and no witness from that State supported it; that 13 witnesses, speaking for numerous shippers of large quantities of traffic from and to Oregon, opposed the Rio Grande's complaint and only 2 witnesses from that State supported it. In short, Appendix B to our reply brief shows that 73 witnesses from the entire northwest area vigorously opposed the Rio Grande's complaint and only 22 witnesses from that area supported it and the latter were from the southeast corner of Idaho, except 2 witnesses from northern Utah and 2 witnesses from Oregon.

Witnesses opposing the Rio Grande testified unanimously that Union Pacific routes are adequate, efficient, shorter, more direct and furnish shippers in the northwest area excellent and entirely adequate transportation services.

Among the witnesses opposing the Rio Grande was Alfred P. Graham, Traffic Manager, Boeing Airplane Co., Seattle, Washington (listed in Martindale-Hubbell Law Dictionary, Vol. II, P. 4325, as a client of the law firm of Holman, Mickelwait, Marion, Black & Perkins of Seattle). Mr. Grahams' testimony is typical and representative of the testimony of all shippers in the northwest area who opposed the Rio Grande. His testimony appears in Vol. II of the Transcript of Record at pages 937-941 and the pertinent part of it is as follows:

> "The Union Pacific's service in regard to road haul, switching, car supply, tracing and in all other related respects has been excellent. The Union Pacific has also prepared and supplied special equipped excess height cars for the movement of large airplane components such as wings fuselages, etc., which are too large to load in standard cars. We have found the Union Pacific particularly mindful and willing to assist in the special transportation problems of our company prior to, during and since the war. It has been particularly important that special equipment assigned to service between our plants move on an expeditious over-the-road schedule, coordinated with our production schedules.
>
> "We have never asked nor do we have need for joint through rates on transcontinental traffic via the Denver and Rio Grande Western in connection with the Union Pacific. The existing routes and services of the Union Pacific are entirely adequate and sufficient for our purposes. We have routed some of our cars to Seattle via [fol. 1370] the Denver and Rio Grande Western in connection with other carriers. Transit time has been two days or more longer that when routed via the Union Pacific.
>
> "The exigencies of our production require the fastest transit time possible. If the route proposed,

which would short haul the Union Pacific, were established, it is only reasonable to assume that such a situation would result in a loss of revenue to the Union Pacific. It would naturally follow that such a loss would have to be offset by an increase in rates or by savings from a curtailment of service. Either of these results would be to the definite detriment and disadvantage of my company.

* * * * *

"The Boeing Airplane Company desires to go on record in opposition to the establishment of the requested through routes and respectfully requests the Commission to take no action that would possibly impair the ability of the Union Pacific to render the service it has in the past, which is vital to our operations."

In an obvious effort to circumvent its inescapable finding from the physical and other facts of record that the Union Pacific routes are adequate to move the present volume of traffic and any additional volume that may be anticipated in the foreseeable future, the Commission said (Nebr. R. 70) that:

"While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. * * *"

But this incredible assertion follows the Commission's correct statement at page 69 of the Nebraska Record that:

"There is no contention here by complainant that the present routes of the defendants are not ade-

quate for the traffic hauled, and no finding is sought by complainant to that effect. * * *"

And that assertion embraces the Commission's erroneous view at page 69 of the Nebraska Record that it is authorized to short haul existing routes, no matter how adequate they may be, to provide "more adequate" service by ordering additional routes.

The assertion also embraces the Commission's further erroneous view that it has power to authorize "as many routes as possible" for perishable food products regardless of the adequate, efficient and economic transportation service of existing routes. Finally, the Commission's efforts to find existing Union Pacific routes indaequate for perishable food products rests upon its wholly irrational and erroneous view expressed at page 70 of the Nebraska Record that it has power to condemn Union Pacific routes as inadequate and to short haul them because they "are not available, and higher rates apply" *at points on the Rio Grande which are not served by the Union Pacific routes.*

In other words, it was only by indulging in the three clearly erroneous premises that the Commission propelled itself to the ultimate false conclusion that Union Pacific routes, though adequate and satisfactory for any commodities moving over them, were, nevertheless, unsatisfactory for perishable food commodities requiring stoppage for in transit (commercial) operations at points located exclusively on the Rio Grande.

Such reasoning is a plain distortion of the purpose of clause "(b)" of Section 15(4) of the Act which authorizes the Commission to condemn and short haul existing routes only where they can be shown to be inade-

quate, inefficient and uneconomic for traffic moving over them, and when a *proposed* route between the same termini can be shown to afford "adequate, and more efficient or more economic, transportation," than that performed by existing routes.

Such flagrant misconstruction of the Act and such clear abuse of its power to short haul existing routes is demonstrated by the legislative history of clause "(b)" quoted at page 12 of our reply brief where it is shown that the purpose of the legislation, as stated in a report of the Senate Committee, was to give shippers "the shortest, quickest and cheapest routes available," where existing routes did not meet those tests.

Counsel for the Commission was unable to support its assertion that Union Pacific routes were inadequate for the through transportation of the involved traffic, as shown by the following from the transcript of the oral arguments:

> "Mr. Ginnane: I should make it clear the Commission did not find and the Rio Grande did not contend that Union Pacific does not render good service on its routes. The Commission made no findings that Union Pacific does not render adequate service on its routes." (p. 98)
>
> "No one challenges the fact that Union Pacific, on its routes furnishes adequate transportation services. * * *" (p. 99)
>
> "Justice Frankfurter: Adequate for what?
>
> "Mr. Ginnane: Adequate for moving these commodities along the Union Pacific's routes."
>
> "Justice Black: From your standpoint, they found the U. P.'s service adequate?
>
> "Mr. Ginnane: On U. P.'s routes." (p. 100)

The testimony of Witness R. K. Bradford, Vice President of Rio Grande, fully supports the position Mr. Ginnane was compelled to take (Vol. II, p. 1161):

> "In regard to the testimony of Mr. Hanson, may we again state that at no time have we in any way questioned the capacity of the Union Pacific Railroad physically to handle the business it now handles, nor have we at any time in this case brought up for discussion the relative efficiency of the Union Pacific—Rio Grande."

INADEQUATE, INEFFICIENT AND UNECONOMIC RIO GRANDE ROUTES

As stated above, the Commission found that the Rio Grande route would add from 33 to 219 miles additional transportation to points like Omaha, Nebraska, and that between the northwest area and many of the eastern points via the Rio Grande would be from 33 to more than 50% longer than present Union Pacific routes.

The majority of the three-judge Nebraska court held (Nebr. R. 166) that transportation service via the Rio Grande:

> "* * * is inadequate and also inefficient and uneconomical".

We urge this Court's careful attention to the compelling significance of the following:

The Examiner's proposed report (which is included in the record before this Court as an original, but not printed, document) recommended at sheet 30 that the Commission make the following finding:

"The Rio Grande, like the Union Pacific, is an efficiently operated railroad and an important and essential railroad in the national transportation system. It is capable of handling efficiently over its line traffic that it may receive from its connections coming from or destined to the territories described in this proceeding. It has demonstrated its efficiency and capacity during the war period of 1942 to 1945, and during the storm period in February 1949 when it received freight, passengers, express and mail traffic diverted from the Union Pacific, when certain portions of the latter railroad's lines in Wyoming were blocked by snow storms. The record contains evidence in considerable detail about the extent and scope of that operation, which it is not necessary to review. From that evidence it is concluded that the Rio Grande has sufficient capacity to handle efficiently the additional traffic that may be routed over its line, in the event that the joint through rates sought in this proceeding are established."

The Commission rejected the recommendation and refused to make the recommended finding. Instead, the Commission found (Nebr. R. 62):

"The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 percent and westbound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grande is 66.3 percent greater than that

of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services."

The Commission further found (Nebr. R. 70-71):

"Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recognized by the Commission in prior proceedings. See *Livestock, Western District Rates, supra,* and *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486."

Thus, the Commission not only failed to find that the *proposed* Rio Grande route was adequate or more efficient or more economic than the shorter, faster Union Pacific routes, but refused to adopt the Examiner's recommended finding that the Rio Grande is efficiently operated and has sufficient capacity to handle efficiently additional traffic from and to the northwest that might be diverted to its line. In other words, the finding recommended by the Examiner with respect to the *proposed* Rio Grande route is an essential prerequisite to ordering that route under clause "(b)" to short haul existing routes, but the Commission refused to make the prerequisite findings, obviously because there was no evidence to support such findings, and, indeed, the Examiner's recommended finding was clearly contrary to the evidence of record.

The Commission's attempt to condemn existing routes as inadequate because they were not available at points

in territory they did not traverse or serve was stricken down by this Court in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, holding at page 545, that it was only by "an artificial use of words" that existing routes were condemned by the Commission and that "[t]he condition in the statute is not to be trifled away."

This Court has also rejected "the Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes", *Thompson v. United States*, 343 U. S. 549, 555, citing *United States v. Mo. Pac. R. Co.*, 278 U. S. 269.

A fortiori, the Court should strike down the Commission's effort here to completely emasculate the short-hauling restriction by misconstruing it as permitting condemnation and short-hauling of the admittedly shorter, faster, efficient and adequate Union Pacific routes, by ordering the longer, slower and "more onerous" Rio Grande route, merely because of its "artificial" assertion that perishable food products require "as many routes as possible", or because Union Pacific routes and their lower rates are "not available" at points located exclusively on the Rio Grande.

CONCLUSION

The judgment of the Nebraska district court in Nos. 117 and 119, enjoining and annulling the Commission's order in part, should be affirmed and its judgment in No. 118, sustaining the validity of the order in part, should be reversed and the case remanded with direction to issue the injunction and relief prayed by the plaintiffs in that court.

The judgment of the Colorado district court, Nos. 322, 333 and 334, should be reversed and the case re-

manded to that court with direction to dismiss the complaint.

Respectfully submitted,

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PROOF OF SERVICE

I, ELMER B. COLLINS, attorney for Union Pacific Railroad Company, one of the Appellants-Appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 11th day of May, 1956, I served, on behalf of all Appellants-Appellees herein, copies of the foregoing Supplemental Memorandum on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff.
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
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and with first-class postage prepaid to:

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306 Post Office Building
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2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
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Interstate Commerce Commission
Washington 25, D. C.

3. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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4. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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and with first-class postage prepaid to:

Harry L. Welch, Esq.
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5. On Idaho Farm Bureau; Public Service Commission of Utah; Committees of Railroad Brotherhoods who

work for The Denver and Rio Grande Western R. R. Co.; National Live Stock Producers Association; Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company, Inc.; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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Denver 2, Colorado

Lee J. Quasey, Esq.
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Chicago 2, Illinois

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

and with first-class postage prepaid to:

Ray McGrath, Esq.
First National Bank Building
Omaha, Nebraska

6. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to;

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

ELMER B. COLLINS,
Of Counsel for Appellants-Appellees Herein.

MEMORANDUM

My name is A. J. Stilling. I am Assistant Freight Traffic Manager of the Union Pacific Railroad and my business address is 1416 Dodge Street, Omaha 2, Nebraska. I am the same A. J. Stilling who testified (Vol. I, pp. 796-865) in behalf of the Union Pacific Railroad Company in "The Denver and Rio Grande Western Railroad Company, Complainant, v. Union Pacific Railroad Company, et al., Defendants, Interstate Commerce Commission Docket No. 30297". I have now had 39 years experience in freight tariff and traffic work with the Union Pacific Railroad Company.

Mr. T. K. Earley was the chief traffic witness for the Rio Grande in the proceeding before the Commission and was at the time he testified Assistant Freight Traffic Manager of the Denver and Rio Grande Western RR. After referring to the establishment in 1897 of through routes and joint rates between the Rio Grande and the Oregon Short Line Railroad Company, Witness Earley stated (Vol. I, pages 86-88):

(1) "Ogden was continued as an open gateway until August 25, 1906, when through competitive rates between Colorado Common Points and certain Montana points on or via the OSL and the Rio Grande through Utah junctions were cancelled by Supplement No. 1 to Union Pacific Tariff No. 10340, ICC No. 1970."

(2) "Between OSL points in Idaho and Oregon, on the one hand, and Colorado Common Points and east thereof, on the other hand, the joint competitive rates via the Utah gateways with the Rio Grande were cancelled effective November 24, 1906, in UP Tariff No. 8606, ICC No. 1583."

(3) "On November 4, 1912, transcontinental rates to OWR&N points were cancelled in Supplement No. 12 to TCFB Tariff No. 4-I, Agent R. H. Countiss' ICC No. 942."

(4) "Eastbound transcontinental rates via D&RG through Utah gateways from OWR&N points were cancelled in TCFB Tariff No. 2-I, Agent R. H. Countiss' ICC No. 958, on December 16, 1912."

In the preceding four sentences Witness Earley refers to the cancellation of "through competitive rates", "joint competitive rates" and "transcontinental rates" via Ogden or Utah gateways. I have personally examined each of the tariffs and supplements referred to by Witness Earley and will show by quotation of pertinent parts of them that the through routes via Utah gateways with the Rio Grande were cancelled on the dates mentioned by him. The numbered sentences above will be dealt with separately.

No. 1

Union Pacific Tariff 10340, ICC No. 1970, contained joint rates and through routes via Utah junctions with the Rio Grande. The following cancellation notice appears in Supplement No. 1 to that tariff effective August 25, 1906:

"CANCELLATION

"CANCEL representation of the Colorado Midland Ry. and Denver and Rio Grande R. R. from title page of tariff. * * *"

This cancellation eliminated the Denver and Rio Grande Western R. R. from participation in the through routes and joint rates published in this tariff.

No. 2

Union Pacific Tariff 8606, ICC No. 1583, contained specific routes via Utah Junction points with the Rio Grande. That tariff was cancelled in full effective November 24, 1906, by Union Pacific Tariff No. 10375, ICC No. 1976. The cancellation notice reads:

"U.P. I.C.C. No. 1976 Supersedes I.C.C. No. 1583.

"U.P. G.F.O. No. 10375 Supersedes G.F.O. No. 8606."

All through routes over the Union Pacific via Utah junctions and the Rio Grande were *omitted* from the new tariff effective November 24, 1906, on which date the Rio Grande ceased to be a part of the routes over which the through rates applied.

No. 3

The following (among other things having no reference to these proceedings) appears on pages 88 and 89, Supplement 12, Trans-Continental Freight Bureau Westbound Tariff No. 4-I, Agent R. H. Countiss' ICC No. 942:

"Effective November 4, 1912 (in Supplement No. 12): AMEND pages 30 to 36, inclusive of tariff by ELIMINATING Gateways 43D, 44, 45, 46 and 47 (and all references thereto shown in tariff), reading as follows:

"43D—Union Pacific RR., or Chicago, Burlington & Quincy RR., Denver, Colo., or Chicago, Rock Island & Pacific Ry., Denver, Colorado Springs or Pueblo, Colo., in connection with Denver & Rio Grande RR., to Salt Lake City, Utah, Oregon Short Line RR., Huntington, Ore., thence Oregon-Washington Railroad & Navigation Co. to destination;

or

Union Pacific RR., or Chicago, Burlington & Quincy RR., Denver, Colo., or Chicago, Rock Island

& Pacific Ry., Denver, Colorado Springs, or Pueblo, Colo., in connection with Colorado Midland Ry. and Denver & Rio Grande RR. to Salt Lake City, Utah, Oregon Short Line RR., Huntington, Ore., thence Oregon-Washington Railroad & Navigation Co. to destination.

"44—Union Pacific RR., or Chicago, Burlington & Quincy RR. to Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs or Pueblo, Colo., in connection with Denver & Rio Grande RR., to Salt Lake City, Utah, Oregon Short Line RR., to Huntington, Ore., Oregon-Washington Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

or

Union Pacific RR., or Chicago, Burlington & Quincy RR., to Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs, or Pueblo, Colo., in connection with Colorado Midland Ry. and Denver & Rio Grande RR. to Salt Lake City, Utah, Oregon Short Line RR. to Huntington, Ore., Oregon-Washington Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (lines in Oregon) to destination.

"45—Denver & Rio Grande RR. in connection with Oregon Short Line RR., Huntington, Ore., thence Oregon-Washington Railroad & Navigation Co.

or

Colorado Midland Ry., and Denver & Rio Grande RR., in connection with Oregon Short Line RR., Huntington, Ore., thence Oregon-Washington RR. & Navigation Co.

"46—Denver & Rio Grande RR., in connection with Oregon Short Line RR., Huntington, Ore., Oregon-Washington Railroad & Navigation Co., to Portland, Ore., thence Oregon City Transportation Co. to destination.

or

Colorado Midland Ry., and Denver & Rio Grande RR., in connection with Oregon Short Line RR., Huntington, Ore., Oregon-Washington Railroad and Navigation Co. to Portland, Ore., thence Oregon City Tranportation Co. to destination.

"47—Denver & Rio Grande RR., in connection with Oregon Short Line RR., Huntington, Ore., Oregon-Washington Railroad & Navigation Co to Portland, Ore., thence Spokane, Portland & Seattle Ry. to destination.

or

Colorado Midland Ry. and Denver & Rio Grande RR. in connection with Oregon Short Line RR., Huntington, Ore., Oregon-Washington Railroad & Navigation Co. to Portland, Ore., thence Spokane, Portland & Seattle Ry. to destination."

In Agent Countiss' Trans-Continental tariffs, the routes in the western states over which the joint rates applied were called "Gateways" or "Western Gateways". Those quoted above included all routes that were in effect via Utah gateways or junction points with the Denver & Rio Grande RR. When those routes or gateways and all reference thereto were eliminated from the tariff, the Rio Grande to Utah junctions ceased to be a part of the through routes over which the joint rates applied.

No. 4

The following routes or "Western Gateways", as they were called, via Utah junctions with the Denver & Rio Grande RR. appear on pages 23 and 24 of Trans-Continental Freight Bureau Eastbound Tariff 2-H, R. H. Countiss' ICC No. 930, which became effective October 10, 1910:

"50-E. Via Oregon & Washington RR., Oregon Railroad & Navigation Co., Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, thence Denver & Rio Grande RR. to Pueblo, Colorado Springs or Denver, Colo., in connection with Chicago, Rock Island & Pacific Ry., or Denver, Colo., in connection with Union Pacific RR.

or

Via Oregon & Washington RR., Oregon Railroad & Navigation Co., Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, thence Denver & Rio Grande RR., and Colorado Midland Ry. to Pueblo, Colorado Springs or Denver, Colo., in connection with Chicago, Rock Island & Pacific Ry. or to Denver, Colo., in connection with Union Pacific RR.

"50-F. Via Oregon & Washington RR., Oregon Railroad & Navigation Co. to Huntington, Ore., and Oregon Short Line RR. in connection with Denver & Rio Grande RR.

or

Via Oregon & Washington RR., Stockdale, Ore., Oregon Railroad & Navigation Co., Huntington, Ore., Oregon Short Line RR. and Denver & Rio Grande RR. in connection with Colorado Midland Ry.

"53-A. Via Oregon Railroad & Navigation Co. to Huntington, Ore. and Oregon Short Line RR., in connection with Denver & Rio Grande RR., or Denver & Rio Grande RR. and Colorado Midland Ry.

"59. Via Oregon Railroad & Navigation Co. to Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, and Denver & Rio Grande RR., or Denver & Rio Grande RR. and Colorado Midland Ry. in connection with Union Pacific RR., Chicago, Rock Island & Pacific Ry., Chicago, Burlington & Quincy RR., Atchison, Topeka & Santa Fe Ry., or the Missouri Pacific Ry.

"60. Via Oregon City Transportation Co. to Portland, Ore., Oregon Railroad & Navigation Co. to Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, and Denver & Rio Grande RR., or Denver & Rio Grande RR. and Colorado Midland Ry. in connection with Union Pacific RR., Chicago, Rock Island & Pacific Ry., Chicago, Burlington & Quincy RR., Atchison, Topeka & Santa Fe Ry., or the Missouri Pacific Ry.

"61. Via Southern Pacific Co. (Lines in Oregon) to Portland, Ore., Oregon Railroad & Navigation Co. to Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, and Denver & Rio Grande RR., or Denver & Rio Grande RR. and Colorado Midland Ry. in connection with Union Pacific RR. or Chicago, Rock Island & Pacific Ry.

"66. Via Astoria & Columbia River RR. to Portland, Ore., Oregon Railroad & Navigation Co. to Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, and Denver & Rio Grande RR. or Denver & Rio Grande RR. and Colorado Midland Ry. in connection with Union Pacific RR., Chicago, Rock Island & Pacific Ry., Chicago, Burlington & Quincy RR., Atchison, Topeka & Santa Fe Ry. or the Missouri Pacific Ry."

The above-mentioned TCFB Eastbound Tariff 2-H, R. H. Countiss' ICC No. 930, was cancelled "in full" effective December 16, 1912, by TCFB Eastbound Tariff 2-I, R. H. Countiss' ICC No. 958. The cancellation reads as follows:

"LIST OF TARIFFS CANCELLED IN FULL BY THIS TARIFF

ICC No.	Agent	Tariff	Cancellation
930	R. H. Countiss	2-H	In full"

The routes or western gateways shown above were not brought forward in Tariff 2-I, ICC No. 958, and were therefore cancelled effective December 16, 1912, on which date the Rio Grande from Utah junctions ceased to be a part of the through routes over which the joint rates applied.

In the tariffs effective at the time the Rio Grande filed its complaint with the I. C. C. and in those effective at the present time the joint rates apply only via routes or gateways published in the tariffs, and as the tariffs do not publish through routes or gateways via Utah junctions with the Rio Grande, there are none and can be none unless and until Union Pacific republishes routes or gateways the same as those that were cancelled in 1912 or prior thereto.

In addition to the complete absence of routes or gateways via Utah junctions with the Rio Grande in the present tariffs of the Trans-Continental Freight Bureau to and from what the Rio Grande calls the "Closed Door Territory", the Union Pacific publishes the following routing prohibition as a further safeguard against being short hauled:

> *Publishing Agent W. J. Prueter's I. C. C. No. 1563, Item 90* (Mr. Prueter is the present-day publishing agent for railroad freight rate tariffs that were issued by Agent Countiss in 1912.)
>
> "Westbound rates to points subject to the Western Gateways named herein do not apply on traffic delivered to the UP by connecting lines at junction points in the State of Utah.
>
> "Eastbound rates from points subject to the Western Gateways named herein do not apply on traffic delivered by the UP to connecting lines at junction points in the State of Utah."

No tariff of the Union Pacific publishes or has published or contained any statement or provision advertising or offering to perform through transportation of traffic between points in the northwest area and points in the eastern and southern parts of the country in connection with the Rio Grande at the combination or sum of the local rates.

A. J. STILLING
Assistant Freight Traffic Manager
Union Pacific Railroad Company
1416 Dodge St., Omaha, Nebr.

VERIFICATION

State of Nebraska }
County of Douglas } ss.

A. J. STILLING, being duly sworn, deposes and says; that he personally prepared the foregoing memorandum and knows that the contents thereof and the statements therein made are true as stated.

A. J. STILLING

Subscribed in my presence and sworn to before me, by the affiant above named, this —— day of May, 1956.

LOUIS SCHOLNICK
Notary Public

Commission expires: May 10, 1960.

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MAY 31 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1954

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska; Nebraska State Railway Commission, Appellants,

v.

United States of America;
Interstate Commerce Commission.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

STATEMENT AS TO JURISDICTION

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Law Briefs—OMAHA LINO-SLUG PRINTING CO—418 So. 15th St.

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Appendix A—Map of Union Pacific Railroad Co., etc.

Appendix B—Report of Interstate Commerce Commission, 287 I. C. C. 611.

Appendix C—Order of Interstate Commerce Commission dated January 12, 1953, in Docket No. 30297, Denver & R. G. W. R. Co. v. Union Pac. R. Co., et al.

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Appendix D—Opinions, findings of fact and conclusions of law of district court.

Appendix E—Final judgment and decree.

Appendix F—Order of district court overruling and denying separate motions of Union Pacific and Rio Grande for new trial.

Appendix G—Injunction pending appeal.

Appendix H—Order extending to June 1, 1955, time for filing record and docketing cases of all appellants.

Appendix I—Pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 1, et seq.

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. ———

Union Pacific Railroad Company;
Chicago and North Western Railway Company;
Chicago, St. Paul, Minneapolis & Omaha Railway Company;
Northern Pacific Railway Company;
Great Northern Railway Company;
The Atchison, Topeka and Santa Fe Railway Company;
Wabash Railroad Company;
Washington Public Service Commission;
Public Utilities Commissioner of Oregon;
Board of Railroad Commissioners of the State of Montana;
State Board of Equalization and Public Service Commission of Wyoming;
State of Nebraska;
Nebraska State Railway Commission,

Appellants,

v.

United States of America;
Interstate Commerce Commission.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15, Revised Rules of the Supreme Court of the United States (effective July 1, 1954), appellants, Union Pacific Railroad Com-

pany; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, submit herewith their statement[1] particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the district court entered in this case on December 20, 1954.

Opinions Below

The report of the Interstate Commerce Commission is found in 287 I. C. C. 611, and is attached hereto as Appendix B. The majority opinion of the three-judge district court, and the dissenting opinion of Circuit Judge Johnsen, were filed October 22, 1954, and have not been reported, but are attached hereto as Appendix D. The court's findings of fact and conclusions of law are set forth in the majority opinion.

Jurisdiction

This action was brought in the District Court of the United States for the District of Nebraska by the Union

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1 Counsel for these appellants fully appreciate the desirability for brevity and the requirement of this Court's Rule 15 for conciseness in preparing jurisdictional statements. The geographical, physical and other facts essential to an understanding of the case and material to consideration of the unusual number and variety of questions presented are, however, so involved and voluminous as necessarily to extend this statement beyond the length ordinarily required in less complicated cases.

Pacific Railroad Company and seven other railroads pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul, suspend and set aside the order issued January 12, 1953, by the Interstate Commerce Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co., et al."

The order (Appendix C hereto) was issued upon a complaint filed with the Commission by The Denver & Rio Grande Western Railroad Company (hereinafter called "Rio Grande"). It requires, among other things, that the railroad appellants herein[2] and over 200 other railroads establish and maintain through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained by them over transcontinental routes embracing the lines of the Union Pacific Railroad Company through Wyoming on certain commodities that move by railroad between points in the northwest area and points in the eastern and southern areas described in the order.[3]

The order presents the unique situation of an attempt by the Commission to short haul the railroads that have the shortest and most efficient routes and lowest rates by compelling them to establish longer and more onerous through routes and equal joint rates in connec-

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2 The railroad appellants herein were among 221 railroads named in the Rio Grande's complaint to the Commission. The public service commissions of the five States, appellants herein, intervened in opposition to the Rio Grande before the Commission, and as plaintiffs in the court below.

3 The lines and termini of the Union Pacific and the Rio Grande (main lines) are indicated on the map attached hereto as Appendix A. Figures in the oblongs on the map show the number of additional miles shipments would move via the Rio Grande compared to mileage via Union Pacific.

tion with the Rio Grande, a short-line railroad, so that it can divert traffic for a "bridge" haul over its line. The Commission's action has implications of vital and far-reaching future effect not only upon the appellant railroads and the economic welfare of shippers and communities served by them in the five appellant States but also upon shippers in communities located upon long-established routes and channels of commerce of the larger railroads generally throughout the country.

Final judgment and decree of the majority of the district court sustaining the validity of the order "in part" and enjoining it "in part" is dated and was entered December 20, 1954. On the same day the district court entered an order in which it "overruled and denied" a motion of the Rio Grande and a motion of these appellants for new trial and reconsideration. The district court also on December 20, 1954, issued an "Injunction Pending Appeal", staying, suspending and restraining enforcement of the Commission's order pending final determination of this appeal. Copies of these documents are attached hereto as Appendices E, F and G, respectively.

Notice of appeal was filed by these appellants in the District Court of the United States for the District of Nebraska on February 18, 1955.[4] On March 22, 1955, an order by Circuit Judge Johnsen, who was the presid-

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4 Notice of appeal from the judgment of the district court in this case was also filed:

1. By The Denver & Rio Grande Western Railroad Company, February 3, 1955.
2. By the United States of America, February 17, 1955.
3. By the Interstate Commerce Commission, February 18, 1955.
4. By the Secretary of Agriculture of the United States, February 18, 1955.

ing member of the three-judge district court, was entered extending to June 1, 1955, the time for filing the record and docketing the cases of all appellants in this Court. Copy of that order is attached hereto as Appendix H.

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b).

The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588; *Thompson v. United States*, 343 U. S. 549; *U. S. v. Great Northern R. Co.*, 343 U. S. 562; *I. C. C. v. Columbus & Greenville Ry.*, 319 U. S. 551; *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499; see also *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538.

Statutes Involved

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out verbatim in Appendix I, hereto:

National Transportation Policy (preceding Section 1), and Sections 1 (3) (a), 1 (4), 1 (5), 3 (1), 3 (4), 15 (1), 15 (3) and 15 (4).

Questions Presented

The following questions are presented by this appeal.[5]

I. Whether the court below erred in refusing to hold that, in this proceeding, brought by the Rio Grande for the admitted purpose of enhancing its financial position by diverting for a "bridge" haul over its line transcontinental through traffic now and for some 75 years moved over Union Pacific routes between points on those routes in the northwest and points in the eastern and southern parts of the United States, the Commission was prohibited from issuing the order by the provision of Section 15 (4) of the Interstate Commerce Act that, "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs," and that this prohibition may not be evaded or circumvented by the Commission's assertion that in making the order "no consideration has been given to the financial needs" of the Rio Grande.

II. Whether the court erred in refusing to hold that, in view of the short haul prohibition of Section 15 (4) of the Act (49 U. S. C., § 15 (4)), the Commission acted arbitrarily and unlawfully in issuing the order

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5 The plurality of questions presented by this appeal results from the Rio Grande's commingling in its complaint of separate and independent provisions of the Act concerning its rights as a carrier, the rights of shippers, and the "public interest"; also from what Circuit Judge Johnsen's dissenting opinion aptly decribes as "all the confusion in which the (Commission's) report is wrapped", "the loose and improper basis and manner in which * * * the Commission has dealt with the entire situation", and from the further confusion and apparent misconception of the majority of the district court concerning its judicial functions in reviewing the order.

short-hauling Union Pacific routes at least 925 miles, upon the Commission's own findings of fact:

(a) That Union Pacific routes have lower rates than the Rio Grande and are shorter, faster, efficiently operated, adequate and have surplus capacity to haul any foreseeable volume of the through traffic involved;

(b) That movement of the same through traffic via the Rio Grande would require over 200 miles additional transportation, at least 24 hours more time in transit, and one or two additional interchange services; and that the Rio Grande maintains higher rates, is less favorably located and has more onerous operating conditions than the Union Pacific or any of the other western lines.

III. Whether the court erred in failing to hold that the entire order is void because the Commission misconstrued, departed from and failed to observe and make the findings required by the controlling statutory standards and criteria of Sections 1 (4), 3 (1) and (4) and 15 (3) and (4) (b), in basing its order:

(a) Upon the premise that the standards and conditions of Section 15 (4) (b) [which permit establishment of a proposed route short-hauling existing routes of other railroads, *only* if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation"] are lawfully observed and applied by the Commission's findings here:

1. of a need for "more" adequate and economic service than that afforded by Union Pacific routes, and

2. that the Rio Grande route is "necessary and desirable" to provide "adequate and more economic transportation",

without any finding by the Commission that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes for the involved through traffic between the same origins and the same ultimate destinations;

(b) Upon the premise that the conditions which permit short-hauling Union Pacific routes under Section 15 (4) (b) can be met and satisfied by merely substituting the lower joint rates applicable over Union Pacific routes for the higher combination rates via the proposed Rio Grande route;

(c) Upon the premise that, under Section 15 (4) (b), Union Pacific routes may lawfully be condemned and found "inadequate and less economical" than the Rio Grande route for through traffic because, *at points located on and served only by the Rio Grande,* "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply";

(d) Upon the premise that the Commission may invoke its power under Section 15(3) and (4) (b) for the purpose of making additional transit privileges available by equalizing rates via the Rio Grande with rates applicable over Union Pacific routes;

(e) Upon the criteria that the marketing system for food articles of a perishable nature requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible", although Section 1 (4) requires carriers to establish only "reasonable" through routes;

(f) Upon the inconsistent criteria that:

1. food articles of a perishable nature must move to markets "with expedition and care" and "without unnecessary interruptions";

2. the longer Rio Grande route is necessary to permit the through transportation of such articles to be interrupted so that the articles may be held as long as 12 months at points on the Rio Grande for "commercial operations" called transit privileges, and

3. ordinary livestock to stop for grazing or feeding, and marble and granite monuments to stop for partial unloading at points on the Rio Grande fall within the category of perishable food articles found by the Commission to require expeditious, careful and uninterrupted transportation;

(g) Upon the premise that the Commission may lawfully invoke its powers under Section 15(3) and (4) to obtain the remedy it desires for rates found violative of Sections 1 and 3, and that findings of violations of the latter sections afford a lawful basis for ordering the through routes and joint rates.

IV. Whether the court erred in holding that the Commission may require Union Pacific routes to short haul themselves by establishing through routes and joint rates with the Rio Grande for the sole purpose of permitting through traffic to be stopped at points on the Rio Grande, not served by the Union Pacific, for "commercial operations" (known as "transit" privileges), such as storing, processing and cattle grazing, at the same rates the same shippers have when using Union Pacific routes between the same points of origin and the same ultimate destinations.

V. Whether the lower court's finding that transportation service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" for through shipments requiring transit at points on the

Rio Grande and reshipment to final destinations beyond its termini, affords a lawful basis for the order short-hauling Union Pacific routes under Section 15 (4) (b), which permits short-hauling other railroads only if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

VI. Whether the court erred in failing to review and consider the whole record of evidence and all of the issues tendered by the pleadings and arguments of the parties, and in failing to hold that the order is entirely null and void, because:

(a) The order is based upon erroneous interpretations of law, and there is no rational basis or support for the order or any part of it, in the evidence or in the findings made by the Commission;

(b) The Commission *did not make,* and the evidence does not justify or support findings essential to the validity of the order, among others:

1. that Union Pacific routes are inadequate, inefficient and uneconomic for movement of the involved traffic,
2. that the Rio Grande route is "needed" for the involved traffic, and that it will provide "more efficient" transportation service than Union Pacific routes,
3. that diverting traffic and revenues from Union Pacific routes to the Rio Grande would serve such beneficial purpose as maintaining good service or improving it,
4. that the Rio Grande is efficiently operated, furnishes satisfactory service or has surplus capacity or ability to haul any additional volume of traffic,

5. that diverting the traffic to the Rio Grande's longer route will speed up its movement,

6. that the Rio Grande will generate new or additional traffic or contribute additional transportation facilities in the northwest area, or that existing routes are insufficient or incapable of moving the traffic to and from that area,

7. that by including the Rio Grande in the through routes shippers to and from the northwest area will have lower rates than they have via Union Pacific routes,

8. that the overall transportation system of shippers using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line,

9. that shippers have ever made complaint against service rendered by Union Pacific routes for the traffic involved, or demanded that the Rio Grande be included in present through routes;

(c) The evidence does not support or justify the Commission's findings—

1. that the combination of local rates via the Rio Grande are unjust and unreasonable,

2. that the joint rates which now apply over Union Pacific's shorter and more direct routes are reasonable for application via the longer and more onerous Rio Grande route,

3. that the combination rates via the Rio Grande are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande route and unduly preferential of shippers and receivers using the Union Pacific routes,

4. that the Union Pacific and other railroads discriminate against the Rio Grande in violation of Section 3 (4) in maintaining joint rates with the Bamberger Railroad at points on its line between Ogden and Salt Lake City, while refusing to make like joint rates with the Rio Grande at the same points,
5. that through routes and joint rates with the Rio Grande are "necessary and desirable" in the public interest to provide "adequate and more economic transportation",
6. that shippers in the northwest producing area (who testified that they sell their products in all markets in all the 48 states and 5 foreign countries) "are debarred from effective participation" in the marketing system because they must pay higher rates if they ship through traffic via the Rio Grande than the joint rates available to them via Union Pacific routes for the same through traffic moving between the same origins and the same destinations;

(d) The Commission arbitrarily refused to give effect to the requirement in Section 15 (4) that reasonable preference be given the originating carriers;

(e) The Commission refused to consider or give effect to the National Transportation Policy and to the evidence showing that diversion to the Rio Grande of any substantial part of the traffic would result in wasteful transportation and economic waste and in serious detriment to Union Pacific service and its employees, to certain other railroads and their employees and would inflict serious economic injury to numerous communities and the public served by Union Pacific routes;

(f) The Commission arbitrarily commingled and misused its authority under, and the remedies for violations of the separate and independent provisions of Sections 1(4), 3 (1) and (4) and Sec-

tion 15 (3) and (4), and its order is vague, uncertain, indefinite and conflicting in its requirements;

(g) Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint and in ordering through routes and joint rates on the theory that because shippers had intervened and testified, the Rio Grande's complaint became a shipper complaint;

(h) The Commission acted arbitrarily and unlawfully in refusing to dismiss the entire proceeding on the ground that it was vitiated and nullified by the fact that shipper witnesses on whose testimony the order is based were admittedly solicited and procured by the Rio Grande to testify in such manner as to help it win its case.

Statement of the Case

The Rio Grande operates a short-line railroad with its eastern termini at Denver, Pueblo and Trinidad, Colorado, and its western terminus at Ogden, Utah, the distance between Denver and Ogden being 607 miles via its main line, and 782 miles via Pueblo (see map, App. A). Its history has been essentially one of financial difficulty and of bankruptcy. It has been a "financial needs" railroad throughout most of its existence.[6]

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6 *Denver & Rio Grande Investigation*, 113 I.C.C. 75; *Reconstruction Finance Corp. v. Denver & R.G.W.R. Co.*, 328 U.S. 495.

Its mountainous location and tortuous physical features have resulted in "operating conditions on the Rio Grande" that are "more onerous than those on the lines of the Union Pacific" or any other transcontinental railroad (App. B, p. 74) and caused the Commission to grant the Rio Grande's demand for higher rates, based on its "financial necessities," than rates prescribed for other western railroads.

Commercial Club, Salt Lake City v. A.T.&S.F. Ry. Co., 19 I.C.C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I.C.C. 481, 486; *Livestock-Western District Rates*, 176 I.C.C. 1, 98, and 190 I.C.C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S.F. Ry. Co.*, 218 I.C.C. 663.

Constructed in 1870 as a narrow-gage line and converted to standard gage in 1890, the "Rio Grande was built for the purpose of handling the local business tributary to its line"[7] but its management soon determined to enhance its financial position by diverting for a "bridge"[8] haul over its line transcontinental Pacific Coast traffic moving over the Union Pacific-Central (now Southern) Pacific route, construction of which had been completed from Council Bluffs, Iowa, through Ogden, Utah, to Oakland, California, in 1869.[9]

Concentrating on its policy of diverting traffic and revenues from other railroads, the Rio Grande's revenues from "bridge" traffic increased over 326 per cent in the 15-year period ending with 1948, while traffic originated and terminated on its line increased only 155 per cent and its local traffic originating and terminating at points on its line was less annually throughout that period than during the period 1924-1929.

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7 *Commercial Club, Salt Lake City v. A.T. & S.F. Ry., supra,* p. 221.

8 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

9 Consistent with its determination to act as a "bridge line," the Rio Grande adopted a "policy to favor the facilities and service of their principal arteries at the expense of the remainder of the system" and to abandon or "to divest themselves of all lines not consistent with that general policy . . ." *Denver & R.G.W.R. Co. Trustees Abandonment,* 247 I.C.C. 381, 384. Between 1930 and 1948, it abandoned branch lines consisting of about 17 per cent of its total mileage.

Further pursuing its "bridge" traffic policy, the Rio Grande filed its complaint with the Commission in this case on August 1, 1949. Although the complaint alleged violations of Sections 1 (4), 3, 15 (1) and 15 (3) of the Interstate Commerce Act, the Rio Grande admitted that it filed the complaint for the purpose of improving its financial position by diverting for a "bridge" haul over its line so much as it can of abut 172,000 carloads annually of transcontinental freight traffic now and for some 75 years moved under joint transcontinental rates[10] over through routes which include lines of the Southern Pacific, Great Northern, Union Pacific, Northern Pacific and Milwaukee railroads (designated herein as "Union Pacific routes") between points in the northwestern states of Oregon, Washington, Montana, Idaho and Utah, north of Ogden (designated in this statement as "northwest area"), and points in the eastern and southern parts of the United States, generally east of the Missouri and Mississippi rivers, including points on the Atlantic and the Gulf coasts.[11] These joint rates do not apply via the Rio Grande, except in connection with routes over the Southern Pacific through central California and Nevada

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10 "Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, *but there are many exceptions.*" (App. B, p. 6, emphasis supplied.)

11 The Commission found that the traffic the Rio Grande seeks to divert to its line in this case ordinarily moves over the Union Pacific through Wyoming and Nebraska to and from Missouri River gateways rather than over the Rio Grande; "because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande" for that traffic. (App. B, p. 21)

to Ogden and over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City, on traffic to and from that part of the northwest area lying north of the southern boundary of Oregon and west of the irregular black line shown near the left or west end of the map attached hereto as Appendix A. The joint rates are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via Union Pacific and the Rio Grande. The Rio Grande demanded that its line be included in all of the through routes to and from the northwest area over which the joint rates are applicable, despite the fact it has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific (see figures in oblongs on map, App. A), and would range from 33 percent to more than 50 percent longer than many routes maintained by the Union Pacific with other railroads; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.[12]

Consistent with the protection afforded by Section 15 (4) of the Act against short hauling, the Union Pa-

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12 As pointed out in footnote "1" of Circuit Judge Johnsen's dissenting opinion:

"1. It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a 'bridge' line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles." (App. D, p. 22)

cific and other roads serving the northwest area have always insisted, with immaterial exceptions, upon retaining their long hauls on traffic to and from the northwest area.[13]

No complaint has ever been filed by shippers or the public or by any state public service commission demanding the through routes and joint rates sought by the Rio Grande.

After lengthy hearings, a proposed report of its examiner recommending the granting of the Rio Grande's full demands, exceptions to that report, and two oral arguments, the full Commission issued its report and the order herein assailed, January 12, 1953. On June 10, 1953, the Commission denied petitions for reconsideration.

The order requires the Union Pacific and numerous other railroads, whose connecting lines form through routes extending from the Pacific to the Atlantic and Gulf coasts, to establish through routes with the Rio Grande and "the same" joint rates maintained on Union Pacific routes on westbound carloads of granite and marble monuments from Vermont and Georgia to points in the northwest area, and on eastbound carloads of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from points in

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13 Union Pacific and some of the other railroad appellants have served the northwest for more than 75 years. Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands, and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its line.

the northwest area to points in the eastern and southern parts of the country, indicated above. These articles comprise about 57,000 carloads annually, or a third of the total volume of the traffic the Rio Grande seeks to divert to its line. Diversion of all the traffic permitted by the order would result in estimated revenue loss to the Union Pacific alone of more than $11,000,000 annually, and in very large losses to others of the railroad appellants.

The Commission's Findings and Conclusions

The Commission made the following findings, among others, which are material to consideration of the questions presented. The findings are described here rather fully because of the apparent inconsistency between them and the Commission's ultimate conclusions and its order:

1. That it must overrule a motion of the defendant railroads to dismiss the complaint on the ground that the Commission was estopped by the "financial needs" prohibition of Section 15 (4) of the Act from issuing the order demanded by the Rio Grande. The Commission stated that, in reaching its conclusions, "no consideration has been given to the financial needs" of the Rio Grande (15)[14];

2. That there are at present no through routes, as that term is used in the Act, over the Rio Grande on the traffic here concerned (except on eastbound sheep and goats) and that any order requiring such routes and joint rates over them must be grounded upon findings as specified in Section 15 (4) (b) of the Act, that the routes sought are necessary or desirable in the public interest,

14 Figures in parentheses refer to pages of the Commission's report, as printed in Appendix B hereto.

and "are needed in order to provide adequate, and more efficient or more economic transportation" (14);

3. That the proposed new route via the Rio Grande could not be required "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation" (72);

4. That the Union Pacific has surplus transportation capacity, is efficiently operated, furnishes good service to shippers over its line, and its "facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (60);

5. A large number of shippers and representatives of communities served by the Union Pacific, traffic, commercial and civic associations, opposed the Rio Grande's complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado (65);

6. Shippers in opposition to the Rio Grande's complaint testified to the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. They testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event (65);

7. That the Rio Grande route is from 33 to 219 miles longer than the Union Pacific (25), and that routes

via the Rio Grande would be from 33 to 50% longer than many of the present Union Pacific routes (75);

8. That evidence as to physical characteristics of the two lines shows that the Rio Grande is less favorably situated than the line of the Union Pacific; that traffic routed over the Rio Grande, as a "bridge" line would require at least 24 hours more time in transit than when routed over the Union Pacific and would require one or two more terminal interchange services (60), and that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (74);

9. That diversion of the traffic over the Rio Grande would deprive the Union Pacific of its long haul and would short haul it at least 925 miles in each instance (27);

10. That the traffic sought by the Rio Grande moves over Union Pacific routes through Wyoming because those routes are shorter and they offer lower rates than the Rio Grande (21);

11. Concerning public need for the proposed Rio Grande route and damage to Union Pacific routes by diversion of traffic from them to the Rio Grande, the Commission found that it was impossible to determine or estimate accurately what volume of traffic might be diverted to the Rio Grande if all of the joint rates were made applicable over its line (67), but that whatever the volume so diverted would be the result of "active solicitation" by the Rio Grande "to persuade" shippers and receivers to use its line as an overhead or "bridge" route, the value of its service to shippers, and the extent to which the Rio Grande can "induce" shippers to route

traffic via its line for the purpose of using transit facilities at points on its line and subsequent reshipment beyond at the balance of joint through rates from the point of origin (35);

12. That there are substantial dissimilarities or differences between transportation conditions, operating conditions and lengths of hauls over Union Pacific routes and over the Rio Grande but that the differences in transportation conditions become "relatively insignificant" and "substantially similar" when "spread" over the longer hauls between the northwest area and the eastern and southern parts of the country (76);

13. That the evidence failed to prove that the Union Pacific and other lines discriminate against the Rio Grande (except at points on the Bamberger Railroad between Ogden and Salt Lake City) under Section 3 (4) of the Act in refusing to include its line in their through routes and joint rates (77);

14. That (notwithstanding the dissimilarities in transportation conditions over the respective routes) the combination rates via the Rio Grande on the articles named in the order from and to the areas therein described are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, to the extent those rates exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes (79);

15. That the Rio Grande, a railroad, could not raise in its own behalf an issue of undue prejudice and pref-

erence under Section 3 (1) against another railroad, but that testimony of intervening shippers raised that issue, and also raised a question as to a need for "more" adequate and economic service than afforded by Union Pacific routes with respect to perishable food articles (72);

16. That the present complex and far-flung marketing system for perishable food articles requires that such articles move with expedition and care "over as many routes as possible" with "as much flexibility as possible" and without "unnecessary interruptions" (73), to "as many markets and outlets as possible" (51);

17. That, while through service over Union Pacific routes in general is as satisfactory to shippers as the service which could be provided over routes including the Rio Grande, this is not true with respect to perishable food articles, and that shippers of those articles from the northwest area "are debarred from effective participation in the widespread system developed for the marketing of such commodities" (73), (apparently, only because, if routed over the longer Rio Grande route to eastern and southern markets, higher rates apply than when routed via Union Pacific routes, for the undisputed evidence shows that those shippers market their products via Union Pacific routes in all 48 states and several foreign countries.);

18. That on shipments of perishable food articles reconsigned or accorded transit privileges such as stop-off for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, *at points on the Rio Grande,* "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that "on such traffic the

defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes" (74);

19. That through routes via the Rio Grande and joint rates "the same" as apply over Union Pacific routes for the commodities named in the order between points in the areas described therein are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (78);

20. That there is no indication that witnesses admittedly solicited and procured by the Rio Grande to testify so as to help it win its case were improperly influenced or had been stimulated in any questionable manner (38).

Opinions of the District Court

Majority Opinion:

The majority opinion holds that the Commission's order is valid only to the extent that it embraces shipments of the articles named in the order which move to and from the northwest area from and to points east of Denver and which require stoppage-in-transit at points on the Rio Grande not also served by the Union Pacific.[15] To that limited extent the majority holds that the evidence supports the order and that it is valid under Sections 1, 15 (3) and 15 (4) of the Act and does not violate the direction of Section 15 (4) that reasonable preference be

15 The transit privileges described in the majority opinion are feeding and grazing livestock, cleaning, packaging, processing, freezing and storing fresh fruits, vegetables, poultry, food products, butter, eggs and beans, at points on the Rio Grande and later shipped to points east of its eastern termini, and westbound carload shipments of monuments to be stopped for partial unloading at points on the Rio Grande with final destination at points on the Union Pacific northwest of Ogden.

given the carrier which originates the traffic, and that so limited, it would "eliminate" the contention that the order was for the purpose of assisting the Rio Grande to meet its financial needs and would rest squarely within Section 15 (4) (b).

The majority further holds that the order is not valid to the extent that it embraces carload shipments of the articles named in the order which do not require stoppage-in-transit privileges at points on the Rio Grande.

The majority holds that the Commission's finding that Union Pacific routes are inadequate is based on the lack of in-transit privileges at points on the Rio Grande (although the Commission's report (App. B, p. 39) clearly states the fact that all customary transit privileges are available at points on the Rio Grande) and that upon that finding the Commission had power to require through routes and joint rates.

In sustaining the order "in part" the majority adopted a different theory or legal basis from that of the Commission, in that, the majority sustains the order "in part" upon its own finding from the evidence that transportation service *via the Rio Grande* between the northwest area and the area east of Denver is "inadequate and also inefficient and uneconomical" (App. D, p. 18). That is, the majority condemns as inadequate the Rio Grande's own *proposed route* which both the Commission and the majority find necessary to provide adequate and more economic transportation, whereas the Commission held that it could not require the through routes and joint rates demanded by the Rio Grande "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation". It found Union Pacific routes

"inadequate and less economical than are the Rio Grande routes" because, on shipments of the articles named in the order reconsigned or stopped for processing, storage or other transit privileges *at points on the Rio Grande*, "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply."

The majority holds that the evidence does not support the Commission's finding that present transportation service via Union Pacific routes between the northwest and points east of Denver is inadequate; that the evidence shows that present service over the Union Pacific between such points is adequate and that establishment of "the same" joint rates via the Rio Grande between the northwest and points east of Denver "would not make such service more economical because the rates for such service would only equal the present rates via the Union Pacific between those points" (App. D, p. 18). But the majority also holds that establishment of through routes and equal joint rates on shipments of the articles named in the order that require stoppage-in-transit at points on the Rio Grande (not also served by the Union Pacific) is necessary "to provide adequate and more economic transportation" (App. D, p. 19), and "will result in more economical transportation" (App. D, p. 13).

The majority holds that the Commission is without power to order through routes and joint rates to remove undue preference and prejudice under Section 3 (1) between shippers located on different railroads because, if it did so, the short-hauling prohibition of Sec. 15 (4) "would be practically emasculated" (App. D, p. 16). But the majority also holds that in its requirement of through routes and joint rates in connection with the Rio

Grande at points from Ogden to Salt Lake City, the order "is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act" (App. D, p. 21). The majority also holds that the order requiring through routes and joint rates which short haul the Union Pacific is valid for the purpose of establishing reasonable joint rates in lieu of the Rio Grande's combination rates found unreasonable by the Commission in violation of Section 1.

Dissenting Opinion:

Circuit Judge Johnsen's dissenting opinion holds that the order should be enjoined and annulled in its entirety because of the "pervading infirmities" on which it rests, and because "The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute" (App. D, p. 22). Pointing out that the Commission purports to make as its primary basis for ordering through routes and joint rates over the Rio Grande, "perishable food articles" and requirements of the marketing system for such articles, including an alleged need for as many transit privileges on as many routes "as possible", and the fact that the Commission has used such new standards and criteria in attempting to justify equalizing rates via the Rio Grande with rates over Union Pacific routes, the dissenting opinion holds—

> "* * * the philosophy and standard of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' can not be made the basis for overriding the short-hauling provisions of section 15(4), through the merry-go-round device of calling all transportation inadequate without the

availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term 'more economic transportation' to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing." (App. D, p. 29.)

Observing that where short-hauling other carriers under Section 15 (4) (b) is involved, as it is here, the Commission must find that the proposed additional route will provide "more efficient or more economic transportation" than that provided by present through routes, and further observing that in final analysis what the Commission's order does is simply to reduce the Rio Grande's combination rates to the level of the joint rates over Union Pacific routes, the dissenting opinion holds:

"* * * where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term 'more economic transportation' under section 15(4), in the addition of another carrier's route as a mere 'bridge' line for such traffic." (App. D, p. 26.)

Circuit Judge Johnsen evaluated the Commission's report and order as a new method by which the Commission attempts "to gain a new foothold, under another disguise" to evade the short-hauling prohibition of Section 15 (4) and he characterizes the Commission's inclusion of marble and granite monuments and ordinary livestock within the "perishable commodities" classification as a further attempt by the Commission "to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an

apparently wider future reach", and holds that to gain a true picture of the order, requires that the Commission's report be "stripped of all the confusion in which the Report has been wrapped".

Pointing to the Commission's findings of more onerous operating conditions and substantially dissimilar and less favorable transportation conditions on the Rio Grande and its conclusion that those dissimilarities become relatively insignificant when spread over hauls of great length, and further pointing to the Commission's finding of discrimination against the Rio Grande without any evidence, but merely upon the lack of evidence concerning either dissimilarity or similarity in transportation conditions along the Bamberger, Circuit Judge Johnsen holds that these instances are "characteristic or in the pattern of the loose and improper basis and manner" in which the Commission has dealt with the entire case and are illustrative of the reasons why the order should be stricken down.

The Questions Presented Are Substantial

The major underlying issue in this case is whether, upon complaint of the Rio Grande, a perenially impecunious short-line railroad seeking to divert additional bridge traffic from other carriers, the Commission may ignore the "financial needs" prohibition of Section 15 (4) of the Act, and use clause (b) of Section 15 (4) to break down admittedly adequate and long-established Union Pacific through routes and channels of commerce and compel them to short haul themselves at least 925 miles to "feed" to the Rio Grande for a "bridge" haul over its longer route traffic which has always moved over the existing Union Pacific routes. The substantiality and public importance of the questions presented is force-

fully indicated by the inevitable fact that, if the interpretations and methods employed by the Commission and the majority of the district court in this case are permitted to stand, then existing through routes and communities served by and dependent on them will no longer have any of the protection under Section 15 (4) against being short hauled which Congress has always refused to yield.[16] That protection is vital to the existence of the essential long-line railroads of the country, and its public importance in this case is demonstrated by the fact that numerous shippers and the public service commissions of Oregon, Washington, Montana, Wyoming and Nebraska, appellants here, intervened and submitted strong testimony to the Commission vigorously opposing the Rio Grande's scheme to enhance its financial position by diverting traffic and revenues to its line from the long-established Union Pacific routes and communities served by them. These five appellant States have continued their opposition to the Rio Grande by intervening as plaintiffs in the district court and joining in the attack

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16 That the Commission in this case has not only departed from but has abused and misused clause (b) of Section 15 (4) clearly appears from the history of legislative action leading to enactment of clause (b). In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

"Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available** * *The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate*. If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

on the Commission's order, and by their appeal to this Court.[17]

In *U. S. v. Great Northern R. Co.*, 343 U. S. 562, while sustaining the Commission's power to aid a carrier in meeting its "financial needs" by redistributing revenues between carriers forming "an existing through route", where no diversion of traffic from one carrier to another was involved, this Court warned the Commission against the very "form of regulation" its order attempts in this case.[18]

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17 The following statement of the interests and position of those States is made at page 2 of their brief in the district court:

"These states were moved to intervene in the proceeding before the Commission because of the overwhelming detriment the shippers and general public of such states would suffer as a result of the diversion of traffic away from the Union Pacific proposed by the Rio Grande. Any such diversion of traffic would immediately affect the service of the Union Pacific to shippers and would also inflict very serious consequences upon employees of the Union Pacific that are now engaged in the handling of such traffic. Moreover, such diversion, as shown by testimony reviewed hereafter, would greatly impair the capacity of the Union Pacific to continue to provide at lowest cost the transportation service so essential in all this territory.

"It was made indisputably clear by these states that in their area there is no substantial need for the new routes and joint rates proposed by Rio Grande and that the granting of proposed relief to this local mountain railroad of Colorado and Utah would adversely affect the economy of all these intervening states."

18 At pages 574-575, the Court held:

"It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially *but can also, at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas. Congress amended Section 15 (4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs.* But the provisions of Section 15 (4) — the restrictions against short hauling, the financial needs prohibition and the emergency route provision — all deal with the Commission's power to establish through routes." (Italics added.)

And in *Thompson v. United States*, 343 U. S. 549, the Court rejected the Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes by altering "the form of its order", and attempting to divert traffic to a new route by equalizing rates under an order purportedly issued as an exercise of the power to prescribe reasonable local rates in lieu of rates found unreasonable in violation of Section 1. Those two decisions were handed down by this Court June 2, 1952, about seven months before the Commission issued its report and order January 12, 1953, in this case. Notwithstanding those warnings from this Court, the Commission proceeded in this case to adopt new disguises and devices to completely evade or nullify the protection railroads have under Section 15 (4) against being short hauled by compulsory establishment of additional through routes and joint rates.

The Commission here short hauls the shorter, admittedly adequate, efficient and long-established Union Pacific routes by ordering new through routes and joint rates over the longer and more onerous Rio Grande route, as an indirect remedy for rates via the Rio Grande found unreasonable under Section 1 and unduly prejudicial and discriminatory under Section 3 (1) and (4), and to equalize rates over the longer Rio Grande route with those on the shorter Union Pacific routes. In its efforts to reach its objective, the Commission has not only ignored its direct powers to remedy violations of those sections, but it has also departed from the special Congressional formula or jurisdictional standards and cri-

teria of Section 15 (4) (b)[19] upon which it purports to base its order, and has, by its findings and conclusion dealt with the standards and special formula of that clause as if it read:

> "(b) unless the Commission finds that the through route proposed to be established is *necessary and desirable in the public interest,* in order to provide *more* adequate and more economic transportation."

Thus, by importing "necessary or desirable in the public interest" from Section 15 (3) (which is the standard for ordering new routes that do not short haul exising routes), and substituting that standard for "needed"[20] (which is one ingredient of the formula prescribed by clause "(b)"), and by adding "more", so as to qualify and dilute "adequate", and by deleting "more efficient" from clause "(b)", the Commission has not only departed from the controlling statutory standards and criteria, but has written its own new and different formula to suit its purpose in this case.

In addition to this mutilation of the statutory standards and criteria, the Commission, although finding existing Union Pacific routes to be adequate, efficient, shorter, less onerous and offering lower rates, nevertheless condemns those routes as "inadequate and less economical than are the Rio Grande routes" upon the novel

19 Section 15 (4) prohibits the Commission from ordering a new through route which short hauls existing routes unless (a) the existing route is unreasonably long, or — "(b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation"

20 *Western Air Lines v. C.A.B.*, 347 U.S. 67, 71; *Delta Air Lines v. Summerfield*, 347 U.S. 74, 79.

ground that "at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply." A similarly unique and untenable reason for condemning and short-hauling an existing route was rejected by this Court in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538.

The result of the Commission's efforts over many years to evade or "limit * * * the impact of the short-hauling restriction on its power to establish through routes"[21] is that in three out of four short-hauling through route cases reviewed by this Court, the Commission's orders have been stricken down because they violated or ignored the short haul prohibition. See *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538 (1910); *United States v. Mo. Pac. R. Co.*, 278 U. S. 269 (1929); and *Thompson v. United States*, 343 U. S. 549 (1952). The only short-hauling order of the Commission which this Court has sustained was in *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588 (1945).[22]

The necessity for briefs, oral argument and a decision by this Court settling the contrariety of views and the legality or illegality of the novel interpretations and

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21 *Thompson v. United States*, 343 U.S. 549, 555-556, and footnotes.

22 But the through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing 90 cents per ton and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commission's order would result in some 200 miles of additional transportation over the most "onerous" operating conditions of any western railroad, adding $124 per car to transportation cost, two additional interchanges between carriers at an additional cost of $20.44 per car per interchange, and at least one or two days' more time in transit, and would short haul existing routes at least 925 miles, and would deprive some of the appellant railroads of their entire hauls.

methods by which the Commission and the majority of the district court reached the results here presented is further indicated by the facts that—

(1) Of the eleven Commissioners, three dissented "in part", one dissented, in effect, by "concurring in part" and one did not vote upon the issuance of the Commission's order in this case;

(2) The majority of the district court found it necessary to "remake" the Commission's order but, even by doing so, was able to sustain it only "in part" by adopting a different legal basis for it and by limiting it to shipments of the articles named in the order that would actually stop for transit privileges at points on the Rio Grande. The dissenting opinion of Circuit Judge Johnsen, however, exhibits views widely divergent from those of the majority and would strike down the order in its entirety because of the "pervading infirmities" on which it rests and because the Commission used "standards and criteria" which are beyond the warrant of the statute, and dealt with the entire case in a "loose and improper" manner so as "to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach", all in "another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier";

(3) Five separate appeals, involving both facets of the final decree sustaining the order "in part" and

enjoining it "in part," have been taken to this Court by adverse parties to this suit from the judgment below;

(4) The Rio Grande itself brought a suit in the District Court for the District of Colorado, *The Denver and Rio Grande Western Railroad Company v. United States of America and Interstate Commerce Commission*, Civil Action No. 4492, in which it sought to enjoin and annul the Commission's failure and refusal in this same proceeding to grant its full demands for through routes and joint rates on all commodities. On February 14, 1955, that Court entered a final judgment and decree, upon its opinion filed January 13, 1955, enjoining and setting aside the Commission's order "insofar as it denied and withheld relief" to the Rio Grande. A motion for new trial, reargument and reconsideration was overruled and denied by order of that court entered April 22, 1955. That case will also be appealed to this Court.

The questions presented by this appeal are new and different from questions presented on different factual situations in other through route cases reviewed by this Court. The questions here presented have not been considered by this Court. If the new methods and criteria by which the Commission and the majority of the court below reached the ends the Commission attempts to accomplish in this case are allowed to stand, then, as pointed out in the dissenting opinion of Circuit Judge Johnsen—

> "* * * the railroads of the country may as well forget section 15(4) entirely, as affording them any protection whatsoever against deprivation of their long hauls." (App. D, p. 27.)

It is submitted that the questions presented by this appeal are substantial and of general public importance not only to the appellant railroads and the five appellant States but also to the more essential railroads comprising long-established routes and channels of commerce and trade, and to shippers and communities served by them throughout the country.

Respectfully submitted,

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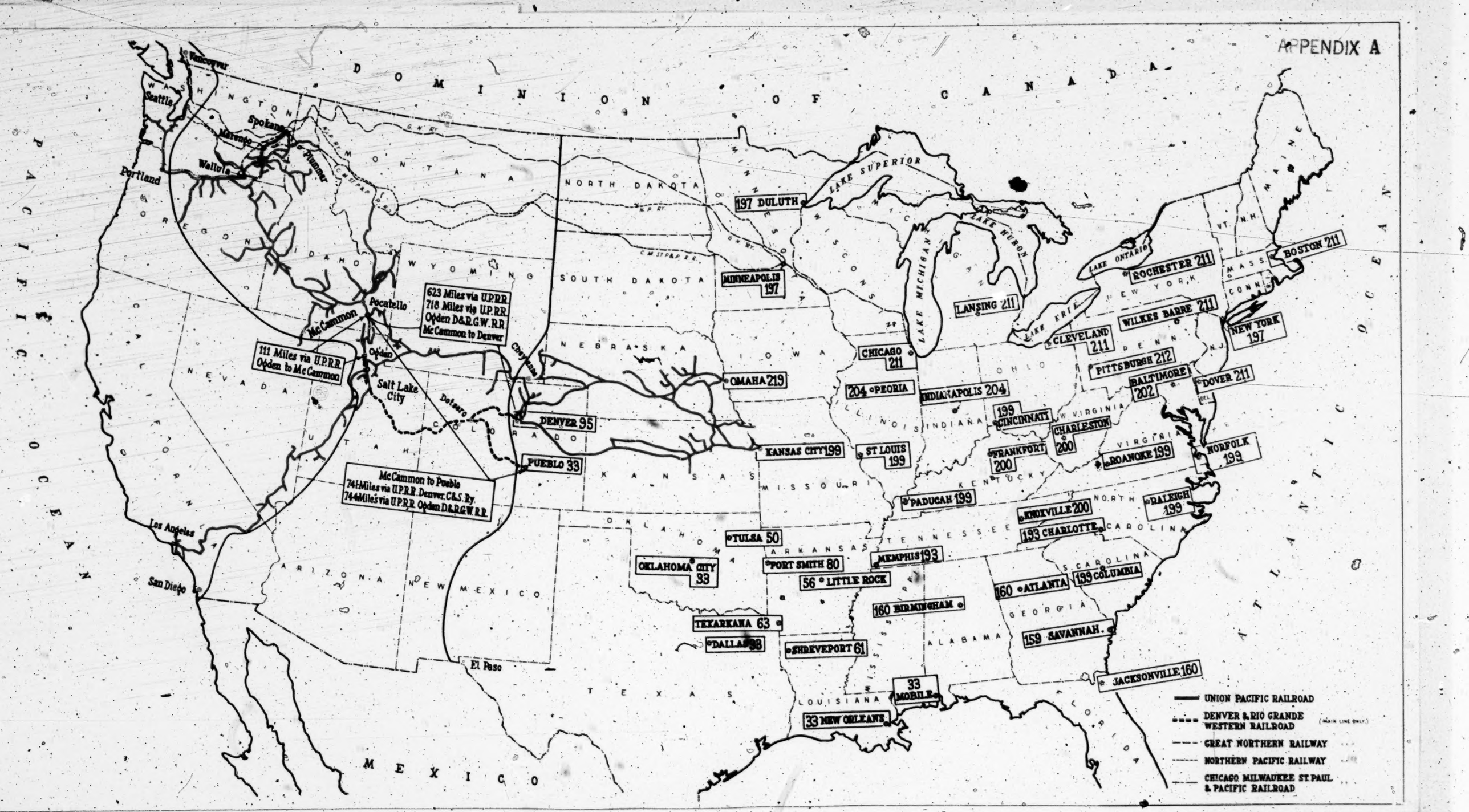
APPENDIX A


DOMINION OF CANADA
PACIFIC OCEAN
ATLANTIC OCEAN
MEXICO
Vancouver
Seattle
Portland
Spokane
Marengo
Wallula
Plummer
WASHINGTON
OREGON
IDAHO
MONTANA
WYOMING
NORTH DAKOTA
SOUTH DAKOTA
NEBRASKA
NEVADA
UTAH
COLORADO
KANSAS
ARIZONA
NEW MEXICO
TEXAS
OKLAHOMA
MISSOURI
ARKANSAS
LOUISIANA
MINNESOTA
IOWA
ILLINOIS
WISCONSIN
MICHIGAN
OHIO
INDIANA
KENTUCKY
TENNESSEE
MISSISSIPPI
ALABAMA
GEORGIA
FLORIDA
SOUTH CAROLINA
NORTH CAROLINA
VIRGINIA
W. VIRGINIA
PENN.
NEW YORK
MASS.
VT.
N.H.
MAINE
CONN.
N.J.
DEL.
MD.
LAKE SUPERIOR
LAKE MICHIGAN
LAKE HURON
LAKE ERIE
LAKE ONTARIO
Los Angeles
San Diego
El Paso
Pocatello
McCammon
Ogden
Salt Lake City
Cheyenne
Denver
Pueblo
Delores
623 Miles via U.P.R.R.
718 Miles via U.P.R.R.
Ogden D&R.G.W.R.R.
McCammon to Denver
111 Miles via U.P.R.R.
Ogden to McCammon
McCammon to Pueblo
741 Miles via U.P.R.R. Denver C&S. Ry.
744 Miles via U.P.R.R. Ogden D&R.G.W.R.R.
197 DULUTH
MINNEAPOLIS 197
OMAHA 219
DENVER 95
PUEBLO 33
KANSAS CITY 199
ST LOUIS 199
CHICAGO 211
204 PEORIA
LANSING 211
INDIANAPOLIS 204
199 CINCINNATI
CLEVELAND 211
ROCHESTER 211
BOSTON 211
WILKES BARRE 211
NEW YORK 197
PITTSBURGH 212
BALTIMORE 202
DOVER 211
CHARLESTON 200
FRANKFORT 200
ROANOKE 199
NORFOLK 199
RALEIGH 199
KNOXVILLE 200
193 CHARLOTTE
PADUCAH 199
MEMPHIS 193
PORT SMITH 80
56 LITTLE ROCK
TULSA 50
OKLAHOMA CITY 33
TEXARKANA 63
DALLAS 98
SHREVEPORT 61
160 BIRMINGHAM
160 ATLANTA
159 SAVANNAH
199 COLUMBIA
JACKSONVILLE 160
33 MOBILE
33 NEW ORLEANS
UNION PACIFIC RAILROAD
DENVER & RIO GRANDE WESTERN RAILROAD (MAIN LINE ONLY)
GREAT NORTHERN RAILWAY
NORTHERN PACIFIC RAILWAY
CHICAGO MILWAUKEE ST PAUL & PACIFIC RAILROAD

INTERSTATE COMMERCE COMMISSION

No. 30297

DENVER & RIO GRANDE WESTERN RAILWAY COMPANY v. UNION PACIFIC RAILROAD COMPANY, ET. AL.

Submitted October 16, 1952. Decided January 12, 1953

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1. Through routes and joint rates found necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with complainant, on certain commodities from and to points in the excluded territory in the northwest area as described in the report, to and from points in official, southern, and southwestern territories, including Missouri and a portion of Iowa.

2. Rates on the same commodities from and to the same points over complainant's routes via Ogden or Salt Lake City, found unreasonable and unduly prejudicial to and preferential of shippers and receivers.

3. Maintenance by defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the line of complainant south of Ogden, found to subject complainant to unlawful discrimination.

4. Order entered requiring removal of unlawfulness found to exist and establishment of through routes and joint rates found reasonable.

Robert E. Quirk, Otis J. Gibson, and *H. L. Mulliner* for complainant.

Elmer B. Collins, L. H. Anderson, John B. Burchell, Robert H. Bierma, L. E. Clarahan, F. H. Cole, Jr., Eugene S. Davis, Lee S. Davis, P. H. Draver, F. G. Fitzpatrick, P. F. Gault, R. J. Hagman, L. W. Hobbs, Roland J. Lehman, B. P. Leverich, James E. Lyons, E. F. McGuire, F. J. Melia, Conrad Olson, W. R. Rouse, James S. Souby, Jr., Carson L. Taylor, and *L. E. Torinus, Jr.,* for defendants.

C. A. Miller for a railroad association; *Chas. B. Bowling, Carl R. Bullock, Henry A. Cockrum,* and *J. L. Pease* for Secretary of Agriculture; *Ralph C. Horton, John H. Winchell, Joseph W. Hawley, T. S. Wood,* and *Ralph Sargent, Jr.,* for Public Utilities Commission of the State of Colorado; *W. B. Joy, H. N. Beamer, B. Auger* and *L. F. Purvis* for Public Utilities Commission of Idaho; *Byron M. Gray* for State Corporation Commission of the State of Kansas; *Edwin S. Booth* and *Sidney T. Smith* for Board of Railroad Commissioners of the State of Montana; *Clarence S. Beck, Harold A. Palmer, Bert L. Overcash,* and *Harry C. King* for State of Nebraska and Nebraska State Railway Commission; *John H. Carkin* and *Thomas W. Dench* for Public Utilities Commissioner of Oregon; *Smith Troy, Phil H. Gallagher, Joseph Starin,* and *Bartlett Burns* for Washington Public Service Commission; *Norman B. Gray* and *Jefferson C. Church* for the State Board of Equalization and Public Service Commission of Wyoming; *Hal S. Bennett, Donald Hacking, W. R. McEntire,* and *Chas. A. Root* for Public Service Commission of Utah; and *George F. Guy* for the city of Cheyenne, Wyo., interveners.

Calvin L. Blaine, Chas. E. Blaine, Maurice H. Greene, Alden T. Hill, E. K. Kohlwes, Lowe P. Siddons, Reginald T. Titus, and *Lee J. Quasey* for other interveners.

Report of the Commission

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the complainants, the defendants, and cer-

tain interveners and the issues were twice argued orally. Our conclusions differ in part from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant, sometimes called the Rio Grande, a common carrier by railroad operating in interstate commerce within the States of Colorado, Utah, and New Mexico, requests us to order the Union Pacific Railroad Company, which with its leased lines is referred to as the Union Pacific system or the Union Pacific, and the other defendants to establish and maintain for the future just, reasonable, and non-discriminatory competitive joint through rates[1] and charges for the transportation of freight in connection with the complainant through Salt Lake City or Ogden, Utah, referred to as the Ogden gateway. More particularly, we are asked to require the defendants to establish such joint rates on freight traffic in connection with the complainant through its Colorado and Utah gateways, (1) between (*a*) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington,[2] and British Columbia, Canada, and (*b*) Colorado common points and the northwest territory specified in 1 (*a*).

No evidence was submitted with respect to rates from or to British Columbia, and such rates will not be considered.

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1 Rates and rate differences named herein are per 100 pounds and are those in effect at the time of the hearing herein.

2 This area is referred to in this report as the northwest area or territory.

Interveners in support of the complaint include the Secretary of Agriculture of the United States, the public utility commissions of the States of Colorado and Utah, the American National Live Stock Association, other livestock and stock-feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce, and certain groups of employees of the complainant.

Interveners in support of the defendants include the State of Nebraska, city of Cheyenne, Wyo., the public utility commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska and Kansas, various chambers of commerce and other associations, certain employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago and North Western Railway Company, and the Wabash Railroad Company.

In its exceptions to the proposed report, the State Corporation Commission of the State of Kansas took the position that the recommended finding that joint rates should be established over the existing through routes by way of Ogden and the Rio Grande is amply sustained by the evidence with respect to the rates on wheat and livestock but not otherwise, and that the recommended findings as to commodities generally are too broad in scope.

The Public Utility Commission of the State of Idaho intervened but presented no evidence. It filed a brief in which it took the position that the relief sought by the complainant should be denied, except that joint through competitive rates should be required to be established via Ogden and the Rio Grande on livestock and fruits and vegetables.

We granted a petition for leave to intervene filed by the American Short Line Railroad Association. That association appeared in support of the complaint and was represented at the hearing and the oral argument, but offered no evidence. The defendants filed a petition for reconsideration of the order permitting intervention. The request was denied at the hearing, but it is renewed on brief. It appears that 44 of the defendants named in the complaint are members of the association and that 8 defendant members are subsidiaries under common control and management with other defendants. Additional facts were developed at the hearing with respect to the relation of certain members of the association as defendants and indicating that they, as well as some others, opposed the complaint. The association filed a brief from which it appears that it has a current membership of 314 common carriers by railroad and that the association as such and many of its members are interested in the issues presented in the complaint. The intervention sought and granted was by the association as such, and not by or in behalf of the respective members thereof named herein as defendants. The petition of intervention was properly granted, and the petition for reconsideration is denied.

Immediately prior to the oral argument, counsel for the defendants submitted a memorandum of additional authorities and discussion relating to certain exceptions filed by the Union Pacific to the proposed report of the examiner. The complainant and certain interveners objected to the receipt of the document. Our rules of practice do not permit the submission of such a document so late in the proceeding. Permission to file it was not requested in time to permit opposing parties to examine it and to make reply thereto prior to the oral argument when

the proceeding was finally submitted. The objection to its receipt in the proceeding is sustained.

The complainant alleges that the defendant's failure and refusal to join with it in establishing joint rates to and from the territories described on transcontinental and other traffic through the gateways referred to result in violations of sections 1 (4) and 3 of the Interstate Commerce Act, and is contrary to the national transportation policy as declared by the Congress. We are asked to prescribe just and reasonable rates over the Rio Grande routes to remove the alleged unlawfulness.

Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions. The principal ones of importance in this proceeding are those under which the Union Pacific for the most part restricts routing on traffic to and from points in Utah north of Ogden and in Idaho, Montana, Oregon, and Washington over its lines so that it may obtain the long haul from and to the Missouri River. On transcontinental traffic that moves over its lines to and from California, Nevada, and portions of Utah, the Union Pacific participates in through routes and joint rates with other lines, including the Rio Grande. On that traffic interchange is made with the Rio Grande at Salt Lake City and Provo, Utah.

As hereinafter explained, the Rio Grande participates in joint rates on transcontinental traffic with all of its connections at its Utah junctions, except the Union Pacific, from and to the western portions of the northwest area. Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect, close the Ogden gateway in a commercial sense. We are asked to exercise our authority under section 15 (3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest.

The power to establish through routes and joint rates is limited by the provisions of section 15 (4), which declares that, except as provided in section 3 of the act, and except where one of the carriers is a water line, we may not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (*a*) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (*b*) unless we find that the through route proposed is needed in order to provide "adequate, and more efficient or more economic, transportation." The foregoing provisions are subject to the further proviso that in prescribing through routes,

we shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (*a*) and (*b*), give reasonable preference to the carrier by railroad which originates the traffic. The section further provides that no through route and joint rates applicable thereto shall be established by us for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15 (4) are not applicable and need not be considered. It further contends that the principal task here is to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such through routes are unjust, unreasonable, or discriminatory, in violation of sections 1 and 3 of the act, and contrary to the national transportation policy. The complainant argues that there is public need for joint rates via the Ogden gateway equal to the joint rates now maintained by the defendants over the competitive routes, and the public interest as well as the national transportation policy will be served by the establishment of such rates.

Through Routes

The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute "through routes" as that term is used in section 15 (3) and (4) of the act. As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or

through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.

In *Thompson v. United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the content of the term "through route" as used in the act, upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15 (1) of the act. The Court held:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such

through route. * * * Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route.

The Court cited with approval *Beaman Elevator Co. v. Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, wherein the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, "that one shipment was not representative of the carriers' course of business." It thus becomes necessary to determine whether the carriers in this proceeding "hold themselves out as offering through transportation service" from and to the points here concerned via the Ogden gateway as indicated by their "course of business" in respect of traffic over the routes in question.

The evidence shows that 37 carload shipments were made in 1948, which may be accepted as a representative year, on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment,

paper bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

West-bound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destinations so as to avoid paying the applicable combination rates on Ogden.

In that same year, 21 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly used routes to the routes here sought to be opened commercially. For example, in February, 1949, when the main line of the Union Pacific in Wyoming was blocked by snow storms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable and have no bearing upon the issue of whether or not those routes constitute "through routes" within the meaning of that term as used in the act.

So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by

the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads eastbound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co., supra,* cited with approval by the Supreme Court in *Thompson v. United States, supra.* Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15 (3) and (4) of the act simply by preliminarily making a shipment or two over

the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15 (4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*

We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic[3] here concerned, and that any order requiring the establishment of such routes and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15 (3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower that the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together.

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3 Except on east-bound shipments of sheep and goats, to which reference is made later in this report.

Before proceeding to a discussion of the evidence relating to the foregoing issues, we shall give consideration to a procedural contention and a motion made by the defendants. The contention is that an allegation of undue prejudice and preference under section 3 (1) of the act is not properly before us. As stated, the complaint embodies an allegation, among other things, of violation of section 3, without specifying any particular paragraph or paragraphs of that section. We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3 (1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con, was received on this issue and we think it has been fairly tendered here for decision.

The motion is that the complaint be dismissed on the ground that the request of the complainant for joint rates over the Rio Grande via the Ogden gateway is for the purpose of assisting that carrier to meet its financial needs. As stated, section 15 (4) of the act forbids us to require the establishment of any through route and joint rate applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs. Consistently throughout the proceeding, the complainant disclaimed any intent to prosecute the complaint with the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion is overruled.

Proponents' Testimony

Joint rates now apply via the Ogden gateway over the Rio Grande on traffic from and to Colorado common

points and points east thereof to and from California and certain Pacific coast points in connection with the Union Pacific, the Southern Pacific Company, The Western Pacific Railroad Company, and The Great Northern Railway Company, as more particularly described later.

The Union Pacific with its leased lines has operated since January, 1936, as a single system. It consists of the Union Pacific Railroad Company operating from Omaha, Nebr., and Kansas City, Mo., to Ogden via Julesburg, Colo., Cheyenne and Granger, Wyo., and via Limon and Denver, Colo., and Cheyenne; the Oregon Short Line Railroad Company operating in Utah north of Ogden, and in Wyoming, Idaho, Oregon, Montana, and Nevada, extending from Salt Lake City to Butte, Mont., and Huntington, Oreg., the Oregon-Washington Railroad and Navigation Company operating in Idaho, Oregon, and Washington north and west of Huntington to Spokane, Wash., Portland, Oreg., and Seattle, Wash.; the Los Angeles & Salt Lake Railroad Company from Salt Lake City to Los Angeles, Calif.; and the St. Joseph & Grand Island Railroad Company in Kansas, Nebraska, and Missouri from St. Joseph, Mo., and Grand Island, Nebr. Lease of the properties of the foregoing roads, which had been operated with the Union Pacific under common control and management, was considered and approved in *Union Pac. R. Co. Unification*, 189 I. C. C. 357 (1933) and 207 I. C. C. 543 (1935).

The railroad now operated by the complainant was originally the Denver, Rio Grande Railway organized in 1870 as a narrow-gage line. After passing through various hands and receiverships, the Denver and Rio Grande Railroad Company was organized in 1886 to operate the property. When the main line was converted to standard

gage in 1890, the railroad was opened for through traffic between Denver and Ogden by way of Pueblo, Rio Grande, and Tennessee Pass, Colo. Prior to that date, the Rio Grande could participate in transcontinental traffic only by transferring the lading to its narrow-gage cars. In 1901, it acquired the Rio Grande Western Railroad Company operating between Grand Junction, Colo., and Ogden via Provo and Salt Lake City.

Although opened for through business, the line was handicapped by the fact, among others, that traffic originated at or destined to its Colorado gateways or east thereof could not be interchanged at joint through rates at Ogden or Salt Lake City with its connections, the Oregon Short Line, to or from points on that line in Utah north of Ogden and through southern Idaho to Butte and Huntington. Also, traffic from and to Oregon over the Southern Pacific, to or from Colorado common points and east, could not be transported over the Rio Grande at joint rates equal to those over competitive routes. In 1897, however, the Union Pacific and its controlled lines, the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company operating north and west of Huntington, were in separate receiverships. In that year the two lines last named established joint through rates to and from points in the northwest area with the Rio Grande via Ogden and thus opened that gateway at rates equal to the rates then in effect over the Wyoming line of the Union Pacific through Cheyenne and Granger. Those rates applied on traffic between the Pacific coast terminals, including Portland, Tacoma, and Seattle, and Missouri and Mississippi River points and numerous points east thereof.

In the same year, the Oregon-Washington Railroad and Navigation Company established joint through rates

between its Oregon and Washington stations and points on, or reached by, the lines of the Great Northern and Northern Pacific Railway Company through Spokane and Wallula, Wash. Joint rates through those junctions from and to Union Pacific stations have been continued in effect.

Ogden remained as an open gateway through which joint rates over the Rio Grande applied until 1906, when such rates were canceled by the Union Pacific from and to Colorado common points and east, to and from points in Montana, Idaho, and Oregon on the Oregon Short Line and its connections. In 1912, transcontinental freight rates to and from points on the Oregon-Washington Railroad and Navigation Company (resulting from reorganizations in the interval) over the Rio Grande and its Utah junctions were also canceled. During this period the Southern Pacific was controlled by the Union Pacific and that circumstance greatly influenced the routing of freight and passenger traffic over the Union Pacific to and from Oregon and California. As a result of competitive stresses, as well as for other reasons, the Rio Grande financed the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast. The Western Pacific was opened in July 1911 and participates in through routes and joint rates on transcontinental traffic via Salt Lake City with the Rio Grande and the Union Pacific, its two connections at that point. In 1912, the Union Pacific was required to divest itself of control of the Southern Pacific. *United States v. Union Pac. R. Co.*, 226 U. S. 61.

Through passenger fares also were in effect over the lines of the Union Pacific and the Rio Grande via the latter's Colorado and Utah junctions from 1897 to 1915,

when they were canceled by the Union Pacific. *Ogden Gateway Case*, 35 I. C. C. 131.

In 1915, the Western Pacific and, in 1918, the Rio Grande, went into receivership. After various changes, the latter was reorganized on April 11, 1947, as the Denver and Rio Grande Western Railroad Company. *Denver & R. G. W. R. Co. Reorganization*, 267 I. C. C. 862. As a part of its reorganization on that date, the Rio Grande merged with the Denver and Salt Lake Railway Company, and thereby acquired the Moffat tunnel line of that carrier. By that line and the Dotsero cut-off, completed in 1934, from Orestod, Colo., on the Denver & Salt Lake to Dotsero, Colo., on its own line, the Rio Grande obtained a route from Denver to Ogden 175 miles shorter than its route through Pueblo.

The Rio Grande now operates between Denver and Ogden over the two routes. By way of the Moffat tunnel the distance is 607 miles, and the other route through Pueblo is 782 miles. These two are the main lines and constitute 951 miles, or 51 percent, of the Rio Grande standard-gage tracks. In addition, there are 1,452 miles of branch lines, of which 527 miles are narrow gage serving western Colorado and northwestern New Mexico in areas of small population and light traffic. In all, it operates about 2,400 miles of road.

Eastern connections of the Rio Grande are in Colorado at Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad. At Denver, it connects and interchanges traffic with the Union Pacific, the Chicago, Burlington & Quincy Railroad Company, called the Burlington, the Chicago, Rock Island and Pacific Railroad Company, called the Rock Island, The Atchison, Topeka and Santa

Fe Railway Company, called the Santa Fe, and The Colorado and Southern Railway Company, of the Burlington system. At Colorado Springs, 75 miles south of Denver, it interchanges with the Rock Island and the Santa Fe. At Pueblo, 119 miles south of Denver, it interchanges with the Missouri Pacific Railroad Company (Guy A. Thompson, trustee), the Santa Fe, and the Colorado & Southern. At Walsenburg, 51 miles farther south, it interchanges with the Colorado & Southern. At Trinidad, a short distance from the Colorado-New Mexico State line and 92 miles south of Pueblo, it interchanges with the Colorado & Southern and the Santa Fe.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City, 37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line.

Since 1890, when its standard-gage line was completed between Denver and Ogden via Pueblo, the Rio Grande, through its eastern and western connections, has been a part of several transcontinental routes. It now participates in through routes and joint rates on equal terms with other carriers on transcontinental traffic between (1) points in an area generally described as west of a line beginning at Vancouver, British Columbia, thence south, just east of Seattle and Portland, and southeasterly to a point west of Ogden and Salt Lake City, crossing the line of the Union Pacific at Lynndyl, Utah, 118 miles west of Salt Lake City, and thence southwesterly, east of the Union Pacific's Los Angeles line, to a point

south of San Diego, Calif., and (2) all points in the United States east of a line beginning at the Canadian border and extending southward along the Montana-North Dakota State line and the western border of South Dakota, thence southwesterly through the extreme southeastern portion of Wyoming, west of Cheyenne, and the eastern part of Colorado just west of Denver, Pueblo, and Trinidad, thence southwest and south through the central or western part of New Mexico to a point just west of El Paso. However, joint rates generally do not apply in connection with the Rio Grande on transcontinental traffic originating at or destined to points in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington east of the line first described. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande such traffic would move at higher combinations of rates to and from Ogden or Salt Lake City.

The area in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington, to and from which joint rates generally do not apply in connection with the Union Pacific and the Rio Grande, will be referred to as the excluded territory. Transcontinental traffic to or from such territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than over the Rio Grande route because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande route. The Rio Grande desires to participate as a bridge line on such traffic via its Colorado gateways and Ogden at the joint through rates. This also would include traffic to or from points in the excluded territory on lines which join with the Union Pacific in joint rates.

Representative origins, destinations, commodities, rates distances, average loadings per car, and revenues per car-mile are shown in an appendix to this report, for east-bound and west-bound movements, compiled from exhibits of record. The distances shown are those over existing routes over the Union Pacific and its connections by which joint through rates apply, and over the Rio Grande and its connections over which combination rates apply. Revenues per car-mile are computed for such rates and distances and, in addition, for the distances over the Rio Grande at joint rates on the same basis as those over the Union Pacific routes, as sought herein.

Traffic between the excluded territory and Colorado common-point territory (points in eastern Colorado from Denver south to Trinidad and west to Canon City) generally must move over the Union Pacific through Denver to get the lowest rate. Similarly, traffic between the excluded territory and Utah common-point territory (points in Utah from Ogden south to Provo and Payson) generally must move over the Union Pacific to get the lowest rate. There are some exceptions, however, with respect to rates between Utah common points on the Rio Grande and the northwest area on livestock, lumber, grain, and other commodities.

An analysis of distances from and to 5 representative points[4] on the Union Pacific in Utah north of Ogden, and in Idaho and Washington, to 14 destinations, Denver and east, over restricted routes of the Union Pacific for distances, computed over the short routes, ranging from 649 miles to Denver to 3,279 to Boston, Mass., shows that routes via Ogden and the Rio Grande to the same points

4 Logan, Utah; Boise, Idaho Falls, and Twin Falls, Idaho; and Spokane, Wash.

are longer by from 1 percent (from Spokane to New Orleans, La.) to 16 percent (from Idaho Falls to Kansas City). To the same destinations from nine other representative points[5] on the Union Pacific, from which through routes and joint rates are available in connection with the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, referred to as the Milwaukee, the Great Northern, the Northern Pacific, or the Southern Pacific, the routes via Ogden and the Rio Grande would be longer than the short workable and service routes by from 1 percent (from Seattle to Fort Worth, Tex., and Oklahoma City, Okla.) to 37.5 percent (from Yakima to Minneapolis, Minn.). To Minneapolis from seven of the nine origin points, the routes via the Great Northern form the short workable and service routes.

The Ogden-gateway routes of the Union Pacific consist of two lines. The Los Angeles line runs southwesterly through Salt Lake City, Provo, and Delta, Utah, Caliente and Las Vegas, Nev., and Barstow, Calif., to Los Angeles. Through routes with joint rates are maintained over that route in connection with the Rio Grande, as hereinbefore described. The other line of the Union Pacific runs north from Ogden, 111 miles to McCammon in southeastern Idaho. At that point it meets the Wyoming line of the Union Pacific leading west 186 miles from Granger, the junction point with the main line through Cheyenne to Ogden from the east. From McCammon the line extends north to Pocatello, Idaho, 22 miles, and from that point the main line runs in a northwesterly direction across Idaho into Oregon and Washington. From Pocatello another line extends northerly to Butte. From

5 Hood River, Milton, Pendleton, Portland, Elgin, and Redmond, Oreg., and Yakima, Kent, and Seattle, Wash.

Cheyenne, the main line extends east across Nebraska to Omaha, 507 miles, and south to Denver, 109 miles. From Ogden through Granger to Cheyenne the distance is 483 miles.

All shipments to or from points in Idaho, Montana, Oregon, and Washington north or west of McCammon over present Union Pacific routes, or over routes through Ogden and the Rio Grande, must pass through McCammon. That point therefore, is used as the point of divergence in computing distances over the Union Pacific routes and the routes over the Rio Grande by way of Ogden. A shipment from McCammon over the Union Pacific to Cheyenne would move 529 miles; and to the Denver gateway, also over the Union Pacific, 623 miles. But over the Union Pacific to Ogden, thence the Rio Grande to the Denver gateway, the shipment would move 718 miles, or 198 miles farther than over the Union Pacific route to Cheyenne and 95 miles farther than over its route to Denver. On shipments carried through to the Missouri River and points east, the Union Pacific route through Cheyenne also has the advantage in distance.

From Cheyenne to Kansas City a shipment would move 624 miles, as compared with 636 miles for a movement off the Rio Grande from Denver to Kansas City over the Rock Island, its short-line connection. A through shipment, therefore, from McCammon to Kansas City over the direct line of the Union Pacific through Granger and Cheyenne would move 1,153 miles, as compared with 1,352 miles, 199 miles longer, via Ogden and the Rio Grande to Denver, thence the Rock Island. The latter route on such a shipment would be 17.2 percent circuitous. To points east of Kansas City the maximum excess mileage from McCammon over the Rio Grande route is on a

haul to Pittsburgh, Pa. Over the Union Pacific to Omaha, thence the Chicago & North Western to Chicago, Ill., and The Pennsylvania Railroad Company beyond, the haul would be 1,991 miles, and over the Union Pacific to Ogden, the Rio Grande to Denver, the Burlington to Chicago, thence the Pennsylvania, the haul would be 2,203 miles, 212 miles longer, or a circuity of 10.7 percent.

In the following table are shown representative destinations and the distances from McCammon over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming. Joint through rates apply over the latter routes. Over routes that include the Rio Grande higher combination rates apply. The table does not contain complete routing, except over the Union Pacific direct to Omaha and Kansas City. The last column of the table shows the percentages by which the Rio Grande routes are longer, or the circuity, from the point of divergence, McCammon, to the points shown.

From McCammon, Idaho, to—	Via Union Pacific	Distance	Via Rio Grande	Distance	Difference	Circuity via Rio Grande
		Miles		Miles	Miles	Percent
Omaha, Nebr.	(1)	1,036	(2)	1,255	219	21.1
Kansas City, Mo.	(3)	1,153	(2)	1,352	199	17.2
Minneapolis, Minn.	(3)	1,396	(2)	1,593	197	14.1
St. Louis, Mo.	(3)	1,428	(2)	1,627	199	13.9
Chicago, Ill.	(1)	1,524	(2)	1,735	211	13.8
Pittsburgh, Pa.	(1)	1,991	(2)	2,203	212	10.7
Charleston, W. Va.	(3)	2,018	(2)	2,218	200	10.0
Columbia, S. C.	(3)	2,274	(2)	2,473	199	8.8
Baltimore, Md.	(1)	2,319	(2)	2,521	202	8.7
Norfolk, Va.	(3)	2,438	(2)	2,637	199	8.2
New York, N. Y.	(1)	2,477	(2)	2,674	197	8.0
Tulsa, Okla.	(4)	1,377	(5)	1,427	50	3.6
Dallas, Tex.	(6)	1,456	(5)	1,489	33	2.3
Fort Smith, Ark.	(4)	1,458	(5)	1,538	80	5.5
Memphis, Tenn.	(3)	1,593	(5)	1,786	193	12.1
New Orleans, La.	(6)	1,970	(5)	2,003	33	1.7
Atlanta, Ga.	(3)	2,044	(5)	2,204	160	7.8
Savannah, Ga.	(3)	2,327	(5)	2,486	159	6.8

1 Union Pacific through Wyoming to Omaha.
2 Union Pacific to Ogden, Rio Grande to Denver.
3 Union Pacific through Wyoming to Kansas City.
4 Union Pacific to Pacific Junction, Kans.
5 Union Pacific to Ogden, Rio Grande to Pueblo.
6 Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

The differences in the distances to destinations in the Southwest over routes including the Rio Grande from points in the excluded territory, as compared with the Union Pacific routes through Wyoming, are much less than they are to Missouri River crossings and points east and southeast. About 90 per cent of the traffic upon which joint through rates are sought via Ogden and the Rio Grande moves to the latter areas, and about 10 percent to the Southwest.

Over its routes through Wyoming, the Union Pacific gets its long haul from McCammon to Omaha, 1,036 miles, and to Kansas City, 1,153 miles. If joint rates were prescribed over the Union Pacific to Ogden and the Rio Grande to Denver, the Union Pacific's haul from McCammon to Ogden on traffic to Omaha or Kansas City and beyond would be 111 miles. However, if such traffic were routed beyond Denver over the Union Pacific, the latter would get a further haul of 560 miles to Omaha via Julesburg, or 640 miles to Kansas City via Salina, Kans., a total haul from McCammon of 671 miles to Omaha or 751 miles to Kansas City. Joint through rates are in effect over that route on sheep from Union Pacific origins in southern Idaho and eastern Oregon, but are 19 cents higher to the Missouri River and east (20 cents to Chicago) than rates over more direct routes of the Union Pacific. That railroad would establish a similar basis on cattle if requested. Over the route in connection with the Rio Grande, it would lose its haul of 529 miles from McCammon to Cheyenne, or 623 miles to Denver. On traffic routed via Ogden, the Rio Grande, and Pueblo to destinations east thereof, the Union Pacific would not be in a position to get any additional haul.

All of the foregoing distances, as stated, are computed from McCammon as the point of divergence. The great bulk of the traffic, however, from the excluded territory in Idaho, Montana, Oregon, and Washington originates or terminates on the Union Pacific or its connections west and north of that junction. On such traffic the Union Pacific would have a substantial haul in addition to that of 111 miles from McCammon to Ogden.

The hauls to Ogden would be, for example, from Lewiston, Idaho, 847 miles; from Centralia, Wash., 937 miles; and from Seattle, 1,029 miles. Over the Union Pacific direct from those respective origins to Omaha, the hauls would be 1,772, 1,862, and 1,954 miles. Those figures show the extent to which the Union Pacific would lose its long haul, the loss in mileage being 925 miles in each instance.

From and to points in the excluded territory in Oregon and Washington, and on the Burke and Headquarters branches of the Union Pacific in northern Idaho, the Union Pacific and certain other defendants have arrangements for the interchange of traffic in various commodities at junctions or gateways in Oregon, Washington, and Idaho, under joint rates. On traffic through such gateways moving under the joint rates, the Union Pacific in many instances foregoes its long haul. The gateways through which the rates are in effect, with certain limitations upon their application specified in the tariffs, are: Portland, in connection with the Southern Pacific; Marengo, Wash., and Plummer, Idaho, in connection with the Milwaukee; Spokane, in connection with the Great Northern; Wallula, Wash., and Spokane, in connection with the Northern Pacific; and Spokane, in connection with the Spokane International Railroad Company con-

necting with the Canadian Pacific Railway Company at Eastport, Idaho, at the Canadian border.

Illustrative of the hauls over the Union Pacific on traffic routed through these gateways are the following: From Lewiston, 132 miles via Marengo or 193 miles via Spokane; from Centralia, 393 miles on a route through Marengo; from Seattle, 184 miles through Portland; and from Pendleton, Oreg., 165 miles via Marengo, 227 miles via Spokane, or 70 miles via Wallula, Wash.; on traffic routed over its connections at such points. If joint rates were established from the same origin points to Omaha and beyond via Ogden and the Rio Grande, the hauls of the Union Pacific to Ogden would be substantially greater than many of its hauls via other junctions with its connections, as illustrated.

For example, from Pendleton, a representative point, on traffic to Chicago the Union Pacific has a haul of 1,560 miles on its route through Omaha, but only 70 miles over an established through route via Wallula and the Northern Pacific and connections. The rates are the same over both routes. Over a route via Ogden and the Rio Grande to Denver, thence the Burlington, the distance is 2,257 miles, or 6.4 percent longer than the route via Wallula and 10.4 per cent longer than the Union Pacific route through Omaha. The Union Pacific's haul over the Rio Grande route would be 633 miles. From Pendleton to St. Louis, the Rio Grande route sought would be shorter by 168 miles than a through route now available via Spokane and the Spokane International and its connections, and would be 201 miles, or 10.3 percent, longer than the Union Pacific route through Kansas City. To Oklahoma City, Okla., the haul of the Union Pacific would be increased from 227 miles, over the present route via Wal-

lula and the Northern Pacific and connections, to 633 miles via Ogden and the Rio Grande to Pueblo and the Santa Fe beyond. The distance over the latter route is 1,910 miles, or only 34 miles, 1.3 percent, longer than the route which gives the Union Pacific its long haul, and 692 miles, or 36.2 percent, shorter than the foregoing route through Wallula.

The foregoing are illustrative of numerous established through routes in which the Union Pacific participates from points in the excluded territory which short haul that carrier. Many of such routes are longer than those here sought via Ogden and the Rio Grande, and this is true to all sections of the country east of the Rocky Mountains, except western trunk-line territory. To the latter territory the short-hauling routes are generally shorter than the routes by which the Union Pacific retains its long haul, and considerably shorter, for example, by 37.5 percent from Yakima to Minneapolis, than the routes sought via Ogden and the Rio Grande. As indicated, the portion of the excluded territory from and to which this short hauling of the Union Pacific occurs does not include points in Utah nor points in Idaho, except on the Burke and Headquarters branches of the Union Pacific in the northern portion of that State.

These short-hauling routes have been in effect for many years. Most of them were established prior to the dates when the Union Pacific assumed control of the portions of its line west of Huntington and south of Salt Lake City. Joint rates with the Southern Pacific through Portland have been in effect since about 1910, with the Milwaukee through Marengo and Plummer since about 1902, with the Great Northern through Spokane since about 1894, with the Northern Pacific through Wallula

since about 1883, and with the Spokane International through Spokane since about 1907.

On some of the traffic interchanged at these gateways the Union Pacific obtains a short haul, as compared with its connections, and on other traffic a long haul. Eastbound traffic through the specified Washington and Idaho gateways consists of apples, pears, lumber and other forest products, some steel products, and miscellaneous commodities. A large portion of the traffic, particularly lumber, moves to North and South Dakota, Minnesota, and Wisconsin over the northern routes. Traffic over such routes moves also to Midwestern States and to States east of the Mississippi River. West-bound traffic through the same gateways consists of manufactured products and miscellaneous commodities from the Middle West and from eastern and southern territories.

These interchange arrangements are warranted and in the public interest, according to the defendants, because each carrier shares in long hauls on some traffic as well as short hauls on other traffic, and because the arrangements make it possible for the carriers to handle traffic over shorter routes in many instances. This latter statement, however, applies only, except to an insignificant extent, to such routes to and from points in western trunk-line territory.

As indicated, through routes and joint rates apply in connection with the Rio Grande through Provo on traffic to or from points on the Los Angeles line of the Union Pacific. Such routes generally are shorter than routes over the Union Pacific direct to or from Omaha, Kansas City, or Denver. The following is illustrative:

From Los Angeles, Calif., to—	Via Union Pacific	Distance	Via Rio Grande	Distance
		Miles		Miles
Omaha, Nebr.	(1)	1,808	(2)	1,813
Minneapolis, Minn.	(1)	2,168	(2)	2,152
Kansas City, Mo.	(3)	1,925	(2)	1,911
St. Louis, Mo.	(3)	2,200	(2)	2,185
Denver, Colo.	(4)	1,395	(2)	1,276
Chicago, Ill.	(1)	2,296	(2)	2,293
Atlanta, Ga.	(3)	2,816	(5)	2,762
Little Rock, Ark.	(3)	2,430	(5)	2,272
Dallas, Tex.	(4)	2,226	(5)	2,045

1 Union Pacific to Omaha.
2 Union Pacific to Provo and Rio Grande to Denver.
3 Union Pacific to Kansas City.
4 Union Pacific to Denver.
5 Union Pacific to Provo and Rio Grande to Pueblo.

Other defendants also participate in through routes with joint rates on traffic moving to or from points on the Union Pacific in the excluded territory from and to eastern points and voluntarily forego their long hauls. For example, the Burlington, the Rock Island, the Santa Fe, and the Missouri Pacific participate in joint rates with the Union Pacific through Kansas City and Omaha. The railroads named could haul the traffic for longer distances over their own rails to Pueblo, Denver, or Cheyenne, instead of permitting shippers to route through Kansas City and Omaha in connection with the Union Pacific.

The total amount of traffic moving between the four Northwestern States and points east of the Colorado common points is substantial. According to figures computed by the Union Pacific, transcontinental carload traffic from the East in the year 1948 over the Union Pacific through Wyoming to those Northwestern States totaled 55,631 cars. Of these, (1) 81.7 percent originated in eastern

Colorado, Kansas, Missouri, Kentucky, Virginia and all States north thereof, (2) 10.8 percent in Texas, Oklahoma, Arkansas, and Louisiana, and (3) 7.5 percent in Tennessee, Mississippi, Alabama, Georgia, Florida, North Carolina, and South Carolina. About 62 percent of the total consisted of manufactures and miscellaneous traffic, most of which originated in group (1). East-bound traffic from the four States to the same three groups in the same year totaled 116,278 carloads, of which 84.1 percent went to group (1), 10.5 percent to group (2), and 5.4 percent to group (3). About 75 percent of that total consisted of agricultural and forest products.

Of the total carloads, 171,909 in both directions, 121,909 originated or terminated in the excluded territory and the remainder, 50,000, originated or terminated at points in Oregon and Washington west of that territory. The Rio Grande is in a position to solicit movements of the latter traffic over its line at competitive joint through rates in connection with longer routes over the Southern Pacific from Portland to Ogden or over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City. These joint rates are the same as the rates which apply over the direct routes of the Union Pacific from origins on that road in the same area west of the excluded territory. For example, from Seattle to Denver the distance is 1,538 miles over the Union Pacific direct and 1,894 miles over the Union Pacific to Portland, the Southern Pacific to Ogden, and the Rio Grande beyond. In addition to the joint rates sought via the Ogden gateway from the excluded territory, the complainant is also seeking joint rates from the northwest area west of the excluded territory, the same as those in effect over the Union Pacific, Southern Pacific, and Great Northern-

Western Pacific routes, for application in connection with the Union Pacific via the Ogden gateway.

A substantial volume of traffic is handled by the Rio Grande in connection with the described routes over which it participates in competitive joint through rates to and from Oregon, Washington, and British Columbia. For example, in 1948 the Rio Grande handled 30,486 carloads in connection with the Southern Pacific and 7,152 carloads in connection with the Western Pacific-Great Northern. In 1947, the volume was 22,722 and 8,909 carloads over the respective routes. Most of this consisted of lumber from Southern Pacific origins south of Portland.[6]

The complainant's estimate of the traffic in carloads that would be potentially available to and from the excluded territory for solicitation by the Rio Grande, in the event competitive joint rates were established over its line via Ogden, from Idaho, Montana, Oregon, and Washington is about 29 percent greater than the volume of traffic, according to the Union Pacific, that moved in 1948 over its Wyoming lines. The estimate was based upon the total carload traffic originated and terminated by the Union Pacific in the years 1944 to 1948, inclusive. It included commodities within the description of products of agriculture, animals and animal products, products of mines, products of forests, and manufactures and miscellaneous commodities. The total carloads estimated as ori-

6 Prior to February 1, 1949, joint rates applied over the Bieber route in connection with the Rio Grande to competitive territory in Colorado and east thereof on lumber from certain origins in Oregon and Washington on the Oregon Trunk Railway and the Spokane, Portland and Seattle Railway Company (subsidiaries of the Great Northern and Northern Pacific). Those rates were canceled on February 1, 1949, in connection with the Rio Grande; there is no indication that the cancellation was protested.

ginated by the Union Pacific annually in the area specified was 101,476 and the number terminated 56,286, a total "potential" of 157,762 carloads.

This estimate did not include any shipments that might originate or terminate off the line of the Union Pacific and moved over that carrier as a part of a longer haul. Although stated to be a conservative estimate of potential traffic, it was computed from a substantial number of reliable sources, and represents the complainant's best analysis of the traffic considered available for solicitation. No attempt was made to estimate the amount of traffic that the Rio Grande might actually obtain from these potential sources other than a statement that there was no probability that it would get more than 10 percent and that the amount probably would be less than 10 percent because of the vigorous competition of the Union Pacific. This figure of 10 percent as a maximum was derived from the experience of the Rio Grande in obtaining other transcontinental traffic now moving at joint rates in competition with the Santa Fe, Southern Pacific, Union Pacific, Great Northern, Northern Pacific, and Milwaukee. If the Ogden gateway were opened to traffic to and from the four States named, there would be active competition with the Union Pacific, the Wabash, the Chicago & North Western, and the Missouri River connections that favor Union Pacific routing. At the present time the Rio Grande gets less than 5 percent of the traffic to and from California over the available through routes, with joint rates in connection with its line, because of competition with other routes.

A transportation specialist of the United States Department of Agriculture testified that the Rio Grande would be doing well if it obtained 1,000 cars additional

annually from this traffic, an amount that is less than 1 percent of the estimated potential total traffic.

Whatever the amount, it would be the result mainly of (*a*) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (*b*) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it.

Since 1934, when the Dotsero cut-off was constructed, affording a shorter route by the Rio Grande between Denver and the Utah gateways, there has been a marked increase in the traffic carried over that railroad. For the 2 years prior thereto, the total tons carried were less than 6,000,000 although the tons carried exceeded that figure in each year before that, back to 1924. Beginning in 1934, the traffic gradually increased and reached a maximum of 18,517,000 tons in the war year of 1944. In 1945 it dropped to 14,213,000 tons, but increased in 1947 to 18,331,000 tons and in 1948 to 18,473,000 tons. This tonnage has shown a considerable increase percentagewise in traffic received from connecting lines and a decrease in traffic originated. In 1924, 23.2 percent was received from connections and 76.8 percent originated. In 1934, the respective percent-

ages were 39.3 and 60.7. In 1947, they were 49.8 and 50.2, and in 1948 they were 52.3 and 47.7 percent. This traffic in 1948 did not differ markedly from the traffic handled in the four war years 1942-45, when the percentages of traffic received from connections ranged from 52.6 percent in 1942 to 58.2 percent in 1945.

Of the traffic received from connections in the 15-year period 1934 to 1948, inclusive, the percentage terminated on the line of the Rio Grande has ranged from 16.4 percent in 1941 to 20.7 percent in 1948. In the war years the percentages were 16.7 to 19.9 percent. In the same 15-year period, of the traffic received from connections, the amount delivered to connections, that is, bridge traffic ranged from 20.7 percent in 1935 to 39.6 percent in the war year of 1945. Excluding the war years, the percentage of traffic received from connections that was delivered to connections was 30.1 percent in 1947 and 31.6 percent in 1948. In 1934, the corresponding percentage was 21.7 percent and in 1924 it was 9 percent. These percentages show the increasing importance of the Rio Grande as a bridge line. In tons of freight carried in 1947, such traffic accounted for 5,519,239 tons out of a total of 18,331,176 tons, and in 1948 accounted for 5,846,793 tons of a total of 18,473,356 tons carried. In revenue, the Rio Grande received in 1947 from its bridge traffic $22,894,412, which was 43.3 percent of its total revenue of $52,883,339; and in 1948. $27,654,086 or 44.2 percent of its total revenue of $62,505,951.

Although the percentage relation of the traffic originated on the Rio Grande to the total traffic of that carrier has decreased, such traffic both in tonnage and revenue has increased in the same 15-year period. In 1934, the tons originated were 3,826,049 and the revenue received therefrom was $8,311,254; in 1947, the tons originated were 9,202,867 and the revenue therefrom $20,190,318; and in

1948, the corresponding figures were 8,804,334 tons and $22,018,519. The 1947 and 1948 figures exceeded those of the war years. The volume of strictly local traffic; that is, traffic both originated and terminated on the line, also increased; this traffic in 1934, for example, accounted for 2,048,544 tons and $4,351,807 in revenue, and in 1948, for 3,307,374 tons and $7,630,587. Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

The reasons given for the decline or lack of proportionate growth in traffic originated are (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many sawmills; and (4) loss of local traffic to other forms of transportation.

The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from connecting lines and terminated. Such traffic affords a measure of the increasing importance of the Rio Grande to the shippers and receivers of freight in the localities and areas in the States of Colorado and Utah served by it. Although percentagewise, bridge traffic in relation to the total was greater in 1948 than in 1934, and increased by over 326 percent in the 15-year period, traffic originated or terminated also increased by substantial amounts, or over 155 percent. In terms of revenue, however, less was received from bridge traffic than from the other traffic. In 1934, for example, the Rio Grande received from bridge traffic $5,648,891, and

in 1948 it received $27,654,086; from the other traffic, it received $11,519,335 in 1934 and $34,851,865 in 1948.

The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled "20 Questions" as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimulated in any questionable manner.

Transit.—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. West-bound traffic to that territory is made up for the most part of manufactures and partially manufactured articles, some of which are stopped for storage, partial unloading at a number of points, and fabrication in transit.

On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the stoppage-in-transit arrangements offered by that railroad at such Rio Grande points. Pueblo has a population of about 75,000; Colorado Springs, 50,000; Grand Junction, 17,500; and Price, 5,000. All of these are distributing points for surrounding areas. A shipper at Chicago, for example, may have a carload containing shipments for consignees at Pueblo and Boise, Idaho. If the car is partially unloaded at Pueblo it cannot be reshipped over the Rio Grande to Boise at a joint through rate; but the car can be moved to Boise via Pueblo and Denver, thence the Union Pacific at a joint through rate. If stops are desired on the Rio Grande at Grand Junction, Price, or Provo, for example, joint through rates would not be available.

A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows:

Building Materials.—A dealer in and distributor of general building materials in Salt Lake City, who handles from 400 to 500 carloads annually, obtains from 150 to 200 cars from points east of Colorado common points, including cellotex from Marrero, La., roofing from Cincinnati, Ohio, doors from Louisville, Ky., hardwoods and plywoods from Algoma, Wis., and Orangeburg, N. C., asbestos products from St. Louis, and asphalt siding from Minneapolis. Distribution is made in carloads, from pool cars, and from warehouses to customers located on the Rio Grande on the western slope of Colorado, such as Glenwood Springs and Grand Junction Colo., and in Utah, such as Price, Helper, Ephraim, and Manti; and also on the Union Pacific in northern Utah; in Wyoming, Rock Springs and west; and in southern Idaho northward to and including Ashton on the West Yellowstone branch and westward to and including Magic, Shoshone, and Buhl. This dealer cannot now serve these customers from shipments made in through cars at joint rates over the Rio Grande when such cars also carry shipments for points on the Union Pacific beyond Ogden. Ephraim and Manti are on a branch line about 52 and 59 miles, respectively, south of Thistle, Utah.

In some instances this shipper has had to forego business east of Salt Lake City at points as far as Glenwood Springs because of the rate situation. If joint through rates were established, this distributor could give customers at a number of intermediate points on the Rio Grande, who generally are small dealers and can take only less-

than-carload quantities, better service through partial unloading in transit and more efficient service by frequent deliveries under more flexible schedules, instead of being limited, as at present to furnishing service in connection with pool cars consigned to Salt Lake City as the ultimate destination. Pool cars with partial loads for that point or Ogden and points on the Union Pacific beyond do not now move over the Rio Grande, but are routed over the Union Pacific to get the benefit of joint rates.

Of the 150 or more cars annually from the east, this distributor estimated that he would have stopped for partial unloading about 25 percent. Witness made no mention of commercial competition, but indicated that his chief concern was better service to his customers and a saving in cost to his company if such carloads could be stopped for partial unloading at intermediate points on the Rio Grande while moving at the through rates to Union Pacific destinations in the area served by him.

Farm machinery.—A distributor of farm machinery and equipment at Salt Lake City receives carloads of these commodities from eastern origins, including farm tractors from Detroit, Mich., and distributes them by his own motor vehicles to points in Utah and Idaho. This business was established in 1947, at which time the production of these commodities was insufficient to meet all demands, and a system of allocations based on prior needs was introduced. While the system of allocations was in effect, it was found to be more convenient and efficient to bring all shipments to Salt Lake City and distribute them by truck. This distributor is located on the Rio Grande at Salt Lake City and all shipments move over that line. He expressed a desire for joint through rates from eastern origins to points in

Utah and Idaho in connection with the Rio Grande, but admitted that no attempt was being made to partially unload shipments at points on the Rio Grande south of Salt Lake City when carloads are consigned to the latter point, or to ship over the Union Pacific to Salt Lake City where carloads could be partially unloaded or stored and later shipped to Union Pacific destinations in Utah and Idaho at joint through rates. The witness for this distributor stated that he preferred to ship in-bound over the Rio Grande and forego the stopping-in-transit provisions that are now in effect at Salt Lake City and other points on the Union Pacific when traffic is routed over that line.

A factory branch of a large manufacturer of farm machinery and equipment which distributes in the intermountain area is located on the Rio Grande at Salt Lake City. In 1949 it received 369 carloads from its eastern manufacturing points. Of these, 70 percent were sold at points north of Salt Lake City, mostly at points served by the Union Pacific as far as Ontario, Oreg., and the remainder in Utah and western Colorado. About one-half of the shipments to Salt Lake City moved over the Rio Grande route and one-half over the Union Pacific. Shipments which move in over the Union Pacific may be stopped at Salt Lake City for partial unloading or storage in transit at the joint through rates when the ultimate destinations are on the lines of that carrier, but combinations of rates to and from Salt Lake City apply when such shipments move into that point over the Rio Grande. The manager of this branch testified that it would be desirable to establish joint through rates over the Rio Grande so that shipments moving over that line could be stored in transit at Salt Lake City and later reshipped, or partially unloaded thereat and the remainder forwarded to points on the Union Pacific at charges no greater than apply on similar

shipments moving over the Union Pacific. However he did not know what effect this would have on the parent company as some shipments have been routed over the Rio Grande when Union Pacific routing was requested. To indicate a need for joint through rates reference was made to a shipment of tractors which were routed over the Rio Grande to Salt Lake City. At that time a customer at Ontario needed two tractors and it cost about $50 each to ship them from Salt Lake City by motor carrier. If joint through rates had been in effect the car could have been partially unloaded at Salt Lake City and the two tractors could have been forwarded to Ontario at the joint rate from origin to Ontario. The record fails to show the difference in the joint rates to Salt Lake City and to Ontario. On a 34,000-pound shipment of tractors from Chicago, the joint through rate is $2.68 to Ogden and $2.98 to Boise, which is southeast of Ontario, representing a difference of $102 in charges.

Monuments.—A fabricator and wholesaler of granite and marble monuments at Brigham City, Utah, on the Union Pacific 21 miles north of Ogden, obtains his stone from Vermont, Georgia, Wisconsin, and Minnesota and sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington. This dealer has keen competition with dealers in like articles in Salt Lake City. Its business is such that straight carloads rarely can be shipped to retailers. If joint through rates were established over the Rio Grande through Ogden, cars could be stopped in transit at Colorado points, such as Grand Junction. A retailer at the latter point testified that he finds it impracticable, except in unusual instances, to purchase the various kinds of monuments needed in the trade in carloads, and that the keen competition cannot be met when

shipments are made in less than carloads. There is thus an urgent need for the establishment of joint through rates on this traffic to destinations in the excluded territory with stop-off privileges at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

Livestock.—Large volumes of traffic are involved in connection with the livestock industry and with the processing and marketing of agricultural products. With respect to livestock, evidence was submitted by producers, feeders, and marketers. A number of producers in the northwest area, particularly in Idaho at such points as Pocatello, Burley, Soda Springs, and Blackfoot, desire joint rates via Ogden and the Rio Grande to markets in Denver, Pueblo, and east thereof on the same basis that applies on shipments moved over the Union Pacific through Cheyenne. Much of the evidence dealt with the advantages from such joint rates when applied on livestock shipped to grazing and feeding areas in Utah and Colorado on the Rio Grande for reshipment beyond under transit arrangements. In the areas in Utah and Colorado served by the Rio Grande are good pasture lands for grazing livestock. In addition to livestock produced locally in those areas, substantial quantities are shipped in the summer season from other sections of Colorado, Utah, and surrounding States, both for feeding in feed lots and pastures and for grazing on the livestock ranges. Movements of livestock, both sheep and cattle, into and out of Colorado are substantial in volume.

Evidence as to the needs of raisers of livestock and operators engaged in fattening livestock for markets was

submitted by persons engaged in those pursuits, individually and as representatives of livestock and feeder associations. These came from several representative points or districts served by the Rio Grande, such as Heber City and La Sal, Utah, and Burns, Lamar, and Las Animas, Colo. Those served only by the Rio Grande generally buy from areas from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit on feeder stock when the fattened animals are shipped to Denver or markets east thereof. The evidence shows that such operators have to absorb the difference in transportation costs and are not able to purchase cattle or sheep economically in the northwest area in competition with buyers from Iowa, Wyoming, Nebraska, Colorado, and Kansas that have the benefit of competitive joint rates from the excluded territory over Union Pacific routes with grazing or feeding in transit arrangements.

Due to the curtailment of the use of grazing lands in national forests in Colorado, as part of a general policy for all such forest lands, livestock raisers in Colorado have curtailed their operations in raising livestock, and have engaged more in fattening stock by grazing in private pastures or feeding in feed lots. They purchase most of their feeder stock in Colorado and surrounding areas, but for supply, quality and price reasons they have been seeking some feeder stock from more distant origins, and the need for doing so, particularly by reason of the curtailment of the pasture area, has been increasing. Livestock produced in the northwest area, particularly in Idaho, Montana, and Oregon, is of excellent grade, does well on the range, and is considered very desirable for feeding and breeding purposes. About 90 percent of the

sheep produced in Colorado are produced in the area served by the Rio Grande, and the operators in this territory purchase replacement or breeding ewes in the excluded territory for summer grazing and the production of white-faced or mutton-type lambs. One witness indicated that in-bound billing on breeding ewes is used under the feeding-in-transit arrangements, when available, at points on the Rio Grande when the new-born, fattened lambs are shipped to markets, but the feeding-in-transit arrangements apparently do not apply for breeding in transit.

Operators on the Rio Grande in western Colorado and those in the eastern Arkansas Valley sections (in southeastern Colorado east of Pueblo and in southwestern Kansas) feel that they cannot now profitably purchase stock in the excluded territory for feeding in transit in competition with similar operators on the Union Pacific in Wyoming, Colorado, Nebraska, and Kansas, due to the rate situation. For example, from Dillon, Mont., to Kansas City the rate on sheep or goats in double-deck cars is $1.21 over the Union Pacific direct and $1.40 over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond, a difference of 19 cents. The 19-cent differential over the latter route applies generally on sheep and goats from Union Pacific origins in the excluded territory to Missouri River markets and points east thereof. These rates are published as joint rates over through routes via Ogden and the Rio Grande. On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to all of the territory Colorado common points and east thereof, via Ogden and the Rio Grande, the rates are on a combination basis. Cattle and sheep may be shipped from the excluded territory over the Union Pacific to Denver and con-

meeting lines beyond to points in the Arkansas Valley, such as Lamar, for feeding in transit and subsequent reshipment to Missouri River markets, or markets east thereof, at the rates applicable over the Union Pacific direct to the Missouri River markets, plus an arbitrary of 8.5 cents per 100 pounds. Feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are now able to overbid the Arkansas Valley feeders on northwest stock when destined to the Missouri River and east thereof, and the latter are thus unable to compete successfully because of their unfavorable rate situation. The northern Colorado-Nebraska operators feed a majority of the lambs fattened for market in the United States.

A packing plant at Pueblo purchases lambs at the Ogden market, some of which originate at points on the Union Pacific in Idaho and Oregon. These shipments are routed over the Rio Grande from Ogden even though it costs from $70 to $80 per car more than the total charges would be if the shipments were routed over the Union Pacific to Denver at the transit balance of the through rate. The Rio Grande is used from Ogden because shipments do not have to be stopped for feed and water en route to Pueblo, whereas shipments routed from Ogden over the Union Pacific usually require feed and water at Denver. There is less shrinkage on shipments moved over the Rio Grande, but not enough to offset the additional freight charges.

The rates on livestock in western territory were prescribed in *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535. Generally, the rates are predicated on the shortest routes over which carload traffic can be moved without transfer

of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the act. The rates on stocker or feeder livestock were prescribed on a basis not in excess of 85 percent of the rates prescribed on the same kind of stock when fit for slaughter, and the carriers were authorized to establish tariff provisions which allow stock moving toward a market to be fed in transit at intermediate points on the basis of the through rates plus a reasonable charge for such privilege. On December 6, 1932, the Rio Grande was authorized (190 I. C. C. 175) to add certain arbitraries to the rates prescribed for mountain-Pacific territory for hauls over its standard-gage lines between Pueblo and Walsenburg on the east, and Provo on the west, including branch lines connecting with the main lines between those points. For hauls of 500 miles or more, the arbitrary authorized at that time was 6 cents on cattle and on hogs and sheep, double deck. Later, these same arbitraries were authorized for application between Denver and Provo over the Dotsero cut-off (200 I. C. C. 535).

In establishing the prescribed rates on livestock, the carriers appear to have limited their application over routes which do not result in short hauling, and over other and longer routes to have provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. As indicated, operators in the Arkansas Valley may now obtain cattle and sheep in the excluded territory for feeding in transit at an arbitrary of 8.5 cents, and this same arbitrary applies when the stock originates on the Burlington in Montana and Wyoming. On the other hand, such operators may ob-

tain feeder stock in other areas, such as Texas and New Mexico, for feeding in transit and reshipment to the Missouri River markets or markets east thereof, at lower rates than would apply if the same stock were fed in transit by operators on the Union Pacific in Colorado, Nebraska, or Kansas. For example, the rate on cattle from Las Vegas, N. Mex., to Chicago is $1.13 when stopped for feeding at Lamar, but if the same cattle were fed at Barton, Nebr., just east of Julesburg on the Union Pacific, the rate would be $1.26, or 13 cents higher. On cattle from Raton, N. Mex., fed in transit at Lamar, the rates are $1.07 to Chicago and 76 cents to Kansas City, but if the same cattle were fed in transit at Barton the rates would be $1.21 and 89 cents, respectively. Many other examples of a similar nature are shown.

The arbitrary of 19 cents, originally 13 cents, applicable on lambs from the northwest area and moving over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond was established prior to the opening of the Dotsero cut-off, and was based in part on the mileage over the Rio Grande via Pueblo. The evidence indicates that this arbitrary was based on the difference between the prescribed scale rates for the average distance from 12 representative origins, on the line of the Union Pacific from Pocatello north to Butte and west to Pendleton, to the several Missouri River markets over the Union Pacific direct and over that road to Ogden, the Rio Grande to Denver via Pueblo, and the Union Pacific beyond. Using the same formula, but giving consideration to the shorter distance over the Rio Grande's Dotsero cut-off, the Union Pacific states that the arbitraries on traffic routed over the Rio Grande should be 5 cents to Denver and Pueblo and 15 cents to the Mis-

souri River markets, and it is willing to establish these arbitraries and make them applicable to cattle as well as sheep. The arbitrary of 8.5 cents on cattle and sheep from origins on the Union Pacific and the Burlington when fed in transit at points in the Arkansas Valley and reshipped to the Missouri River and beyond apparently is based on a similar formula. Reasonable groupings were authorized in *Livestock Western District Rates, supra.*

In seeking to have the rates on livestock which apply over the Union Pacific made applicable over its lines from Ogden, the Rio Grande indicates a desire to waive the arbitraries which were authorized over its line from Provo to Denver and Pueblo and, in addition, to have established over its routes lower rates than would result from the application of the prescribed scales for the distances over its routes. On shipments moving over the Union Pacific-Ogden-Rio Grande route, this would result in short hauling the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City, which are the differences in the Union Pacific distances from McCammon to Ogden and from McCammon to Denver and Kansas City.

Reference is made to *Crouch v. Nevada N. Ry. Co.*, 208 I. C. C. 586, which concerned the rates on feeder cattle moved from East Ely, Nev., to Davis, Calif., over the lines of the Nevada Northern Railway Company to Shafter, Nev., thence the Western Pacific to Sacramento, Calif., and the Southern Pacific beyond, 760.4 miles. A rate of 47.5 cents was applicable over the Nevada Northern to Shafter and the Southern Pacific beyond, 705 miles. This rate was collected, but the defendants later sought to collect a rate of 58 cents, which was the combination rate based on Sacramento. Division 4 found that the combination rate was applicable but unreasonable to the ex-

tent that it exceeded 49.5 cents, which was the prescribed scale rate for distances of 775 miles and over 750 miles. See also *Routing Livestock to and from Oregon Points*, 209 I. C. C. 349. We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden gateway.

Agricultural commodities.—Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.

In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.

The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the Central, Southwestern, and Southeastern States. Carloads

moved over the Union Pacific to the Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

Wichita and Liberal, Kans., are described as pocket markets on potatoes and other vegetables originating in Idaho because they cannot be diverted or reconsigned therefrom to points east of the Missouri River at joint through rates. However, the record indicates that shipments refused at these two points may be diverted or reconsigned to destinations in the Southwest at the joint through rates. Wichita is not located on the direct line of any carrier operating between the Colorado common points and the Missouri River gateways, and Liberal is located in the southwestern part of Kansas near the Oklahoma border. Shipments to Kansas City and east thereof would require an out of line haul via Wichita and a substantial back haul via Liberal.

Storage facilities are available at Pueblo for the storage of perishables, including potatoes, onions, apples, pears, frozen poultry, frozen foods, butter and eggs. Joint through rates are applicable from the excluded territory via Pueblo on shipments routed over the

Union Pacific to Denver and connecting lines beyond to destinations in the Southwest and to points west of the Missouri River. The route of the Rio Grande from Ogden would be used if joint through rates were available over that route to additional destinations with storage in transit at Pueblo. Storage operators at Pueblo are now handicapped, in relation to two competitors at Denver, because the through rates do not apply via Pueblo to Denver and other northern destinations where a back haul would be required on shipments routed to Pueblo via Denver, whereas the competitors can ship at the through rates in all directions, except westward. The application of the through rates via Ogden and the Rio Grande is sought so that these shippers may have available the same distribution markets as their competitors.

A shipper who deals in dried beans from Idaho and other Western States is located at Colorado Springs. His principal markets are in southeastern territory. Beans which originate in California, Colorado, and Wyoming may be stopped at Colorado Springs for cleaning and packaging and reshipped at the balance of the joint through rates. Beans which originate in Idaho may be shipped over the Union Pacific to Denver and the Rio Grande or other connections to Pueblo and reshipped therefrom at the balance of the through rates, except to points east of the Missouri River. The route of the Rio Grande from Ogden would be used on Idaho beans if it would result in the application of joint through rates to points east of the Missouri River on the same competitive basis as is now applicable when such beans are transited at points on the Union Pacific. Another bean dealer at Fruita, Colo., on the Rio Grande about 10 miles west of Grand Junction, would like to transit Idaho beans

on the same competitive basis as is applicable at Union Pacific points. This dealer is now engaged primarily in buying pinto beans from growers in the vicinity of Fruita and shipping them in carload lots to others, including the shipper at Colorado Springs. These dealers in dried beans are in competition with like dealers at points on the Union Pacific who have the benefit of transit at the through rates to destinations, among others, east of the Missouri River.

A company which is engaged in the purchase and sale of dried beans and peas maintains plants in Nebraska at Morrill on the Burlington and at Gering on the Union Pacific. Carloads of dried beans and peas originating in California, Utah, Oregon, Washington, Idaho, Colorado, Wyoming, Montana, and Nebraska are shipped to Morrill and Gering where they are cleaned, sorted, and packaged, and reshipped generally eastward and to Oklahoma and Texas. This company can obtain Idaho beans and reship them from Gering to eastern and southern destinations at the joint through rates. It was stated, however, that a substantial amount of pinto beans (about 6,000,000 pounds per year) are obtained from Colorado, mostly on the Rio Grande, on which an out-of-line charge of 7 cents per 100 pounds is applicable in addition to the joint through rates over direct routes when such beans are processed at Gering and reshipped to the Missouri River and points east thereof; also that when such beans are processed at Gering and reshipped to destinations west of the Missouri River, combinations of rates to and from Gering are applicable.

The Utah Growers' Cooperative operates throughout Utah in the production and shipment of vegetables.

including potatoes and onions. It has two branches on the Union Pacific and three on the Rio Grande in Utah, the latter at Midvale, American Fork, and Springville, all south of Salt Lake City. These three points are served by the Union Pacific and the Rio Grande, but track connections exist only at Midvale. Shipments of box shooks and of seed potatoes from Idaho and of fertilizer from Montana may move into American Fork and Springville over the Union Pacific at lower rates than when they are interchanged with the Rio Grande at Ogden or Salt Lake City, but when they are received over the Union Pacific they must be trucked to the plants on the Rio Grande. The differences in the rates are not shown.

Various flour mills at southern Kansas points, such as Moundridge and Wichita, support the complaint because they cannot at present purchase wheat at points on the Union Pacific in Idaho, Oregon, and Washington, mill it in transit, and reship to the Missouri River and points east thereof at the same rates that are applicable when similar wheat is milled at points on the Union Pacific. A specific instance was shown where nine carloads of wheat moved from Ogden to Moundridge on which the Ogden shipper applied in-bound transit billing on wheat originating at Idaho Falls. The shipments moved from Ogden over the Union Pacific to Denver, the Rio Grande to Pueblo, and the Missouri Pacific beyond. Moundridge is a local point on a branch line of the latter carrier north of Eldorado, Kans. After the wheat was milled at Moundridge the in-bound billing thereon was applied against an out-bound movement of flour to New Cumberland, Pa. The rate on flour from Idaho Falls to New Cumberland over the route of movement through Denver and Moundridge was $1.335, or 12.5 cents higher than the

rate would have been if the same wheat had been milled at a point on the Union Pacific. The distances over the route of movement through Denver and Moundridge and the more direct route of the Union Pacific are not shown.

The rate restrictions complained of by shippers of and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from the excluded territory to Colorado common points and east thereof have placed these shippers and dealers at a serious disadvantage in marketing their products, as compared with competing shippers and dealers located on the Union Pacific and having the benefit of the lower joint through rates from and to the same points. Some of these restrictions complained of, such as those by operators of flour mills in southern Kansas, could be remedied by the establishment of additional joint through rates from the excluded territory over routes of the Union Pacific to Denver and connecting lines beyond. From McCammon and points north thereof such routes would in all instances be shorter than the routes over the Union Pacific to Ogden, the Rio Grande to Denver or Pueblo, and connecting lines beyond. The Union Pacific states that it has not been requested to establish additional joint through rates via Denver. Its position with respect thereto is that the rates on agricultural commodities are on a low basis and, therefore, the carriers should be permitted to limit their application to more direct routes, thereby maintaining their long hauls and preventing undue circuity. For example, it believes that if competitive joint through rates were established on grain for milling at Wichita and other southern Kansas points and reshipment beyond to the Missouri River and east, other and longer routes probably would be demanded on the

same basis at points in Oklahoma and Texas where competing mills are located.

The establishment of additional routes and rates by way of the Union Pacific, however, would not remedy the disadvantage complained of by the shippers of and dealers in these products in the excluded territory who are compelled to pay combination rates on shipments diverted or reconsigned at intermediate points on the Rio Grande, including those stored at Pueblo or Colorado Springs on that road, and reshipped to Colorado common points and east thereof. The only effective remedy in those instances would appear to be the establishment of through rates, the same as those over the Union Pacific routes, over Rio Grande routes via Ogden or Salt Lake City.

Lumber.—A number of lumber dealers and lumber mills are located at Grand Junction and other points, and a wood-treatment or preserving plant is located at Salida, Colo., all on the Rio Grande. Generally, the complaints of these parties relate to their inability to ship lumber and millwork from the excluded territory on competitive joint rates via Ogden and the Rio Grande with stoppage in transit for partial unloading, storage, milling, or treatment and reshipment beyond to Colorado common points and east thereof at the balance of the joint rates. Mention also was made of a handicap in diverting or reconsigning at the joint rates to such points carloads originally shipped to local stations on the Rio Grande via Ogden. As previously indicated, joint through rates apply on lumber and mill work from points in California and in Oregon and Washington west of the excluded territory, including areas around Seattle, Tacoma, and Portland, over the Southern Pacific or the Western Pacific and the Rio Grande through the Utah gateways to points

on the Rio Grande and east thereof, with storage, milling, and treatment under transit arrangements. Lumber may be shipped at joint through rates from the excluded territory when the final destinations are local points on the Rio Grande, but such rates are not applicable from that territory over the Union Pacific to Ogden and the Rio Grande when the final destinations are Colorado common points or points east thereof, whether the shipments move direct or are stopped for milling or other transit purposes.

A lumber company with a wholesale yard, a box factory, a mill, and a storage and drying yard is located at Grand Junction. This company buys most of its lumber, both rough and dressed, and plywood and doors at points west of the excluded territory and sells in Colorado and points east and south thereof. This company also has a financial interest in a wholesale lumber company at Colorado Springs. It has purchased some lumber at points in the excluded territory, such as Cascade and Winchester, Idaho, Burns, Oreg., and Metaline Falls, Wash. Lumber shipped from Cascade, Winchester, and other points in the excluded territory over the Union Pacific to Ogden and the Rio Grande to Grand Junction could not be stored in transit at the latter point and later reshipped to Colorado common points or points east thereof at the joint through rates as those rates apply only over the Union Pacific routes.

Another lumber company on the Rio Grande at Military Junction, Colo., about 10 miles south of Denver, purchases lumber in California and Oregon; also a small amount in Washington, for milling in transit and reshipment beyond. Lumber from the excluded territory can now be milled in transit at Military Junction and re-

shipped to Colorado points south thereof and to points in the Southwest at the joint through rates to final destination, but this is not true to other destinations east of the Rocky Mountains. Military Junction is about 1 mile outside of the Rio Grande's switching limits at Denver.

The wood-treatment plant at Salida purchases some lumber, poles, piling, and cross ties in Colorado, Utah, and New Mexico but most is obtained from points in Oregon and Washington west of the excluded territory. This plant has a contract for treating cross ties for the Rio Grande, but about 60 percent of the forest products which it treats are reshipped to points outside of Colorado. It has not purchased products in the excluded territory, but probably would do so if the joint through rates to eastern and southern destinations were made applicable over the Union Pacific to Ogden and the Rio Grande through Salida. The company which owns the plant at Salida has a similar plant at Denver and 22 others scattered throughout the country. The plant at Denver can perform treatment in transit at the joint through rates from the excluded territory to final destinations in the East, South, and Southwest, and apparently joint through rates apply on about 40 percent of the business at Salida which does not move outside of Colorado.

Opposition Testimony

The Union Pacific operates about 9,724 miles of railroad serving over 1,700 points in 13 States.[7] It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte,

7 Iowa, Nebraska, Wyoming, Idaho, Oregon, Washington, Missouri, Kansas, Colorado, Montana, Utah, New Mexico and California.

Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 percent and west-bound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grande is 66.3 percent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services.

The Union Pacific objects to the establishment of joint through rates to points beyond Denver or Pueblo via Salt Lake City or Ogden over the Rio Grande upon the principal grounds that such routes would short haul the Union Pacific and that the diversion of traffic over such route from the Union Pacific routes now available would curtail the service and growth of the Union Pacific in the teritories it alone serves and in which it pioneered in railroad construction. Such diversion, it fears, would adversely affect the operation of its numerous branch lines in Idaho, Montana, Oregon, and Washington, which are feeders for its main line and are not self-sustaining. In those States the Union Pacific operates a total of 5,606 miles of railroad, with 2,913 miles of branch lines upon which about 46 percent of the total traffic in that territory originates or terminates. It contends that unless it has a substantial main-line haul on branch-line traffic, the operation of many, if not most, of such branches would not long be justified.

Another objection is that yard facilities of the Ogden Union Railway and Depot Company, referred to as the Depot Company, jointly owned by the Southern Pacific and the Union Pacific, at Ogden terminal are inadequate to interchange any additional volume of traffic with the Rio Grande that may be routed to or from the northwest area through Ogden, and that expansion of facilities there is not possible. Several instances of delays to trains, particularly in the fall when traffic is heavy, are shown. The record describes in detail the yard and track lay-out at this terminal and interchange point. At present the Union Pacific finds it necessary to bypass the Ogden terminal as much as possible by taking its trains for Pocatello, Salt Lake City, or Green River over an outside wye

track which avoids the terminal proper. In addition to these deficiencies, icing facilities now maintained at Ogden for east-bound and west-bound traffic are not considered adequate for icing perishable commodities from Idaho and the Pacific Northwest for delivery to the Rio Grande. The Depot Company estimated that the cost of interchanging cars between the Rio Grande and the Union Pacific and Southern Pacific is at least twice the average cost of cars in the terminal because of the additional handling required.

The largest volume of traffic was moved through the Ogden terminal in the war year 1945, when a total of 2,847,277 cars were handled. In July, the peak month in that year, the total was 284,711 cars in 2,966 trains, an average of 96 trains daily, which required an average of 70 switching shifts a day. Of that number in July, 894 were solid trains that moved through the terminal without switching. The handling of such a large volume caused considerable congestion and delays to trains. In 1949 the total number of cars handled was 1,955,219. In the peak month of that year, 2,359 trains were handled, an average of 76 trains per day, requiring about 59 switching shifts daily. These figures show that 892,058 fewer cars were handled in 1949 than in the peak year of 1945.

To show that the Union Pacific cannot afford to lose any part of its haul on traffic, attention is directed to the large deficits which the Union Pacific incurred in its passenger service. In 1948 that deficit amounted to $28,462,000, equivalent to $4,291 per mile of road operated, as compared with a passenger deficit incurred by the Rio Grande of $4,954,000, equivalent to $3,127 per mile of road. In the last 20 years the Union Pacific in only 6 years, principally in the war years, has had railway

operating income sufficient to pay fixed charges plus declared dividends, and in 1949 it had a net railway operating income of $21,707,437, which was not sufficient by $10,269,865 to pay declared dividends and interest on funded debt. That is contrasted with the results on the Rio Grande, which in 1948 had a net railway operating income of $12,156,284, out of which it provided for all fixed charges, paid a declared dividend, provided for sinking-fund requirements, and had left for its surplus account $5,167,148.

The Wabash and the Chicago & North Western, important eastern connections of the Union Pacific, furnished estimates of the possible loss of traffic to those roads, and its effect upon train service and employment on their lines in the event that the volume of traffic embraced in the Rio Grande estimate of potential traffic were diverted over the Rio Grande route.

The Wabash in 1948 participated in 9.07 percent of the total traffic handled by the Union Pacific from the Northwest and about one-half of that on west-bound traffic to that area. It estimates the value to it of the potential traffic which it might lose at $1,602,000.

The revenue derived by the Chicago & North Western from the traffic to and from the northwest territory handled in connection with the Union Pacific in 1948 was about $4,000,000. Based on the loss of the potential traffic as estimated by the Rio Grande, it urges that it will lose that amount of revenue if the joint through rates sought in this proceeding are established.

The Great Northern, Northern Pacific, Santa Fe, and Milwaukee oppose granting the Rio Grande's re-

quest for the establishment of competitive joint through rates via Ogden. Neither of these defendants, except the Santa Fe, connects with the Rio Grande. They participate, however, in joint rates with the Union Pacific on traffic between the northwest area and eastern points, but there are numerous exceptions. For example, from origins on the Great Northern joint rates are not applicable via Spokane and the Union Pacific on wool, livestock, ores, concentrates, or smelter products, and the joint rates east-bound on fruits and vegetables over that route are limited to destinations reached by the Union Pacific. These restrictions became effective on September 15, 1932, although they were protested by various shipping interests. On lumber from origins on the Great Northern, joint rates apply over that line to Spokane and the Union Pacific only when the traffic is destined to points on and west of the Missouri River, Council Bluffs to Kansas City, thence the line of The Kansas City Southern Railway Company to the Gulf of Mexico. Reference is made also to *Transcontinental Traffic Routed via Bieber, Calif.*, 213 I. C. C. 487, wherein the Great Northern was permitted to cancel joint rates via Bieber and Salt Lake City on transcontinental traffic originating at or destined to various points on the Great Northern in Idaho and Washington.

The Milwaukee, the Santa Fe, and the Wabash, in a joint brief, contend, as does the Great Northern, that upon the evidence submitted the establishment of joint rates which would short haul the defendants is not warranted.

A large number of shippers and representatives of communities served by the Union Pacific, and traffic asso-

ciations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock.

It is not practicable to deal with all of this evidence in detail, but the testimony and position of the parties have been considered. Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four Northwestern States, a total of 157,762, that number was used as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to $49,880,000 yearly.

Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (*a*) the discontinuance of four trains daily east-bound and four trains daily west-bound between Pocatello and North Platte; (*b*) three trains east-bound and three west-bound daily between North Platte and Council Bluffs; and (*c*) one train east-bound and one west-bound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of $5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300. Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed as 5,144, with a total loss of wages of $21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real-estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect such employees from loss, as conditions upon the establishment of the joint rates and through routes.

There is no specific provision in section 15 (3) or (4) requiring that such conditions be imposed, but it is argued that in finding joint rates and through routes necessary and desirable in the public interest, as required by section 15 (3), the interests of employees must be considered as they are in proceedings involving consolidations, mergers, and abandonments. Reference is made to the decision in *Cancelation of Rates and Routes via Short Lines*, 245 I. C. C. 183. In that proceeding certain carriers sought to cancel their joint rates over through routes with specified short lines. It was found that cancellation of the rates and routes would result in abandonment of the short lines with resulting inconvenience and loss to shippers and to carrier employees. Permission to cancel certain of the routes was denied.

Upon the record before us it is impossible to find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made.

Shippers have a right to route their own traffic, and where traffic is not routed by the shipper, the originating carrier has the right to control the routing within certain limitations.

General Discussion and Ultimate Fact Findings

In support of its contention that the assailed rates over its line are unreasonable, the Rio Grande submitted a large number of comparisons showing the differences in such rates and the competitive joint through rates on various commodities, together with the car-mile and ton-mile revenue under the respective rates and what the revenue would be if the lower joint rates were made applicable over its line. Neither factor of the combination rates is assailed, but the aggregates of such factors are alleged to be unreasonable to the extent that they exceed the competitive joint rates.

Many of the present joint rates on the transcontinental traffic here affected are commodity rates which were established originally on particular commodities to meet water competition. Others, such as those applicable on agricultural commodities, were established from producing areas in the excluded territory to enable growers and shippers to market such commodities in eastern and midwestern territories. For these reasons, and others, the defendants contend that it would be unreasonable to require the application of the joint rates over the Rio Grande, as it would result in depleting their revenues and in wasteful transportation over circuitous routes, as well as in short hauling the defendants, especially the Union Pacific. For example the rates on potatoes to Chicago are 96 cents from Monte Vista and Greeley, Colo., and $1.14 from Idaho Falls, Idaho, a difference of 18

cents, although the distance from Idaho Falls to Chicago, 1,597 miles, is 315 miles greater than from Monte Vista and 590 miles greater than from Greeley. Computations were submitted which indicate that on a carloads of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of $1.14 would yield a net profit of $1.97 per car when moved over the Union Pacific to Omaha and the Chicago & North Western beyond, and a net loss of $62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington beyond, 1,809 miles. The computed costs were based on general cost scales compiled by our Bureau of Accounts and Cost Finding and were not based on studies of particular movements of traffic over the respective routes. Many other examples of this nature were submitted.

With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates.

With respect to the issue under section 15, the facts before us here are in some respects similar to those con-

sidered in *United States v. Union Pac. R. Co.*, 28 I. C. C. 518, and *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127, in both of which the complaints were dismissed. In the first, the complainant sought through routes and joint rates over the Rio Grande, among others, in connection with the Santa Fe at Pueblo or Denver on the east and the Oregon Short Line at Salt Lake City or Ogden on the west, on traffic moving between Chicago and certain Mississippi and Missouri River points, on the one hand, and stations on the Oregon Short Line, on the other. The joint rates sought were the same as those then in effect over generally shorter routes of the Union Pacific and other defendants. The short-hauling provision of the statute was held to be a bar to the establishment of the routes and rates sought.

In the second proceeding, the Western Pacific alleged that the failure of the defendants to join with it in the establishment and maintenance of joint rates between points in California on the Northwestern Pacific Railroad Company, controlled by the Southern Pacific, on the one hand, and eastern defined groups, on the other hand, over routes in which the Western Pacific would be an intermediate participating carrier, was discriminatory and prejudicial, and that the combination rates between such points over such routes were unreasonable. Therein, division 2 said, at pages 136 and 137:

> In requesting the application of the joint rates over its line complainant is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic which, under the act, belongs, in the absence of emergency, to the Northwestern Pacific and Southern Pacific.

The instant complainant likewise is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul. In that proceeding, the distance over the Southern Pacific route to Ogden was about 200 miles shorter than the route sought, which is substantially the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves. Again, the short-hauling provision was held to be a bar to the relief sought.

Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co. v. United States*, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons, Inc. v. Alton R. Co., supra*, the Supreme Court said that the expressions "more efficient or more economic" transportation, as used in section 15 (4), "may well embrace both shippers' and carriers' interests," * * that both interests should be considered and a fair balance found."

These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.

In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

There is no contention here by complainant that the present routes of the defendants are not adequate for the traffic hauled, and no finding is sought by complainant to that effect. The absence of such a request may well be due to complainant's contention, not sustained herein except as to sheep and goats to points on the Missouri River and east thereof, that through routes via Ogden and the Rio Grande already exist within the meaning of section 15 (3) of the act. Testimony on behalf of shippers, however, does raise a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities.

In order properly to evaluate the testimony of shippers it is necessary to consider the nature, extent, and functioning of our intricate and far-flung commodity marketing system. The growth of our population and the development of the country have required a constantly expanding flow of diverse commodities. Great consuming areas in many instances are far distant from the points of production of the necessities of every-day life, particularly articles of food. Movements of transcontinental proportions are involved in important instances. That is true here. A complex but efficient marketing system has been evolved to provide as orderly a distribu-

tion of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and over as many routes as possible. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities. *Southeastern Vegetable Case*, 200 I. C. C. 273, and *Routing Lumber and Fruits, South to C. F. A. Territory*, 256 I. C. C. 223.

While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing,

or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes.

In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established.

The situation as to the commodities above named, as to which the defendants' routes are inadequate, is largely similar to that considered in *D. A. Stickell & Sons, Inc. v. Alton R. Co., supra.* There is one point of difference. There, the operating conditions, mile for mile, on the respective routes were substantially similar. Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recognized by the Commission in prior proceedings. See *Livestock, Western District Rates, supra,* and *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486. There is before us no data from which the exact differences in costs over the Union Pacific routes and the Rio Grande routes can be determined. Several estimates were made by witnesses for both the Rio Grande and the defendants, but the estimates vary so widely and are so obviously incomplete as to be practically useless. The record is sufficiently complete, however, to enable us to make a rough approximation of the differences in the operating con-

ditions and to appraise the weight which should be given to those differences, as well as to the differences in the distances over the respective routes, in determining the issues before us.

The differences in the distances between the Union Pacific routes through Wyoming, on the one hand, and the Rio Grande routes sought, on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles, or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls

between the excluded territory, on the one hand, and ponts in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments westbound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs eastbound, who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3 (1) of the act.

As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates the same as those in effect over the routes of

the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. No such a showing has here been made.

The situation is different with respect to traffic between Utah common points, on the one hand, and the northwest area, on the other. On such traffic the Union Pacific interchanges with the Bamberger Railroad Company at Ogden at joint through rates to and from points on that line, including Salt Lake City. There is no apparent reason why similar arrangements should not apply on like traffic interchanged with the Rio Grande. The Bamberger operates, for about 36 miles between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande.

The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points, embraced within the findings of unlawfulness herein made.

The testimony dealing with the terminal facilities at Ogden has been carefully considered. We are persuaded that the additional traffic over the Rio Grande routes which will result under the findings herein made can be interchanged at that point or at Salt Lake City by the use of the present facilities and without serious detriment to the operating efficiency of the railroads concerned.

Conclusions

We conclude:

1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans.

to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

An appropriate order will be entered.

LEE, *Commissioner*, concurring in part:

I concur in the conclusions of the majority that joint [illegible] me as apply over the Union [illegible] and [illegible]

connecting lines should be established via Ogden or Salt Lake City, in connection with the Rio Grande, on the commodities and from and to the origins and destinations specified by the majority; that the rates assailed on such commodities from and to such origins and destinations are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes; and that the maintenance by the Union Pacific and other defendants of joint rates from and to points on the Bamberger Railroad south of Ogden, while refusing to participate in like rates from and to the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section (3) (4) of the act. The decision in this case will correct in part, a long-standing, unlawful rate adjustment, an adjustment which has discriminated against the industries and people of Washington, Oregon, Idaho, Montana, and Utah, the area from and to which such unlawful adjustment applies being referred to in the report as the "excluded territory." However, I am of the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment. On the facts shown in the record, the act requires that the rates on all commodities, between points in the excluded territory and Colorado common points and points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes. The act contemplates that there shall be no excluded territory with respect to any commodity or persons.

Transcontinental joint rates on freight traffic were established in 1897, from and to the territory here considered, applicable over the Rio Grande routes via Ogden. These joint rates were in effect for many years, until 1906 from and to some points and until 1912 from and to other points, when they were canceled by the Union Pacific and higher combination rates became effective. However, the through routes were not closed. Numerous shippers testified that these routes are open and available and that they can route traffic over them. This testimony was not challenged or contradicted. On the contrary, a responsible traffic official of the Union Pacific testified that the Rio Grande routes are "actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon, and Washington." That these routes are open and used is proved by evidence in the record (1) of east-bound shipments of various commodities made in 1948 from points on the Union Pacific in the excluded territory to Colorado common points, and which moved over the Rio Grande routes, including the entire length of the Rio Grande line, on through bills of lading issued by the Union Pacific, (2) of west-bound shipments of various commodities made in the same year from various eastern points to points in the so-called excluded territory, and which moved on through bills of lading over carriers east of Colorado junctions to the Rio Grande at such junctions and thence over the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond, and (3) of numerous shipments moved over the Rio Grande routes between eastern points and the excluded territory during World War II and in 1949 when the Union Pacific main line in Wyoming was blocked by snow. The year 1948, the calendar year immediately preceding the hearing, was selected as typical of the sit-

uation which prevailed in the prior years and which continued up to the time of the hearing.

I am unable to agree with the majority that the shipments referred to above must be regarded as of an isolated nature and as falling in the same category as the single shipment considered in the *Beaman Elevator case*, 155 I. C. C. 313, referred to in a footnote to the opinion of the United States Supreme Court in *Thompson v. United States*, 343 U. S. 549. In the *Beaman* case a single carload shipment of grain moved over the lines of two connecting railroads from Beaman, Iowa, via Clinton, Iowa, to St. Louis, Mo. The evidence plainly showed that the bill of lading covering this shipment was issued and recognized by these railroads through error. There was no evidence "of any like movement before or since." Adequate service was available over nine other routes. A wholly different situation is before us in this proceeding. Numerous shipments of a variety of commodities have been transported in both directions over the Rio Grande routes on through bills of lading deliberately issued and recognized by the Union Pacific and the other participating carriers. The situation here before us is similar to that considered by the Supreme Court in *Virginia Ry. v. United States*, 272 U. S. 658, also referred to in a footnote to the decision in *Thompson v. United States, supra*, in which, in referring to the route over which the Commission there prescribed reasonable and nondiscriminatory rates, the Court stated that "that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive."

The Court held however, that even though the route was closed commercially, open through routes to the West were in existence.

In the *Thompson* case the court pointed out that "there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line" or that the carriers have ever offered through service over the Missouri Pacific-Burlington route. Thus, the facts before the Court in that case likewise were wholly different from those before us in this proceeding. I think that the Court's opinion in that case supports the conclusion that through routes on freight traffic over the Rio Grande routes have existed for many years and now exist and that the short-hauling provision of section 15 (4) is not applicable.

If, however, the Rio Grande routes were actually closed, the short-hauling provision of section 15 (4) of the act would not be a bar to the correction in full of the present discriminatory rate adjustment. The discrimination in violation of section 3 of the act, shown by the evidence, makes that provision of section 15 (4) inapplicable. In any event, the Rio Grande routes are shown to be needed in order to provide adequate, and more efficient and more economic transportation, and, if they were not already open through routes, we could and should require that they be opened.

As stated in the report of the majority, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments, livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, who reconsign shipments or take advantage of transit arrangements at intermediate points

on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges enjoyed by their competitors located on the Union Pacific. The evidence is equally impressive with respect to the disadvantage or handicap to shippers or receivers of lumber, building materials, farm machinery, and other commodities. For instance, the lumber company at Military Junction, Colo., referred to in the majority report, is handicapped in its efforts to compete with mills at Denver and Kansas City because it cannot obtain lumber from the excluded territory for milling in transit on the same basis as these competing mills. A representative of that company testified that it would purchase several million feet of lumber annually from points in the excluded territory if it had available reasonable and nonprejudicial joint rates over the Rio Grande routes. By reason of the rate situation complained of, the lumber dealer at Grand Junction, Colo., who is also referred to in the majority report, has lost business to competitors who have the benefit of transit at the joint rates applicable over the Union Pacific routes. This evidence is only typical; it was presented as representative of the prevailing situation.

Shippers and receivers of freight at points in eastern Oregon and southern Idaho, on the line of the Union Pacific, have been, and are, excluded from additional markets that would be available to them if reasonable and nonprejudicial joint rates were in effect over the Rio Grande routes. Some of these shippers express the belief that the establishment of such joint rates would provide them with a better car supply, in that the Rio Grande would furnish additional cars to move out shipments routed over its line. It is common knowledge that better supply of cars is available to shippers who have com-

petitive routes to the consuming markets. The record clearly establishes that the present rate adjustment results in a substantial disadvantage to the industries, shippers, and receivers located in the considered territory, and in undue prejudice to them.

Likewise, the evidence establishes that the defendant railroads discriminate against the Rio Grande, in that from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections, its long haul, while refusing to establish the same joint rates over the Rio Grande routes. The routes by which defendants short haul themselves are generally as long as, and in many instances substantially longer than, the Rio Grande routes, and the hauls of the Union Pacific and of other defendants are shorter over such established routes than over the Rio Grande. The evidence does not establish that transportation conditions are more favorable over these routes than over the Rio Grande routes which are discriminated against by defendants. On the contrary, the record, in my opinion, warrants finding that the transportation conditions over such routes are, in general, no more favorable than over the Rio Grande routes. The Union Pacific and the other defendants are, and for the future will be, violating section 3 (4) of the act by failing and refusing to participate in joint rates with the Rio Grande, from and to points in the excluded territory, to and from points in official, southern, and southwestern territories, while participating with each other in joint rates from

and to the same points, over routes over which the Union Pacific and other defendants short haul themselves.

The Union Pacific is a strong and progressive rail road. It is ably managed and efficiently and economically operated. Being the only railroad in southern Idaho, every shipper in that area is dependent on it for rail service. I am persuaded that, instead of being allowed to continue to maintain an "excluded territory," it should be required to provide these shippers with joint rates which will enable them to buy and sell in all markets on an equality with other shippers, and that such joint rates will not result in any substantial diversion of the traffic now moved over its lines.

The joint rates now in effect on freight traffic over the Union Pacific routes are shown by the record to be reasonable for application over the Rio Grande routes. We should require that these rates be maintained over the latter routes.

PATTERSON, *Commissioner*, concurring in part:

I concur in the relief granted to the Rio Grande and transit operators thereon who are handicapped by the lack of through routes and joint rates the same as those over the Union Pacific routes. It seems to me, however, that the findings of unlawfulness are inconsistent in that they fail to include lumber and articles taking lumber rates in the relief granted.

The showing made of a need for such through routes and joint rates, in my opinion, is more persuasive as to lumber and articles taking lumber rates than as to any of the commodities included in the foregoing findings, with the possible exception of livestock. The record shows

that at least one lumber dealer at Grand Junction, another at Military Junction, near Denver, and a wood-treatment plant at Salida, all on the Rio Grande, are handicapped in their efforts to compete with like dealers on the Union Pacific routes, and that at least the dealer at Grand Junction has lost business, by reason of the rate situation complained of, to competitors who have the benefit of transit at the joint rates over the Union Pacific routes. I believe this evidence is adequate support for the inclusion of this commodity group in the findings of unlawfulness made.

The order entered in connection with this report requires the establishment on particular commodities in connection with the Rio Grande, of through routes and joint rates the same as those now in effect over the Union Pacific routes. The formation of those through routes is appropriately left, in large measure, to the carriers. I want to make it clear that in my view, on traffic to or from the area east of the Colorado common points, where the provisions of the order so permit, these new routes should be formed in such a manner as to short haul the Union Pacific only to the extent necessary to afford the Rio Grande its line haul and avoid unduly circuitous routes.

ARPAIA, *Commissioner*, concurring:

In my opinion there are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of section 15 (4) of the Interstate Commerce Act is not required.

The evidence of record shows that these routes presently are open and available to shippers on combination

rates. The history of the relationship between these carriers leaves no doubt as to that fact.

When joint rates over these routes, which were in effect from 1897 to 1906 and 1912, were canceled by the Union Pacific, no specific cancellation was made of the through routes over which the joint rates applied. To my mind it would be necessary for the Union Pacific to have shown affirmatively that it refused traffic on through billing over the Ogden Gateway in order to negative the existence of such through routes. Instead, the record shows information elicited from an official of the Union Pacific to the effect that routes via Ogden were available subject to the application of combinations of local rates.

The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.

We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires.

MAHAFFIE, *Commissioner*, dissenting in part:

I dissent from the majority report insofar as it fails to find that the existing routes to and from the northwest territory, described in the report, via the Rio Grande through the Ogden gateway are effective through routes and that the failure of the Union Pacific and other defendant railroads to establish joint rates with the Rio Grande via Ogden unjustly discriminates against that carrier. I disagree also because the report does not find that

it is necessary and desirable in the public interest that joint rates on commodities generally, in addition to those specified, should be established over such through routes.

We are not called upon in this proceeding to exercise our authority, under section 15 (4) of the Interstate Commerce Act, to establish new through routes via that gateway. Therefore, the conditions in that paragraph are not applicable. We are free to exercise our power under section 15 (3) to establish joint rates unhampered by those restrictions.

A finding that these routes are open and freely available to shippers today is fully supported by the evidence. It was acknowledged by a freight traffic official of the Union Pacific that a shipper has the right under the act (section 15 (8)), to specify such routes for the carriage of his shipments. That right, it should be noted, can be availed of only when two or more through routes and through rates are actually established and in existence.

The record shows that some joint through rates, as distinguished from combination rates, are in fact now published in a Union Pacific tariff for application through Ogden over the entire length of the Rio Grande to Denver and the Union Pacific beyond. These apply on shipments of sheep or goats originating on the Union Pacific in southern Idaho and eastern Oregon, billed to destinations on the Missouri and Mississippi Rivers and to Chicago and other points. The joint rates are higher than rates on like livestock moved over the direct route of the Union Pacific and, therefore, retard use of the Rio Grande route. But the publication of such joint rates in connection with transportation over the whole length of the Rio Grande is proof of the consent of the Union Pacific for

the use of that rail line as part of a through route at joint rates. And it was further stated by the same witness that the Union Pacific has no objection to publishing the same joint rate arrangement on shipments of cattle.

In 1941-42 mixed military trains with troops in passenger cars and military supplies in freight service were transported over this route on through billing. Four examples of such trains are described in the record. These moved from Fort Sill, Okla., and Camp Claiborne, La., to Fort Lewis, Wash., in December 1941 and February 1942. The trains were routed and moved to Colorado junctions of the Rio Grande, thence over that railroad to Ogden and the Union Pacific beyond. Unlike certain other movements to and from the northwest area via Ogden in the war period in connection with these two lines, the military trains were not routed under service orders issued by us or the Office of Defense Transportation. Arrangements for the through movements were made with the railroads and the rates charged were settled on the basis of the joint rates applicable in connection with the Union Pacific routes through Wyoming.

The existence of the route as an established through route was undoubtedly an important consideration for its use in February 1949, when the line of the Union Pacific was blocked by snow. In that emergency, freight cars, passenger cars, express and mail were promptly diverted by the Union Pacific through Denver over the Rio Grande to Salt Lake City and to Ogden for movement beyond. Of the freight cars diverted, 1,493 were for destinations in Idaho on the Union Pacific and in the northwest area.

Actual and continuous use of the Rio Grande route at through rates made by combinations of separate rate factors via Ogden to and from the Northwest without op-

position or objection by the Union Pacific or other participating railroads is amply shown by the evidence of typical movements of numerous commodities. The calendar year 1948 was used by the Rio Grande as a representative year. In that year 16 carloads of various commodities were shipped from the northwest territory over the Union Pacific to Ogden and the Rio Grande beyond to Denver, Louviers, Pueblo and Trinidad, Colo., over the entire length of the Rio Grande. They originated on the Union Pacific and moved on through bills of lading. Some of the cars were partly unloaded at Rio Grande points and then continued through to their destinations. Seventeen carloads of various commodities moved, from late in December 1947, and in the year 1948, from various eastern points on through bills of lading at through combinations of rates over rail lines east of the Colorado junctions to the Rio Grande at such junctions thence over that line to Salt Lake City or Ogden and the Union Pacific beyond. Some of the cars were stopped for partial unloading at stations on the Rio Grande or the Union Pacific.

The same kinds of movements as those exhibited in 1948 prevailed to about the same extent in years prior to 1948 and continued into 1949 at the time of the hearings.

All of this evidence clearly supports a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for a finding that they are established through routes announced by the United States Supreme Court in

Thompson v. United States, 343 U. S. 549. In that case, the Court said "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the Court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit and, therefore, no through routes existed between those points.

The situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole inevitably leads to that conclusion. To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.

Even if a finding that no through routes exist over this line be sustained there is substantial evidence that the rate situation results in undue prejudice and undue

disadvantage to shippers and to districts and localities in Utah and Colorado dependent upon the Rio Grande for rail service, in violation of section 3 (1) of the act. Such violation removes the restrictions imposed in section 15 (4) upon our authority to establish through routes. That undue prejudice and undue disadvantage exist is fully supported by the testimony of numerous witnesses. Briefly, the testimony shows that livestock producers in Utah and Colorado, in areas served by the Rio Grande, are not able, due to the combination through rates via Ogden, to buy on a reasonably competitive basis, cattle and sheep in Idaho, Montana, Oregon and Washington for grazing and feeding in transit on the ranges in Utah and Colorado, in competition with buyers and stock feeders in northern Colorado, Nebraska, and northern Kansas. The same undue prejudice and undue disadvantage is experienced by buyers and feeders in southeastern Colorado east of Pueblo, Colo., and in southwestern Kansas served by the Santa Fe and the Missouri Pacific railroads. Their failure to obtain joint through rates from the producing areas in the Northwest over the Union Pacific to Ogden, Rio Grande to Pueblo and its connections beyond places them at an undue disadvantage.

The record contains convincing evidence by representatives of large groups of shippers that there is undue prejudice and undue disadvantage to wool producers, as well as to livestock operators in Colorado served by the Rio Grande; also to lumber dealers and processors; dealers in farm machinery and other commodities; and to a cold storage warehouse operator in Pueblo. There is substantial evidence from producers and shippers of agricultural commodities in the Northwest, particularly in Idaho, to support findings that the refusal of the defendant railroads to join in joint through rates via Ogden

and the Rio Grande to and from points beyond the Colorado gateways of that carrier exclude them from additional markets needed for their products. All of that evidence sustains and fully supports the finding that there is a violation of section 3 (1) of the act and justifies a general finding that joint through rates via the Ogden gateway should be established on commodities generally. The findings should not be limited, as are the findings of the majority, to particular commodities as to which evidence was offered but should be broadened to include all commodities.

We are fully warranted in dealing with this situation broadly, in considering what is necessary and desirable in the public interest, with respect to joint rates over these established through routes. We are not limited to consideration of proof as to every rate on every commodity from every origin to every destination. Such a view of our authority is too narrow and is not justified by the law or the evidence.

In other types of proceedings where we found it necessary to deal generally with a comprehensive rate situation, the Supreme Court has held that we may properly make general findings upon typical evidence representative of the situation as a whole.

In exercising authority under section 13 (4) as to the lawfulness of rail rates on intrastate traffic in a State and under section 15 (6) as to divisions of joint rates of rail carriers we may make general findings when the evidence is shown in numerous and representative instances that are typical of the rate situation as a whole. Similarly we need not attempt the impracticable, if not impossible, task of examining every rate on every commodity

and class of commodities, from every origin to every destination in the large areas and territories under scrutiny here. We can adjust the remedy to the evil and make our order as broad as the discrimination and undue prejudice. *See Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493, 507. In *Wisconsin Railroad Comm. v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579, a proceeding dealing with intrastate rates on a State-wide basis, the Court stated that "any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute." In *Georgia Public Service Comm. v. United States*, 283 U. S. 765, 774, the Court said that "when an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings." That case also arose under section 13 (4) of the act with respect to intrastate rates. There the order related to a few commodities but the rates prescribed were State-wide in operation and applied to shipments between hundreds of points of origin and destination. Under those circumstances the Court held that "To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief."

To the same effect is the holding of the Court in *New England Divisions Case*, 261 U. S. 184, 197. There the Court had under consideration contentions with respect to the nature of the evidence in support of our order as to divisions of joint rates between groups of rail carriers. The Court pointed out that our order was based on evidence which we assumed was "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." That method of proof was found to be our common practice in

adjudicating comprehensively upon substantially all rates in a large territory, and that the actual necessities of procedure and administration had led to the adoption of that method also in passing upon the reasonableness of proposed rate increases. That method was found equally appropriate in passing upon multitudes of divisions of joint rates. That it has similar application in a comprehensive case such as we have here where we are called upon to establish joint rates via a gateway through which substantially all joint rates have been refused, is equally clear. In the case cited, the Court said that there was no constitutional obstacle to the adoption of the method pursued and that only in the way could the task be performed.

The same rule should be applied in the instant case, in order to carry out effectively our authority to prescribe, in the public interest, joint rates by way of the Ogden gateway. The report of the majority finds it necessary in the public interest that joint rates via that gateway be established on particular commodities as specified in the report. The same evidence is, and should be concluded to be typical of the rate situation as a whole. In accordance with our practice in other types of comprehensive proceedings which has been found lawful and necessary under principles announced in the Supreme Court cases cited, that evidence should be found adequate to support an order that joint rates be established via that gateway on commodities generally.

I am authorized to state that COMMISSIONERS SPLAWN and CROSS join in this expression.

COMMISSIONER KNUDSON did not participate in the disposition of this proceeding.

From—	To—	Commodity	Rates [1]		Distances [2]		Revenues per car-mile			Average carload weight
			Via Union Pacific routes	Via D&RGW routes	Via Union Pacific routes	Via D&RGW routes	Via Union Pacific joint rates	Via D&RGW combination rates	Via D&RGW joint rates [3]	
			Cents	*Cents*	*Miles*	*Miles*	*Cents*	*Cents*	*Cents*	*Pounds*
Pendleton, Oreg	North Salt Lake, Utah	Cattle	58	90	342	342	37.99	58.95	37.99	22,400
Logan, Utah	Denver, Colo	do	83	111	649	679	28.65	36.62	27.38	22,400
Huntington, Oreg	Chicago, Ill	do	168	213	1,872	2,083	20.10	22.91	18.07	22,400
Idaho Falls, Idaho	Oklahoma City, Okla	Potatoes	90	128	1,428	1,462	28.44	39.50	27.78	45,120
Redmond, Oreg	Atlanta, Ga	do	163	203	2,808	3,008	26.19	30.45	24.45	45,120
Armstead, Mont	Oklahoma City, Okla	Dry beans and peas	93	203	1,550	1,584	50.89	108.70	49.80	84,820
Twin Falls, Idaho	Atlanta, Ga	do	148	187	2,172	2,372	57.80	66.87	52.92	84,820
Nampa, Idaho	Detroit, Mich	Lettuce	175	217	2,074	2,286	20.96	23.58	19.02	24,840
Hood River, Oreg	Pittsburgh, Pa	Apples	192	252	2,666	2,877	29.99	36.47	27.79	41,640
Spokane, Wash	Kansas City, Mo	Wheat	86.5	132	1,901	2,101	47.40	65.45	42.89	104,180
Pocatello, Idaho	Wichita, Kans	do	68.5	96	1,206	1,240	59.17	80.66	57.55	104,180
Spokane, Wash	Omaha, Nebr	Lumber	92	143.5	1,784	2,003	35.76	49.68	31.85	69,340
Kellogg-Wardner, Idaho	Fort Worth, Tex	do	104	143.5	2,237	2,271	32.24	43.81	31.75	69,340
Portland, Oreg	Provo, Utah	Canned goods	84	116	943	930	53.82	75.36	54.57	60,420
Do	New Orleans, La	do	143	209	2,762	2,728	31.28	46.29	31.67	60,420
St. Louis, Mo	Logan, Utah	Roofing	153	196	1,453	1,588	64.76	75.91	59.25	61,500
Chicago, Ill	Spokane, Wash	do	161	250	2,272	2,483	43.58	61.92	39.88	61,500
Geneva, Utah	Boise, Idaho	Iron and steel articles	63	78.55	447	440	109.76	139.03	111.51	77,880
Do	Portland, Oreg	do	63	78.55	928	921	52.87	66.42	53.27	77,880
Pittsburgh, Pa	do	do	167	205	2,729	2,941	47.50	54.10	44.08	77,880
Salt Lake City, Utah	Butte, Mont	Agricultural implements	141	173	433	434	98.67	120.78	98.44	30,300
Detroit, Mich	Malad, Idaho	do	295	333	1,836	1,982	49.17	51.41	45.54	30,300
Denver, Colo	Spokane, Wash	Vehicle parts	251	370	1,371	1,466	79.16	109.13	74.03	43,240
Fort Worth, Tex	Seattle, Wash	Animal and poultry feed	119	278	2,338	2,372	31.48	72.48	31.02	61,840
Denver, Colo	Butte, Mont	Tires and tubes	179	294	908	1,004	73.41	109.05	66.39	37,240
Atlanta, Ga	do	Furniture	396	596	2,318	2,518	28.63	39.67	26.36	16,760
Kansas City, Mo	Seattle, Wash	Paper	154	373	2,069	2,269	31.72	70.06	28.93	42,630
Oklahoma City, Okla	Boise, Idaho	Petroleum and petroleum products	141	188	1,612	1,645	48.09	62.83	47.13	54,960
Kanssa City, Mo	Portland, Oreg	Paint and paint material	170	364	1,891	2,091	52.84	102.32	47.79	58,780

[1] In cents per 100 pounds, in effect September 1, 1949.
[2] Over existing routes of Union Pacific and connections; and over Denver & Rio Grande Western routes.
[3] At joint rates applicable over competitive routes of Union Pacific and connections.

APPENDIX C

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

Denver & Rio Grande Western Railroad Company

v.

Union Pacific Railroad Company, et al.

This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand; and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination;

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of

the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

(Seal)

GEORGE W. LAIRD,
Acting Secretary.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,
Plaintiffs,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Messrs. Elmer B. Collins, Asst. Western General Counsel, John J. Burchell and W. R. Rouse, Of Counsel, Omaha, Nebraska, for Union Pacific Railroad Company.

Mr. F. O. Steadry, Chicago, Illinois, for Chicago and North Western Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company.

Mr. Carson L. Taylor, Chicago, Illinois, for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Mr. Eugene S. Davis, St. Louis, Missouri, for Wabash Railroad Company.

Messrs. Robert E. Quirk, Washington, D. C., Harry L. Welch, Omaha, Nebraska, and Herbert M. Boyle, Denver, Colorado, for Denver & Rio Grande Western Railroad Company.

Mr. L. E. Torinus, Jr., St. Paul, Minnesota, for Great Northern Railway Company.

Mr. Bert L. Overcash, Lincoln, Nebraska (Mr. Clarence S. Beck, Attorney General of Nebraska, was on the brief) for the State of Nebraska and Nebraska State Railway Commission.

Mr. Robert L. Simpson, Olympia, Washington (Mr. Don Eastvold, Attorney General of Washington, was on the brief) for Washington Public Service Commission.

Mr. John H. Carkin, Salem, Oregon (Mr. C. W. Ferguson was with him on the brief) for Public Utilities Commission of Oregon.

Mr. John H. Risken, Helena, Montana, for Board of Railroad Commissioners of the State of Montana.

Mr. Howard B. Black, Attorney General of Wyoming, Cheyenne, Wyoming, for State Board of Equalization and Public Service Commission of Wyoming.

Mr. Justus R. Moll, Washington, D. C., and Messrs. J. D. Cranny and J. P. Moore, Omaha, Nebraska, for M. P. Caveny of Omaha, chairman of the Union Pacific General Chairmen's Association.

Mr. Ray McGrath for Idaho Farm Bureau, Public Service Commission of Utah, Committees of the Railroad Brotherhoods who work for the D&RG, and National Livestock Producers Association.

Messrs. Warren H. Ploeger and Roland J. Lehman, on the brief, Messrs. Nye F. Morehouse, M. L. Countryman, Jr., Edwin C. Matthias, J. C. Gibson, M. L. Bluhm, Joseph H. Miller, Of Counsel, for the plaintiffs.

Mr. Edward M. Reidy, Chief Counsel, and Mr. Samuel R. Howell, Asst. Chief Counsel, Of Counsel, for Interstate Commerce Commission.

Mr. Henry B. Cockrum, Acting Assoc. Solicitor, United States Department of Agriculture, Washington D. C.; Mr. Charles W. Bucy, Assoc. Solicitor, was with him on the brief for the Department of Agriculture.

Mr. E. Riggs McConnell, Special Asst. to the Attorney General, Washington, D. C.; Messrs. Stanley N. Barnes, Asst. Attorney General, James E. Kilday, Special Asst. to the Attorney General, and Donald

R. Ross, United States Attorney, were with him on the brief for the United States.

Before JOHNSEN and COLLET, Circuit Judges, and DELEHANT, District Judge.

COLLET, Circuit Judge.

The Denver and Rio Grande Western Railroad Company, hereafter referred to as the Rio Grande, filed a complaint with the Interstate Commerce Commission requesting the Commission to order the Union Pacific Railroad Company (and other lines comprising the Union Pacific System, together with connecting carriers comprising, in all, 221 railroads, which will be referred to as the Union Pacific) to file joint rates over through routes with the Rio Grande for the transportation of freight from and to certain areas. The Commission granted the request as to certain types of freight with substantial territorial limitations. The Union Pacific brings this action to enjoin and set aside the order. A reference to a map of the United States will be helpful in understanding the following summarization of the facts.

The northern terminus of the Rio Grande is Ogden, Utah. From Ogden it runs south through Salt Lake City and Provo, Utah, then southeasterly and east, entering Colorado at about the south central part of that state, thence east and somewhat north through the central part of Colorado to Dotsero, west of Denver, where it divides, one branch going on east to Denver, the other swinging south and east to Pueblo, Colorado. From Denver the Rio Grande line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serve territory in southern Utah, northwestern New Mexico, and southern Colorado. These latter lines are not of special

importance in this action. At Denver, Colorado Springs, Pueblo, and Trinidad the Rio Grande maintains joint rates and through routes with lines other than the Union Pacific to destinations east and south of those points.

The Union Pacific (including connecting lines which were defendants in the I. C. C. proceedings) serves the greater part of the east, south and midwestern sections of the United States. Traffic involved in this action from those sections flowing westward over the Union Pacific and connecting lines converges at Denver and Cheyenne, Wyoming, then moves westwardly across the southern part of Wyoming to Ogden and Salt Lake City. One of its lines runs from Salt Lake City south to Provo, Utah, thence southwest to Los Angeles, California.

The Union Pacific also serves the northwestern part of the United States, including that part of Utah north of Ogden, Idaho, Montana, Oregon, and Washington. It is traffic from and to this latter territory, referred to herein as the northwest territory or area, which is the principal subject of the present controversy.

The Union Pacific maintains joint rates and through routes over its lines and with many connecting carriers from and to the northwest territory through Ogden and Salt Lake City, Cheyenne, Denver, and points east and south to the Atlantic Seaboard and the Gulf of Mexico. For a comparatively short distance, from Ogden through Salt Lake City to Provo, where the Los Angeles line swings southwest, the Union Pacific and the Rio Grande parallel and serve some common points. To and from these points, joint rates and through routes are maintained by the Union Pacific over its lines with the northwest territory and the area east of Cheyenne and Denver served by the Union Pacific. The Union Pacific does not maintain joint through rates with the Rio Grande, with

certain exceptions not material in this proceeding. Freight moving from the northwest territory to points in southern Utah and Colorado on the Rio Grande, finally destined to points east of the eastern termini of the Rio Grande, moves on the combination rate, consisting of the total of the Union Pacific rate to Ogden via Union Pacific and the Rio Grande rate from Ogden via Rio Grande to points on the Rio Grande. The same is true of the rates on shipments from points east of Denver to those points on the Rio Grande finally destined to the northwest territory. This combination of rates, or combination rate, as it is called, is considerably higher than a joint through rate Freight moving from and to the northwest territory from and to all points east of Denver[1] served by the Union Pacific and connecting car-

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1 "All points east of Denver" will be used as the designation of all points included in the Commission's order to or from which through routes and joint rates were ordered established by the Union Pacific with the Rio Grande. The Commission's order in this respect was (287 I. C. C. 611, 659):

> "We conclude:
>
> "1. That is is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

riers has the benefit of joint through rates via Union Pacific, with accompanying in-transit privileges en route, while freight originating on the Union Pacific in the northwest territory and moving to the area east of Denver, which is routed over the Rio Grande, pays the combination rate without in-transit privileges at points on the Rio Grande. The result is that practically all of the long-haul traffic originating in the northwest area and destined to the area east of Denver goes over the Union Pacific all the way on the lower joint and through rates. Since the formal record before the Commission consists of 1,957 pages of testimony, 57 exhibits and 74 verified statements, the foregoing statement is obviously only a salient outline of the basis for the Rio Grande's complaint. For a complete understanding of the intricacies of the case by one unfamiliar with the record, it will be necessary to refer to the extensive report and order of the Commission reported in 287 I. C. C. 611.

The Commission ordered the establishment of through routes and joint rates via Ogden or Salt Lake City by the Union Pacific with the Rio Grande for the transportation of granite and marble monuments in carloads from points of origin in Vermont and Georgia to destinations in the northwest area, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from points of origin in the northwest territory to destinations "east of Denver." The order is based upon three primary basic findings. First, that the through routes and joint rates are necessary and desirable in the public interest, in order to provide *adequate and more economic transportation;* second, that the existing joint rates maintained by the Union Pacific are and will be *unjust and*

unreasonable and unduly prejudicial to shippers and receivers of freight using or desiring to use the Rio Grande and *unduly preferential to shippers and receivers of freight using the Union Pacific;* third, that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad between the northwest area and points on the Bamberger line between Ogden and Salt Lake City, while refusing to establish joint rates with the Rio Grande to and from the same points on the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Sec. 3 (4) of the Interstate Commerce Commission Act. Finding No. 1 has heretofore been quoted in footnote 1. Findings 2 and 3 are set out below.[2] To understand the import of these findings it is necessary to explain the factual theory upon which they are based.

First as to the finding that the rates ordered are necessary and desirable to provide adequate and more economic transportation. Located along the route of the Rio Grande, between Ogden on the west and Denver, Pueblo and Trinidad on the eastern termini, are a num-

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2 "2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes:

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act."

287 I. C. C. 611, 659-660.

ber of livestock feeders. Some of these are ranchers who graze and feed cattle and sheep. Others are operators of beet sugar plants which produce livestock feed as a by-product and feed the by-product to livestock. These livestock feeders buy cattle and sheep in the northwest area, which are ultimately destined for the market, and ship them to points on the Rio Grande for feeding. Many of the principal livestock markets of the United States are located east of Denver. Without joint through rates with in-transit privileges which would permit these livestock feeders to ship from the northwest area to the feeding points on the Rio Grande and then reship on joint through rates to points east of Denver, Pueblo, and Trinidad, they are at a substantial rate disadvantage with similar livestock feeders following the same practice who are located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific, who reship to points east of Denver. They are also at a substantial rate disadvantage in purchasing livestock in the northwest area in competition with buyers located on the Union Pacific lines west of Denver and Cheyenne who have the benefit of joint through rates and in-transit privileges over the Union Pacific.

Also located on the Rio Grande are a number of industries which clean, package, process, freeze, and store fresh fruits, vegetables, poultry, food products, butter, eggs and beans, and ship them on east to points beyond Denver, Pueblo and Trinidad. These industries are at a comparable rate disadvantage, without in-transit privileges, as livestock feeders, and for the same reasons.

Monument dealers obtaining or shipping granite and marble from Vermont and Georgia are unable to ship full carloads to the northwest territory and have the rate ad-

vantage of partially unloading cars at intermediate points on the Rio Grande under in-transit privileges of through routes and joint rates which are available at points located on the Union Pacific.

This finding, which is finding No. 1 quoted in the footnote, is held by the Commission to justify ordering the establishment of through routes and joint rates under Secs. 15 (3) and 15 (4), Title 49 U. S. C. A. Secs. 15 (3) and 15 (4). Sec. 15 (3) empowers the Commission to establish through routes and joint rates when necessary or desirable in the public interest,[3] but Sec. 15 (4) prohibits the Commission from ordering the establishment of through routes by a carrier under Sec. 15 (3) without the carrier's consent if the result would be to short-haul that carrier unless, as provided by Sec. 15 (4), the Commission finds that the through route is needed in order to provide (1) *adequate* and (2) *more efficient* or *more economic* transportation.[4]

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3 "Sec. 15 (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by carriers subject to this part, * * *."

4 "Section 15 (4) In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, * * *. (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: **Provided, however,** That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. * * *."

The Commission accurately states the legal effect of Sec. 15 (4) in its report (*Denver & R. G. W. R. Co. v. Union Pac. R. Co.*, 287 I. C. C. 611) at page 655 as follows:

> "Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the 'through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation.' Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In Pennsylvania R. Co. v. United States, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in D. A. Stickell & Sons, Inc., v. Alton R. Co., supra, the Supreme Court said that the expressions 'more efficient or more economic' transportation, as used in section 15 (4), 'may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found.' These latter considerations are not determinative, however, unless the existing routes can be found not to provide 'adequate' transportation.
>
> "In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests."

Was there evidence to support the finding of inadequacy? Only in the event there was inadequacy of trans-

portation can the question of efficiency or economy be reached. It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order. There is no evidence to support a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are inadequate. There is abundant support, however, for the finding that the service is inadequate to patrons of the Rio Grande, located on the Rio Grande between Ogden on the west and Denver, Pueblo, and Trinidad on the east (not served by the Union Pacific between Ogden and Provo), who do not have in-transit privileges with respect to freight moving from the northwest area which is to be reshipped to points east of Denver, if under the law the lack of in-transit privileges many constitute "inadequacy." That is also true as to the service to shippers of marble and granite from Vermont and Georgia to initial points on the Rio Grande who need the in-transit privileges of partial unloading or processing enroute, incident to reshipment to final destination points beyond Ogden in the northwest area. The foregoing inadequacies are based upon the premise that the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15 (4). The Union Pacific vigorously contends that it does not. This question presents the crux of this case. If, as the Union Pacific contends, in-transit rights and privileges are matters over which the Commission under the law has no control, the existence or granting of which is subject only to managerial discretion of the carrier, and relate only to economy or efficiency of transportation to the exclusion of considerations of adequacy of transportation, then the lack

of in-transit privileges will not suffice as a proper basis for ordering "adequate" transportation. The argument is made in effect that since the transportation facilities are now available over the Union Pacific and the Rio Grande on the higher combination rates, the present non-existence of in-transit privileges relates only to the cost or economy of transportation. Reference is made to excerpts from opinions which it is said support the conclusion that the Commission may not under its general regulatory power force a carrier to provide or establish in-transit privileges. The question has many ramifications. We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. *Pennsylvania R. Co., et al., v. United States, et al.*, 323 U. S. 588, 54 F. Supp. 381.

But the inadequacy established by the evidence does not extend to shipments from the northwest area to initial destinations east of Denver. The same is true of shipments of monuments from Vermont and Georgia to points of initial destination in the northwest territory. Transportation service is now adequate between those points. There is ample evidence to support the finding that the establishment of the through routes and joint rates between the northwest area and points on the Rio Grande (not also served by the Union Pacific between Ogden and Provo), as to shipments which require in-

transit privileges at points on the Rio Grande for reshipment to points east of Denver, will result in more economical transportation. Differences in mileage and other comparative factors are for the Commission to weigh, evaluate and determine. Its ultimate factual conclusion may not be overturned when supported by the evidence. But, again, there is no evidence that the service is inadequate or that more economical transportation service will result with respect to shipments from the northwest area to points between Ogden and Provo served by both the Union Pacific and the Rio Grande and to be reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established. The evidence therefore sustains the finding of inadequacy and the need for more economical transportation only as to (1) carload shipments of commodities embraced in the Commission's order from points in the northwest territory destined to points of final destination east of Denver which require in-transit privileges at points on the Rio Grande; (2) shipments of granite and marble monuments from Vermont and Georgia to final destinations in the northwest territory which require in-transit privileges at points on the Rio Grande not also served by the Union Pacific. If the order had been so limited to the evidence it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its fi-

nancial needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15 (4).

The second finding, that the combination rates maintained by the Union Pacific and the Rio Grande are unduly prejudicial to shippers using or desiring to use the Rio Grande and unduly preferential to shippers and receivers using the Union Pacific to the extent they exceed the joint and through rates available to shippers located on the Union Pacific, is made for the purpose of bringing the order within the authorization of Sec. 3 (1). Title 49 U. S. C. A. Sec. 3 (1). That section is as follows:

> "Sec. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The situation which this finding seeks to correct, simply stated, is that the shippers and receivers of the designated commodities located on the Rio Grande who do not have in-transit privileges and joint and through rates are at an economic disadvantage compared to shippers

and receivers located on the route of the Union Pacific who do have joint and through rates and in-transit privileges.

If the prejudice and preference shown by the evidence falls within the prohibitions of Section 3 (1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15 (4) heretofore considered. But the prejudice and preference prohibited by Sec. 3 (1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3(1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3 (1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, was different, the purpose of Sec. 3 (1) was there stated as follows (Loc. cit. 259-260):

> "What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of § 3."

If the Commission could order through routes and joint rates between two or more competing railroads under

Sec. 3 (1) merely because a shipper entity described in Sec. 3 (1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15 (4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3 (1).

The third finding, heretofore quoted, to the effect that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad to and from points in the northwest area and points on the Bamberger line from Ogden to Salt Lake City, inclusive, while refusing to maintain joint rates with the Rio Grande on shipments from the northwest area to the points served by both the Rio Grande and the Bamberger Railroad from Ogden to Salt Lake City, inclusive, discriminates against the Rio Grande, is based on Sec. 3 (4), which is as follows:

> "Sec. 3 (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

The Bamberger Railroad is an electric line operating only from Ogden to Salt Lake City, serving those

cities and intermediate points. The Rio Grande serves all points served by the Bamberger. The criterion for determining unlawful discrimination under Sec. 3 (4) is stated by the Commission at page 658 of its order as follows:

> "A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred."

The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3 (4) clearly prohibits such discrimination. The Commission's order in this respect is valid under Section 3 (4).

Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the Rio Grande's case before the Commission. We do not find justification for serious consideration of that question.

Findings of Fact

I.

The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the estab-

lishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points.

II.

The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.

III.

The record supports the Commission's finding that present transportation service for granite and marble monuments, in carloads, originating in Vermont and Georgia, consigned to initial destination points on the Rio Grande, requiring unloading and in-transit privileges for continued movement to points in the northwest territory, is inadequate and uneconomical and that the establishment of joint rates and through service is necessary in order to provide adequate and more economic transportation for such shipments.

IV.

The evidence supports the finding that as to designated items of traffic moving from the northwest area,

shippers and receivers of freight located on the Rio Grande are at an economic disadvantage compared with shippers and receivers of freight from the northwest area who are located on the Union Pacific. But there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3 (1).

V.

The evidence supports the finding of the Commission, referred to and quoted herein as Finding 3, that unlawful discrimination prohibited by Sec. 3 (4) is being practiced by the Union Pacific in refusing to establish through routes and joint rates with the Rio Grande comparable to those existing between the Union Pacific and the Bamberger Line on traffic moving from the northwest area to points served by both the Bamberger Line and the Rio Grande between Ogden and Salt Lake City.

Conclusions of Law

I.

The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4). The evidence therefore supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities in carloads originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trini-

dad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities the order of the Commission is valid under Secs. 1, 15 (3) and 15 (4) of the Act and does not violate the direction of Sec. 15 (4) that reasonable preference be given the carrier which originates the traffic.

II.

The evidence supports the finding of the Commission that it is necessary, in order to provide adequate and more economic transportation of shipments of marble and granite monuments in carloads from points in Vermont and Georgia to points of final destination in the northwest territory, which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area, that through routes and joint rates be established between the Union Pacific and the Rio Grande as to such shipments.

III.

To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad, said order is not valid, because Sec. 15 (4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary

in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking.

IV.

To the extent the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande at Ogden on carload traffic moving from the northwest area to points between Ogden and Salt Lake City, inclusive, served by both the Rio Grande and the Bamberger Line, the order is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act.

To the extent stated in the foregoing opinion, findings of fact, and conclusions of law, the order of the Commission will be enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings as it may deem appropriate, consistent herewith.

Civil Action No. 76-53

Union Pacific R. Co. vs. United States.

JOHNSEN, Circuit Judge, dissenting:

The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute. The majority opinion upholds in part the result which the Commission has so reached.

What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is "perishable food articles." Here, as taken from its Report, are the manner and perspective of its approach to the question.

"Growers [of perishable food articles in Idaho, located on the Union Pacific] * * * market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon and Washington] need as many markets and outlets as possible."[1] 287 I. C. C. at page 642. To comprehend or evaluate that need, says the Commission, "it is necessary to consider the nature, extent and functioning of our in-

1 It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a "bridge" line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles.

tricate and far-flung commodity marketing system." P. 655. The importance, in our condition of growing population and national development, of having "a constantly expanding flow of diverse commodities" and "particularly articles of food" is emphasized. The comment is made that "A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible," and the truism is expressed that "Adequate transportation facilities and services are required for the proper functioning of the system." P. 656.

Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

1. "Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible*. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process*, be permitted." (Emphasis mine.) P. 656.

2. "A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities." In-transit privileges, "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit," are available at various points on the Union Pacific to through-shippers, on the basis of the joint rates applicable over that route, and

similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates, by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these additional facilities would be able to enjoy them on the same basis as those on the Union Pacific. Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union Pacific, "The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities." P. 656.

3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them "from effective participation in the widespread system developed for the marketing of such commodities." In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given "as many routes as possible" and "as much flexibility as possible in the distribution process," because otherwise they will be "debarred from effective participation in * * * the marketing of such commodities."

In other words, whenever it is possible physically and practicably to open up a new or an additional through

route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15 (4) of the Act, 49 U. S. C. A. § 15 (4), where the element of short-hauling another carrier is involved, as it is here, that such an added through-route must also provide "more efficient or more economic transportation" than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15 (3) to prescribe joint rates and pointing out that joint rates necessarily in the situation will provide "more economic transportation," since they obviously are lower than the previous combination rates.

I have grave legal doubt whether the Commission's power to establish joint rates under section 15 (3) has any relationship to the term "more economic transportation" in section 15 (4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term "more economic transportation" in section 15 (4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportational comparison from the standpoint of the interests of both the public and the carriers—and that the Com-

mission's power to establish joint rates under section 15 (3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15 (4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term "more economic transportation" under section 15 (4), in the addition of another carrier's route as a mere "bridge" line for such traffic. If that be not so, then there is not any situation in which the Commission can not make a finding of "more economic transportation" for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to "as many routes as possible" and "as much flexibility as possible in the distribution process," so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and further such new route can be declared to provide "more economic transportation," because by placing joint rates in effect the cost of using

such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15 (4) entirely, as affording them any protection whatsoever against deprivation of their long hauls.

Here the opening up of a through route over the Rio Grande as a bridge carrier for the transcontinental freight involved will deprive the Union Pacific of a long haul of 975 miles upon such traffic as the Rio Grande is able to solicit away from it. But this is not the sole purport or effect of the Commission's order. If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessarily will reduce the cost of using the new through route as against the combination rate previously applicable.

Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" is, as previously indicated, "perishable food articles." But it has, by means of some artificial classification, included ordinary livestock as a perishable food article (p. 656), saying merely, before doing so, that "We think, however, that the situation here as to livestock is no different from that portrayed as to certain

other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway." And it has further held that a little monument dealer, located on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and there in Colorado, on a through rate basis, some individual monuments out of an estimated four-carload lot of monuments per year.[2]

All of this to me is but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that end. But Congress has never been willing to accede to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All

2 I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of "urgent need" (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones, constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of "as many routes as possible" and "as much flexibility as possible in the distribution process" for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country.

this is familiar history in the railroad world, and I shall not bother to go into it further here.

It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out.

I do not mean to make any implication, nor do I here assume to pass judgment, on whether the Ogden gateway is in other manner or to other extent subject to being opened up. All I say is that the philosophy and standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" can not be made the basis for overriding the short-hauling provisions of section 15 (4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term "more economic transportation" to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the coun-

try has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did.

I have previously referred to the fact that most of the traffic that is here involved originates on the branch lines of the Union Pacific, and that on such of this traffic as the Rio Grande is able to solicit to use its route, the Union Pacific will lose a line haul of 975 miles. The Report of the Commission admits that "the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves" is about 200 miles. Page 654. It also recognizes that the Rio Grande is a mountainous route, of higher grades, more circuity, and greater operational costs than the Union Pacific. "The total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific. Other data as to physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services." Page 648.

All of these matters, however, the Commission lightly brushes aside, as not having relationship to the question

of "more economic transportation" in the situation, and so leaving it free to hold, as above indicated, that the new through route provides "more economic transportation," because its joint rates necessarily are lower than the previously applicable combination rates. All that the Commission says, in brushing aside the transportational differences which I have set out, as not requiring consideration on the question of "more economic transportation" in the situation, is that, when they are spread over hauls of such great lengths as are here involved "they become relatively insignificant." Page 658.

The Report does not undertake to show what amount of traffic goes where. It merely says that "About 90 per cent of the traffic upon which joint rates are sought via Ogden and the Rio Grande moves to (Missouri River crossings and points east and southeast) and about 10 per cent to the Southwest." Page 626. How much terminates at the Missouri River crossing-points or at other midwestern destinations, the Report does not state. As to livestock, however, it certainly is a matter of common knowledge that the primary markets are Chicago, Omaha, Kansas City and some other Missouri River points. To each of these points, as well as to the Minneapolis and St. Louis markets, the record shows that a haul of 200 miles more, and a transportation time of at least 24 hours longer, as well as at least one or two more terminal-yard services, are involved over the Rio Grande route. I do not believe that without rational demonstration the Commission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1524 miles (Chicago), the elements of difference which I have set out are so "relatively insignificant" as to be entitled to be ignored on the ques-

tion of whether "more economic transportation" is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportational and service differences existing, as related to the question of "more economic transportation" under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without establishment of the reality of that horizon for lumping purposes.

Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611; 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting

of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations.

This dissent is being written hastily in order not to delay the filing of the majority opinion, and I shall accordingly not take the time to go into detail on other matters. I agree with the majority that the Commission had no right here to find a violation of section 3 (1) of the Act against the Union Pacific and its connecting through-route carriers, but the basis for my view is not that adopted by the majority, that a discrimination under this section cannot at all exist, unless the complaining person or entity is located upon the lines of the carrier or combination of carriers claimed to have committed the discrimination. I do not believe that this viewpoint is tenable on the language of section 3 (1), nor on the expressions contained in *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 144, as well as on the plain, contrary assumptions made in *Texas & Pacific Ry. Co. v. United States*, 289 U. S. 627. But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3 (1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at

the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3 (1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3 (1), I am certain that its action resting on this basis alone could not on these facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15 (4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through routes and joint rates in relation to the existing conditions.

In the pattern of the Commission's apparent attempt to strike at as much in the present situation as possible, the Commission further, as noted in the majority opinion, required the Union Pacific to establish joint rates with the Rio Grande to and from the same points where it maintained joint rates with the Bamberger Railroad. The Report says: "The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande." P. 659. The brief of the Union Pacific argues pointedly that "No evidence was submitted concerning or comparing transportation conditions on the Bamberger's electric line between Ogden and Salt Lake City with conditions on the Rio Grande." The brief of the Commission makes

no denial of the fact that no such evidence is contained in the record. The most that the Commission could properly have said, I think, was that it had not been made to appear by the evidence that there was any important dissimilarity in the conditions on the two roads. But the lack of any such evidence of dissimilarity could hardly afford a basis for a finding of similarity on the part of the Commission. This segment of the Commission's order is perhaps of relatively small importance in the present controversy. I refer to it simply as being characteristic or in the pattern of the loose and improper basis and manner in which it seems to me that the Commission has dealt with the entire situation.

I would strike down the Commission's order, generally, on the basis and manner in which its result has been reached. In taking that position, however, I would again emphasize that I intend no implication that there may not exist some proper basis and some proper manner of reach as to some parts of the Ogden gateway situation. I have not allowed my mind to look at that avenue, in either one direction or the other. The pervading infirmities on which the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right there.

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,

Plaintiffs,

v.

United States of America and Interstate Commerce Commission,

Defendants,

The Denver and Rio Grande Western Railroad Company, et al.,

Intervening Defendants.

Filed Dec. 20, 1954

Final Judgment and Decree

The above-entitled action having come on for final hearing on November 23 and 24, 1953, before Circuit Judges Johnsen and Collet and District Judge Delehant, constituting a District Court of three judges, convened pursuant to Title 28 U. S. C., Sections 2284 and 2325, and all parties being represented by counsel and the Court having received the evidence offered by the parties and heard the arguments of counsel and having considered the pleadings, the evidence and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its opinions, findings of fact and conclusions of law herein on October 22, 1954, and the majority of the Court being of opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297, is valid and lawful in part and invalid and unlawful in the particulars set forth in the majority opinion,

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the majority opinion of the Court, heretofore filed, it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be granted and denied, consistent with said findings of fact, conclusions of law and the majority opinion of the Court filed herein;

It is further adjudged and decreed that this Court has no power under the Interstate Commerce Commission Act to determine whether it would be in the public interest and consistent with good transportation practices to put into effect only that part of the order of the Interstate Commerce Commission held to be lawful, without regard to and independent of that part of the order held to be unlawful, and, that question being one which should under the law be determined by the Interstate Commerce Commission in the exercise of its informed judgment in its specialized field;

It is ordered, adjudged, and decreed that this cause be and is hereby remanded to the Interstate Commerce Commission for such further proceedings and orders, consistent with the majority opinion, the findings of fact and conclusions of law, as the informed judgment of the Commission may dictate.

Dated this 20th day of December, 1954.

/s/ JOHN C. COLLET
John C. Collet
Judge
United States Court of Appeals

/s/ JOHN W. DELEHANT
John W. Delehant
Judge
United States District Court

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,

Plaintiffs,

v.

United States of America and Interstate Commerce Commission,

Defendants.

Filed Dec. 20 1954

Order

Upon consideration of the separate motions for new trial, IT IS CONSIDERED AND ORDERED:

1. That the motions be and they hereby are overruled and denied;

2. That the Clerk transmit forthwith copies of this Order to counsel in this case.

DATED this 20th day of December, 1954.

BY THE COURT:

/s/ HARVEY M. JOHNSEN
Harvey M. Johnsen
Judge
United States Court of Appeals

/s/ JOHN C. COLLET
John C. Collet
Judge
United States Court of Appeals

/s/ JOHN W. DELEHANT
John W. Delehant
Judge
United States District Court

APPENDIX G

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,

Plaintiffs,

v.

United States of America and Interstate Commerce Commission,

Defendants,

The Denver and Rio Grande Western Railroad Company, et al.,

Intervening Defendants.

Filed Dec. 20, 1954

Injunction Pending Appeal

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, having filed their application stating that they will appeal to the Supreme Court of the United States from the final judgment and decree entered herein by this Court on December 20, 1954, and praying for an injunction, pursuant to Rule 62(c) of Federal Rules of Civil Procedure, staying and

suspending the operation, enforcement and execution pending final determination of their appeal to the Supreme Court, of the Interstate Commerce Commission's order which is sustained in part by the majority opinion and final decree of this Court;

And it appearing to this Court that unless said order is stayed and its operation suspended and enjoined pending determination of their appeal, each of the plaintiffs and numerous other railroads may be subjected to a penalty of $5,000.00 per day if they do not comply with the requirements of the order, or to irreparable injury from loss of large sums of money in compiling and publishing the required rates and from loss of traffic and revenues, if they do comply with the order;

And the Court, finding no reason for permitting the order to become effective while its validity is being litigated, and being of opinion that the status quo should be preserved by staying and suspending the operation and enforcement of said order pending final determination of plaintiffs' appeal to the Supreme Court, it is hereby

ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297, Denver & Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al., be and it is hereby stayed, and suspended and the defendants and their officers, agents and employees are enjoined and restrained from enforcing or attempting in any way to enforce said order or any part thereof pending final determination of the

plaintiffs' appeal to the Supreme Court of the United States.

Dated December 20, 1954.

/s/ HARVEY M. JOHNSEN
Harvey M. Johnsen
Judge
United States Court of Appeals

/s/ JOHN C. COLLET
John C. Collet
Judge
United States Court of Appeals

/s/ JOHN W. DELEHANT
John W. Delehant
Judge
United States District Court

APPENDIX H

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civil Action No. 76-53

Union Pacific Railroad Company, et al.,

Plaintiffs,

v.

United States of America and Interstate Commerce Commission,

Defendants,

The Denver and Rio Grande Western Railroad Company, et al.,

Intervening Defendants.

Order

This matter having been presented to the Hon. Harvey M. Johnsen, one of the members of the three-member Court which tried the above-entitled cause, on the ex parte motion and application of the intervener, The Denver and Rio Grande Western Railroad Company, for an order enlarging the time to docket the case on appeal and file the record thereof with the Clerk of the United States Supreme Court, and good cause having been shown:

IT IS ORDERED that the time within which the intervener, The Denver and Rio Grande Western Railroad Company, must docket the case and file the record with the Clerk of the United States Supreme Court shall be and hereby is enlarged from April 4, 1955, to June 1, 1955.

IT IS FURTHER ORDERED that the times within which each and all of the other parties or interveners who have filed appeals herein must docket their cases with the Clerk of the United States Supreme Court shall likewise be and hereby are enlarged to June 1, 1955.

March 22, 1955.

/s/ HARVEY M. JOHNSEN
United States Circuit Judge

Filed, District of Nebraska, Mar. 22, 1955

MARY A. MULLEN, Clerk

I certify this to be a true copy of the original record in my custody.
MARY A. MULLEN, *Clerk*

By /s/ Evelyn Copeland
Deputy Clerk (Seal)

APPENDIX I

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1 (3) (a)—

"* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit.

ventilation, refrigeration or icing, storage and handling of property transported. * * *"

Section 1 (4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1 (5)—

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3 (1)—

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district,

gateway, transit point region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3 (4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15 (1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or

property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15 (3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the

terms and conditions under which such through routes shall be operated. * * *"

Section 15 (4)—

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

No. 118
Consolidated with Nos. 117, 119, 332, 333 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNION PACIFIC RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; WABASH RAILROAD COMPANY,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF FOR ABOVE NAMED APPELLANTS

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J. C. GIBSON,
Of Counsel.

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Appendix B—Pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 1, et seq.

No. 118
Consolidated with Nos. 117, 119, 332, 333 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNION PACIFIC RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; WABASH RAILROAD COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF FOR ABOVE NAMED APPELLANTS

OPINIONS BELOW

The majority opinion and the dissenting opinion of the three-judge United States District Court for the District of Nebraska (R. 151) are reported in 132 F. Supp. 72. The report of the Interstate Commerce Commission (R. 25) appears in 287 I. C. C. 611.

JURISDICTION

This action was brought June 25, 1953 (R. 3), by the above-named railroads pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul and set aside the order issued January 12, 1953, by the Interstate Commerce Commission in a proceeding entitled "Docket

No. 30297, *Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co., et al.*" Petitions for reconsideration were denied by the Commission on June 10, 1953 (V. II, 1778).*

Final judgment and decree of the majority of the district court sustaining the validity of the order "in part" and enjoining it "in part" was entered December 20, 1954 (R. 210). Notice of appeal[1] was filed February 18, 1955 (R. 230). On March 22, 1955, Circuit Judge Johnsen, presiding member of the district court, entered an order extending to June 1, 1955, the time for filing the record and docketing the cases of all appellants in this Court. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101(b). Probable jurisdiction was noted on October 24, 1955.

STATUTE INVOLVED

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out verbatim in Appendix B hereto:

National Transportation Policy (preceding Section 1), and Sections 1(3)(a), 1(4), 1(5), 3(1), 3(4), 15(1), 15(3) and 15(4).

QUESTIONS PRESENTED

The Commission's order in this case was issued upon a complaint filed by The Denver and Rio Grande Western Railroad Company (herein called "Rio Grande"). The Rio Grande has been a chronically bank-

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1 Jointly with Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska; and Nebraska State Railway Commission, who are filing a brief for those States.

* Because of duplication in page numbering of part of the record, this abbreviation will be used to designate pages of the record in Vols. I and II, proceedings before the Commission.

rupt and a "financial needs" railroad throughout its existence, and its President testified that the sole purpose of the complaint was to improve the Rio Grande's financial condition. The order requires the Union Pacific and over 200 other railroads to establish and maintain through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained over their transcontinental routes (herein called "Union Pacific routes") on traffic[2] originated and terminated at points on Union Pacific routes and hauled under joint rates maintained over those routes through Wyoming, Nebraska and Kansas for 7½ years between points in the northwest area, embracing Utah north of Ogden, Idaho, Oregon, Washington and Montana, and points in the eastern and southern parts of the United States generally east and south of the Missouri River.[3] The joint rates do not apply via the Rio Grande and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via that line.

The commodities named in the order comprise about 57,000 carloads of traffic annually or about one-third of the total traffic the Rio Grande seeks to divert to its line. Diversion of the traffic to the Rio Grande would short haul Union Pacific routes 925 miles, leaving those routes hauls as short as 100 to 400 miles on most of the traffic, in lieu of their present hauls of 1,000 to more than 2,000 miles.

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2 Carloads of granite and marble monuments from origins in Vermont and Georgia to destinations in the northwest area embracing Utah north of Ogden, Idaho, Oregon, Washington and Montana, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from origins in the northwest area to destinations in the eastern and southeastern parts of the United States.

3 The lines and termini of the Union Pacific and the Rio Grande (main lines) and other data are indicated on the map attached as Appendix A hereto.

Section 15(4) of the Act prohibits the Commission from ordering additional routes that would short haul existing routes, except under the conditions therein specified. Such additional routes ordinarily are sought not, as in this case, by a railroad seeking to improve its financial position, but by shippers seeking better transportation service. The ordering of such additional routes is justified only when the existing routes are unreasonably long or fail to render adequate, efficient or economic service, and when the *proposed* additional routes are shorter and are needed to provide "adequate and more efficient or more economic" service than that provided by existing routes.[4]

The physical, geographic and transportation conditions in the instant case are exactly the reverse of those upon which the Commission is justified in ordering an additional route that short hauls existing routes.

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4 See *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588; and *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331, in which the Commission said at pages 333-334:

"Section 15(4) of the act has been in its present form since September 18, 1940. In several proceedings since then, reasonable through routes which short haul one or more carriers have been prescribed. See *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333 (sustained in *Pennsylvania R. Co. v. United States*, 323 U. S. 588); *Allied Mills, Inc., of Virginia v. Alton R. Co.*, 272 I. C. C. 49; *California Milling Corp. v. Atchison, T. & S. F. Ry. Co.*, 269 I. C. C. 725, and 274 I. C. C. 120. In the first two of those proceedings it appeared that the routes required to be established eliminated expensive out-of-line hauls, and in the latter proceeding the routes required were shown to be shorter in many instances than those which had existed. In all of those proceedings the routes required were at least as economical, from the standpoint of the carriers as well as of the shippers, as were most of the existing routes. . . .

"The instant situation differs. All of the routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation. In addition, because of the circumstances here present, we believe a requirement that the routes sought be established would not 'give reasonable preference' to the originating carrier."

The Commission found that existing Union Pacific routes are shorter and faster than the Rio Grande; are efficiently operated; have surplus transportation capacity; furnish service "as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande" (R. 70), and are adequate to move over their "direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (R. 62).

On the other hand, the Commission found that the Rio Grande has no trackage in the northwest and proposes to render no service in that area; that routes via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific and would range from 33% to more than 50% longer than many of the Union Pacific routes; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers than is now required in movement of the traffic over Union Pacific routes. The Commission further found that the Rio Grande route is "less favorably situated than that of the Union Pacific"; that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (R. 62, 70), and that dissimilarities in transportation and operating conditions are so substantial and unfavorable to the Rio Grande as to prevent a finding of discrimination against the Rio Grande resulting from refusal of lines comprising Union Pacific routes to make their joint rates on the involved traffic applicable via the Rio Grande.

Notwithstanding those findings, the Commission concluded that through routes in connection with the longer,

slower and "more onerous" Rio Grande line, and joint rates "the same" as the rates maintained over Union Pacific routes were "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for the commodities named in its order (R. 73).

The Commission found that through service over Union Pacific routes, in general, "is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City," but that the testimony of shippers "does raise a question" as to a need for "more adequate and economic" service than is afforded by existing routes with respect to some commodities (R. 70, 69). It asserted that shippers of perishable food articles in the northwest area "are debarred from effective participation in the widespread system developed for the marketing of such commodities" (apparently, only, because they must pay higher rates if they ship over the Rio Grande to markets in the eastern and southern parts of the country), and that for perishable articles "reconsigned or accorded transit privileges" *at points on the Rio Grande*, "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that, therefore, Union Pacific routes are "inadequate and less economical than are the Rio Grande routes" (R. 70). In other words, the Commission condemned Union Pacific routes as "inadequate" because they do not serve points located exclusively on the Rio Grande, and because higher rates apply via the Rio Grande.

The district court (Circuit Judge Johnsen dissenting on the ground that the order was void and should be enjoined in its entirety because the Commission used

standards and criteria that were beyond warrant of the Act) held that the order is valid only to the extent that it embraces shipments of the articles named therein stopped for processing, milling, grazing cattle in transit and other "commercial operations" known as "transit privileges", at points on the Rio Grande and later reshipment to destinations beyond its termini.

The majority of the court, however, though correctly holding that the evidence does not support the Commission's finding that service over Union Pacific routes is inadequate or less economical than that of Rio Grande routes, proceeded to make its own finding that transportation service for the involved traffic over the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" and that, therefore, the through routes and joint rates ordered by the Commission are justified for shipments stopped for in-transit privileges at points on the Rio Grande and later reshipment to points beyond its termini. For those shipments the court held that the order "is valid under Secs. 1, 15(3) and 15(4) of the Act" and "for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act" at points along the Bamberger Railroad between Ogden and Salt Lake City (R. 167, 168).

For shipments *not* stopped for in-transit privileges on the Rio Grande, the court held the order invalid.

The following questions are presented by this appeal.[5]

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5 The plurality of questions presented and the length of this brief are results of the Rio Grande's commingling in its complaint of separate and independent provisions of the Act concerning its rights as a carrier, the rights of shippers, and the "public interest"; also from

(Continued on next page)

I. Whether the court below erred in refusing to hold that, in this proceeding, brought by the Rio Grande for the admitted purpose of enhancing its financial position by diverting for a "bridge" haul over its line transcontinental through traffic now and for some 75 years moved over Union Pacific routes between points on those routes in the northwest and points in the eastern and southern parts of the United States, the Commission was prohibited from issuing the order by the provision of Section 15(4) of the Interstate Commerce Act that, "[n]o through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs", and that this prohibition may not be evaded or circumvented by the Commission's assertion that in making the order "no consideration has been given to the financial needs" of the Rio Grande.

II. Whether the court erred in refusing to hold that, in view of the short haul prohibition of Section 15(4) of the Act (49 U. S. C., § 15(4)), the Commission acted arbitrarily and unlawfully in issuing the order short-hauling Union Pacific routes at least 925 miles, upon the Commission's own findings of fact:

(a) That Union Pacific routes have lower rates than the Rio Grande and are shorter, faster, efficiently operated, adequate and have surplus capacity to haul any foreseeable volume of the through traffic involved;

(Continued from preceding page)

what Circuit Judge Johnsen's dissenting opinion aptly describes as "all the confusion in which the [Commission's] report is wrapped," "the loose and improper basis and manner in which * * * the Commission has dealt with the entire situation," and from the further confusion and apparent misconception of the majority of the district court concerning its judicial functions in reviewing the order.

(b) That movement of the same through traffic via the Rio Grande would require from 200 miles to as much as 50% more transportation, at least 24 hours more time in transit, and one or two additional interchange services; and that the Rio Grande maintains higher rates, is less favorably located and has "more onerous" operating conditions than the Union Pacific or any of the other western lines.

III. Whether the court erred in failing to hold that the entire order is void because the Commission misconstrued, departed from and failed to observe and make the findings required by the controlling statutory standards and criteria of Sections 1(4), 3(1) and (4) and 15(3) and (4)(b), in basing its order:

(a) Upon the premise that the standards and conditions of Section 15(4)(b) [which permit establishment of a proposed route short-hauling existing routes of other railroads; *only* if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation"] are lawfully observed and applied by the Commission's findings here:

1. of a need for "more" adequate and economic service than that afforded by Union Pacific routes and

2. that the Rio Grande route is "necessary and desirable" to provide "adequate and more economic transportation",

without any finding by the Commission that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes for the involved through traffic between the same origins and the same ultimate destinations;

(b) Upon the premise that the conditions which permit short-hauling Union Pacific routes under Section 15(4)(b) can be met and satisfied by merely substituting the lower joint rates applicable over the Union Pacific routes for the higher combination rates via the proposed Rio Grande route;

(c) Upon the premise that, under Section 15(4)(b), Union Pacific routes may lawfully be condemned and found "inadequate and less economical" than the Rio Grande route for through traffic because *at points located on and served only by the Rio Grande*, "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply";

(d) Upon the premise that the Commission may invoke its power under Section 15(3) and (4)(b) for the purpose of making additional transit privileges available by equalizing rates via the Rio Grande with rates applicable over Union Pacific routes;

(e) Upon the criteria that the marketing system for food articles of a perishable nature requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible", although Section 1(4) requires carriers to establish only "reasonable" through routes;

(f) Upon the inconsistent criteria that:

1. food articles of a perishable nature must move to markets "with expedition and care" and "without unnecessary interruptions";

2. the longer Rio Grande route is necessary to permit the through transportation of such articles to be interrupted so that the articles may be held as long as 12 months at points on the Rio Grande for "commercial operations" called transit privileges, and

3. ordinary livestock to stop for grazing or feeding, and marble and granite monuments to stop for partial unloading at points on the Rio Grande fall within the category of perishable food articles found by the Commission to require expeditious, careful and uninterrupted transportation;

(g) Upon the premise that the Commission may lawfully invoke its powers under Section 15(3) and (4) to obtain the remedy it desires for rates found violative of Sections 1 and 3, and that findings of violations of the latter sections afford a lawful basis for ordering the through routes and joint rates.

IV. Whether the court erred in holding that the Commission may require Union Pacific routes to short haul themselves by establishing through routes and joint rates with the Rio Grande for the sole purpose of permitting through traffic to be stopped at points on the Rio Grande, not served by the Union Pacific, for "commercial operations" (known as "transit" privileges), such as storing, processing and cattle grazing, at the same rates the same shippers have when using Union Pacific routes between the same points of origin and the same ultimate destinations.

V. Whether the lower court's finding that transportation service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" for through shipments requiring transit at points on the Rio Grande and reshipment to final destinations beyond its termini, affords a lawful basis for the order short-hauling Union Pacific routes under Section 15(4)(b), which permits short-hauling other railroads only if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

VI. Whether the court erred in failing to review and consider the whole record of evidence and all of the issues tendered by the pleadings and arguments of the parties, and in failing to hold that the order is entirely null and void, because:

(a) The order is based upon erroneous interpretations of law, and there is no rational basis or support for the order or any part of it, in the evidence or in the findings made by the Commission;

(b) The Commission *did not make*, and the evidence does not justify or support findings essential to the validity of the order, among others:

1. that Union Pacific routes are inadequate, inefficient and uneconomic for movement of the involved traffic,

2. that the Rio Grande route is "needed" for the involved traffic, and that it will provide "more efficient" transportation service than Union Pacific routes,

3. that diverting traffic and revenues from Union Pacific routes to the Rio Grande would serve such beneficial purpose as maintaining good service or improving it,

4. that the Rio Grande is efficiently operated, furnishes satisfactory service or has surplus capacity or ability to haul any additional volume of traffic,

5. that diverting the traffic to the Rio Grande's longer route will speed up its movement,

6. that the Rio Grande will generate new or additional traffic or contribute additional transportation facilities in the northwest area, or that existing routes are insufficient or incapable of moving the traffic to and from that area,

7. that by including the Rio Grande in the through routes shippers to and from the northwest area will have lower rates than they have via the Union Pacific routes,

8. that the overall transportation system or shippers using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line,

9. that shippers have ever made complaint against service rendered by Union Pacific routes for the traffic involved, or demanded that the Rio Grande be included in present through routes;

(c) The evidence does not support or justify the Commission's findings—

1. that the combination of local rates via the Rio Grande are unjust and unreasonable,

2. that the joint rates which now apply over Union Pacific's shorter and more direct routes are reasonable for application via the longer and more onerous Rio Grande route,

3. that the combination rates via the Rio Grande are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande route and unduly preferential of shippers and receivers using the Union Pacific routes,

4. that the Union Pacific and other railroads discriminate against the Rio Grande in violation of Section 3(4) in maintaining joint rates with the Bamberger Railroad at points on its line between Ogden and Salt Lake City, while refusing to make like joint rates with the Rio Grande at the same points,

5. that through routes and joint rates with the Rio Grande are "necessary and desirable" in the public interest to provide "adequate and more economic transportation",

6. that shippers in the northwest producing area (who testified that they sell their products in all markets in all the 48 states and 5 foreign countries) "are debarred from effective participation" in the marketing system because they must pay higher rates if they ship through traffic via the Rio Grande than the joint rates available to them via Union Pacific routes for the same through traffic moving between the same origins and the same destinations;

(d) The Commission arbitrarily refused to give effect to the requirement in Section 15(4) that reasonable preference be given the originating carriers;

(e) The Commission refused to consider or give effect to the National Transportation Policy and to the evidence showing that diversion to the Rio Grande of any substantial part of the traffic would result in wasteful transportation and economic waste and in serious detriment to Union Pacific service and its employees, to certain other railroads and their employees and would inflict serious economic injury to numerous communities and the public served by Union Pacific routes;

(f) The Commission arbitrarily commingled and misused its authority under, and the remedies for violations of the separate and independent provisions of Sections 1(4), 3(1) and (4) and Section 15(3) and (4), and its order is vague, uncertain, indefinite and conflicting in its requirements;

(g) Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint and in ordering through routes and joint rates on the theory that because shippers had intervened and testified, the Rio Grande's complaint became a shipper complaint;

(h) The Commission acted arbitrarily and unlawfully in refusing to dismiss the entire proceeding on the ground that it was vitiated and nullified by the fact that shipper witnesses on whose testimony the order is based were admittedly solicited and procured by the Rio Grande to testify in such manner as to help it win its case.

STATEMENT

The Rio Grande operates a short-line railroad with its eastern termini at Denver, Pueblo and Trinidad, Colorado, and its western terminus at Ogden, Utah, the distance between Denver and Ogden being 607 miles via its main line, and 782 miles via Pueblo. Its history has been essentially one of financial difficulty and of bankruptcy. It has been a "financial needs" railroad throughout most of its existence.[6] Its mountainous location and tortuous physical features have resulted in "operating conditions on the Rio Grande" that are "more onerous than those on the lines of the Union Pacific" or any other transcontinental railroad (R. 70), and caused the Commission in prior cases to grant the Rio Grande's demands for higher rates, based on its "financial necessities", than rates prescribed for other western railroads.[7]

Constructed in 1870 as a narrow-gage line and converted to standard gage in 1890, the "Rio Grande was built for the purpose of handling the local business tributary to its line"[8] but its management soon determined

6 *Denver & Rio Grande Investigation*, 113 I. C. C. 75; *Reconstruction Finance Corp. v. Denver & R. G. W. R. Co.*, 328 U. S. 495.

7 *Commercial Club, Salt Lake City v. A., T. & S. F. Ry. Co.*, 19 I. C. C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486; *Livestock-Western District Rates*, 176 I. C. C. 1, 98 and 190 I. C. C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S. F. Ry. Co.*, 218 I. C. C. 663.

8 *Commercial Club, Salt Lake City v. A., T. & S. F. Ry.*, *supra*, p. 221.

to enhance its financial position by diverting traffic from other lines for a "bridge"[9] haul over its line, including transcontinental Pacific Coast traffic moving over the Union Pacific-Central (now Southern) Pacific route, construction of which had been completed from Council Bluffs, Iowa, through Ogden, Utah, to Oakland, California, in 1869.

Concentrating on its purpose to enhance its financial position by diverting traffic and revenues from other railroads, the Rio Grande's revenues from "bridge" traffic increased over 326 per cent in the 15-year period ending with 1948, while traffic originated and terminated on its line increased only 155 per cent and its local traffic originating and terminating at points on its line was less annually throughout that period than during the period 1924-1929.

Further pursuing its "bridge" traffic policy, the Rio Grande filed its complaint with the Commission in this case on August 1, 1949. Although the complaint alleged violations of Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act, the Rio Grande's President testified that the complaint was filed for the purpose of

9 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates on Union Pacific routes. Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

improving and enhancing its financial position by diverting for a "bridge" haul over its line so much as it can of about 172,000 carloads annually of transcontinental freight traffic now and for some 75 years moved under joint transcontinental rates[10] over through routes which include lines of the Southern Pacific, Great Northern, Union Pacific, Northern Pacific and Milwaukee railroads (designated herein as "Union Pacific Routes") between points in the northwestern States of Oregon, Washington, Montana, Idaho and Utah, north of Ogden (designated in this brief as "northwest area"), and points in the eastern and southern parts of the United States, generally east of the Missouri and Mississippi rivers, including points on the Atlantic and the Gulf coasts.[11] These joint rates do not apply via the Rio Grande (except in certain instances not relevant here) and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via the Rio Grande.

The Rio Grande demanded before the Commission that its line be included as a "bridge line" in all of the multitude of through routes of Union Pacific and other railroads to and from the northwest area over which the

10 "Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions." (R. 28.)

11 The Commission found that the traffic the Rio Grande seeks to divert to its line in this case ordinarily moves over the Union Pacific through Wyoming and Nebraska to and from Missouri River gateways rather than over the Rio Grande, "because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande" for that traffic. (R. 37.)

joint rates are applicable, despite the fact it has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific and would range from 33 per cent to more than 50 per cent longer than Union Pacific routes; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.

Consistent with the protection afforded by Section 15(4) of the Act against short-hauling, and having their own direct and shorter routes, the Union Pacific and other roads serving the northwest area have always insisted, with immaterial exceptions, upon retaining their long hauls on traffic to and from that area.[12]

No complaint has ever been filed by shippers or the public or any state public service commission demanding the longer through routes and joint rates sought by the Rio Grande.

After lengthy hearings, a proposed report of its examiner recommending the granting of the Rio Grande's full demands, exceptions to that report, two oral arguments before the full Commission, it issued the subject

12 Union Pacific and some of the other railroad appellants have served the northwest for more than 75 years. Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands and the effect of the order is that all these main and branchelines serve as "feeders" of bridge traffic to its line.

order January 12, 1953. Petitions for reconsideration were denied June 10, 1953.

The order (R. 21) requires the Union Pacific and numerous other railroads, whose connecting lines form through routes extending from the Pacific to the Atlantic and Gulf coasts, to establish through routes with the Rio Grande and "the same" joint rates maintained on Union Pacific routes on westbound carloads of granite and marble monuments from Vermont and Georgia to points in the northwest area and on eastbound carloads of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from points in the northwest area to points in the eastern and southern parts of the country, indicated above. These articles comprise about 57,000 carloads annually, or a third of the total volume of the traffic the Rio Grande seeks to divert to its line. Diversion of the traffic permitted by the order would short haul Union Pacific routes at least 975 miles, leaving them hauls as short as 100 to 400 miles on most of the traffic in lieu of their present hauls of 1000 to more than 2000 miles, resulting in a potential estimated revenue loss to the Union Pacific alone of more than $11,000,000 annually, and in very large losses to others of the railroad appellants.

The Commission's Findings and Conclusions

The Commission made the following findings, among others, which are essential to consideration of the questions presented. The findings are described here rather fully because of the obvious inconsistency between them and the Commission's ultimate conclusions and its order:

1. That it must overrule a motion of the defendant railroads to dismiss the complaint on the ground that the Commission was estopped by the "financial needs"

prohibition of Section 15(4) of the Act from issuing the order demanded by the Rio Grande. The Commission stated that, in reaching its conclusions, "no consideration has been given to the financial needs" of the Rio Grande (R. 34);

2. That there are at present no through routes, as that term is used in the Act, over the Rio Grande on the traffic here concerned (except on eastbound sheep and goats), and that any order requiring such routes and joint rates must be grounded upon findings as specified in Section 15(4)(b) of the Act, that the routes sought are "necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation" (R. 33);

3. That the proposed new route via the Rio Grande could not be required "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation" (R. 69);

4. That the Union Pacific has surplus transportation capacity, is efficiently operated, furnishes good service to shippers over its line, its "facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (R. 62), and that "through service" over Union Pacific routes is "as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande" (R. 70), except with respect to perishable food articles;

5. A large number of shippers and representatives of communities served by the Union Pacific, traffic, commercial and civic associations, opposed the Rio Grande's complaint. These were from localities in Washington,

Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah and Colorado (R. 65);

6. Shippers in opposition to the Rio Grande's complaint testified to the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. They testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event (R. 65);

7. That the Rio Grande route is from 33 to 219 miles longer than the Union Pacific (R. 40), and that routes via the Rio Grande would be from 33 to 50% longer than many of the present Union Pacific routes (R. 71);

8. That evidence as to the physical characteristics of the two lines shows that the Rio Grande is less favorably situated than the line of the Union Pacific; that traffic routed over the Rio Grande, as a "bridge" line would require at least 24 hours more time in transit than when routed over the Union Pacific and would require one or two more terminal interchange services (R. 62), and that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (R. 70);

9. That diversion of the traffic over the Rio Grande would deprive the Union Pacific of its long haul and would short haul it at least 925 miles in each instance (R. 41);

10. That the traffic sought by the Rio Grande moves over Union Pacific routes through Wyoming because those

routes are shorter and they offer lower rates than the Rio Grande (R. 37);

11. Concerning public need for the proposed Rio Grande route and damage to Union Pacific routes by diversion of traffic from them to the Rio Grande, the Commission found that it was impossible to determine or estimate accurately what volume of traffic might be diverted to the Rio Grande if all of the joint rates were made applicable over its line (R. 66), but that whatever the volume so diverted would be the result of "active solicitation" by the Rio Grande "to persuade" shippers and receivers to use its line as an overhead or "bridge" route, the value of its service to shippers, and the extent to which the Rio Grande can "induce" shippers to route traffic via its line for the purpose of using transit facilities at points on its line and subsequent reshipment beyond at the balance of joint through rates from the point of origin (R. 46);

12. That there are substantial dissimilarities or differences between transportation conditions, operating conditions and lengths of hauls over Union Pacific routes and over the Rio Grande but that the differences in transportation conditions become "relatively insignificant" and "substantially similar" when "spread" over the longer hauls between the northwest area and the eastern and southern parts of the country (R. 72);

13. That the evidence failed to prove that the Union Pacific and other lines discriminate against the Rio Grande (except at points on the Bamberger Railroad between Ogden and Salt Lake City) under Section 3(4) of the Act in refusing to include its line in their through routes and joint rates (R. 72);

14. That (notwithstanding the dissimilarities in transportation conditions over the respective routes) the combination rates via the Rio Grande on the articles named in the order from and to the areas therein described are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, to the extent those rates exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes (R. 73);

15. That the Rio Grande, a railroad, could not raise in its own behalf an issue of undue prejudice and preference under Section 3(1) against another railroad, but that testimony of intervening shippers raised that issue (R. 33), and also raised a question as to a need for "more" adequate and economic service than afforded by Union Pacific routes with respect to perishable food articles (R. 69);

16. That the present complex and far-flung marketing system for perishable food articles requires that such articles move "with expedition and care" and "over as many routes as possible" with "as much flexibility as possible" (R. 70), without "unnecessary interruptions", to "as many markets and outlets as possible" (R. 70, 56);

17. That, while through service over Union Pacific routes in general is as satisfactory to shippers as the service which could be provided over routes including the Rio Grande, this is not true with respect to perishable food articles, and that shippers of those articles from the northwest area "are debarred from effective participation in the widespread system developed for the mar-

keting of such commodities" (R. 70) (apparently, only because, if routed over the longer Rio Grande route to eastern and southern markets, higher rates apply than when routed via Union Pacific routes, for the undisputed evidence shows that those shippers market their products via Union Pacific routes in all 48 states and several foreign countries);

18. That on shipments of perishable food articles reconsigned or accorded transit privileges such as stop-off for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, *at points on the Rio Grande*, "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that "on such traffic the defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes" (R. 70);

19. That through routes via the Rio Grande and joint rates "the same" as apply over Union Pacific routes for the commodities named in the order between points in the areas described therein are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (R. 73);

20. That there is no indication that witnesses admittedly solicited and procured by the Rio Grande to testify so as to help it win its case were improperly influenced or had been stimulated in any questionable manner (R. 48).

Opinions of the District Court

The majority opinion holds that the Commission's order is valid only to the extent that it embraces shipments of the articles named in the order which must stop

for in-transit privileges at points on the Rio Grande not also served by the Union Pacific.[13]

To that limited extent the majority holds that the evidence supports the order, and that it is valid under Sections 1, 15(3) and 15(4) of the Act and does not violate the direction of Section 15(4), that reasonable preference be given the carrier which originates the traffic; that so limited, it would "eliminate" the contention that the order was for the purpose of assisting the Rio Grande to meet its financial needs and would rest squarely within Section 15(4)(b).

The majority further holds that the order is not valid to the extent that it embraces carload shipments of the articles named in the order which do *not* stop for in-transit privileges at points on the Rio Grande.

The majority holds that the Commission's finding that Union Pacific routes are inadequate is based on the lack of in-transit privileges at points on the Rio Grande (although the Commission's report (R. 48) clearly states the fact that all customary transit privileges are available at points on the Rio Grande) and that upon that finding the Commission had power to require through routes and joint rates.

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13 The "transit privileges" described in the majority opinion are feeding and grazing livestock, cleaning, packaging, processing, freezing and storing fresh fruits, vegetables, poultry, food products, butter, eggs and beans, at points on the Rio Grande and later shipped to points east of its eastern termini, and westbound carload shipments of monuments to be stopped for partial unloading at points on the Rio Grande with final destination at points on the Union Pacific northwest of Ogden. The Commission and the courts hold that "transit privileges" are not transportation service, but are "commercial operations."

In sustaining the order "in part" the majority adopted a different theory or legal basis from that of the Commission, in that, the majority sustains the order "in part" upon its own finding from the evidence that transportation service *via the Rio Grande* between the northwest area and the area east of Denver is "inadequate and also inefficient and uneconomical" (R. 166). That is, the majority condemns service of the Rio Grande's own *proposed route* which both the Commission and the majority find necessary to provide adequate and more economic transportation, whereas, the Commission, correctly holding that it could not require the through routes and joint rates demanded by the Rio Grande "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation", incorrectly condemned Union Pacific routes as "inadequate and less economical than are the Rio Grande routes" because, on shipments of the articles named in the order reconsigned or stopped for processing, storage or other transit privileges *at points on the Rio Grande*, "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply."

The majority holds that the evidence does not support the Commission's finding that present transportation service via Union Pacific routes between the northwest and points east of Denver is inadequate; that the evidence shows that present service over the Union Pacific between such points is adequate and that establishment of "the same" joint rates via the Rio Grande between the northwest and points east of Denver "would not make such service more economical because the rates for such service would only equal the present rates via the Union Pacific between those points" (R. 165). But the majority also holds that establishment of through

routes and equal joint rates on shipments of the articles named in the order that stop for in-transit operations at points on the Rio Grande (not also served by the Union Pacific) is necessary "to provide adequate and more economic transportation" (R. 167), and "will result in more economical transportation" (R. 161).

The majority holds that the Commission is without power to order through routes and joint rates to remove undue preference and prejudice under Section 3(1) between shippers located on different railroads because, if it did so, the short-hauling prohibition of Sec. 15(4) "would be practically emasculated" (R. 164). But the majority also holds that in its requirement of through routes and joint rates in connection with the Rio Grande at points from Ogden to Salt Lake City, the order "is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act" (R. 168). The majority also holds that the order requiring through routes and joint rates which short haul the Union Pacific is valid for the purpose of establishing reasonable joint rates in lieu of the Rio Grande's combination rates found unreasonable by the Commission in violation of Section 1.

Circuit Judge Johnsen, dissenting, holds that the order should be annulled in its entirety, among other reasons, because:

> "The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute." (R. 169)

He points out that:

> "What the Commission purports to make the primary basis for its establishing through routes and

joint rates over the Rio Grande is 'perishable food articles'." (R. 169)

* * * * *

"Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

"1. 'Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible*. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process*, be permitted.' (Emphasis mine.) P. 656.'" (R. 170)

"* * * the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' because otherwise they will be 'debarred from effective participation in * * * the marketing of such commodities.'" (R. 171)

"* * * the philosophy and standard of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' can not be made the basis for over-riding the short-hauling provisions of section 15(4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term 'more economic transportation' to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing." (R. 175)

"It is on the basis of the unqualified use of that standard here in relation to perishable commodities,

and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out." (R. 175)

Observing that where short-hauling other carriers under Section 15(4)(b) is involved, as it is here, the Commission must find that the *proposed* additional route will provide "more efficient or more economic transportation" than that provided by present through routes, and further observing that in final analysis what the Commission's order does is simply to reduce the Rio Grande's combination rates to the level of the joint rates over Union Pacific routes, the dissenting opinion holds:

"* * * where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term 'more economic transportation' under section 15(4), in the addition of another carrier's route as a mere 'bridge' line for such traffic." (R. 172)

Pointing to the Commission's findings of more onerous operating conditions and substantially dissimilar and less favorable transportation conditions on the Rio Grande, and its "brushing aside" of those dissimilarities "without rational demonstration" but by arbitrarily saying they "become relatively insignificant" when spread over hauls of great length, and further pointing to the Commission's finding of discrimination against the Rio

Grande at points on the Bamberger Railroad, without any evidence, but merely upon the lack or absence of evidence concerning either dissimilarity or similarity in transportation conditions along the Bemberger, Circuit Judge Johnsen holds that these instances are "characteristic or in the pattern of the loose and improper basis and manner" in which the Commission has dealt with the entire case and are illustrative of the reasons why the entire order should be stricken down (R. 179).

SUMMARY OF ARGUMENT

Congress has declared that the National Transportation Policy is, *inter alia*, to promote "adequate, economical, and efficient service" to the end of developing and preserving an "adequate" transportation system. A "primary aim" of that Policy is "avoidance of waste", *Texas v. United States*, 292 U. S. 522, 530. The Policy seeks to preserve the earning capacity of "individual carriers" and to avert losses and public injury resulting from "the building of unnecessary lines" of railroad and from cut-throat competition, *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277.

Consistent with its purpose to promote adequate, economical and efficient service, Congress has conferred power on the Commission to order new through routes and joint rates applicable thereto when "necessary or desirable in the public interest", (Section 15(3).) But that power is limited by Section 15(4) which expressly prohibits the Commission from establishing and diverting traffic to a new route where the effect will be to short haul[14] a carrier or carriers directed to participate there-

14 To short haul a carrier is to require it to contribute to a route substantially less than the entire length of its railroad between the termini of such route.

in, unless existing routes are (a) "unreasonably long", or—

> "(b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

As the Rio Grande's demands would short haul Union Pacific routes 925 miles, even though they are as much as 50 per cent shorter than the *proposed* Rio Grande route and, therefore, could not be condemned as "unreasonably long" and short hauled under clause "(a)", the Commission invoked the standards of clause "(b)" as the statutory or legal basis on which to justify its order short-hauling existing Union Pacific routes.

In prescribing a through route, the Commission is required by Section 15(4) to give "reasonable preference to the carrier which originates the traffic", subject to certain exceptions, and the Commission is expressly forbidden by Section 15(4) from establishing a new through route and joint rates to confer a financial benefit upon a particular carrier or to assist any carrier participating in such new route "to meet its financial needs", and from "tinkering" with through routes for that purpose, *U. S. v. Great Northern R. Co.*, 343 U. S. 562, 575.

Ordinarily the establishment of a new route that short hauls existing routes is ordered upon complaint of shippers where existing routes are shown to be inadequate, inefficient or uneconomical, contrary to the National Policy and that the proposed new route is shorter and will furnish better, more efficient, or cheaper transportation service than that provided by existing routes, within contemplation of the Policy.

The order in the instant case is unique in that it was issued upon complaint filed by the Rio Grande, a chronically bankrupt short line railroad, for the admitted purpose of improving its financial condition by diverting traffic and revenues from existing Union Pacific routes so that the Rio Grande can participate as a "bridge" line in the through transportation between points in the northwest area and points in the eastern and southern parts of the country.

The order is also novel and unprecedented in that it would short haul existing Union Pacific routes 925 miles, which routes originate[15] the traffic and are found by the Commission to be shorter (by as much as 50%), faster and efficient and with "adequate" surplus capacity to haul any foreseeable volume of traffic. The order would divert the traffic and revenues to the longer, mountainous Rio Grande route, which the Commission finds is "less favorably situated", would require at least 24 hours additional time in transit and one or two more terminal-yard services, and has "more onerous" operating conditions than the Union Pacific or any other transcontinental line. The order is plainly at war with the National Transportation Policy.

I. Since no railroad, in demanding through routes and joint rates to divert traffic from other railroads for a "bridge" haul over its line, could have any other purpose than to enhance its financial position and aid it-

15 The Union Pacific's costs of gathering and hauling to its main lines the involved traffic originated on its 2,900 miles of branch lines in the northwest area range from $19 to $106 per car and average $45.59 per car. These gathering costs are and would be borne entirely by Union Pacific in addition to its cost of the line-haul movement to Ogden, while the Rio Grande, as a "bridge" line, would incur no gathering or originating costs whatever on the traffic it seeks. (Orig. I. C. C. Ex. 27.)

self in meeting its financial needs, and as the President of the Rio Grande admitted that this was its sole purpose in this case, the Commission was prohibited from issuing the order by the provision of Section 15(4) that—

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

The Commission may not escape that prohibition by its mere assertion that in reaching its conclusions "no consideration has been given to the financial needs" of the Rio Grande. That assertion is contrary to the Commission's own recognition of the Rio Grande's perennial financial needs, and contradicted by and inconsistent with the extraordinary emphasis the Commission gave to the financial importance of "bridge" traffic to the Rio Grande. Nor may the Commission evade the "financial needs" prohibition by altering the "form" of its order in attempting to make it appear that its purpose was to grant "relief" to intervening shippers by reducing the Rio Grande's combination rates to the level of the joint rates on the Union Pacific routes, *Thompson v. United States*, 343 U. S. 549, 559-560. The order violates the intent of Congress in adding the "financial needs" prohibition to Section 15(4) "to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs", *U. S. v. Great Northern R. Co.*, 343 U. S. 562, 575.

The majority of the district court, in "remaking" and limiting the order to shipments actually stopped for transit operations on the Rio Grande, not only failed to save the order from the "financial needs" prohibition but also exceeded its authority and usurped administrative powers.

II. In refusing to judge the validity of the order by the standards of Section 15(4)(b) expressly invoked by the Commission, the district court ignored or violated principles laid down by this Court controlling judicial review of administrative actions, *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87; 332 U. S. 194, 196; *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488. The court clearly erred in refusing to annul the entire order because, *first*, the Commission misconstrued clause "(5)" as authorizing it to condemn and short haul the shorter, faster and adequate Union Pacific routes merely because they are "not available" at points served exclusively by the Rio Grande and higher rates apply on the Rio Grande; *second*, the Commission did not make the special findings required by the standards of clause "(b)" which it expressly invoked; *third*, the Commission forsook the standards of clause "(b)" which it had invoked, and substituted therefor the standards or criteria of its asserted need of the marketing system for perishable articles for as many markets "as possible", as wide a distribution "as possible" and as many routes "as possible"; and, *fourth*, the substituted standard is beyond warrant of the Act and affords no legal basis for the order, nor did the Commission adhere even to that standard.

Upon its own holding that the evidence would not support the Commission's finding that service via Union Pacific Routes is "inadequate", the district court clearly should have held the entire order void. Instead, the court made its own administrative finding that service via the Rio Grande is "inadequate and also inefficient and uneconomical" and substituted that finding as a basis on which it held the short-hauling order could be partly justified. In doing so the court not only usurped adminis-

trative power, but also attempted to save part of the order upon still another unwarranted and illegal basis, for clearly, clause "(b)" does not authorize short-hauling faster, shorter and cheaper existing routes by substituting for them a *proposed* route which, the court finds, is "inadequate and also inefficient and uneconomical."

The legislative history of clause "(b)" clearly shows that its only purpose was to empower the Commission to order through routes that are "shorter or cheaper" than existing routes which could not be condemned as "unreasonably long" and short hauled under clause "(a)" of Section 15(4), but which do not provide the adequate, efficient and economic through service contemplated by clause "(b)", and the National Transportation Policy.

If, as the Commission held, clause "(b)" permits short-hauling the shorter, faster Union Pacific routes because they are not available, and higher rates apply *at points served exclusively by the Rio Grande*, or if, as the district court held, clause "(b)" permits short-hauling the shorter and faster Union Pacific routes because *service via the Rio Grande* is "inadequate and also inefficient and uneconomical", then the carriers' "right guaranteed by Section 15(4)" against short-hauling is wiped out and the short-haul prohibition is "unnecessary surplusage." This Court has steadfastly rejected any such treatment of the short-haul prohibition. See *Thompson v. United States*, 343 U. S. 549, and cases therein cited.

The undisputed facts found by the Commission prove that through service over Union Pacific's shorter and faster routes is not only adequate but greatly superior in every way to any service that could be furnished by the Rio Grande for the through traffic concerned, and the district court erred in refusing to hold that upon those

facts the Commission's view that the law permits it to condemn and short haul Union Pacific routes because they are not available at points served exclusively by the Rio Grande and because higher rates apply on the Rio Grande is foreclosed by this Court's decision in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538.

The Commission not only misconstrued clause "(b)" as authorizing it to condemn and short haul the shorter, faster and adequate Union Pacific routes because they are "not available" at points served exclusively by the Rio Grande and because the latter has higher rates, and to compel "more" adequate service by ordering the longer Rio Grande route at equal rates, but it also departed from and failed to make the special findings listed in clause "(b)". It did not find that the Rio Grande route was "needed" or that it would furnish "more efficient" service, and its finding that the Rio Grande route would furnish "more economic" service is a plain distortion of fact, since its rates are higher, and under the order would only equal those via Union Pacific routes, and the Rio Grande route, found by the Commission to be longer and more onerous, is necessarily less economical than Union Pacific routes.

Being precluded by the basic evidential facts from making the special findings required by the standards of clause "(b)" which it expressly invoked, the Commission forsook the statutory standards and adopted as the basis for its order its own asserted requirements of the marketing system developed for perishable articles for as many markets and outlets "as possible", as wide a distribution "as possible", over "as many routes as possible". In thus substituting its own standard for the statutory standards it had invoked, the Commission clearly exceeded its authority and its order is void.

Chenery cases, *supra*. If, as it has done in this case, the Commission may cast aside the statutory standard of "reasonable through routes" (Section 1(4)) that are "needed" to provide "adequate and more efficient or more economic" transportation (Section 15(4)(b)) and short haul existing routes upon its mere assertion that perishable articles require as many markets and outlets "as possible", as wide a distribution "as possible" and "as many routes as possible", then it has found a way to short haul every existing through route by compelling additional through routes via every junction of connecting carriers until it has established every "possible" route, or, in other words, to completely emasculate the prohibition against short-hauling existing routes.

The Commission not only forsook the statutory standards of adequate and more efficient and more economic transportation which it had invoked and substituted its own standard of as many markets, outlets and routes "as possible", for *perishable articles*, but it also departed from its own substituted standard by including ordinary livestock, dried beans and granite and marble monuments in the order.

Both the Commission and the district court misconstrued clause "(b)" in holding that it authorizes short-hauling existing routes by the simple expedient of reducing the Rio Grande's combination rates and equalizing them with the joint rates via Union Pacific routes. The Commission and the court also misconstrued clause "(b)" in holding that it authorizes short-hauling Union Pacific routes for the purpose of making transit privileges (which the Commission finds to be "commercial operations") available on the Rio Grande at the same rates those privileges or commercial operations are avail-

able on the Union Pacific, and, further, in holding that the carefully restricted through route powers may be invoked to remedy rates found to be in violation of Section 1, and Section 3. Since the Commission expressly invoked the standards of clause "(b)" as the legal basis for the order, it must be judged by those standards, and the contention of the Government and the Rio Grande that the Commission's finding of a violation of Section 3(1) may now be used as an "independent basis" for sustaining the validity of the order must be rejected. The Commission's order cannot be upheld upon "considerations" that are "not those upon which its action was based" (318 U. S., p. 92).

Moreover, as the shippers in the northwest area found to be unduly prejudiced when they ship via the Rio Grande are *the same shippers* found to be unduly preferred when they ship via Union Pacific routes, and as all of them are located on Union Pacific routes in the northwest and all of them have the *same choice* of routing their traffic over either the Union Pacific or the Rio Grande, there is no basis in law or fact for the Commission's finding of a violation of Section 3(1); nor would the evidence support such finding, for the Commission may not ignore the substantial differences in "more onerous" transportation conditions which it finds over the Rio Grande compared to conditions on Union Pacific.

III. The Commission's findings, among numerous others, that Union Pacific routes have lower rates, are shorter, faster and are adequate to haul any foreseeable volume of the traffic concerned do not, as a matter of law, support or afford a rational or valid basis for the order short-hauling Union Pacific routes by diverting the traffic to the longer, more onerous and less favorably situated Rio Grande route. Nor did the Commission make findings es-

sential to the validity of its order; for example, it did not find that diversion of the traffic to the Rio Grande "would serve some beneficial purpose such as maintaining good service and improving it", *F. C. C. v. RCA Communications, Inc.*, 346 U. S. 86, 97, or that the Rio Grande route is "needed" or that it will furnish "more efficient" service, or that it is efficiently operated or furnishes satisfactory service, or that it has ability or capacity to haul any additional volume of traffic. The facts found by the Commission and those it did not and could not find from the evidence compel the conclusion that its order is void and the district court erred in refusing so to hold.

IV. The order is not only unsupported by evidence but is contrary to the overwhelming preponderance of the evidence. The testimony on which the Commission based its order was that of a few shippers which the Rio Grande admitted it solicited and procured to testify so as to help it win its case and is, therefore, without credibility, weight or probative force. Since that testimony is the only evidential basis for the Commission's conclusions that the Rio Grande's combination rates are unreasonable and unduly prejudicial, that the Rio Grande route and the prescribed joint rates are necessary "in the public interest", the order is clearly without support of substantial evidence. Moreover, the Commission's findings that the combination rates are unreasonable and unduly prejudicial and that the joint rates via the Union Pacific are reasonable for application via the longer Rio Grande route and are preferential of shippers using Union Pacific routes are based entirely on the fact that the combination rates via the Rio Grande are higher than the joint rates via the Union Pacific and the Commission's report admits that there was no other evidence of record concerning the lawfulness of the rates.

Witnesses for the State public service commissions of Washington, Oregon, Montana, Wyoming and Nebraska, and a far greater number of shippers than the number solicited and procured by the Rio Grande testified that service provided by existing Union Pacific routes is entirely adequate, satisfactory and efficient, and that not only was there no necessity for the longer, slower and more onerous Rio Grande route, but also that diversion of the traffic to that route would jeopardize the ability of Union Pacific routes to continue to furnish the adequate and efficient service they now provide and result in deterioration of that service to the detriment of the public and the shippers using those routes and the economic welfare of communities served by and dependent upon them. The Commission's assertion that shippers in the northwest or originating area "are debarred from effective participation" in the markets for their products is capricious and contrary to the evidence which shows that shippers from that area, including those who supported the Rio Grande, market their products in all of the 48 States and in several foreign countries through the use they now make of Union Pacific routes.

There is no basis in either law or fact for the finding that shippers desiring to use the Rio Grande are unduly prejudiced or disadvantaged because its rates are higher than those of Union Pacific routes for those shippers and all others in the northwest area are located on Union Pacific routes and have exactly the same privilege of routing their traffic over either the Union Pacific routes at lower joint rates or over the Rio Grande route at higher combination rates. The record is devoid of any evidence on which the Commission could base any finding of discrimination against the Rio Grande resulting from the Union Pacific's refusal to establish joint rates with

it while maintaining such rates with the Bamberger Railroad at Ogden and Salt Lake City and intermediate points.

V. Having found that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and unlawfully in failing to dismiss the complaint and in seizing upon the Rio Grande's solicited and procured shipper testimony and ordering through routes and joint rates on the theory that because those shippers had testified the complaint became a shipper complaint. The Commission further acted arbitrarily and erroneously in refusing to give effect to the requirement in Section 15(4) that reasonable preference be given to the carriers that originate the traffic concerned, and in refusing to give weight and effect to substantial evidence showing that diversion to the Rio Grande of any substantial part of the traffic it seeks would result in wasteful transportation and economic waste and in serious detriment to Union Pacific service and its employes, to certain other railroads and their employes, and to communities and areas served by and dependent upon them. Further, the entire order should be annulled because of its uncertainty and conflicting requirements, and because the Commission exceeded its authority in using its through route powers to require a rate reduction, to remove undue prejudice and discrimination and to equalize rates via the Rio Grande with those of Union Pacific routes.

ARGUMENT

I.

Upon the Admission by the Rio Grande's President and Other Evidence That the Sole Objective of the Proceeding is to Increase its Revenues and Improve its Financial Condition by Diverting Traffic and Revenues from the Union Pacific and Other Railroads, the Commission Acted Arbitrarily and Contrary to Law in Overruling the Motion to Dismiss the Complaint on the Ground that Section 15(4) of the Act Prohibits the Commission from Compelling Through Routes and Joint Rates for that Purpose, and the District Court Erred in Refusing to Annul the Order on that Ground.

The pertinent provision of Section 15(4) of the Act is that:

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

As no railroad in demanding through routes and joint rates to divert traffic to its line from other railroads could have any other purpose than to enhance its financial position or aid itself in meeting it financial needs, and as the President of the Rio Grande admitted that this was the sole purpose of this case, the Union Pacific moved that the Commission dismiss the complaint on the ground that the quoted provision, to which we shall refer as the "financial needs" prohibition, prohibits the Commission from compelling in whole or in part the through routes and joint rates demanded by the Rio Grande in this case. The Commission overruled this motion and sought to evade the "financial needs" prohibition, *first*, by stating that in reaching its conclusions

to compel the through routes and joint rates required by its order "no consideration has been given to the financial needs of the complainant" (R. 34), and, *second*, by abandoning the Rio Grande's case, creating new issues, treating the case as if it were a shipper complaint and granting a third of the demands of the Rio Grande under the guise and in the "form" of relief to shippers and "the public" (R. 69).

The first of these two efforts to escape the "financial needs" prohibition is merely an "artificial use of words" and a self-serving "declaration" that cannot be permitted to stand in the face of actual facts and realities, *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545.[16]

The Rio Grande's President stated that since he came to that property in 1935 a planned program was progressed to enable the Rio Grande to participate to a greater extent as a "bridge" line in transcontinental traffic, that it has been the policy of the Rio Grande under his management to divert from the trafiscontinental lines more and more "bridge" traffic, and filing of the complaint in this case is but another step in that direction. On cross-examination, he testified as follows (V. I, 48):

> "Q. That is, from the standpoint of what I will say the treasury of the Rio Grande and the stockholders, that would be the purpose?
>
> "A. Yes, we hope to improve our condition if we can get these through rates.

16 "This Court has refused to accept assumptions of fact which are demonstrably false, *United States v. Provident Trust Co.*, 291 U. S. 272 [286], even when agreed to by the parties, *Swift & Co. v. Hocking Valley R. Co.*, 243 U. S. 284, [289]; *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 497.

"Q. Insofar as the corporate management and the stockholders of the Rio Grande are concerned, that would really be the only immediate purpose to them, would it not?

"A. Yes—that they would want to improve the financial condition of our railroad."

He further testified that the reason for pressing for an increased volume of "bridge" traffic over the Rio Grande is that "there is more money in it", than in traffic it originates or terminates (V. I, 50). It has been a part of his program since 1935 to have through routes and joint rates published via the Rio Grande on the traffic involved in this case as a further means of enhancing the financial position of the Rio Grande (V. I, 49).

The "financial needs" of the Rio Grande for the "bridge" traffic it seeks in this case was confirmed by its Vice President of Traffic, witness Hogue, who testified on this point as follows (V. I, 69):

"With the decline experienced in the originated commodities named, plus a heavy tonnage loss of untold volume to other forms of transportation in the states served by the Rio Grande, we are forced to turn our thoughts and efforts to main line through freight traffic. In no other way could we have survived and continued to render rail transportation service to those people of Colorado, Utah, and New Mexico who are reached only by the Rio Grande."

The point is further emphasized in the testimony of witness Earley, Assistant Freight Traffic Manager of the Rio Grande, who described the decline in the local and originated traffic which has not kept pace with the increase in traffic it now takes from connecting lines (V. I, 81) and concluded that: "The importance of overhead or bridge traffic to the Rio Grande is thus emphasized" (V. I, 82).

The Commission's assertion that it gave no consideration to the Rio Grande's "financial needs" is at variance with the allegation in paragraph V, page 2, of its answer to the complaint herein, that the Rio Grande "has numerous branch lines connecting with and extending from its main lines in Utah and Colorado" (R. 92), which quite clearly implies that at least one of the Commission's purposes in issuing the order was to aid the Rio Grande in maintaining and operating its branch lines by diverting traffic and revenues from the Union Pacific. The assertion is also at variance with the Commission's own statement that the Rio Grande "is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul" (R. 68).

The Rio Grande's complaint asked the Commission to issue an order compelling through routes and joint rates via its line for the purpose, stated by its own President, of improving the financial condition of the Rio Grande. The Commission has issued such order. Its assertion that in doing so it gave no consideration to the Rio Grande's financial position necessarily seems futile. If not, then the financial needs prohibition in Section 15(4) is futile, for, to avoid it, the Commission need only deny that it gave any consideration to the financial needs of the carrier that seeks the order for the sole purpose of improving its financial condition.

Furthermore, the Commission's assertion that it gave no consideration to the Rio Grande's financial needs is at variance with the extraordinary emphasis which the report places upon the financial importance to the Rio Grande of "bridge traffic", which is traffic now being transported by the Union Pacific and other railroads and which the

Rio Grande would take at one end of its line and deliver at the other end of its line to another carrier. There can be no public interest in diverting "bridge traffic" from the Union Pacific to the Rio Grande. *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127. "Bridge traffic" is "financial needs" traffic, and since that is the only traffic affected by the order, it cannot be denied that this is a "financial needs" case.

While the report is so written as to de-emphasize, by not discussing the long history of the Rio Grande's bankruptcy and financial distress, it does concede that the Rio Grande passed "through various hands and receiverships" in its early days (R. 34), and that it again went into receivership in 1918 and remained in that status until April 11, 1947 (R. 36). As shown earlier in this brief, the Rio Grande has always been a chronically bankrupt and a "financial needs" short line railroad.

As we have said, the emphasis upon "bridge traffic" throughout its report contradicts the Commission's assertion that in reaching its conclusions it gave no consideration to the Rio Grande's financial needs. The report states that in 1890 the Rio Grande was opened for "through traffic between Denver and Ogden" but was "handicapped" because it did not have joint through rates with the Oregon Short Line on bridge traffic between the northwest and points at or east of its Colorado gateways (R. 35); that the Rio Grande wants to participate as a "bridge line" on such traffic via its Colorado gateways and Ogden at joint through rates (R. 37); that rearrangement of portions of the Union Pacific lines with that of the Rio Grande would enable the latter to obtain a full main-line haul on the involved "bridge" traffic and yet leave the Union Pacific a "substantial" haul west of

Ogden and the possibility of a haul east of Denver (R. 41). The Rio Grande "as a bridge line" is discussed and emphasized by showing that its "bridge traffic" diverted from other railroads increased 326 per cent in the period 1934-1948 and that its revenue from "bridge traffic" increased from $5,648,891 to $27,654,086 during that period. The importance of transit privileges on the Rio Grande to attract "bridge traffic" to that line is again emphasized. All of the traffic involved in the long and detailed recitals at pages 635-647 of the report (R. 48-61) is "bridge traffic". The report and order are not concerned with traffic originated or terminated at points on the Rio Grande, for joint rates now apply to that traffic.

There could be no reason for the emphasis which the Commission thus places upon bridge traffic and its financial importance to the Rio Grande except to attempt to justify diverting such traffic to that line so that it may benefit from revenues now earned by the Union Pacific and other carriers which originate or terminate the traffic in the northwest area.

The second method by which the Commision, in giving its order "the form" of relief to shippers and the public, seeks to evade the financial needs prohibition is even more untenable. Acceptance of this method of dealing with the case "would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order," *Thompson v. United States*, 343 U. S. 549, 559. In that decision, which was hardly six months old when the Commission rendered its report and order in the instant case, the Court not only annulled the order because of the Commission's attempt to evade the restrictions in Section 15(4) upon its power

to compel through routes and joint rates by the simple expedient of reducing the sum of the local rates, thus putting its order in the "form" of a case under Section 1 of the Act, but the Court also warned the Commission against the identical result it attempts to accomplish in this case by giving its action "the form" of an order granting relief to shippers and the public. At pages 559-560 the Court said:

> "The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of section 15(4), before the Court in *United States v. Great Northern R. Co.*, 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."[17]

In the case cited in the quotation, dealing with the very provision which the Commission here seeks to evade by altering "the form" of its order, *U. S. v. Great Northern R. Co.*, 343 U. S. 562, the Court said at pages 574-575:

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17 The Commission's defiance of this Court's decision in the *Thompson* case, its efforts to evade the "financial needs" prohibition, as well as the short-hauling prohibition of Section 15(4), and its distortion and abuse of its through routes and joint rates powers in the instant case, are all the more amazing in view of the fact that, although the case was argued and submitted for decision by the full Commission on October 11 and 12, 1951, the Commission withheld its decision until after this Court handed down its decision, June 2, 1952, in the *Thompson* case, significantly, at page 555, warning the Commission against continuation of its past efforts to evade the short-haul prohibition. Whereupon, the Commission ordered complete reargument of the instant case—October 15 and 16, 1952—after which it issued its report and order, January 12, 1953.

"It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially but can also, at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas. Congress amended Section 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs."

Remedies and rights accorded to shippers by the Act do not give the Commission "a roving commission" to use such rights and remedies to accomplish the purpose of carriers or to attain some objective that the Commission itself may desire, *Interstate Comm. Comm. v. D., L. & W. R. R.*, 216 U. S. 531, 537. In that case, the Commission's order was enjoined and annulled because it "had exceeded its power" in granting demands of a railroad under a provision of the Act which gave only shippers the right to relief.

The result of the Commission's efforts over many years to evade or "limit * * * the impact of the short-hauling restriction on its power to establish through routes"[18] is that in three out of the four short-hauling through route cases reviewed by this Court, the Commission's orders have been stricken down because they violated or ignored the short haul prohibition. See *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538 (1910); *United States v. Mo. Pac. R. Co.*, 278 U. S. 269 (1929); and *Thompson v. United States*, 343 U. S. 549 (1952).

18 *Thompson v. United States*, 343 U. S. 549, 555-556, and footnotes.

The only short-hauling order of the Commission which this Court has sustained was in *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588 (1945).[19]

In *U. S. v. Great Northern R. Co.*, 343 U. S. 562, this Court said at page 575:

> "Congress amended Section 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs."

The Rio Grande's complaint asked the Commission to indulge in "tinkering" with through routes and "through joint rates" in order that, according to its own President's testimony, the Rio Grande could improve its financial position. In ordering through routes and joint rates on the specified commodities, the Commission has affirmatively responded to the complaint and in so doing it has "tinkered" with through routes and joint rates inevitably to improve the Rio Grande's financial position and help it meet its "financial needs".

If it be said that the Rio Grande is not presently a "financial needs" carrier, then all the more reason why traffic and revenues should not be diverted just to improve an already healthy financial position.

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19 But the through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing 90 cents per ton and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commission's order would result in some 200 miles of additional transportation over the most "onerous" operating conditions of any western railroad, adding $1.24 per car to transportation cost, two additional interchanges between carriers at an additional cost of $20.44 per car per interchange, and at least one or two days' more time in transit, and would short haul existing routes at least 925 miles, and would deprive some of the appellant railroads of their entire haul. (R. 41.)

As Section 15(4) prohibits the Commission from helping even the most "needy" carrier financially by compelling through routes to divert traffic from existing routes, *a fortiori* it prohibits compelling through routes to aid the less "needy" or the financially healthy carrier.

The Commission's denial that it gave any consideration to the Rio Grande's financial needs is equivalent to saying that in reaching its conclusions and issuing its order it gave no consideration to the case which the Rio Grande called upon it to decide. In the circumstances the Commission's refusal to dismiss the complaint on the grounds we have discussed was clearly arbitrary, erroneous and contrary to the "financial needs" prohibition of Section 15(4).

The majority of the district court refused to enjoin the order on the grounds just discussed. Instead, it undertook to "remake" the order by limiting it to shipments stopped for in-transit privileges at points on the Rio Grande, not served by the Union Pacific. The majority then held that "[i]f the order had been so limited" by the Commission, "it would eliminate the charge by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial needs" (R. 162).

In both its refusal to test the validity of the order as issued by the Commission, and its attempt to save the order in part by usurping administrative authority to "remake" it, the majority of the district court was clearly wrong, *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, and 332 U. S. 194. Because the order is prohibited by the "financial needs" prohibition of Section 15(4) of the Act, this Court should set it aside and end its consideration of the case right there.

II.

The District Court Erred in Failing to Judge the Order by the Standards the Commission Invoked, and in Substituting its own Standards for Those Used by the Commission; and the Court Further Erred in Refusing to Hold that the Order is Entirely Void Because the Commission Misconstrued, Departed from and Failed to Observe and Make Findings Required by Controlling Statutory Standards and Substituted its own Standards and Criteria for the Statutory Standards it Invoked.

Basic principles laid down by this Court controlling judicial review of administrative actions were ignored or violated by the majority of the district court in sustaining the Commission's order "in part".

In *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, this Court held, at page 87, that:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

The Court said at page 89, the "action must be judged by the standards which the Commission itself invoked", and, pointing out that the grounds urged by counsel to the Court "in support of the Commission's order were not those upon which its action was based", the Court refused to sustain the validity of the order, saying at page 95 that:

> "* * * an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

At page 94, the Court repeated the settled rule that "orderly functioning of the process of review requires

that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained", and said that the "action must be measured by what the Commission did, not by what it might have done" and that the action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order * * *."

The Court remanded the case to the Court of Appeals and, in an opinion in the same case upon its return to this Court the principles just quoted from the Court's first decision were reiterated, *Securities Comm'n v. Chenery Corp.*, 332 U. S. 194, 196:

> "This case is here for the second time. In *S. E. C. v. Chenery Corp.*, 318 U. S. 80, we held that an order of the Securities and Exchange Commission could not be sustained on the grounds upon which that agency acted.
>
> * * * * *
>
> "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

In *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, this Court set aside an order of the Commission because the report and findings did not clearly and definitely show that the Commission had fully complied with, properly applied statutory standards for granting operating rights to motor carriers. At page 488, the Court said:

"Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 144."

1. **The district court erred in failing to judge the order as made, and by the standards the Commission invoked; in substituting its own finding, that transportation service of the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical," and sustaining the order "in part" upon the untenable premise that Section 15(4)-(b) permits short-hauling Union Pacific routes because service via Rio Grande routes is inadequate.**

Section 15(4) of the Act prohibits the Commission from ordering a proposed new through route that short hauls existing routes unless (a) the existing routes are

unreasonably long as compared with the *proposed* new route, or—

> "(b) unless the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic transportation".

As the Union Pacific routes are shorter and could not be found "unreasonably long", the Commission said that any order requiring through routes and joint rates demanded by the Rio Grande—

> "* * * must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate and more efficient or more economic transportation." (R. 33).

Recognizing that the clear and unambiguous purpose of clause "(b)" of Section 15(4) is to permit short-hauling existing routes *only* when they are inadequate to furnish service meeting all the tests specified in that clause *and* where service which meets all of those tests can and will be provided by a *proposed* new route, the Commission correctly held that it could not order the *proposed* Rio Grande route "unless the *existing* [Union Pacific] routes can be found not to provide 'adequate' transportation" (R. 69).

But, in its efforts to condemn and short haul Union Pacific routes, the Commission, without explanation or reason, asserted the palpably erroneous and untenable conclusion that Union Pacific routes are "inadequate" because they are "not available *at points on the Rio Grande* and because higher rates for the involved traffic apply at points on that line than at points on Union Pacific routes" (R. 70).

The Commission's own findings of facts, *ante* pp. 19-24, prove that service over Union Pacific's shorter and faster routes is not only equal but greatly superior in every way to service via the Rio Grande for the through traffic concerned. Upon those indisputable facts the Commission's view that the law permits it to condemn and short haul Union Pacific routes because they are not available at points not reached by their rails and because higher rates apply on the Rio Grande is precluded by this Court's decision in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, in which this Court held unlawful a short-hauling through route order based on the Commission's conclusion that the Northern Pacific route through the northernmost states to Seattle and Portland was not "reasonable or satisfactory" because it did not serve and was not available at points on other railroads traversing Wyoming and Utah en route to Portland.[20] Although

20 In that case, this Court annulled the Commission's order requiring the Northern Pacific to short haul itself by establishing through routes via Portland with the Union Pacific and its connections between Chicago and Seattle, and publishing joint passenger fares "the same" as those of the Northern Pacific between the same points. At that time the Commission's power to order through routes was conditioned by the proviso that "no reasonable or satisfactory through route exists." Holding that the Commission had proceeded upon an erroneous "view of the law," the Court said at pages 544-545:

"But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of the law upon which this court must pass. It is admitted that the Northern Pacific route is shorter than that of the Union Pacific by way of Portland and the running time somewhat less, and it is added by the majority that the 'passenger goes in as good a car and is provided with as good a berth and as good a meal.'

"There is some suggestion that at times the northern route may not be as good as the southern, although at other times it may be better, but the ground of the order avowedly was that the personal

(Continued on next page)

clause "(b)" has been added as an exception to the short-haul restriction since the Court rendered the decision just cited, the Commission's interpretation of that clause as authorizing it to short-haul Union Pacific routes because they do not serve points located exclusively on other railroads that maintain higher rates is not merely to "limit by construction the impact of the short-hauling restriction" on the Commission's power to order through routes, but to completely emasculate and nullify the short-haul restriction, *Thompson v. United States*, 343 U. S. 549, 555. Such interpretation of clause "(b)" is diametrically opposed to the purpose of Congress in denying the Commission's request "to delete completely the short-hauling restriction"; and in adopting clause "(b)" as a compromise under which the short-hauling restriction was retained subject to the new exception "applicable only where the Commission makes the special findings listed" in Section 15(4) as amended by clause "(b)" (*ibid.*).

The history of legislative action leading to enactment of clause "(b)" clearly shows that the purpose of Congress was to empower the Commision to order additional

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(Continued from preceding page)

preferences of many travelers is to go by the Southern way. If they do, it is said, they can select from a great variety of routes as far as Ogden, Utah, they can visit cities not reached by the northern lines, they can search over a wide area for homesteads, they can behold the natural beauties that may be rivalled but not repeated on the other roads. It appears to us that these grounds do not justify the order. The most that can be said of them is that they are reasons for desiring a second through route; but they are not reasons warranting the declaration that 'no reasonable or satisfactory through route exists.' Obviously that is not true, except by an artificial use of words. It cannot be said that there is no such route, because the public would prefer two. The condition in the statute is not to be trifled away. Except in case of a need such as the statute implies, the injustice pointed out by the Chairman in his dissent is not permitted by the law."

through routes that are "shorter or cheaper" than existing routes between the same termini which could not be condemned as "unreasonably long" and short hauled under clause "(a)" of Section 15(4). In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

> "Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available* * * * The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate*. If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

The district court refused to decide expressly whether the order was void because of the Commission's construction of clause "(b)", but the court did hold that there was no evidence to support the Commission's finding that Union Pacific routes are inadequate.[21]

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21 Under "Findings of Fact I," the majority opinion reads:

> "The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points."

Upon that holding, and apart from its erroneous refusal to hold that the order is entirely void because the Commission misinterpreted clause "(b)", we submit that it was clearly the court's duty to enjoin and annul the order in its entirety, for an order based on a finding unsupported by evidence is void, *Int. Comm. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91.

Instead of judging the order as made by the Commission, and disregarding the rules laid down by this Court in the *Chenery* cases, *supra*, that an order "must be measured by what the Commission did, not by what it might have done" (318 U. S. 80, 93-94), and that, if the grounds on which an order is based are inadequate or improper, "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" (332 U. S. 194, 196), the district court proceeded to make its own finding of fact that "transportation service" via the Rio Grande "is inadequate and also inefficient and uneconomical"[22] for shipments of the specified articles which require in-transit operations at points on the Rio Grande and reshipment to final destinations beyond its termini (R.

22 In making these findings of fact the district court clearly exceeded its authority and "usurped an administrative function," *F. P. C. v. Idaho Power Co.*, 344 U. S. 17, 20. Those findings are "a substitution of judicial for administrative discretion," *Communications Comm'n v. WOKO*, 329 U. S. 223, 229. See also *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470, and *Federal Comm'n v. Broadcasting Co.*, 309 U. S. 134, 144. The statute authorizing judicial review of the Commission's order grants the courts no authority "to revise the Commission's decision and to enter such judgment as the Court may think just," *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 276. Instead, the statute authorizes courts "to enjoin, set aside, annul, or suspend in whole or in part any order" of the Commission, 28 U. S. Code, Sec. 1336, and "the court must act within the bounds of the statute and without intruding upon the administrative province," *Ford Motor Co. v. Labor Board*, 305 U. S. 364, 373.

166). The Commission made no such finding, nor did it purport to base its order upon inadequacy of service via the Rio Grande. It avowedly based its order upon its view that under clause "(b)" it had power to condemn Union Pacific routes as "inadequate" and to short haul them because they are not available at points served exclusively by the Rio Grande and because higher rates apply to the traffic if moved via the Rio Grande (R. 70).

In making its own finding of fact the court said:

> "If the order had been so limited to the evidence it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15(4)." (R. 162)

The court thus not only failed to judge the order as made and upon the standards invoked by the Commission, and exceeded its judicial authority in usurping administrative power to make its own finding of fact which it substituted as a "more adequate or proper basis" for the order than the basis used by the Commission, but in

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23 The court's finding is that:

"II.

"The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver."

doing so, the court also misconstrued, distorted and reversed the statutory pattern and circumstances under which short-hauling existing routes is permitted by clause "(b)". That is to say, Section 15(4)(b) permits short-hauling existing routes when they are inadequate and when it can be found that a *proposed* route will provide adequate and more efficient or more economic transportation than that provided by existing routes, but the court condemns the very route *proposed* to be established as "needed" to provide the "adequate and more efficient or more economic transportation" contemplated by clause "(b)", and holds that short-hauling Union Pacific routes is justified—not because service via those routes is inadequate or fails to meet the tests of clause "(b)" but—because service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical."

To summarize the errors and confusion of both the Commission and the court:

The Commission found that the shorter, faster, efficient Union Pacific facilities "are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (R. 62), and furnish "through service", in general, "as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande" (R. 70). Nevertheless, the Commission found Union Pacific routes "inadequate", *first*, because they "are not available" for perishable traffic reconsigned or accorded transit privileges at points that are not located on Union Pacific routes but are served exclusively by the Rio Grande, and, *second*, because higher rates apply on such traffic via the Rio Grande than the rates via Union Pacific.

Thus, the Commission attempts to justify short-hauling Union Pacific routes not because their service is inadequate, inefficient or uneconomical or that the Rio Grande could furnish better service, but because Union Pacific routes are not available for shipments reconsigned or stopped for transit operations at points served exclusively by the Rio Grande and because Union Pacific routes have lower rates than the rates via Rio Grande.

The court refused to decide whether, as a matter of law, the Commission erred in condemning Union Pacific routes as inadequate and in short-hauling them under clause "(b)" on the sole ground that they are not available at points served exclusively by the Rio Grande and because higher rates apply at Rio Grande points, and, though holding that the evidence would not support a finding that Union Pacific routes are inadequate, refused to enjoin and annul the entire order. Instead, the court held that the evidence does support a finding that "transportation service" *via the Rio Grande* for shipments of the specified commodities from and to the northwest area requiring stoppage for transit operations at points on the Rio Grande "is inadequate and also inefficient and uneconomical", and, substituting that premise, in lieu of the Commission's basis for the order, holds that it is valid as to such shipments.

It is too plain for argument that Union Pacific routes may not be short hauled upon either the ground asserted by the Commission or the substituted ground asserted by the court. It is clear beyond a shadow of a doubt that clause "(b)" of Section 15(4) does not permit short-hauling the shorter, adequate, efficient and more economic Union Pacific routes because, as asserted by the Commission, they are not available for transit operations

at points served exclusively by the Rio Grande, or for the purpose, asserted by the court, of improving the Rio Grande's "inadequate and also inefficient and uneconomical" service, or reducing the cost of it to shippers using the Rio Grande.

If the Commission is correct in its view that Union Pacific routes may be condemned as inadequate and uneconomical, and short hauled by establishment of longer routes via the Rio Grande because higher rates apply on that line, and because the shorter Union Pacific routes with their lower rates are "not available" *at points on the Rio Grande*, then the Commission is at liberty to condemn and short every railroad and every through route in the country as inadequate and uneconomical, and to require them to short haul themselves by joining in through routes that pass through every point on every railroad in the country on the theory that such disregard of the short haul prohibition in Section 15(4) is necessary to provide adequate and more economic transportation.

If the court is correct in its view that the shorter, efficient, and adequate Union Pacific routes may be short hauled because service for shipments requiring transit at points on the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical", then every *existing* through route may be short hauled wherever the Commission can find a connecting railroad that has higher rates and is inadequate, inefficient and uneconomical.

Neither the Commission's nor the court's plain distortion of the Act can afford any possible legal basis for the order, and, because both completely nullify the short-hauling prohibition of Section 15(4), and ignore the

adequate, efficient and economic service admittedly provided by existing Union Pacific routes, the order clearly is void and must be annulled. *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538; and *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *Thompson v. United States*, 343 U. S. 549, 560.

2. The district court erred in refusing to enjoin the entire order because the Commission misconstrued, departed from and failed to make the special findings required by Section 15(4)(b) which it expressly invoked as the basis of the order.

The Commission is authorized by Section 15(3) of the Act to compel a carrier to join in a through route that does *not* short haul it upon a finding that such route is "necessary or desirable in the public interest." But that finding is not a lawful basis for an order compelling a carrier to join in a through route which *does* short haul it. Before it can compel a carrier to join in a through route that *does* short haul it, the Commission must find upon substantial evidence that one or more of the exceptions to the short-hauling prohibition in Section 15(4) has been established by the evidence. Such findings are prerequisite to the exercise by the Commission of its jurisdiction or power to compel through routes that short haul a carrier. In the absence of findings clearly stated in the report from which the Court can discern with certainty that the exception invoked by the Commission is fully satisfied, there is no basis for the order and it must be enjoined.

This was clearly recognized by the Commission in the instant case and it was definite in specifying the exception and the precise standard invoked by it in ordering through routes and joint rates. After finding

that there were no through routes via the Rio Grande for the traffic it seeks, the Commission stated (R. 33):

> "* * * that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation."

The specific exception to which the Commission refers is Section 15(4)(b) which authorizes the Commission to order a new route that short hauls existing ones if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or[24] more economic, trans-

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24 The Commission and the courts construe the word "or" in this context as meaning "and". In *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, at page 343, the Commission said:

"We interpret that exception to mean adequate and more efficient *and* more economic from the public's or shippers' as well as the participating carriers' standpoint" (Emphasis supplied.)

That interpretation was sustained by the three-judge court in *Pennsylvania R. Co. v. United States*, 54 F. Supp. 381, in an opinion which was affirmed by the Supreme Court, *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, at page 593. The Commission has consistently adhered to that interpretation. *Richards Milling Co. v. Erie R. Co.*, 268 I. C. C. 237, 240; *General Mills, Inc., v. Great Northern Ry. Co.*, 269 I. C. C. 457, 465; *Borough of Edgewater, N. J. v. Arcade & A. R. Corp.*, 280 I. C. C. 121, 142. (Order held valid in *Baltimore & O. R. Co. v. United States*, 100 F. Supp. 1002).

Interpretation of the word "or" as meaning "and" has long had the approval of the courts when such interpretation is necessary to give effect to the clear intention of the legislature. *United States v. Fisk*, 70 U. S. 445, in which the Court said at page 447:

"In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe *'or'* as meaning *'and'* and again *'and'* as meaning *'or.'*"

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portation". But this authority is "applicable only where the Commission makes the *special findings listed*" in Section 15(4) as amended by clause "(b)", *Thompson v. United States*, 343 U. S. 549, 555. (Italics added.)

In *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, this Court held at pages 592-593:

> "* * * if the Commission is asked to abrogate the general rule with regard to the short-haul, *the statute says it must have regard to several matters.* The first of these is adequacy of transportation. The expression would seem to apply only to the interest of the shipping public. The second and third matters to be considered are efficient *and* economic transportation. These expressions may well embrace both shippers' and carriers' interests." (Italics added.)

That is to say all of the words taken together in clause "(b)" constitute a "standard" pursuant to which

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The Commission's interpretation, sustained by this Court, of the word "or" as meaning "and" is necessary to conform clause (b) of Section 15(4) with the declared purpose of the National Transportation Policy to promote "safe, adequate, economical, *and* efficient service *and* foster sound economic conditions in transportation and among the several carriers," and to the "Rule of Rate Making" in Section 15a of the Act. In other words, all of the descriptive words are in the conjunctive and not the disjunctive. Each word or term specifies one of several desired elements, aspects, or attributes, and the accomplishment of each of them is essential—"all to the end" of providing "a national transportation system" that is "adequate to meet the needs" of the country. The same ultimate objective is the basis of permitting the Commission to short haul a carrier under clause (b) of Section 15(4).

In *California Milling Corp. v. Atchison, T. & S. F. Ry. Co.*, 276 I. C. C. 531, the Commission's finding at page 555 was that through routes and joint rates there prescribed were needed in order to provide "adequate and more economic transportation," omitting the finding of "more efficient" transportation. There was no court decision in that case and the finding there made does not have judicial sanction.

the Commission, upon evidence meeting *all* requirements of that standard, may short haul a carrier, but the Commission may not pick and choose particular words from or parts of the complete standard prescribed by Congress in clause "(b)". It must apply the standard as Congress wrote it, and it is not at liberty to depart from it, or to make a new or different standard by adding to, taking from or ignoring any part of the statutory standard. In *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, this Court set aside an order of the Commission because the report and findings were insufficient to show definitely that the Commission had fully complied with the statutory standard for granting operating rights to motor carriers. At page 489 the Court said:

> "Congress has made a grant of rights to carriers such as appellee[25] Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those

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25 The right of carriers to their long hauls has been granted and reserved to them by Congress throughout the life of the Interstate Commerce Act. It is "a right guaranteed by Section 15(4)" of the Act, and it may be taken from them by the Commission only when it complies strictly with one or more of the exceptions specified in Section 15(4). *Thompson v. United States*, 343 U. S. 549, 556, 559.

The reason for the prohibition against short-hauling a carrier and the limitation upon the Commission's authority to compel through routes was explained by Senator Elkins in 1910 as follows (see page 2, Report No. 404, April 22, 1937, by Senate Committee on Interstate Commerce, on S. 1261):

"The second exception to the grant of this power is one which has always been recognized in the transportation business of the country. The road that initiates the freight and starts it on its movement in interstate commerce should not be required, where it is a line not unreasonably long, to transfer its business from its own road to that of a competitor, especially when the commerce initiated by it can be as promptly and safely transported from the point of shipment to the point of destination by its road as by the line of its competitor."

standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. * * * An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 144. Hence, that requirement is not a mere formal one."

The necessity of strict adherence by an administrative agency to statutory standards is sharply illustrated in *Western Air Lines v. C. A. B.*, 347 U. S. 67, and *Delta Air Lines v. Summerfield*, 347 U. S. 74. In those cases the statutory standard for subsidy rates was "the need" of the carriers for subsidies. The Board allowed profits in addition to the "needed" subsidies. Rejecting that action, this Court said:

> "The difficulty here is that the Board, in concluding that a part of the profits from the sale to United should not be used as an offset, forsook the standard of 'need' and adopted a different one." (347 U. S., p. 72)

As noted above, the Commission correctly held (R. 69) that it could not order through routes via the Rio Grande "unless the existing routes can be found *not* to provide 'adequate' transportation."[26] The ma-

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[26] The essentiality of a finding that existing service is "inadequate" as a prerequisite to ordering or permitting additional competitive service lies in the fact that such finding has been regarded as "jurisdictional." Both the Commission and the courts "have recognized inadequacy of existing facilities as a basic ingredient in the determination of public 'necessity'." *Hudson Transit Lines v. United States*, 82 F. Supp. 153, 157, setting aside a portion of a

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jority of the district court said that "[o]nly in the event there was inadequacy of transportation can the question of efficiency and economy be reached" (R. 166).

Thus, as construed by the Commission and the courts, the standard of Section 15(4)(b), expressly invoked by the Commission, required each of "the special findings" that—

1. Union Pacific routes are "inadequate", *and*
2. the proposed Rio Grande route is "needed" in order to provide
   a. adequate transportation, *and*
   b. more efficient transportation, *and*
   c. more economic transportation

   than the transportation provided by Union Pacific routes.

And, if the shorter and faster Union Pacific routes with lower rates and surplus capacity, could *not* be found, upon substantial, rational and probative evidential facts, to be "inadequate" for the transportation of the involved perishable and other products between the far northwest area and points in the eastern and southern parts of the country, then the Commission's inquiry and proceedings must end.

The Commission observed that the Rio Grande did *not* allege or contend that Union Pacific routes "are not adequate for the traffic hauled, and no finding is sought

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Commission order authorizing additional competing service without "any finding that the existing service is inadequate." The opinion of the three-judge court, by Circuit Judge Swan, cites numerous cases on this point, and was affirmed per curiam by this Court, 338 U. S. 802. See also *I. C. C. v. Parker*, 326 U. S. 60, 69, 70, 74; *Florida v. United States*, 282 U. S. 194; *United States v. B. & O. R. Co.*, 293 U. S. 454, 463-465; *American Trucking Assns. v. U. S.*, 326 U. S. 77, 86; *U. S. v. Detroit Navigation Co.*, 326 U. S. 236, 240.

by the complainant [Rio Grande] to that effect", but that testimony of shippers raises a question as to the need for "*more adequate* and economic service than afforded by existing routes with respect to some commodities" (R. 69).

While, as indicated above, the Commission was fully aware of *all* the elements required to be found under the standard of Section 15(4)(b), its finding and conclusion as to through routes and joint rates was as follows:

> "We conclude: 1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established * * *." (R. 73)

The very wording of the Commission's finding shows that it departs from and fails to meet the requirements of the standard in clause "(b)". The errors, omissions and deficiencies which nullify this finding and the order based upon it are these:

First, the Commission correctly held that the Rio Grande route could not be compelled under clause "(b)", "unless the existing routes can be found *not* to provide 'adequate' transportation." But, the Commission had already found that existing routes are "adequate". Discussing the routes of the Union Pacific, it found:

> "Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future." (R. 62)

The court agreed that:

> "There is no evidence to support a finding that the physical transportation facilities furnished by the

Union Pacific between the northwest area, on the one hand, and points east of Denver are inadequate." (R. 160).

* * * * *

"The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific." (R. 162)

Thus, at the very threshold the Commission, with the court's acquiescence, correctly made the basic finding which clearly called for dismissal of the complaint and which contradicts and precludes the later assertion that Union Pacific routes are "inadequate" (R. 70). The Commission cannot make transportation service of existing routes "inadequate" by mere "declaration" or "by an artificial use of words"; nor does a desire for an additional route warrant condemning existing routes as "inadequate", especially where, as in this case, the Commission has already found Union Pacific routes "adequate." "The condition in the statute is not to be trifled away", *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545.

Second, having found that the Union Pacific routes are "adequate" to haul any volume of traffic that might be offered in the foreseeable future, and that the Rio Grande does not contend or allege in its complaint "that the present routes of the defendants are not adequate for the traffic hauled", the Commission sought to escape its dilemma by enlarging or expanding the authority conferred by the clause, saying that shipper testimony raises the question as to the need for "more" adequate and economic service. Thus, the Commission, although holding that it may not require additional routes if service of existing routes is "adequate", contradicts itself by holding that the question here is not whether service of ex-

isting routes satisfies the statutory standard of "adequate" transportation contemplated by Section 15(4)(b) but whether there is need for "more" adequate service than existing routes afford. This is not merely to construe or interpret the standard erroneously, but to enlarge the Commission's power by adding the word "more" to the statutory standard. As thus expanded and applied by the Commission, "adequate" means "more adequate", which necessarily means "more than adequate". By construing "adequate" to mean "more adequate", the Commission has created and substituted its own new and enlarged standard for that fixed by Congress to be used in determining whether it is justified in ordering a new route which short hauls existing ones.

Clearly, if the Commission may lawfully compel an additional short-hauling route on the premise that the more routes there are the "more adequate" the service will be, then the standard of "adequate" transportation fixed by the Act becomes meaningless, and the Commission's power to nullify the prohibition against shorthauling a carrier is complete. For, no matter how "adequate" the service afforded by existing routes, the Commission could always say, with logic and plausibility, that an additional route would afford "more" adequate service than that rendered by existing routes, and this process could be pursued until the Commission had compelled through routes and joint rates via every junction where tracks of two or more railroads connect.

Third, to justify exercising its power under clause "(b)", the Commission must find specifically that the proposed route is "needed". It has not so found here, the finding being merely that the Rio Grande route is "necessary and desirable in the public interest", which

is the more general finding required by Section 15(3) only in compelling a carrier to join in a route that does *not* short haul it. In short, the Commission "forsook the standard of 'need' and adopted a different one", as did the Board in *Western Air Lines v. C. A. B.*, *supra*, page 72, causing this Court to set the order aside.

In *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, at page 592, the Court rejected the contention that the words "necessary and desirable in the public interest" in Section 15(3), and the words "needed in order to provide adequate, and more efficient or more economic, transportation" in clause "(b)" of Section 15(4) are redundant as permitting short-hauling merely if the Commission thought it "in the public interest". Saying that "Congress had a purpose in amending the provision" in Section 15(4) against short-hauling, the Court made it plain that the requirements of all the elements specified in clause "(b)" must be fully satisfied before a carrier may be short hauled under that clause. While the Court did not attempt to draw the line between a new route that is "needed" for the purposes specified in clause "(b)" and one that is merely "necessary or desirable in the public interest" under Section 15(3), the decision makes it certain that the requirement of clause "(b)" for a finding that the proposed route is "needed" cannot be avoided by the Commission or satisfied by a finding in terms of the looser and more general expression "necessary or desirable in the public interest" used in Section 15(3).

Lacking the finding that the Rio Grande routes are "needed", an essential condition precedent has not been satisfied, leaving the Commission's ultimate conclusion deficient and inadequate to support the order.

Fourth, to justify short-hauling a carrier under clause "(b)", the Commission must also find upon substantial evidence that the proposed route will provide "more efficient" transportation service than that furnished by existing routes. The Commission itself admits that in making a finding to justify short-hauling a carrier under clause "(b)" it "must" give consideration to the "efficiency" as well as the economy of the transportation (R. 69). It has not made the finding that the Rio Grande will provide "more efficient" transportation than is provided by Union Pacific routes, and the order is void because *of this further deficiency*. Being precluded from making that finding by the facts of record and its own findings that operating conditions are "more onerous" on the Rio Grande, that routes via its line would be longer and require one or two more interchanges and at least a day more in transit time, the Commission has arbitrarily ignored the essential requirement of the clause for a finding that the *proposed* route will provide "more efficient" transportation than existing routes. This it may not do. Attainment of "efficient service" is one of the fundamental aims of the National Transportation Policy, which directs that "[a]ll of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." In *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, the Court said, at page 25, that the Act is concerned with adequacy of transportation service, and its essential conditions of "economy and efficiency" and "best use of transportation facilities."

The Commission's report says that "through service over defendants' routes, in general, is as satisfactory" (R. 70), as any that the Rio Grande route could provide, except as to the perishable commodities specified, which shippers may desire to reconsign or stop off for some

"commercial operation" (R. 48) called a "transit privilege", at local points on the Rio Grande. The report does not explain why the shorter and faster Union Pacific routes are not "efficient" for transporting perishable commodities which, it says, must move to markets "with expedition and care", or how the longer and "more onerous" Rio Grande route will be able to render the "more efficient" service required by clause "(b)". Thus, if it be contended that the Commission gave any consideration at all to the "efficiency" of transportation, since all of the traffic is "through" or "bridge" traffic requiring "through" transportation service as distinguished from "local" transportation between points on the Rio Grande, the Commission's test of the efficiency of Union Pacific routes in hauling a carload of apples, for example, from Yakima, Washington, to Chicago, apparently is whether the apples could stop for some "commercial" service *at local points on the Rio Grande.* And, since the report makes it plain that the only purpose of ordering the route via the Rio Grande is to enable shippers desiring to use that line to "reconsign" or to "stopoff for partial unloading, storing" (R. 70), or other in-transit privileges and services at the same transportation rates they pay when those privileges are exercised on the Union Pacific, it results that the order is based not upon the statutory criteria of adequacy, efficiency and economy of transportation, but upon the wholly erroneous view that the Commission can use its through route powers for the purpose of making "commercial operations" available on the Rio Grande for the same rates at which they are available on the Union Pacific routes.

The Commission's ultimate finding and conclusion clearly is not that which is required by clause "(b)" before the Union Pacific may be short hauled on the theory

that the Rio Grande route is "needed" to provide "adequate, and more efficient or more economic, transportation". Findings that the Rio Grande route is "needed" and that its service will be "more efficient" than that rendered by Union Pacific routes are essential prerequisites to the exercise of the power granted by clause "(b)" to compel a route that short hauls existing routes, and the Commission's inability to make those findings from the facts and evidence may not be overcome by such jumbling of standards of Section 15(3) with those of Section 15(4), or by rearranging, adding to and deleting from the language of clause "(b)" as it has indulged in this case. The absence of those findings renders the Commission's order void. In *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504, the Court said:

> "This Court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida v. United States*, 282 U. S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454."

Fifth, the Commission's finding that through routes and joint rates via the Rio Grande are necessary to provide "more economic transportation" (R. 73), is obviously based upon the erroneous view that the requirement of clause "(b)" that the proposed route will provide "more economic transportation" means "more economic" transportation than that now provided by the Rio Grande under the higher combination of local rates. Use of the through route power was not appropriate to attain that result for it could readily be obtained directly by reducing the Rio Grande's rates if they were unreasonable under Section 1 of the Act.

The majority of the district court rejected this error of the Commission's as to shipments *not* stopped for in-

transit operations at points on the Rio Grande, saying that (R. 165):

> "* * * the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would *not* make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points."

But, incredibly, the majority adopted the Commission's error as to shipments *stopped* for in-transit operations at points on the Rio Grande, saying that for such shipments, establishment of the through routes and joint rates via the Rio Grande "will result in more economical transportation" (R. 161).

Of course, reducing the combination rates and requiring joint rates via the Rio Grande "the same" as rates maintained on Union Pacific routes will make transportation "more economic" than it now is via the Rio Grande under the present combination rates. But, quite clearly, that result does not meet the requirement of clause "(b)". To justify compelling a proposed route that short hauls existing routes, clause "(b)" requires a finding, among others, that the *proposed* route will provide "more economic" transportation that that provided by the *existing routes*. The Commission has not made that finding, and it obviously was unable to make it in the face of the fact that it merely orders "the same" rates, or an equalization of rates via the Rio Grande with those maintained via existing Union Pacific routes through Wyoming. Nor could the Commission make that finding in the face of other facts it had found, that the Rio Grande line is longer, requires at least 24 hours more

time in transit and one or two more interchanges with other carriers, has "more onerous" operating conditions than those of the Union Pacific or any of the other transcontinental lines, and is "less favorably situated" than the line of the Union Pacific.

Circuit Judge Johnsen refused to be deluded by the Commission's—

> "* * * merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term 'more economic transportation' to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing." (R. 175)

He denies that the Commission has power to open up a new or additional short-hauling through route—

> "* * * in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15(4) of the Act, 49 U. S. C. A. § 15(4), where the element of short-hauling another carrier is involved, as it is here, that such an added through-route must also provide 'more efficient or more economic transportation' than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15(3) to prescribe joint rates and pointing out that joint rates necessarily in the situation will provide 'more economic transportation,' since they obviously are lower than the previous combination rates." (R. 171)

He gravely doubts whether—

"* * * the Commission's power to establish joint rates under section 15(3) has any relationship to the term 'more economic transportation' in section 15(4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term 'more economic transportation' in section 15(4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportational comparison from the standpoint of the interests of both the public and the carriers—and that the Commission's power to establish joint rates under section 15(3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15(4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

"But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term 'more economic transportation' under section 15(4), in the addition of another carrier's route as a mere 'bridge' line for such traffic. If that be not so, then there is not any situation in which the Commission can not make a finding of 'more economic transportation' for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination 'rates otherwise applying.'" (R. 172)

The failure and inability of the Commission to make a rational or valid finding that the Rio Grande's line is needed to and will provide "more economic" transportation than that provided by Union Pacific routes leaves the order without support of this essential jurisdictional finding, and without it the order is void.

These new interpretations, misinterpretations and mutilations of the Act and the statutory standard invoked by the Commission are but the latest of its perennial efforts, recognized in this Court's decisions, to nullify or "limit by construction the impact of the short-hauling restriction on its power to establish through routes," and they must be rejected, *Thompson v. United States*, 343 U. S. 549, 555; *U. S. v. Great Northern R. Co.*, 343 U. S. 562, 575; and see *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 277.

3. The district court erred in refusing to enjoin the entire order because the Commission forsook the statutory standard of Section 15(4)(b) expressly invoked by it, and adopted its own standard, based upon its asserted requirements of the marketing system for perishable food products for "as many routes as possible."

The Commission said at the beginning of its report that any requirement of through routes and joint rates via the Rio Grande must be grounded upon findings specified in Section 15(4)(b) (R. 33), but nearing the end of its report it is quite obvious that the Commission forsook the standards of Section 15(4)(b) and adopted its own new standards based on claimed requirements of the perishable food marketing system for "as wide a distribution as possible" to "as many markets and outlets as possible" with "as much flexibility as possible" and "over as many routes as possible" (R. 70).

The report clearly shows that the Commission thought the marketing system for perishable food articles from the northwest area requires more transportation facilities than could be compelled under the statutory standard of "reasonable through routes" required by Section 1(4) or under the standard of routes

that are "needed" to provide "adequate and more efficient or more economic transportation" as provided in Section 15(4)(b).

Thus, the Commission not only failed to adhere to the statutory standard invoked by it, but adopted new standards and criteria of its own which go the fullest possible distance beyond and are wholly unrelated to routes that are "needed" to provide "adequate and more efficient or more economic transportation". In basing its order on the requirements of the marketing system for perishable food products for as many markets and as many routes "as possible", the Commission has clearly and arbitrarily gone far beyond the power granted by the Act to compel through routes and joint rates that short haul existing routes.

We can best demonstrate the Commission's action in this respect by quoting at some length from the discerning and penetrating dissent of Circuit Judge Johnsen:

> "What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is 'perishable food articles.' Here, as taken from its Report, are the manner and perspective of its approach to the question.
>
> "'Growers [of perishable food articles in Idaho, located on the Union Pacific] * * * market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon and Washington] need as many markets and outlets as possible.' 287 I. C. C. at page 642. To comprehend or evaluate that need, says the Commission, 'it is necessary to consider the nature, extent and functioning of our intricate and far-

thing 'commodity marketing system.' P. 655. The importance, in our condition of growing population and national development, of having 'a constantly expanding flow of diverse commodities' and 'particularly articles of food' is emphasized. The comment is made that 'A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible,' and the truism is expressed that 'Adequate transportation facilities and services are required for the proper functioning of the system.' P. 656.

"Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

"1. 'Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible*. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process*, be permitted.' (Emphasis mine.) P. 656.

"2. 'A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities.' 'In-transit privileges, 'such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit,' are available at various points on the Union Pacific to through-shippers, on the basis of the joint rates applicable over that route, and similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates, by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these ad-

ditional facilities would be able to enjoy them on the same basis as those on the Union Pacific. Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union Pacific, 'The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities.' P. 656.

"3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them 'from effective participation in the widespread system developed for the marketing of such commodities.' In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' because otherwise they will be 'debarred from effective participation in * * * the marketing of such commodities.' (R. 169-171)

* * * * *

"* * * All I say is that the philosophy and standard of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' can not be made the basis for overriding the short-haul ing provisions of section 15(4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term 'more economic transportation' to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

"The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did." (R. 175)

We submit that Circuit Judge Johnsen is correct in his analysis of the Commission's report and in his conclusion that the order in reality is based not upon transportation standards and criteria provided by the Act but solely upon the Commission's concept of the requirement of the marketing system for perishable food articles that such articles must have as many markets and outlets "as possible" and move "over as many routes as possible". Indeed, the report clearly shows that the Commission's last hope of granting any part of the Rio Grande's demands lay in carving out perishable food products from the general body of the traffic and asserting that the marketing system for those products requires all "possible" transportation routes and service, regardless of statutory standards which require that carriers provide only "reasonable" transportation. The report states (R. 70):

"While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the

originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities."

The report makes no attempt to explain why the through service of Union Pacific's routes, which it admits are shorter, faster and have lower rates, for the perishable traffic from the northwest area to markets in the eastern and southern parts of the country is not as satisfactory as service that could be provided by including the Rio Grande's longer and more onerous route, and the absence of any explanation is particularly significant in view of the Commission's finding that the perishable articles must be moved to market "with expedition and care" and without "unnecessary interruptions". Although the shippers of perishable products from the northwest area testified that they now market those products in all of the 48 states and in several foreign countries, the Commission was content merely to say that those shippers "are debarred from effective participation" in the marketing system for such products, apparently and solely because, lacking equal rates via the Rio Grande route, they do not have "as many routes as possible" at exactly the same rates.

The Commission's further implication that the Rio Grande route at equal joint rates is needed to provide additional transit privileges on that line so that perishable products could be stopped and held at points on the Rio Grande for as long as twelve months for storage, processing, etc., not only contradicts its finding that these perishable products must move "with expedition and care" in order to avoid "unnecessary interruptions", but also ignores the fact that the same shippers of the same perishable products from the northwest to the same

eastern destinations already have available at points on the shorter, faster Union Pacific routes at lower rates, all of the same transit privileges they would have on the Rio Grande under the Commission's order.

The order clearly must be set aside because (1) the Commission forsook the transportation standards of Section 15(4)(b), which it purported to invoke, and adopted a different standard, *Western Air Lines v. C. A. B.*, 347 U. S. 67, 72, and *Delta Air Lines v. Summerfield*, 347 U. S. 74, and (2) because the Commission is without power to order through routes that short haul existing routes on the theory or premise that the requirements of the marketing system for perishable food products are such that the transportation standards of the Act requiring only reasonable through routes and adequate, efficient and economical transportation, must be abandoned as to those products because of the Commission's unsupported assertion that they require "as many routes as possible", *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538.

4. By including marble and granite tombstones and ordinary livestock in its order, the Commission departs from its own criterion that short-hauling Union Pacific routes is justified as to perishable food products because the marketing system for those products requires "as many routes as possible."

Having abandoned the transportation standards and criteria of the Act and adopted its own criterion that food products of a perishable nature from the northwest area to the east and south require "as many routes as possible", the Commission immediately proceeded to depart from its own criterion by including in that category or classification westbound granite and marble

tombstones,[27] saying merely that:

> "In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established." (R. 70)

Again departing from its perishable food criterion, the Commission included in its order eastbound "ordinary livestock" from the northwest area to be stopped for grazing at points along the Rio Grande, for which its only explanation is as follows:

> "We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden Gateway." (R. 56)

These departures by the Commission from its own newly created standard for short-hauling are best described and discussed in the following comments in the dissenting opinion of Circuit Judge Johnsen:

> "Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standards of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' is, as previously indicated, 'perishable food articles.' But it has, by means of some artificial classification, included ordinary livestock as a perishable food article (p. 656), say-

27 The Commission's inclusion of granite and marble tombstones and ordinary livestock within the category of perishable food products calls for application of the observation in *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 497, that:

"This Court has refused to accept assumptions of fact which are demonstrably false, *United States v. Provident Trust Co.*, 291 U. S. 272 * * *."

ing merely, before doing so, that 'We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway.' And it has further held that a little monument dealer, located on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and there in Colorado, on a through rate basis, some individual monuments out of an estimated four-carload lot of monuments per year.[28]

"All of this to me is but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that end. But Congress has never been willing to acceed to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All this is fa-

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28 In his footnote 2 Circuit Judge Johnsen said:

"I shall not take the time to go into details of this trivial monument situation, which the Commission characterized as one of 'urgent need' (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country."

miliar history in the railroad world, and I shall not bother to go into it further here." (R. 173-174)

* * * * * *

"Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15(4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure, as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations." (R. 177)

We submit that the following conclusions of Circuit Judge Johnsen are correct and should be the decision of this Court:

"It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out." (R. 174)

* * * * * *

"I would strike down the Commission's order generally, on the basis and manner in which its result has been reached. * * * The pervading infirmities on which the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right there." (R. 179)

5. The conditions specified in the exceptions to the short-hauling prohibition in Section 15(4) cannot be met or satisfied, as the Commission here attempts, by merely substituting the lower joint rates of Union Pacific routes for the higher combination rates via the proposed Rio Grande route.

"* * * all the confusion in which the [r]eport has been wrapped", to use Circuit Judge Johnsen's description, leaves it difficult, if not impossible, to understand or reconcile various aspects of the Commission's report and order. One thing, however, is certain, namely, that, despite its long and discursive report, its various unexplained conclusions and its inconsistencies, the end result is that the Commission merely requires that the lower joint rates of Union Pacific routes be substituted for the higher combination rates of the Rio Grande. To accomplish this result, the Commission expressly declares

that it invoked its powers under Section 15(4)(b) to short haul Union Pacific routes.

We submit that a mere substitution of the joint rates for the Rio Grande's higher combination rates does not conform to or satisfy the requirements of Section 15(4)(b). Those requirements relate to the adequacy, efficiency and economy of transportation facilities, routes and service, while the reasonableness of rates involves the question whether or not the charges are too high for the services performed in the light of such basic facts as volume of the traffic, length of haul, value of commodities, competitive, operating and other conditions which influence cost and value of service. The through routes powers are for the purpose of compelling a sufficient number of routes adequately to transport the traffic from origins to destinations. The reasonable rate powers are for the purpose of preventing carriers from demanding extortionate or exorbitant charges for the services they perform in hauling the traffic of a shipper or shippers of traffic over a route or routes already in existence. There may be and usually are more than a sufficient number of through routes adequately, efficiently and economically to haul the traffic, thus satisfying the statutory requirement, Section 1(4) of the Act, that carriers shall establish "reasonable through routes", and yet the rates charged for transportation over those routes may be so high as to be "unreasonable". Clearly, the prescription by the Commission of a rate that is "reasonable" in lieu of a rate that is "unreasonable" would not satisfy or meet the requirements of Section 15(4)(b) for through routes that are needed to provide adequate and more efficient or more economic transportation where a sufficient number of routes to meet those requirements have not been voluntarily established by

the carriers. In short, the reasonableness of a rate has nothing whatever to do with adequacy or efficiency of transportation, and whatever relation the reasonableness of a rate has to "economic transportation" is a matter to be dealt with by the Commission under Section 1(5) and Section 15(1) of the Act.

Just as the Commission may not use its reasonable rate powers to defeat the requirements of Section 15(3) and (4), as this Court held it could not, in *Thompson v. United States*, 343 U. S. 549, neither can it use its through route powers to prescribe reasonable rates, or to equalize rates of different railroads.

6. The district court erred in holding that the Commission has power under Section 15(3) and (4) to short haul Union Pacific routes by reducing and equalizing the Rio Grande's combination rates with the joint rates of Union Pacific routes, for the sole purpose of making "in-transit privileges" available on the Rio Grande at the same rates those privileges are available on Union Pacific routes.

Although the majority of the district court erroneously assumed that there are no transit privileges available at points on the Rio Grande, and proceeded from the premise that "the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15(4)" (R. 161), it sanctions and upholds the Commission's ordering of through routes and joint rates not only for the purpose of making transit privileges available on the Rio Grande but also for the purpose of reducing the Rio Grande's rates to equalize them with the rates under which transit privileges are available on Union Pacific routes. The majority opinion states (R. 161):

> "We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. *Pennsylvania R. Co., et al. v. United States, et al.*, 323 U. S. 588, 54 F. Supp 381."

While the lack of specificity, in which the Commission's report abounds, apparently confused the majority of the district court, it is clear that the Commission understood that all customary transit privileges are available on the Rio Grande (R. 48) and that the Commission's real and fundamental purpose was to reduce and equalize the Rio Grande's rates with those of Union Pacific routes so that transit privileges offered by the Rio Grande would be available at exactly the same rates they are available on Union Pacific routes. And, to the extent it sustains the order, this is what the opinion of the majority of the district court sanctions and upholds.

We submit that the court plainly erred in holding that the Commission has power under Section 15(4)(b) to order through routes and joint rates for the sole purpose of making transit privileges available on the Rio Grande and that it further erred in sustaining the Commission's requirement that the Rio Grande's rates be reduced and equalized with those of Union Pacific routes so that transit privileges offered on both sets of routes would be available at the same rate.

Section 1(3)(a) of the Act defines the various elements and services included in the term "transportation"

which carriers are required by Section 1(4) to furnish upon reasonable request. That definition does not include "in-transit privileges". Hence, the Commission may not order carriers to establish or furnish "in-transit privileges", for the Commission obviously is without authority to order the carriers to furnish what the statute does not require.

A so-called "transit privilege" is not "transportation" at all, but is a "commercial operation" and the Commission so found in the instant case (R. 48). In fact, an "in-transit privilege" is just the opposite of "transit" or transportation which carriers are required to furnish. It is a privilege granted by carriers to shippers of interrupting the actual transit or transportation of a shipment at a point designated by the shipper, who takes the shipment in his custody and holds it for periods as long as 12 months for the purpose of storing, processing, milling, or other such "commercial operations" and later reshipment at the balance of through rates as if there had been no interruption to the continuous through movement of the shipment. This has been called by this Court "the fiction of a through rate with transit privilege", *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 777.

As a "transit privilege" is held, by the Commission and the courts, *B. & O. R. Co. v. U. S.*, 305 U. S. 507, 525-526, to be a "commercial operation" and not transportation which carriers are required by the Act to furnish, plainly such commercial operations cannot be made the basis of an order requiring through routes and joint rates that short haul existing routes, nor the basis of an order, as in this case, equalizing rates on different routes so that transit privileges may be available at equal rates on both routes.

Moreover, a "transit privilege" is "a matter local to the railroad, on which the transit point is situated." "Whether the privilege shall be granted or withheld is determined by the local carrier", and the Commission is without power by the indirect process of ordering through routes or joint rates to require a carrier to establish or offer transit privileges on its line, to say nothing of ordering the Union Pacific to short haul itself by joining in through routes and joint rates for the purpose of utilizing at equal rates the transit privileges offered by the Rio Grande. *Central R. R. Co. v. United States*, 257 U. S. 247, 255-256.

The district court cited *Pennsylvania R. Co v. U. S.*, 323 U. S. 588 (affirming 54 F. Supp. 381), in support of its view that the Commission has power to order short hauling through routes and joint rates for the purpose of making transit privileges available at points on the new route ordered (R. 161). But the decision in that case is clearly inapposite. The order there was on complaint of a shipper, Stickell, whose plant was located on the Pennsylvania Railroad at Hagerstown, Maryland. He already had ample transit privileges but he objected to the time consumed in transporting his grain by the route over which the Pennsylvania insisted upon moving his shipments in order to retain its long haul. The case did not involve the question of establishing a new through route so that shipments could receive transit operations at points on a railroad other than the Pennsylvania. Stickell wanted routes that would avoid a back haul and save transit time, enabling him to operate on a more equal basis with his competitors. In short, he wanted better and faster transportation and not, as the Commission here orders, slower transportation over a longer and more onerous route.

The through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing 91 cents per ton, and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commision's order would result in from 200 miles to 50 per cent more miles of additional transportation over the most "onerous" operating conditions of any western railroad, adding $124 per car to transportation cost, two additional interchanges between carriers at an additional cost of $20.44 per car per interchange, and at least one or two days' more time in transit, and would short haul existing routes at least 925 miles, and would deprive some of the appellant railroads of their entire hauls (R. 41).

7. The district court erred in holding that the Commission may lawfully order through routes and joint rates under Section 15(3) and (4) to remedy rates found unreasonable under Section 1, and "for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act."

The Commission concluded that the combination rates via the Rio Grande on the commodities specified in the order are and for the future will be "unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes", and that maintenance by Union Pacific and other railroads of joint rates on the traffic involved with the Bamberger Railroad at points between Ogden and Salt Lake City while refusing to participate in like rates with the Rio Grande at the same points "subjects the Rio Grande to discrimination in violation of section 3(4) of the act" (R. 73-74).

To remedy the violations so found of Section 1(5) and Section 3(1) and (4), the order requires establishment of through routes in connection with the Rio Grande for the specified commodities and "joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming" (V. II, 1596).

Although the order further requires the carriers to "cease and desist" from publishing and demanding rates in excess of those prescribed and from practicing undue prejudice and preference and unlawful discrimination and to maintain and apply rates which will prevent and avoid undue prejudice and preference and unlawful discrimination, it is apparent that to remedy all of the violations so found the Commission seized upon its powers to prescribe through routes and joint rates under Section 15(3) and (4). This is made clear by the Commission's own statement (R. 33) that any order requiring establishment of through routes and joint rates in connection with the Rio Grande must be grounded upon the provision in Section 15 that such routes are necessary and desirable in the public interest and are "needed in order to provide adequate and more efficient or more economic transportation".

While the district court held that there was no evidence to support the Commission's finding of undue preference and prejudice in violation of Section 3(1), it held that the order (as modified and restricted by the court) "is valid under Secs. 1, 15(3) and 15(4) of the Act" and that the order is valid "for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act" (R. 167, 168).

Thus, the court expressly sustains the Commission's prescription of through routes and joint rates to remedy violations of Sections 1(5) and 3(4) of the Act, and in doing so we submit that the court was plainly in error.

The Rio Grande's complaint to the Commission alleged that the combination rates were unreasonable, unduly prejudicial and preferential, and the Commission so found. The Commission has direct power to remedy violations of Sections 1 and 3 of the Act but it could not, by using that direct power, require the exact equalization of rates demanded by the Rio Grande, *Thompson v. United States*, 343 U. S. 549. Seizing upon its through route powers, the Commission "sought to accomplish by indirection" what it could not accomplish by using its direct powers to remedy violations of Sections 1 and 3 of the Act, *Central R. R. Co. v. United States*, 257 U. S. 247, 257.

That the real and ultimate purpose in ordering the through routes and equal joint rates is to satisfy the Rio Grande's demand that the specified commodities pass through points on that line en route to destinations in the eastern and southern part of the country at exactly the same rates and charges which apply via the Union Pacific, is shown by the report where it is said:

> "For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply." (R. 70)

The Rio Grande has no right to demand that traffic en route, for example, from Portland, Oregon, to New

York, N. Y., pass through points on its line, nor may the Commission, upon such demand by the Rio Grande, order a through route for that purpose for it is prohibited by Section 15(4) from requiring a through route to help a carrier financially, and "* * * there is no express requirement of law that routes *must* pass through particular intermediate points," *Pennsylvania R. Co. v. United States*, 54 F. Supp. 381, 392, affirmed, 323 U. S. 588. As this is the Rio Grande's complaint and not that of a shipper, the Commission has acted arbitrarily and erroneously in ordering that the traffic pass through points on the Rio Grande.

In order to divert the traffic to its line, the Rio Grande demanded and the Commission has given it an exact equalization of rates with the rates on the specified commodities via the Union Pacific through Wyoming. That this was the only thing sought by the Rio Grande and that the Commission invoked its through route powers to accomplish that result clearly appears from the following language of the report (R. 28-29).

> "Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect, close the Ogden gateway in a commercial sense. We are asked to exercise our authority under section 15(3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest."

The Commission's power to require a reduction in rates found unreasonable is conferred by Section 15(1) of the Act. It was that power which the Rio Grande asked the Commission to invoke to equalize its rates via Union Pacific routes. But, while the instant case was pending decision before the Commission, this Court on June 2, 1952, held that the Commission's power under Section 15(1) to determine and prescribe reasonable rates could not be used to equalize rates on different routes or to defeat the requirement of Section 15(3) and (4) of the Act, *Thompson v. United States*, 343 U. S. 549. In that case, the Commission ordered local grain rates of the Missouri Pacific and the Burlington railroads from Lenora, Kansas, via Concordia, Kansas, to Omaha, reduced to the extent that those rates exceeded rates on grain from the same origins via the Missouri Pacific to Kansas City. This would, on traffic from Lenora to Omaha, short haul the Missouri Pacific from Concordia to Omaha. Through routes and joint rates had not been published to Omaha, but the Commission held that through routes between the Missouri Pacific and the Burlington from Lenora to Omaha already existed because their tracks connected at Concordia and that, therefore, it was not required to make findings under Section 15(3) as limited by paragraph (4) of that section. Shippers could use the route via the Missouri Pacific and Burlington if they elected to pay the higher combination rates in effect over such routes. *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.*, 278 I. C. C. 519, 523. This Court enjoined and annulled the Commission's order because it "in effect, establishes a new through route without complying with the requirements of Section 15(3) and (4) of the Act," (p. 554). At pages 559-560 the Court said:

> "* * * the Commission under its present theory would never have to establish through routes under Section 15(3) and (4) but could divert traffic to any

route between two points by ordering reduction of the sum of the local rates over that route. Acceptance of this argument would mean that Congress insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order. The Commission by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4), before the Court in *United States v. Great Northern R. Co.*, 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."

Faced with this decision, and being prevented by it from using its rate-reducing power to require exact equalization of rates via the Rio Grande with those via Union Pacific routes and thus "in effect," establishing a new through route, the Commission turned to its through routes authority under Section 15(3) and (4) to compel the reduction in the Rio Grande's combination rates and to equalize them with rates via Union Pacific routes.

Section 15(3) and (4) confers no power upon the Commission to require rate reductions or to equalize rates via different routes. Those provisions, as noted above, do not concern the reasonableness or unreasonableness, *per se*, of rates. They are concerned with public and shipper "need" for through routes which railroads have not voluntarily established. In other words, those provisions concern the adequacy, efficiency and economy of transportation routes, services and facilities. Where, as in the instant case, only a reduction or equal-

ization in rates is sought, Section 15(3) and (4) are not available and provide no power in the Commission to accomplish the sought reduction or equalization.

While Section 15(3) empowers the Commission, after finding a new through route is "necessary or desirable in the public interest" to establish joint rates "or the maxima or minima, or maxima and minima, to be charged" over the new through route, it does not authorize the Commission to compel a rate reduction via one route to equalize rates maintained over other routes.

Nor may the Commission invoke its through route and joint rate powers to prescribe the exact remedy it wants for a violation of Section 3 of the Act. The remedy for a violation of that section is an order to "cease and desist" from the unlawful practice. Such order must leave to the carriers "discretion to determine how the discrimination should be removed," *American Express Co. v. Caldwell*, 244 U. S. 617, 625. In *Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, at page 650, this Court held:

> "Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. Compare *American Express Co. v. Caldwell*, 244 U. S. 617, 624; *United States v. Penna. R. Co.*, 266 U. S. 191; *Chicago, I. & L. Ry. Co. v. United States*, 270 U. S. 287, 292; *Minneapolis & St. L. R. Co. v. Peoria & Pekin U. R. Co.*, 270 U. S. 580, 582. The situation must be such that the carrier or carriers if given an option have an actual alternative.
>
> "The principle has been approved in decisions of this court with respect to practices. *Interstate Commerce Comm'n v. Diffenbaugh*, 222 U. S. 42; *Central Railroad of New Jersey v. United States*, 257 U. S. 247, and rates, *East Tenn. V. & G. Ry. Co. v. Interstate Commerce Comm'n*, 181 U. S. 1; *Penn Re*

fining Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 221."

Where, as here, Congress has provided direct remedies for violations of Sections 1 and 3, the Commission may not resort to its through route powers under Section 15(3) and (4) to prescribe the exact remedy it wants. *Central R. R. Co. v. United States*, 257 U. S. 247, 258.

The "alternative order" principle of the Court decisions has been championed and consistently adhered to by the Commission. *Fort Smith & W. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 216 I. C. C. 411, 433; *Quanah, A. & P. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 205 I. C. C. 253, 261; *Nicholson Universal S. S. Co. v. Pennsylvania R. Co.*, 203 I. C. C. 637, 647.

Counsel for the Rio Grande has contended in this proceeding that the "alternative order" principle laid down in the cited cases has been overruled or modified by *State of New York v. United States*, 331 U. S. 284, and *Ayrshire Corp. v. United States*, 335 U. S. 573. The contention is based on a misunderstanding or misstatement of those cases. The limited power to require through routes and joint rates was not involved in either of those cases. Neither of those cases involved the intermingling and alternative use of different provisions of the Act and powers thereunder to find first a violation of one provision and then to seize upon another provision to prescribe the remedy most suitable to the Commission. Neither of the decisions may be construed as holding that the Commission may use its through routes powers under Section 15(3) and (4) to require the remedy it would like to impose for a violation of Section 1 or Section 3.

The "alternative" order principle is not a mere academic matter—it is a right of great benefit to carriers ordered to "cease and desist" from violations of Section 3. In the instant case, to cure undue prejudice to shippers, and apart from the Commission's erroneous conclusion that "the same" rates must apply over the longer and "more onerous" Rio Grande routes as over the Union Pacific's shorter and more efficient routes, rates could be equalized over the two routes by reducing the Rio Grande's combination rates, or by raising the rates of the Union Pacific routes, or by altering both the combination rates and the joint rates to the point where an exact equality is reached. Raising the joint rates via Union Pacific routes would be particularly just and appropriate in this case because, as the report shows, the joint rates are subnormal, depressed rates resulting from water, truck and other competitive forces, and are too low to be spread over the longer and "more onerous" Rio Grande route (R. 67).

By its commingling and confusion of its powers, and its unexplained and inexcusable departure from the settled "alternative order" principle which it has long championed, the Commission would, by resorting to its through route powers, deprive the appellants and other railroads of any chance to preserve their revenues or safeguard their earning capacity, as they have a right to do, *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277, or to prevent or offset, by increasing the joint rates via the Union Pacific routes, the revenue losses which they will most certainly suffer if they are to be short hauled as permitted by the order.

The Commission's commingling of separate and independent sections of the Act and its use of its through

routes and joint rates powers to effect the exact equalization of the Rio Grande's rates with those of Union Pacific routes has not only confused and led the majority of the district court into the error pointed out above, but has also confused and misled counsel for the Government and the Rio Grande into the error of suggesting that the order requiring through routes and joint rates can be sustained upon the Commission's findings of unreasonable rates in violation of Section 1(5) and undue prejudice and preference in violation of Section 3(1). At page 10 of the Government's jurisdictional statement (No. 119) it is asserted that:

> "An independent basis of the Commission's order establishing through routes was its finding that the combination rates between the Union Pacific and the Rio Grande were, to the extent that they exceeded the joint rates via the Union Pacific routes to the same points, unjust and unreasonable and unduly prejudicial of shippers and receivers using the Rio Grande, and unduly preferential of shippers and receivers using the Union Pacific routes, in violation of Section 3(1) of the Act."

The Rio Grande's jurisdictional statement states at pages 12 and 13 that the short-haul prohibition of Section 15(4) does not apply "[w]here discrimination and undue prejudice is found under Section 3 of the Interstate Commerce Act."

Thus, counsel for both the Government and the Rio Grande ask the Court in this case to do the very thing it refused to do in *Securities Comm'n v. Chenery Corp., supra,* namely, to sustain the validity of the order upon grounds or standards other than those of Section 15(4)(b) which the Commission expressly and avowedly invoked. While we demonstrate elsewhere in this brief that find-

ings of a violation of Section 3 afford no basis for compelling through routes and joint rates that short haul existing routes, the point here is that even if the Commission could order through routes upon findings under Section 3, it did not purport to do so in this case but instead expressly declared that in ordering through routes and joint rates it was acting upon the authority, standards and requirements of Section 15(4)(b). "Since the decision of the Commission was explicitly based upon the applicability of" those standards and requirements "its validity must likewise be judged on that basis", first *Chenery* case, 318 U. S. 80, page 87.

The Commission having departed from, misapplied and failed to meet the requirements of the standards it explicitly invoked, this Court will not attempt to sustain the order by searching for or spelling out a different or "a more adequate or proper basis" for it, second *Chenery* case, 332 U. S. 194, page 196; *Florida v. United States*, 282 U. S. 194, 215; *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

Neither Section 1 nor Section 3 authorizes the Commission to order through routes and joint rates. The provisions of those Sections concern the reasonableness of carriers' charges for hauling freight and the fairness or equality to shippers by a carrier or carriers when shippers' circumstances are substantially similar. The specific purposes of those provisions, as noted elsewhere in this brief, bear no relationship to the adequacy and efficiency of transportation facilities and service or other circumstances which constitute the power to require through routes and joint rates. If, as the majority of the district court held and counsel for the Government and the Rio Grande now urge, a finding of a violation of either or both sections 1 and 3 may serve as the basis

or an independent or secondary basis for an order requiring through routes and joint rates, then as said by this Court in *Thompson v. United States, supra*, page 560:

> "* * * the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."

8. In condemning Union Pacific routes as "inadequate" because (1) they have lower rates and are "not available" at points served only by the Rio Grande, and (2) on the theory that shippers from the northwest area are "debarred" from effective participation in the marketing system for perishable products because they must pay higher rates when they ship via the Rio Grande than when they ship via the shorter, adequate and efficient Union Pacific routes, the Commission misconstrued and misapplied Section 15(4)(b) and departed without justification from the norms of its prior decisions.

The rule and norm of the Commission's prior decisions has been that the Act does not require it to order through routes and joint rates in all instances where carriers have refused to do so but empowers the Commission to order through routes and joint rates for the purpose of securing reasonable facilities to the public. In *New York Dock Ry. v. B. & O. R. R. Co.*, 32 I. C. C. 568, in dismissing a complaint of a railroad demanding joint rates to improve its financial position, the Commission said at page 575:

> "* * * we cannot view with favor an effort to require the establishment of such routes and rates merely to enable a carrier to wrest from its connections, or an agent to wrest from its principal, greater compensation."

In *Lehigh Portland Cement Co. v. Lehigh Valley R. Co.*, 238 I. C. C. 199, the Commission said at page 201:

> "The statute makes it the duty of common carriers subject to the act to establish through routes and just and reasonable rates applicable thereto. Where this duty has been fully met and discharged and there exists both such reasonable through routes and joint rates, and other routes by combination over which no joint through rates apply, the carriers in our opinion are not required to maintain a parity of rates over both such routes, but may properly maintain through joint rates over joint through routes that are somewhat less than the combination of locals used to make the through rates applicable over the combination through routes; provided that neither rate, under all the facts and circumstances, is more than just and reasonable for the service performed."

In *Kansas City Hay Dealers Asso. v. C. G. W. R. R. Co.*, 49 I. C. C. 372, the Commission said at page 377:

> "To compel the application of short-line rates over indirect and longer routes, merely as a means of providing a channel of doubtful benefit to comparatively few shippers, would lay an unnecessary expense upon the railroads against the interest of the public as a whole. When joint rates that are neither unreasonable nor unduly prejudicial are maintained over direct routes adequate response is made to the reasonable requirements of the public, and carriers should not be required to perform wasteful transportation by maintaining the same rates over indirect and more circuitous routes."

In the instant case the joint rates over existing through routes of the Union Pacific and its connections are neither unreasonable nor unduly prejudicial. In fact, they are expressly found by the Commission to be reasonable, and the direct routes over which they apply are found adequate to haul any foreseeable volume of traffic.

On the other hand, the combination rates via the indirect and longer Rio Grande routes are found both unreasonable and unduly prejudicial.

Keeping in mind that the proceeding before the Commission is an effort of the Rio Grande to enhance its financial position by the simple expedient of having the traffic move over its line instead of the Union Pacific and that the only difference that would result if the order becomes effective would be a rate reduction via the Rio Grande in the amount of the difference between its combination rates and the joint rates via the Union Pacific on whose route the shippers now have every privilege they would have on the Rio Grande, the following language of the Commission in *C. & C. Traction Co. v. B. & O. S. W. R. R. Co.*, 20 I. C. C. 486, 492, is very pertinent:

> "* * * we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates. * * *"

Improvement of the Rio Grande's financial position and reductions in transportation costs of shippers are not measures of a carrier's duty to establish "reasonable through routes," required by Section 1(4) of the Act. In *Beaver Sand Co. v. Director General*, 66 I. C. C. 285, the Commission dismissed a complaint demanding through routes and joint rates, saying at page 289:

> "In *C. & M. Elec. R. R. Co. v. Illinois Central R. R. Co.*, 13 I. C. C. 20, in discussing a suggestion that the then existing provision of the law with respect to the establishment of through routes and joint rates was mandatory, we said:
>
> "'We are unable to perceive the force of this suggestion. It proceeds apparently on the

> theory that the sole object of the provision above quoted was to afford a means by which new lines, with the aid of the Commission, may profitably force their way into shipping districts built up and already well and adequately served by older lines, and thus seize and divide with the latter such traffic as may be offered for movement. If that be the import of the clause in question, it is too well concealed to be readily discernible.' * * *"

In *Fort Smith & W. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 216 I. C. C. 411, at page 431, the Commission, in rejecting a contention of shippers supporting the railroads' complaint that partial-unloading privileges on that line in connection with transcontinental joint rates was needed to further economical distribution of canned goods and dried fruit, pointed to the depressed level of canned goods and dried fruit rates and said:

> "While the establishment of the transit service on these commodities would result, in many instances, in a saving in transportation costs to these shippers, such saving which would be at the expense of the carriers cannot be said to be a commercial necessity."

In short, the rule and norm of the Commission's prior decisions has been consistent with the statutory standard and requirement of Section 1(4) that carriers shall establish "reasonable through routes" and with the rule laid down by this Court that "[t]he law exacts only what is reasonable from such carriers", *Midland Valley R. R. v. Barkley*, 276 U. S. 482, 485.

Decisions of the Commission since enactment of clause "(b)" in 1940, summarized in *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331, disavow any departure from the statutory standard and requirement of

"reasonable through routes". At pages 333-334 of the *Adrian* case, the Commission said:

> "Section 15(4) of the act has been in its present form since September 18, 1940. In several proceedings since then, reasonable through routes which short haul one or more carriers have been prescribed. See *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I. C. C. 333 (sustained in *Pennsylvania R. Co. v. United States*, 323 U. S. 588); *Allied Mills, Inc., of Virginia v. Alton R. Co.*, 272 I. C. C. 49; *California Milling Corp. v. Atchison, T. & S. F. Ry. Co.*, 269 I. C. C. 725 and 274 I. C. C. 120. In the first two of those proceedings it appeared that the routes required to be established eliminated expensive out-of-line hauls, and in the latter proceeding the routes required were shown to be shorter in many instances than those which had existed. In all of those proceedings the routes required were at least as economical, from the standpoint of the carriers as well as of the shippers, as were most of the existing routes.
>
> "The instant situation differs. All of the routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation. In addition, because of the circumstances here present, we believe a requirement that the routes sought be established would not 'give reasonable preference' to the originating carrier."

In the instant case the Commission condemns Union Pacific routes as "inadequate", not because they are longer, inefficient or unable to haul any foreseeable volume of traffic, but because "at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply" (R. 70). And, in an apparent effort to justify short-hauling Union Pacific routes, the Commission asserts that shippers of perishable products from the northwest

area "are debarred" from effective participation in the marketing system for such products, obviously for the sole reason that, although those shippers have available a multitude of Union Pacific routes at lower rates, they must pay higher rates if they ship over the Rio Grande route.

Both reasons upon which the Commission thus attempts to condemn Union Pacific routes as inadequate are clearly based upon its assertion that perishable products require "as many routes as possible." Since Section 15(4)(b) clearly lays down the standard of "adequate" transportation and Section 1(4) requires only "reasonable through routes", it is plain that the Commission has grossly misinterpreted and misapplied the standards of both sections, in addition to departing from the rule and norm of its prior decisions. Circuit Judge Johnsen's dissenting opinion aptly appraises this phase of the Commission's report as follows:

> "The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them 'from effective participation in the widespread system developed for the marketing of such commodities.' In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' because otherwise they will be 'debarred from effective participation in * * * the marketing of such commodities.' * * *" (R. 171)

"Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and further such new route can be declared to provide 'more economic transportation,' because, by placing joint rates in effect the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15(4) entirely, as affording them any protection whatsoever against depriviation of their long hauls." (R. 172-173).

It may not be gainsaid that if the Commission may short haul Union Pacific routes either because they are "not available" at points served only by the Rio Grande or on the theory that shippers are "debarred" from effective participation in markets simply because they must pay higher rates when they ship via the Rio Grande to eastern and southeastern markets, then the Commission has at last invented an interpretation of the short-haul prohibition of Section 15(4) and the exceptions thereto which accomplishes the complete deletion of the short-haul prohibition as effectively as if it had succeeded in persuading Congress to repeal that prohibition. *Thompson v. United States*, 343 U. S. 549, 555.

III.

The District Court Erred in Refusing to Hold That the Entire Order is Void Because the Basic Facts Found by the Commission Contradict and are Inconsistent With its Conclusions, and Afford no Rational or Valid Basis for the Ultimate Conclusions and Order; and Because the Commission did not Make Findings Essential to the Validity of the Order.

Tested by the rule that the Commission's report must set forth a logical and rational basis for the order, *Miss. Valley Barge Co. v. U. S.*, 292 U. S. 282, 287; *Sec'y of Agriculture v. United States*, 347 U. S. 645, 654, examination of the inconsistent, contradictory and irrational conclusions in the report will demonstrate that the report and order here are far more vulnerable than the Commission's order which this Court enjoined in *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, saying at page 511:

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

It is found in the Commission's report that articles of the perishable and semi-perishable nature named in the order must be moved to markets "with expedition and care" (R. 70); that Union Pacific routes are as much as 50 per cent shorter than Rio Grande routes (R. 71); that facilities of Union Pacific routes "are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future"; that Union Pacific has surplus capacity, is efficiently operated (R. 62) and furnishes as good service as any that could be provided by the Rio Grande (R. 70); that the Rio Grande is

"less favorably situated" than the Union Pacific (R. 62); that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein" (R. 70); and that traffic routed over the Rio Grande as a bridge line would require at least 24 hours more time in transit than when routed over the Union Pacific, and would require one or two more terminal yard services (R. 62).

To borrow a word from the court's decision in *Watson Bros. Transp. Co. v. United States*, 59 F. Supp. 762, 778, one who reads and understands those findings of fact from the standpoint of adequate, efficient and economic transportation must be "scandalized" upon reading the Commission's conclusions that Union Pacific routes are "inadequate" for transporting the perishable articles named in the order from the northwest area to eastern points and that through routes and joint rates via the longer, slower and "more onerous" Rio Grande are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for those articles which "must be moved to market with expedition and care." In short, "the facts found do not, as a matter of law, support the order made", *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91.

Despite the fact found in the report that the Union Pacific's direct single line between McCammon, Idaho, and Omaha, for example, is 219 miles shorter than the Rio Grande route, at least 24 hours faster in transit time, and would require no interchange with other lines, the order would short haul the Union Pacific 925 miles so that the traffic may move via the longer and slower Rio Grande line, leaving the Union Pacific a haul of 111 miles from McCammon to Ogden in lieu of the direct single

line haul of 1,036 miles from McCammon to Omaha (R. 40).

Despite the fact that the purpose of Congress in adding clause "(b)" to Section 15(4) in 1940 was to accord shippers the benefits of shorter and more efficient through routes than routes that give carriers their long haul, the Commission here uses the power granted by clause "(b)" to short haul the Union Pacific's shorter, faster routes 925 miles, by requiring routes that are as much as 50 per cent longer via the Rio Grande's "less favorably situated" and "more onerous" line.

Although unable to find that public need for the Rio Grande route is sufficient to cause any of the traffic to move via that line except such as might move as result of "active solicitation" by the Rio Grande "to persuade" and to "induce" shippers to use its line as "an overhead or bridge route" and for "transit facilities" on that line, the Commission nevertheless finds it "necessary and desirable in the public interest in order to provide adequate and more economic transportation," that the Union Pacific and other lines join in through routes and joint rates so as to permit the Rio Grande to solicit, persuade and induce shippers to divert traffic and revenues from the shorter and faster Union Pacific routes to the Rio Grande's longer and slower route. And this incongruous conclusion is reached in the face of the Commission's settled administrative ruling that "[s]hippers who have to be importuned to use a railroad have no urgent need for it," *Tonopah & T. R. Co., Abandonment*, 240 I. C. C. 145, 149, citing *Mississippi Valley Co. Abandonment*, 145 I. C. C. 289, 293; *Batesville S. W. R. Co. Abandonment*, 170 I. C. C. 269, 277; and *Seaboard Air Line Ry. Co. Abandonment*, 184 I. C. C. 575, wherein the Commission said at page 580:

"When urgent solicitation is required to hold traffic to the railroad at noncompetitive points, it is apparent that there is no substantial necessity for the line."

Regardless of the admission in the report that many examples were shown in computations, based on cost scales prepared by the Commission's own Bureau of Accounts and Cost Finding, that, for instance, on a carload of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of $1.14 per 100 pounds via Union Pacific route, 1,597 miles, would yield a net profit of only $1.97 per car, and a net loss of $62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington, 1,809 miles (R. 67), the Commission erroneously asserts that there is no claim that any of the joint rates are below a minimum reasonable level and that they "must be regarded as reasonable rates" (R. 68).

The Rio Grande's complaint alleged that the combination of local rates via its line and the lines of the defendants named in its complaint to and from the northwest area were unreasonable and discriminatory in violation of Sections 1 and 3 of the Act. It alleged that maintenance by the Union Pacific and certain other railroads of joint rates for the traffic in question, while refusing to establish the same joint rates with the Rio Grande, discriminated against the Rio Grande in violation of Section 3 of the Act. It did not allege that its rates were unduly prejudicial or preferential as between shippers.

The Commission finds that because of dissimilarities in transportation conditions on the Rio Grande's "more onerous" line compared with conditions on the Union Pa-

cific, the evidence fails to prove discrimination against the Rio Grande, but, as pointed out by Circuit Judge Johnsen, it brushes the dissimilarities aside for the purpose of finding undue prejudice against shippers who might desire to use the Rio Grande. It finds that the Rio Grande's combination rates are unreasonable in violation of Section 1, and unduly prejudicial to shippers using the Rio Grande, and preferential of shippers using Union Pacific routes in violation of Section 3 of the Act, but, incredibly, the order inflicts no punishment on the Rio Grande for maintaining unreasonable and unduly prejudicial rates but, would punish railroads named as defendants in the Rio Grande's complaint by requiring them to establish through routes and joint rates with the Rio Grande "the same" as their own joint rates, thus short-hauling themselves to permit diversion of the traffic and revenues from their lines to the Rio Grande.

Despite the fact that "the defendants named in the complaint" do not demand or collect rates that exceed their own joint rates for the transportation of the specified commodities, they are, nevertheless, ordered to cease, desist and abstain from publishing, demanding or collecting rates that exceed their own joint rates which they now demand and collect.

Regardless of the fact that the Commission has complete power under Section 15(1) to prescribe the reasonable rate to be charged in lieu of a rate found unreasonable, and to require a carrier found guilty of practicing undue prejudice and preference, to "cease and desist" from such practice, the Commission ignores those direct powers to remedy the violations found, and seizes upon its through route power under Section 15(3) and (4) to require the "defendants named in the complaint" to

remedy the Rio Grande's violations as well as their own by joining with it in through routes and joint rates which will enable that violator to increase its revenues and improve its financial position by diverting traffic and revenues from the other carriers.

Regardless of the fact that all of the shippers in the northwest area are located on Union Pacific routes, and all of them have exactly the same privilege and choice of routing over the Rio Grande at its higher rates or over the Union Pacific at lower rates, the Commission concludes that shippers "using, or desiring to use the Rio Grande" are unduly prejudiced when they use the Rio Grande because the Union Pacific routes with lower rates are available to them; in other words, the shippers using the Rio Grande are found to be unduly prejudiced because they voluntarily choose that line instead of electing to route via the Union Pacific at lower rates.

Despite the undisputed testimony, not mentioned in the report, of the shippers in the northwest area, including those found to be unduly prejudiced as well as those unduly preferred, that they ship their commodities to markets in all 48 states and to Canada, South Pacific, South America, Cuba, South Africa and other foreign countries (V. I, 246), the Commission asserts (R. 70) that those shippers "are debarred from effective participation" in the marketing of their commodities, and this, merely because their shipments of potatoes, for example, can move from Idaho origins to Chicago over shorter mileage of Union Pacific routes in 24 hours less time and at lower rates than if moved via the Rio Grande.

Faced with the decision of this Court in *Thompson v. United States*, 343 U. S. 549, that the Commission could

not use its power to prescribe reasonable rates so as to equalize rates via two different routes and, thus, "in effect" establish through routes and joint rates, without complying with the requirements of Section 15(3) and (4), the Commission now seizes upon the through routes power to equalize rates which it could not do under its reasonable rate powers.

Faced with the holding of this Court in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 277, that "the purpose" of the prohibition against compelling through routes that short haul carrier "is to protect the long haul routes of carriers," the Commission now seizes upon the 1940 clause "(b)" amendment to Section 15(4) as its authority to rearrange the railroads by chopping the Union Pacific in two and tying the separate pieces to the Rio Grande's line at Ogden and Denver to enable it to participate in the traffic and revenues.

Despite the fact that the Rio Grande's President testified that its sole purpose in filing the complaint was to increase its revenues and improve its financial position, and the fact that the order will accomplish this purpose, the Commission would evade and escape the provision in Section 15(4) that prohibits it from compelling through routes to aid a carrier financially, by the simple expedient of denying that in reaching its conclusions it gave any consideration to the Rio Grande's financial needs.

Regardless of the fact that the order requires "the same", and not lower, rates via the Rio Grande as the rates via Union Pacific routes, and the further facts shown by undisputed testimony that the average cost of hauling a carload of freight from Pocatello to the Missouri

River is $124.33 greater via the longer Rio Grande route than via the Union Pacific, the Commission finds that the Rio Grande route is necessary to provide adequate and "more economic" transportation.

Despite the obvious and unalterable physical and geographical fact that towns and communities served exclusively by the Rio Grande are not located on Union Pacific routes, the Commission holds that Union Pacific routes are "inadequate" because they are "not available" at points on the Rio Grande (R. 70) for transit privileges which the Commission finds to be "commercial operations" (R. 48) and not transportation service.

The Commission correctly states (R. 72) that it cannot find discrimination against the Rio Grande because there is no evidence of record as to transportation conditions over the routes allegedly committing the discrimination, but despite the absence of such evidence, the Commission proceeds (R. 73-74) to find undue prejudice and preference between shippers even though such finding cannot be made without evidence showing that transportation conditions affecting both the alleged unduly prejudiced and preferred shippers are substantially similar. Not only is the finding of undue preference and prejudice among shippers precluded by the absence of evidence showing that transportation conditions affecting them are substantially similar, but it is also precluded by the Commission's own finding (R. 70) that transportation conditions on the Rio Grande are "more onerous" than those on the lines of any of the other transcontinental railroads, and by the finding (R. 71) that the differences in transportation conditions are "substantial." Having thus found dissimilarities in transportation conditions, the Commission was under the plain

duty to make a finding that the evidence did not prove undue prejudice and preference between shippers, *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197.

Despite its findings that dissimilarities in transportation conditions resulting from the Rio Grande's longer and more onerous route must be given effect in rates for shorter hauls, but not for hauls of "great lengths" (R. 72), the order would give effect to those dissimilarities in hauls via the Rio Grande as long as 3,044 miles from Seattle, Wash., to Sault Ste. Marie, Michigan, but would ignore the same dissimilarities and require equal joint rates via the Rio Grande in hauls, for example, from Brigham City, Utah, to Omaha, 1187 miles, to Kansas City, 1267 miles, to St. Joseph, Missouri, 1269 miles, and many other hauls that are far shorter than many of the hauls in which the order gives effect to the dissimilarities by not requiring rate reductions.

Although the report states (R. 70) that "adequate transportation facilities and services are required for the proper functioning of the system" which has been evolved for orderly distribution of perishable food products, it contains no finding that physical transportation facilities of Union Pacific routes are incapable of hauling efficiently and economically the articles specified in the order between the originating area and points in the southern and eastern part of the country; on the contrary, the report finds (R. 62) that transportation facilities of Union Pacific routes "are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future."

Although the report states (R. 70) that perishable articles require a number of services, "not only at origin

and destination, but en route, which are not usually required in the movement of ordinary traffic," it refrains from disclosing in that connection the fact that all of such services such as reconsignment, refrigeration and transit privileges are available at lower rates on the shorter Union Pacific routes.

The report shows that (R. 70) all of the "in-transit privileges and services" are now available at points on the Rio Grande, and as there is no finding that any new or additional privileges or services will be made available at origins or destinations or en route via the Rio Grande between the northwest area and points in the southern and eastern part of the country, it results that so far as shippers are concerned, the only effect of the order is a reduction in the Rio Grande's rates to equalize them with rates via Union Pacific routes.

We submit that the findings made by the Commission not only fail to support or furnish a rational basis for the order but that they compel the conclusion that Union Pacific routes provide adequate, efficient and economic transportation service for the traffic, including the commodities specified in the order, between points in the northwest and points in the eastern and southern parts of the country and that less adequate, less efficient, and less economic service would be provided by the Rio Grande.

Indeed, every fact stated and found in the report (apart from mere unfounded assertions made as conclusions) with respect to the Union Pacific routes, leads logically and rationally to the dismissal of the Rio

Grande's complaint. Not one fact stated or found with respect to the Rio Grande could possibly lead to the conclusion that its line is necessary to provide adequate and more efficient or more economic transportation of the traffic it seeks.

In addition, the Commission did not make findings of fact that are essential and would naturally be expected on the subject of the necessity of adding the Rio Grande's longer routes to existing routes which the Commission finds adequate to haul the present volume of traffic and any additional volume that might be offered in the foreseeable future. In *F. C. C. v. RCA Communications, Inc.*, 346 U. S. 86, 97, this Court said that findings of the Commission "must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it." The basic findings must be of such nature that the ultimate conclusion or finding in the language of the statute will logically flow and be inferred from them. The findings of fact must be "logically related" to the ultimate conclusion on which the order rests, *Tri-State Broadcasting Co. v. Federal C. Com'n*, 96 F. (2d) 564, 567, in which the United States Court of Appeals for the District of Columbia held at page 568:

> "The findings of basic fact which would naturally be expected on the subject of need of an additional station where a community already has radio service would be those concerning the adequacy of the existing service, and in particular in this case concerning the adequacy of the service of the primary stations KTSM and WDAH. The existing radio service might be inadequate in financial stability, equipment, or management; or it might be adequate in such respects and still be inadequate in the sense that the stations, although operating at full capacity, are unable to supply the demands of advertisers and

performers in the community. The Statement of Facts and Grounds for Decision on the part of the Commission contains no finding that the existing service is inadequate in any such particulars as are above mentioned. If there is evidence in the record warranting finding of inadequacy of the present service the Commission should make and state such findings. It was the intention of Congress in requiring findings of fact that the Commission should disclose the facts which cause it to reach its decision, and that it should not reach a decision without facts."

As noted earlier, the report says (R. 33) the order must be "grounded" upon findings required by Section 15(3) and (4) that the routes sought are "necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation". But the Commission has not made this essential jurisdictional finding. Instead, it finds merely that the Rio Grande route is necessary and desirable in the public interest "in order to provide adequate and more economic transportation." It is not found that the route is "needed" or that it will provide "more efficient" transportation.

There is no finding that diverting the traffic and revenues from Union Pacific routes to the Rio Grande "would serve some beneficial purpose such as maintaining good service and improving it," *F. C. C. v. RCA Communications, Inc., supra*, p. 97.

It is not found or stated in the report that the Rio Grande has surplus capacity or ability to haul any additional volume of traffic or that it is efficiently operated, or furnishes good or satisfactory service.

There is no finding that inclusion of the Rio Grande for a "bridge" haul in the through transportation will gen-

erate new or additional traffic, and the report shows that it would merely redistribute present traffic and revenues.

There is no finding that the over-all transportation system or those using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line.

There is and could be no finding that the order will give shippers lower rates than they now have via Union Pacific routes, for, the purpose and requirement of the order is merely to make the Rio Grande's rates "the same" as those of Union Pacific routes.

There are no findings of basic fact on the questions whether the combination rates via the Rio Grande are unreasonable or whether the joint rates of Union Pacific routes are reasonable for application via the longer and more onerous Rio Grande routes.

There are no basic findings of fact to show how or in what manner shippers from the northwest area are unduly prejudiced if they elect to use the Rio Grande with its higher rates instead of Union Pacific routes which those same shippers now use at lower rates for the through traffic.

The order will aid the Rio Grande financially but will be detrimental to carriers participating in the Union Pacific routes, for every dollar the Rio Grande gains will be lost by the Union Pacific and other carriers participating in the present routes.

Diverting the traffic to the Rio Grande will slow up rather than speed up its movement.

There is no finding that present transportation facilities in the northwest area, or between that area and the eastern and southern part of the country are insufficient or incapable of moving all of the traffic, including the commodities specified in the order, as promptly and expeditiously as it could move via the Rio Grande; on the contrary, the report shows there are abundant facilities of several railroads in active competition in the northwest area that are hauling and could haul any foreseeable volume of traffic between that area and the east and south, faster, over shorter routes and at lower rates than the Rio Grande.

There is no finding that present transportation service of carriers that would lose the traffic and revenues could be maintained, or that the over-all service would be improved or that the general public would benefit by diverting the traffic to the Rio Grande.

There is no finding that the Rio Grande will contribute additional facilities in the northwest or in the east or south—indeed, the report finds that the Rio Grande wants to divert the traffic merely for a "bridge" haul over its line between Ogden and Denver.

There is no finding that any complaint has been made by shippers against the service rendered by Union Pacific routes, and the record shows that no such complaints have been made since those routes were established some 50 years ago.

There is no finding that anticipated future developments in the northwest area may reasonably require additional transportation facilities, and if there were, the order would not alleviate that situation, for the Rio Grande proposes, and the order requires merely that the

traffic be diverted to the Rio Grande for a haul over its longer line en route from or to the northwest area.

The facts found by the Commission and those it did not, and could not, find in this case presents a situation similar to that in which this Court in *F. C. C. v. RCA Communications*, 346 U. S. 86, declined to approve an order of that commission authorizing an additional radio-telegraph circuit to compete with existing circuits. The basic and underlying facts found by that commission in that case were almost identical in substance to the facts found in the instant case. In that case, as in this, there was no finding that the competition of the additional circuit would be of benefit to the public. The Court remanded the case to give that commission an opportunity to determine, if it could, from the evidence whether the competition of the additional radio-telegraph circuit "would serve some beneficial purpose such as maintaining good service and improving it." Mr. Justice Douglas agreed that such finding, "measured by the public interest" was necessary to justify the order, but dissented from the remand and held that the order should be set aside because the facts of record "are so unequivocal that there is no apparent way for the Commission to meet the standard approved both here and below." At page 99, he summarized those facts as follows:

> "* * *—existing facilities are in excess of those required to handle present and expected traffic;
>
> "—the proposed operations will redistribute present traffic rather than generate new traffic;
>
> "—the proposed service will not lower rates nor speed up transmission nor improve the existing service in any respect;
>
> "—the proposed service will aid Mackay financially and be detrimental to RCA;

"—this is a field where without the proposed service there is active competition and an excess of facilities to meet present or expected needs."

Keeping in mind that the question here is whether there is a "need", for example, for a carload of potatoes shipped from a station on the Union Pacific in Idaho to New York to move via the longer line of the Rio Grande between Ogden and Denver instead of moving over the Union Pacific's 219-mile shorter, direct single line to the Missouri River, and observing the Commission's finding (R. 62) that the Union Pacific has lower rates and is "adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future," we submit that it is wholly illogical, irrational and a mere "artificial use of words" for the Commission to assert that Union Pacific routes for the commodities named in the order are "inadequate and less economical than are the Rio Grande routes." This assertion becomes even more irrational when we observe the Commission's finding (R. 70) that the perishable commodities named in the order "must be moved to market with expedition and care," and the further finding (R. 62) that "bridge" traffic moved over the Rio Grande en route to eastern destinations "would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services."

The Report will be searched in vain for any finding or statement of fact which could possibly justify the conclusion (R. 70) that Union Pacific routes "are inadequate and less economical than are the Rio Grande routes." Having correctly held (R. 69) that the Rio Grande route could not be required "unless the existing

routes can be found not to provide 'adequate' transportation," and (R. 62) that facilities of Union Pacific routes "are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future," the Commission, in its desperation, condemns the Union Pacific routes as "inadequate" simply by saying (R. 70) that they "are not available, and higher rates apply" *at points on the Rio Grande* for shipments reconsigned or accorded "transit privileges" at such points on that line. If such reasoning were sound, the Rio Grande route should also be condemned because it is "not available" at points on the lines of the Union Pacific or other railroads. Indeed, upon that theory, all through routes in the country are "inadequate" and therefore may be short hauled because they are "not available" at points not located upon them.

Nor is the fact that "higher rates apply" via the Rio Grande a logical or rational basis for condemning the Union Pacific routes as "inadequate." Where, as here, existing routes are shorter in both mileage and in "running time," are capable of hauling all of the traffic offered and no fault can be found with the *transportation service* they perform, a mere "declaration" by the Commission that such routes are "inadequate" is "an artificial use of words" and will not justify an order requiring an additional short-hauling route, *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545.

The order clearly should be enjoined and annulled in its entirety because the findings made by the Commission do not, as a matter of law, support the order or afford any rational basis for it, and because the Commission did not and could not make findings essential to the validity of the order.

IV.

The District Court Erred in Refusing to Enjoin the Entire Order Because the Commission's Ultimate Findings and Conclusions and the Order are not Supported by the Evidence and are Contrary to the Overwhelming Preponderance of the Evidence.

1. **The evidence on which the Commission based its conclusions and order is without credibility or probative force, and affords no support for the order, because it was admittedly solicited and procured by the Rio Grande to help it win its case.**

As shown in the Commission's report (R. 35-36), there have never been any through routes and joint rates between the Union Pacific and other railroads with the Rio Grande via Ogden and Denver on the traffic to and from the northwest area except during a short period beginning in 1897 when the Union Pacific, Oregon Short Line Railway Company and the Oregon-Washington Railroad & Navigation Company were in separate receiverships. After these receiverships ended, the joint rates with the Oregon Short Line Railway Company were cancelled in 1906, and those with the Oregon-Washington Railroad & Navigation Company were cancelled in 1912, with the approval of the Commission. *Lumber Rates, Oregon and Washington to Eastern Points*, 29 I. C. C. 609, 31 I. C. C. 191; *The Ogden Gateway Case*, 35 I. C. C. 131.

In the 40-year period since the joint rates were cancelled no shipper or any representative of the public has filed with the Commission or any of the state commissions any complaint, request or demand for the through routes and joint rates sought by the Rio Grande. In other words, there has been a complete absence of any manifestation of shipper or public interest in the objective sought by the Rio Grande to divert traffic to its longer, slower

and more onerous route from the shorter, faster and direct route of the Union Pacific and connecting lines over which the traffic moves (V. I, 766-784; V. II, 913-999; 1181-1199; 1318-1331).

Realizing that it had no legal right to demand that the Union Pacific and other railroads join in through routes and joint rates via its line, and that such routes and joint rates could be compelled only upon a showing that they are "in the public interest", the Rio Grande contrived to gain its objective by pleading public interest in its complaint and by soliciting and procuring testimony of shipper and other public witnesses so as to help it win its case.

After thus intermingling and confusing its financial objective with rights of shippers and the public, the Rio Grande planned and executed a most vigorous and vicious campaign in an effort to stimulate and create an interest in its undertaking among shippers and the general public, particularly in communities and areas served by the Union Pacific in the northwest in Idaho, Montana, Oregon and Washington, at some points almost 1,000 miles from any area served by the Rio Grande. This campaign was publicly launched immediately upon the filing of its complaint on August 1, 1949, and the fact that it was conducted for the purpose indicated is admitted by the President of the Rio Grande, by its counsel, and by stipulation in the record (V. I, 48, 61; V. II, 964). The fact thus admitted was also shown by the testimony of numerous shippers, state commissions and others who were solicited by the Rio Grande to testify for it as public witnesses or not to testify against it.

In its campaign of agitation and solicitation to obtain witnesses so as to prosecute its complaint under the

guise and pretense of a public interest, the Rio Grande's representatives publicly condemned and vilified the Union Pacific, sought to persuade shippers and the public that they were suffering from "discriminatory freight rates of the Union Pacific," charged that shippers located on the Union Pacific were deprived of their right to select routes of their own choice, were denied access to markets, denied the use of transit privileges, denied a full supply of cars, and asserted that shippers would receive much better service from the Union Pacific if they would join with the Rio Grande pretending a public interest and testifying in such a way as to help it win its case. The Rio Grande charged the Union Pacific with a transportation "monopoly" in the northwest area despite the fact that a half dozen other railroads serve that territory and despite the fact that the Rio Grande did not and does not propose to perform any transportation service beyond the termini of its own present lines (original I. C. C. Ex. 30).

Finding itself unable to sustain the Rio Grande's case (R. 72, 33), the Commission turned to the testimony of shippers so solicited, procured and produced as witnesses by the Rio Grande in support of its complaint. The Commission's ultimate findings, conclusions and order are based entirely upon that testimony. Upon that testimony the Commission based its findings and conclusions that the through routes and joint rates required by the order are "necessary and desirable in the public interest, in order to provide adequate and economic transportation", as well as its findings that the combination rates via the Rio Grande are unduly prejudicial to shippers desiring to use the Rio Grande for the through traffic involved and unduly preferential of those same shippers when they route their traffic over the Union Pacific.

The Union Pacific contended before the Commission and the district court that testimony so procured by the Rio Grande *in its efforts* to prosecute its case under the guise of public interest, could legally be given no weight or probative effect, and that the Rio Grande's action and activities in soliciting, persuading and procuring witnesses to testify for it so as to help it win its case vitiated and nullified the proceeding, and called for dismissal of the complaint.

The Commission disposed of the contention by saying merely that both the Rio Grande and the Union Pacific sought to interest the public in their respective sides of the controversy and that there was no indication in the record that the witnesses admittedly persuaded and procured by the Rio Grande "had been stimulated in any questionable manner.". The Commission seemed to think that the admitted solicitation and procurement of witnesses by the Rio Grande to help it win its case in the belief gained from the Rio Grande that they, too, would profit if the joint and collusive effort succeeded, is not "questionable" and does not destroy or detract from the weight, credibility or legal effect of that testimony. The majority of the district court merely said "[w]e do not find justification for serious consideration of that question" (R. 48, 165).

The courts of this country and the statutes of the land, and even the common law, have long since condemned and refused to tolerate the procurement of witnesses by a party to testify in such a way as to help him maintain and win his case. Even attempts to do so by any method are not only "improper" but also contrary to law. There is no "proper" method by which witnesses may be persuaded and procured to testify in such a way as to

help a party maintain and win his suit. The fact that the witnesses were "procured" is the vitiating circumstance. Such activities have been held to require courts to dismiss proceedings and refuse to become organs of perversion of justice, and that it is the duty of our tribunals to resist and strike down collusive and conniving contrivances in litigation, by refusing to lend their functions in such situations.

This intolerance of "procured" witnesses and proceedings in which such "procured" testimony is attempted to be used, has its basis in the ancient common law and more modern statutory law against champerty and maintenance.

Champerty and maintenance are defined in the Restatement of the Law of Contracts (Section 540(1) and (2)), as follows:

> "'Maintenance' means the maintaining, supporting or promoting of litigation of another person.
>
> "'Champerty' is the division of the proceeds of litigation between the owner of the litigated claim and a party supporting or enforcing the litigation."

In *United States v. Call*, 287 Fed. 520, the 5th Circuit Court of Appeals, page 521, says:

> "Champerty is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it."

The following definitions are found in *Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 85 S. W. 930 (Mo.):

> "Maintenance is one of the old actions at common law, the right of which exists to this day. Brad-

laugh v. Newdegate, 11 Q. B. Div. 1. It is defined as an 'officious intermeddling in a suit that no way belongs to one, by assisting either party, with money or otherwise, to prosecute or defend.' And it is said to be an offense against good morals, in that it keeps alive strife, and perverts the remedial powers of the law into an engine of oppression.' 5 Am. & Eng. Ency. of Law (2d Ed.) 815. The offense may be committed by stepping in after litigation has been begun, as by encouraging and aiding its origin. Bradlaugh v. Newdegate, 11 Q. B. Div. 9. Champerty is generally treated by text-writers in connection with maintenance, and it also is one of the old common-law actions which yet subsist. Duke v. Harper, 66 No. 51, 37 Am. Rep. 314. These old actions, though akin, are unlike in many particulars. The champertor has in view a profit to himself, in a share of the spoils of the litigation. The maintainer is more of a voluntary intermeddler, and stirrer up of strife for the love of it. He is described as an 'officious' intermeddler. In other words, he interferes where he has no business."

In *Casserleigh v. Wood*, 119 F. 308 (8th C. C. A.), the Court dismissed a suit in which both parties expected to profit by evidence "procured" by plaintiff to help win the case. The Court said the arrangement to procure witnesses was "opposed to public policy," and that (p. 315):

> "We are also of opinion that, even if an action at law could be maintained for a breach of the contract, yet it is so far meretricious and tainted with illegality that a court of equity ought not to enforce it specifically."

It is enough if the understanding "savored of the character of champerty," *Jamison Coal & Coke Co. v. Goltra*, 143 F. 2d 889, 895; and the courts will raise the question *sua sponte* when grounds to do so appear.

Curry v. Dahlberg, 110 S. W. 2d 742 (Sup. Ct. Mo.); *Barker v. Barker*, 14 Wis. 142; *Miles v. Mutual Reserve Fund Life Ass'n*, 84 N. W. 159, 164 (Sup. Ct. Wis.), holding that when a court discovers that a suit on trial before it is "tainted with champerty, a failure to refuse to proceed therein in effect makes such a court a party to the illegal transaction," and that a court should not "permit itself to become the organ or instrument of carrying out the champertous agreement, but it should repel the plaintiff and his suit."[29]

We appreciate that the Commission is not a court. It has been called a "quasi-judicial" tribunal in some of

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29 *Quirk v. Muller* (14 Mont. 471), 36 Pac. 1077 (Supreme Court of Montana, 1894), appears to be one of the leading cases on the offense of procuring and suborning witnesses. At page 1078 the Supreme Court of Montana held:

"Indeed, the contract, brought down to a simple statement, is that plaintiff agreed, for a consideration to procure testimony that would win the lawsuit. He procured the testimony, and it won the suit. We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury; but the contract had the tendency and opened the very strong temptation to the procurement of perjury. Mr. Bishop says: 'The mere tendency of a contract to promote unlawful acts renders it illegal, as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts.' Bish. Cont. § 476."

Citing several cases, the Montana Supreme Court said at page 1080:

"We fully concur in the views expressed in these cases, and we are of opinion that the contract under consideration falls within the objectionable class. To be sure, under the contract the plaintiff, Quirk, may have performed only innocent acts, and there is nothing to indicate that both his intentions in making the contract and his acts in carrying it out were other than wholly innocent and lawful. But the contract was just such a one as to encourage an unlawful act. It invited subornation of perjury. It held out a large reward for success. * * * There is here too close an approach of the evil maxim, sometimes quoted: 'Get money; honestly, if you can; but get money.' The contractor in plaintiff's position could only too easily be led to say to his conscience: 'I will procure the necessary testimony; honestly, if I can; but I will procure the testimony.'"

its functions. It was none the less its duty under the law to hold that testimony so "procured" is without credibility or probative force, that the Rio Grande's deliberate procurement of the testimony vitiated and nullified the proceeding, and to demonstrate, by dismissing the complaint that the Commission will not, as said in *Miles v. Mutual Reserve Fund Life Ass'n*, 84 N. W. 159, 164, "permit itself to become the organ or instrument of carrying out" schemes and efforts to wrest a favorable decision from it, regardless of the lack of merit in the Rio Grande's own cause.

In a basically comparable situation, the Florida Railroad and Public Utilities Commission, on June 30, 1955, dismissed a proceeding[30] brought as the result of agitation, connivance and collusion between several parties with a view to profiting from refunds of electric rates they expected to prove had been excessive. In condemning as "champertous," the collusive activities which led to the filing of the complaint, the Florida Commission said:

> "Another feature of a champertous contract that is boldly evident in this case and one of the features condemned by law is that in which a person, for his own selfish gain, and a stranger to the subject matter, stirs up strife and litigation by bringing a proceeding which a party in interest might not do if left to his own judgment and not induced by the fact that the litigation would be carried on at the expense of another for what he may acquire from the action maintained.
>
> * * * * *
>
> "It is not difficult to stir up and foment rate dissatisfaction when the intermeddler agrees to pay all costs incurred in bringing about a rate investigation on

30 "Order No. 2200, Docket No. 4046-EU, In Re: Complaint of various subscribers against Florida Power & Light Company seeking a reduction in electric rates and charges."

the promise that he will receive nothing more than a portion of any rebate or saving that may be obtained. If this scheme of developing rate investigations is recognized and encouraged, there will be no end to the investigations this commission will be called upon to conduct in order that such intermeddlers may remain in business."

2. **The Commission's conclusion, on which the order rests that the required through routes and joint rates "are necesary and desirable in the public interest, in order to provide adequate and more economic transportation" is based on (a) solicited and procured testimony that legally has no probative value, (b) is contrary to the overwhelming preponderance of the evidence, and (c) is the result of the Commission's arbitrary and biased treatment of the evidence.**

While this Court has held that "the credibility of witnesses", and "conflicts in the testimony", are for the Commission, it has laid down the rule that "the legal effect of evidence is a question of law" and that an order of the Commission is void if "contrary to the 'indisputable character of the evidence'," *Int. Comm. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91-92. The Court has held that whether an order is supported by "substantial" evidence is also a question of law; that "substantiality of evidence must take into account whatever in the record fairly detracts from its weight"; that an administrative tribunal's order must be set aside unless "justified by a fair estimate of the worth of the testimony of witnesses", and that, in resolving these questions, the courts must "consider the whole record" and determine whether the evidence is substantial "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed" to the administrative tribunal's decision. *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 488-490.

(a) The "indisputable character" of the testimony on which the order is based.

As shown above, the Commission expressly stated that any order requiring through routes and joint rates in this case "must be grounded upon findings, as specified in Section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation", but that such findings would not be "determinative" unless Union Pacific routes could be found not to provide "adequate" transportation (R. 69).

The Commission found that for the commodities named in the order, through routes and joint rates in connection with the Rio Grande are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (R. 73). Although not conforming to the standards and criteria expressly invoked by the Commission, as we have already demonstrated, the finding made is the legal basis on which the Commission says it pivots the order. The order thus purportedly rests upon the finding of "public interest", necessity and desirability for adequate and more economic transportation. Therefore, unless that finding is supported by substantial evidence, the order can not be sustained.

The only tesimony mentioned by the Commission in attempting to support its order, and, in fact, the only "public" testimony of record that purported to advocate even the desirability of the through routes and joint rates ordered by the Commission, is that, discussed above, of some 50 shipper or "public" witnesses whose testimony the Rio Grande admitted it solicited and procured to be submitted so as to help it win its case.

Upon authorities cited above, we submit that the "indisputable character" of solicited and procured testimony as such, as a matter of law, as to deprive it of any credibility or probative force, and that, in basing its order upon that testimony the Commission has not only failed and refused to consider and give effect to the "indisputable character" of that testimony, but also to consider "whatever in the record fairly detracts from [the] weight" of such testimony, and failed to fairly estimate "the worth of the testimony of witnesses" solicited and procured by the Rio Grande to help it win its case.

In these circumstances, without more, the order is void because it lacks support not merely of "substantial" evidence, but of any evidence that could legally have any weight, credibility or probative force.

But even if the testimony on which the order rests had not been solicited and procured by the Rio Grande, it is so lacking in substance and probative force that it does not begin to establish the criteria of Section 15(4)(b) which the Commission invoked as the legal basis of the order. In the first place, the Commission frankly and correctly concedes that:

> "There is no contention here by complainant [Rio Grande] that the present routes of the defendants are not adequate for the traffic hauled, and no finding is sought by complainant to that effect." (R. 69)

Undaunted by that fact, and still pursuing its ancient determination to evade completely or limit "the impact of the short-hauling restriction on its power to establish through routes", *Thompson v. United States*, 343 U. S. 549, 555, the Commission embraced the testimony of the Rio Grande's solicited and procured shipper witnesses and said that the testimony of those shippers "does *raise a*

question as to the need for *more* adequate and economic service than afforded by existing routes with respect to some commodities" (R. 69; Italics added).

Before discussing the testimony of those witnesses, we observe that all of them testified for the Rio Grande concerning their desires for *all possible routes* at *equal rates* without any routing restrictions whatever, for fresh fruits and vegetables, ordinary livestock, wheat, dried beans, lumber and forest products, commodities for cold storage, farm implements, monuments and steel for fabrication. Those witnesses were located in Kansas, Colorado, Utah, Idaho and Oregon, and they ship, receive or "handle" an estimated volume of about 28,000 carloads annually of the commodities just named.

However, the through routes and joint rates required by the order are limited to—

> "* * * granite and marble monuments [in carloads] *from origins* in Vermont and Georgia to *destinations in the* * * * *northwest area* * * * and * * * ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, *from origins* in the described excluded territory [*northwest area*] to destinations in the United States [in the] south and east * * *." (Italics added). (V. II, 1595)

Thus, the order is clearly designed for the benefit of shippers in and from the "originating" area in Utah north of Ogden and Idaho, Montana, Oregon and Washington (which the Commission's report refers to as the "excluded territory", the "originating area" and "the northwest area or territory") (R. 26, 70, 71).

Although the report discusses at length and in detail the situations of numerous witnesses located outside

the "originating" or "northwest area" in Utah south of Ogden and in Colorado and Kansas, the order does not include them, hence, search for evidential support, if any, for the order must be confined to testimony of Rio Grande shipper witnesses located in the "originating" or northwest area described above, and who ship commodities on which the order requires through routes and joint rates. Only 15 such shippers are located in the northwest area, of whom 12 are shippers of fresh fruits and vegetables *from origins* in the northwest area, 2 are shippers of livestock and 1 is a receiver of monuments. The estimated volume of their traffic is about 10,000 carloads. All of those shippers are located exclusively on the shorter, faster Union Pacific routes and they enjoy the lower joint rates and full transit privileges of those routes. Thus, the order rests upon the testimony of 15 of the Rio Grande's solicited and procured witnesses who handle about 10,000 carloads annually of the articles on which the order requires through routes and joint rates in connection with the Rio Grande's longer, slower and more onerous route.

But not one of the Rio Grande's shipper witnesses testified that present services of Union Pacific routes are "inadequate" for the traffic hauled. Indeed, their testimony was not concerned with the adequacy, efficiency or economy of Union Pacific routes, but with the fact that they must pay higher rates if they ship via the Rio Grande than when they ship via Union Pacific routes which they now use, and with their *desire* for removal of *all* routing restrictions which protect carriers' right to their long hauls, "a right guaranteed by Section 15(4)". *Thompson v. United States*, *supra*, 559.

Reference to the testimony of a few of the Rio Grande's shipper witnesses will serve to illustrate and

demonstrate the "indisputable character" of their testimony, the vague, untenable and irrelevant reasons given by them for desiring longer routes via the Rio Grande and the lack of credibility, probative force or merit in their testimony individually and collectively.

The Secretary of Agriculture, for example, who intervened in support of the Rio Grande in the proceeding before the Commission and as a defendant in the district court, is in complete disagreement with the Congressional policy, insofar as it relates to agricultural commodities, of affording carriers protection under Section 15(4) against short-hauling under compelled through routes. A witness for the Secretary testified that he was opposed to any routing restriction on any agricultural commodity regardless of any consequences that might be inflicted upon carriers that would be short hauled or upon their ability to render adequate and efficient service generally to shippers located on their lines (V. II, 1077). This disagreement with the Congressional legislative policy and his support of the Rio Grande in this case directly opposes the position and testimony of some 85 shippers and producers most of whom are in the northwest area who testified against the Rio Grande and who ship about 136,000 carloads of freight annually, of which nearly 50 per cent consists of agricultural commodities and livestock. The testimony for the Secretary also contradicts testimony of witnesses for the public service commissions of Montana, Washington, Oregon, Wyoming and Nebraska who also oppose the Rio Grande's complaint. In supporting the Rio Grande's complaint, the Secretary disregards and stands in opposition to the overwhelming majority of shippers and public representatives in the northwest.

A. G. Stanger, of Idaho Falls, Idaho, *served only* by Union Pacific, ships potatoes, onions and turkeys to the Southwest, Middlewest and East. He believes shippers owning their products should have the right "to route them as we see fit" and that this is in keeping with the principle which "has founded and helped to build this country by free enterprise." He wants "flexible" diversion or reconsigning privileges *on various routes to "try" markets* and failing to sell at one, then move on to other points at joint through rates. He says "competition is the life blood of American business" (V. I, 254, 253, 256).

This witness finally stated his real reason for supporting the Rio Grande.

> "If the Union Pacific or the carriers fail to give us cars with which to move this produce then, *as retaliation, or to help to put the Union Pacific on their toes*, we can take the freight away from them and ship it over the D&RG, which at the present time we cannot under circumstances unless we are penalized" (by the combination rates via D&RG). (V. I, 257; Italics added.)[31]

He thinks the sought routes and rates via the Rio Grande might induce the Union Pacific to "help develop" the Idaho territory, apparently for the purpose of creating more traffic to be diverted to the Rio Grande.

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31 During periods of "peak" traffic when there are not enough cars to supply all shippers with all cars they order, the Union Pacific distributes without preference or discrimination the available cars proportionately among shippers based upon each shipper's past need for and ability to load cars, a method approved and required by the Interstate Commerce Commission. Obviously, this witness had been misled to believe that the Union Pacific would or could furnish more than his equitable proportion of cars merely upon his threatened "retaliation" to route his traffic away from the Union Pacific to the Rio Grande.

Union Pacific built lines in Idaho about 1880 when there was nothing to haul and the total population of the Idaho territory was only 32,000, and many shipper witnesses highly commended Union Pacific for its cooperative part in developing Idaho and contributing to its improvement and economic welfare (V. I, 260, 261).

Witness Bass, another Idaho potato shipper, supports the Rio Grande because he says he cannot sell in certain markets "with safety", that he is "very much in favor of free enterprise" and thinks closed gateways restrict our freedom." His company did not decide they wanted routes with equal rates via the Rio Grande until after they heard the propaganda and promises of Rio Grande's representatives, and it is certain from his testimony that neither his Company nor Idaho produce shippers generally have suffered for the lack of through routes and joint rates via Ogden and the Rio Grande, since Idaho ships to all markets in the 48 states, and exports to Canada, South Pacific, South America, Cuba, South Africa and other points (V. I, 243, 244, 246).

Witness Davis, Idaho Falls Chamber of Commerce, testified (V. I, 225) that he wanted all gateways open "that restrict the economy of eastern Idaho", but he did not explain in what manner, if any, the economy of Eastern Idaho is restricted by the present lack of longer routes via Ogden with the Rio Grande or how it would be improved by taking millions of dollars in revenues from the Union Pacific, and passing those millions to the Rio Grande.

L. E. Stephens, potato shipper and dealer in grain and feed, whose potato markets cover the entire United States with the exception of Maine" (V. I, 247), supports

the Rio Grande, but has never shipped to any market on the Rio Grande except Denver (V. I, 247), which is also served by a shorter line of the Union Pacific. He claims he has suffered at times from lack of cars (V. I, 248), but witness Hanson shows that Stephens misstated his car supply situation, and, in fact, along with other Idaho potato shippers, inflated or overstated the number of cars they could load during car shortages, a trick or subterfuge among shippers, well known to railroad officials and to the Commission itself (V. I, 650). Stephens said there are certain markets which are "closed" and "a shipper is not too familiar with the tariffs, and will get into a market of this type unknowingly and then will be unable to get out." He could not name any such market except Wichita, Kansas (V. I, 249), but witness Stilling demonstrated that Stephens was in error with respect to Wichita being a "closed market," and, in fact, that the alleged "pocket market" situations mentioned by some of the witnesses "does not actually exist" (V. I, 851), and the Commission's report shows (R. 57) that the shipments could have been reconsigned from Wichita to destinations in the southwest at joint rates. Stephens did not explain how he expected his alleged car shortages to be relieved if the Rio Grande obtained the routes and rates sought in this case, nor could he make such explanation because the Rio Grande does not propose to transport anything to or from points north of Ogden or to extend its transportation services in any way. The implication is that with the same rates via the Rio Grande, he could and would follow witness Stanger's purpose to route against the Union Pacific in "retaliation" if the Union Pacific was unable to furnish him cars as and when he wanted them.

Witness Harris, a wheat farmer and dealer in implements and hardware at Rexburg and St. Anthony,

Idaho, thinks the Union Pacific has a "monopoly" upon the traffic of shippers which it serves exclusively, and believes that gateway problems "are barriers entered against our freedom of competition." He apparently was not speaking of the Ogden gateway but of "[t]he gateways in Kansas, in Nebraska and in Colorado." He was entirely unable to describe what restrictions, if any, he is under with the present rate situation and could give no specific illustration. He is located on the Union Pacific, has lower rates than the Rio Grande, and his inbound shipments of hardware and gasoline move direct to Idaho from Rock Island or Chicago, Illinois, or Salt Lake City, respectively (V. I, 233, 236).

Witness Higgins, a member of the Executive Committee, Idaho State Grange, made it quite clear that the members of the grange had not felt the need for the sought routes and rates via the Rio Grande until after its complaint was filed. Some of the resolutions from the local granges stated that opening the Ogden gateway might "possibly open up new markets and create better facilities for handling the produce" but "they never specified any particular markets"; they thought "they would possibly have better service" but "they didn't state in the resolution why they thought they would have better service" (V. I, 265). Higgins said opening the Ogden gateway *might* give Idaho shippers competitive rates to new markets and that "competition, in my estimation, does a lot of things, and I thought possibly it would help to eliminate the shortage of cars and give us better servige than we had previously" (V. I, 267).

Witness Adams, a "buying agent for jobbers throughout the country" including the buying and shipping of

potatoes, supports the Rio Grande in order "to bring about a competitive effort", and he thinks the opening of the Ogden gateway would eliminate considerable "discrimination" in times of car shortage because "*it would be used as a competitive weapon or a weapon in competition*" (V. I, 475-476).

Despite the fact that Idaho producers ship to markets in all 48 states and 5 or more foreign countries (V. I, 246), witness W. B. Long, produce shipper at Twin Falls, Idaho, said "I am not just here in the belief that they should open the Ogden gateway. *I think all gateways should be opened*, so that perishables may move when and where you want to move them" (V. I, 478) (Italics added).

Witness Titus, Executive Vice President, Western Forest Industry Association, Portland, Oregon, testified that his Association supports the Rio Grande because it is "necessary to carry out the national transportation policy," although his Association was interested in only two or three items of forest products (V. I, 214). Asked what need there was for the routes and joint rates via the Rio Grande and Union Pacific and what use of them would be made by shippers in his Association, and he answered: "No, I don't think anyone knows, until the situation is such that it could be utilized, no one is going to develop the territory." He further said "our shippers like to be free to ship in all directions, and over all lines." He did not know whether any members of his Association were interested in routes via the Rio Grande or whether a single carload of lumber might move over such routes if established (V. I, 218).

Witness Miller, manager of a canning company at Milton, Oregon, testified that "we resent the discrimina-

tory practices that make us ship over certain routes" (V. I, 540), but that "the strongest argument" in favor of the Rio Grande's complaint in this case is that "it would give us another route in the event storm areas would develop along the Union Pacific" (V. I, 539), although he never knew the Union Pacific to be blocked by storms except once and then some of his shipments were rerouted via the Rio Grande at the same rates he had via Union Pacific (V. I, 540).

(Of course, such emergency use of all railroads is expressly provided for by the last sentence of Section 15(4) of the Act.)

Witness Lau, farmer and President Idaho Farm Bureau Federation, asked by his counsel why he favored "the opening of the Ogden gateway", said "[p]ersonally, it doesn't make any difference to me" (V. I, 554), but that his board of directors sent him to state its "stand" which was (V. I, 554).

> "* * * that by opening this gateway it will create competition which our people have always thought develops good business. They feel that if there is competition created, it is going to bring about better service, and they also feel that they should have the satisfaction themselves in where they ship their products, over what roads, without being penalized."

He did not say that Union Pacific routes are inadequate or inefficient, or that better service was expected from the Rio Grande's longer and "more onerous" route. He thinks he might benefit "indirectly" if the sought routes and rates were established (V. I, 559), but he "never even had thought of it up until that time" (V. I, 557), when he said there was a car shortage which the Rio Grande apparently refused to alleviate because it

wouldn't get the traffic. He said it would be detrimental to him and his Federation if diversion of traffic to the Rio Grande resulted in curtailment of Union Pacific's main line train service, an increase in its rates to offset loss of revenue from the diversion, less frequent switching and spotting of cars for loading and unloading, or payment of less taxes by Union Pacific to the state and counties of Idaho (V. I, 559).

Witness Batt, shipper of produce from Caldwell, Idaho, supports the Rio Grande because it is his "conviction" that "any obstacle, natural or artificial, which interrupts the free flow of those agricultural products does not serve the best interest of the community or the area in which I operate." His principal market is Chicago, then Kansas City and next St. Louis, with a substantial volume of shipments to New York, to all of which markets the Union Pacific, which originates the traffic at Caldwell, is the shortest, the direct and single-line route to the Missouri River. The bulk of his commodities are marketed east of the Missouri River and in the northern part of the country, mostly in the Chicago area. He thought that through routes and joint rates via the Rio Grande would reduce the activities of "an unscrupulous receiver" who refuses a car in order to get an unjust allowance for claimed but faked damage, and that he would not have testified if he had not thought that such unscrupulous practices would be reduced or partially eliminated. This desire for protection from unscrupulous dealers "is the principal reason that I am here, sir." He said that he had made the statement in defense of the Union Pacific in discussing this case that while competition can be beneficial "it can also be destructive" and that he was not testifying in this case to produce additional competition or routes (V. I, 421-424).

Witness Rosenblatt, whose business is warehousing and manufacturing iron and steel articles at Salt Lake City, which is served by Union Pacific lines to the east, north and south, was asked whether his company would benefit by the through routes and joint rates sought by the Rio Grande, and he answered (V. 1, 223):

> "Only to the extent that we would be in position to repay the D&RG and their urgent solicitation for our business as a reward for the very good service they give us for handling in and out cars at our plant."

The Commission's report states (R. 51, 70) that a "fabricator and wholesaler" of monuments at Brigham City, Utah, on *the Union Pacific*, 21 miles north of Ogden, has "a special need" for through routes and joint rates on granite and marble monuments from Georgia and Vermont to destinations in the northwest area and that the need is "urgent" to enable the Brigham City dealer to fabricate stone at that point and ship in less-than-carload quantities at carload rates to a retailer at Grand Junction on the Rio Grande and to stop to partly unload at intermediate points on the Rio Grande. On such fabricated stone the shipments would move from Vermont or Georgia to Brigham City and, under the Commission's order, would move in less-than-carload quantities, presumably at the balance of joint through rates, in a *backhaul* of 332 miles from Brigham City to Grand Junction.

The "fabricator and wholesaler" at Brigham City is witness Bott who stated that his entire business which he distributes to retailers in various states *would not exceed four carloads a year* (V. 1, 393) and the report shows that the business of the retailers is so small that they cannot deal in carload lots.

The report says the Brigham City dealer has "keen" competition with a like dealer at Salt Lake City. But,

since both of these dealers are located at points served by the Union Pacific they have identical rates and transit privileges. The Brigham City dealer testified that he has complete transit privileges on all shipments that move via Union Pacific to destinations on its line (V. I, 392) and as Salt Lake City is on the line of the Union Pacific, both the dealer at that point and the dealer at Brigham City may fabricate or transit stone and move it on into Idaho at equal joint rates to points on the Union Pacific. Since the joint rates do not apply via the Rio Grande, neither of these dealers can ship "bridge" traffic via that line at joint rates and transit privileges. As to the less-than-carload retailer located on the Rio Grande, his situation is simply that of less-than-carload shipments hauled at carload rates. It is not the duty of the Union Pacific or any other railroad to equalize a retailer with a wholesaler for this Court has held that, "[t]he law does not attempt to equalize fortune, opportunities or abilities", *Interstate Com. Comm. v. Diffenbaugh*, 222 U. S. 42, 46. If this were not the law, then every less-than-carload shipper would be entitled to rates and privileges that would equalize him with carload shippers.

The report states (R. 52) that "[a] substantial portion of this traffic has been lost to the trucks", but this fact is irrelevant to a finding of public "need", under Section 15(4) for an additional railroad route or inadequacy of existing routes. While the witness said that the monument business was going to trucks, he made it plain that from the railroads "we don't get the service that the truck people give us"; that his competitor trucks stone from the West Coast and from Wisconsin and Minnesota in "duplex trucks" and that he cannot compete with those conditions (V. I, 390). It is indisputable that the truck competitive conditions could

not be met or overcome by establishing an additional through route over the Rio Grande's 219 mile longer and more onerous line. Since the total business of this Brigham City wholesaler would not exceed four carloads per year and his retailers can handle only less-than-carloads, it is the height of frivolity for the Commission to assert that such testimony proves an "urgent" and "special" need for through routes and joint carload rates via the Rio Grande on this commodity, especially since nothing will be accomplished except to furnish distributor service by rail of less-than-carload lots at carload rates. Regardless of the desire of these dealers to increase their profits to that extent, the fact remains that the Brigham City dealer is at no disadvantage whatever compared to his alleged competitor at Salt Lake City and it results that there is no possible evidential basis for a finding of a public "need" for routes via the Rio Grande.[32] . . .

Witnesses for the Rio Grande brotherhoods and employees resorted to repeating what they had learned in its propaganda campaign. Witness Warner explained his presence by saying: "We are very much interested in a good old American principle, * * * free enterprise * * * "

32 Circuit Judge Johnsen properly evaluated this monument dealer's situation as follows (R. 174):

"I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of 'urgent need' (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country."

(V. II, 1306); and witness McDonald also for Rio Grande brotherhoods said "there is a principle involved here of free enterprise and competition" (V. II, 1313).

Witness Chipman, also testifying for the Rio Grande brotherhoods, hits at "monopoly" and "discrimination", the very words Rio Grande representatives used so freely and constantly in their campaign of accusation against the Union Pacific and agitation among shippers to obtain their support. Chipman thought if the "monopoly is dissolved" the Rio Grande's traffic solicitors could obtain enough Union Pacific business to make secure the employment of the Rio Grande employees for whom he was speaking (V. II, 1217).

When pressed for facts to support their desires or beliefs that they should have the same rates via the longer Rio Grande that they have via the shorter Union Pacific routes, the Rio Grande shipper witnesses resorted to irrelevant conclusions, generalities concerning economic welfare of their states and the country, and even the legal conclusion taught them by Rio Grande propaganda and persuasion that the Union Pacific holds a harmful "monopoly" over the transportation of communities located exclusively on its route and of commodities which originate or terminate on its line, or, in other words, that every railroad has a "monopoly" of transportation at points on its line unless those points are also served by another railroad. Those witnesses were unable to state facts to show how they were damaged or handicapped by having lower rates and shorter routes via the Union Pacific, or what necessity if any, there might be for through routes and equal rates via the longer, slower and more onerous Rio Grande route.

Indeed, such facts as they stated squarely contradict their pretense for a need of the Rio Grande route. For example, witness Bass, supporting the Rio Grande, testified that shipments of his producers organization move to markets in "the entire forty-eight states" and to Canada, South Pacific, South America, Cuba, Africa and other points (V. I, 246). The Commission's report ignores these undisputed facts and the legal effect of them. In the face of such facts it says (R. 70) that those shippers "are debarred from effective participation in the widespread system developed for the marketing of such commodities." Obviously ignoring the national and international distribution by Idaho producers, the Commission quite apparently rests its conclusion upon the witnesses' belief in "free enterprise" and their thought that "all gateways should be opened."

At least 15 of the Rio Grande shipper witnesses characterized their testimony by insisting upon abstract and general principles of "free enterprise," elimination of "monopoly," "freedom of competition," "free flow of goods," "free markets," routing traffic to the Rio Grande in "retaliation" against the Union Pacific, desirability of equal rates via the Rio Grande for use as "a competitive weapon or a weapon in competition" in periods of car shortages.

The testimony of all of the Rio Grande's shipper witnesses rests upon the basic proposition that Congress is and always has been wrong in affording carriers any protection against being compelled to join in through routes that short haul them.

Such testimony, in addition to the fact frankly admitted by Rio Grande that it was obtained by solicita-

tion and persuasion to help the Rio Grande win its case, obviously is without "rational probative force," and is not "such relevant evidence as a reasonable mind might accept to support a conclusion," *Edison Co. v. Labor Board*, 305 U. S. 197, 229, 230, that there is public necessity or need for shippers to have equal rates via the Rio Grande's longer line to provide adequate and more economic transportation than the same shippers have via the shorter and faster Union Pacific.

The term "public interest" has "direct relation to adequacy of transportation service to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities," *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, 25, but the testimony of the Rio Grande's solicited and procured shipper witnesses clearly is devoid of any such relation. The vague and irrelevant reasons given by the witnesses for the longer, slower and "more onerous" Rio Grande route are squarely contrary to the "primary aim" of the Congressional "policy to secure the avoidance of waste," which, "as well as the maintenance of service, is viewed as a direct concern of the public," *Texas v. United States*, 292 U. S. 522, 530.

To require through routes and joint rates that short-haul existing routes upon such evidence; as the Commission does in this case, is to ignore the Congressional concern with the "preservation of the earning capacity, and conservation of the financial resources of individual carriers" that will lose the traffic and revenues for the benefit of the Rio Grande. *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277.

Examination of "the whole record" will compel the decision that the Commission's order is not "justified

by a fair estimate of the worth of the testimony," and that the Commission has failed completely to take into account the circumstances, recited above, that detract from and destroy the weight of the Rio Grande's shipper testimony on which the order rests, *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 482, 488.

(b) The Commission arbitrarily ignored, distorted and gave no weight to the overwhelming preponderance of evidence against the Rio Grande.

Against the testimony of the witnesses supporting the Rio Grande, 120 shipper and public witnesses testified in opposition to the Rio Grande's complaint, of whom 85 are shippers who ship and receive approximately 136,000 carloads of traffic annually. Some 70 of these witnesses ship or receive a total of about 65,000 carloads annually of the commodities on which the Commission's order requires through routes and joint rates in connection with the Rio Grande from the northwest area.

Their evidence established the undisputed fact (not disclosed in the Commission's report) that since 1906 and 1912 when through routes and joint rates between the Oregon Short Line Railroad Company with the Rio Grande via Ogden were cancelled, there have been no complaints or demands by shippers to state commissions or the Interstate Commerce Commission or the railroads for establishment of such through routes and joint rates. This is shown by undisputed testimony of the state commissions of Montana, Washington, Oregon, Wyoming, and Nebraska (V. II, 988, 915, 954, 1322, 1183).

The complete absence of shipper or public demand for the through routes and joint rates sought by the Rio Grande was ignored by the Commission, but it demon-

states not only that there was no public interest in the Rio Grande's proposal, but also that it was only by its propoganda campaign of agitation that the Rio Grande was able to inject into the case procured shipper testimony on which the Commission has based its order, after finding that the record did not justify any findings favorable to the Rio Grande upon its own testimony.

Since public interest is to be determined by weighing and appraising the interests, circumstances and activities of all of those for whom testimony was submitted, it is appropriate to point to the fact that the public service commissions of the States of Washington, Oregon, Montana, Wyoming, and Nebraska, which intervened in opposition to the Rio Grande's demands as shown in the report (R. 65), represent the interests of all citizens in those States and must be considered as having spoken in behalf of the entire population of those States, with the exception of those few individuals who were procured by and appeared in support of the Rio Grande. Attention is called to the fact that the total population of the intervening states opposing the Rio Grande was nearly 7,000,000 people as of 1940 and we think the Commission was extremely arbitrary in refusing to give effect to the interventions and testimony of those States as expressing the interests, needs and desires of this great number of people. The interests of many of them were voiced again through commercial or other organizations of which they are members and many others personally testified with respect to their own individual interests.

Of the shipper and public witnesses who testified in opposition to the Rio Grande—[33]

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33 Several of these witnesses were shippers of two or three commodities, which accounts for an apparent larger number who testified about particular commodities, than the total number who testified against the Rio Grande.

—33 testified on behalf of state public service commissions, chambers of commerce, farm organizations, labor unions and various civic or commercial groups.
—29 were shippers of livestock.
—37 were shippers of fruits and vegetables.
— 6 were grain shippers.
— 9 were lumber shippers.
— 3 were seed shippers.
— 4 were shippers of farm machinery and supplies.
— 7 were shippers of products of mines.
— 1 was a shipper of building materials.
—30 were shippers of miscellaneous articles, such as paper products, beer, honey, aircraft parts, wool, general merchandise, groceries, contractors' supplies, etc.

Shippers opposing the Rio Grande ship and receive from and to the northwest area about 136,000 carloads annually of the same commodities shipped by witnesses supporting the Rio Grande, and all of them ship to and from the same general markets and areas.

The evidence submitted by the shipper and public witnesses opposing the Rio Grande established the following facts (V. II, 913-1068; 1082-1126; 1181-1203; 1281-1293; 1318-1515):

(1) Transportation facilities, service and routes of the Union Pacific are entirely adequate and satisfactory.

(2) Through routes and joint rates sought by the Rio Grande have never been needed or requested and are not necessary now or for any time in the foreseeable future, and would not be used by shippers now using the Union Pacific because the Rio Grande's routes would be longer, delaying their shipments in transit, and would require additional interchanges between carriers contributing to loss and damage to their commodities.

(3) If the Rio Grande should take any appreciable volume of traffic and revenues from the Union Pacific, the result would be retrenchments by the Union Pacific to save operating expenses, curtailment of train service to shippers and abandonment of branch lines, and these results would seriously and injuriously affect the business activities of shippers and the welfare of the general public along its line.

(4) The Union Pacific has co-operated and aided in the building and development of the communities it serves, has built branch and feeder lines to develop many areas for the purpose of retaining its full main line haul of such traffic and it would be unjust at this late day to permit the Rio Grande, without contributing any facilities or service in the northwest, to divert any of such traffic away from the Union Pacific.

(5) The Union Pacific contributes greatly to the economic welfare of the communities served by it in investments in those communities, employment of large numbers of people, payment of large amounts of taxes that go to the maintenance of schools and all other public institutions in those States and communities.

(6) Anything that prejudices or injures the Union Pacific is detrimental and injurious to individual shippers served by it and to the general economic welfare and public interests of those communities.

(7) While they will continue using the Union Pacific for traffic over which they control the routing, most of them ship and receive perhaps the bulk of their traffic over which control of routing is in the hands of their customers in many distant parts of the country who might be persuaded by Rio Grande solicitors and those of its

connections to route the traffic via the Rio Grande without realizing the serious detriment that would result to the shippers and communities on the Union Pacific through the latter's loss of the traffic.

(8) It would be unjust and unreasonable for the Rio Grande and its shipper witnesses seeking only financial gain for their individual selfish reasons with no proposal to contribute any public benefit as an offset to the Union Pacific or the shippers and citizens along its lines, to undermine and jeopardize transportation service of the witnesses supporting the Union Pacific who are fighting to retain good transportation service and to prevent any potential deterioration or curtailment of the service or in the ability of the Union Pacific to contribute to the communities in the form of future investment and developments and expansions in employment, in taxes to the States, counties and cities and to the general economic prosperity of the communities it serves.

(9) Rio Grande's livestock shipper witnesses misled the Commission to believe that they are at a competitive disadvantage because of their inability to buy and ship livestock out of Idaho and the Northwest for feeding or breeding in transit on the Rio Grande and southern Colorado at the same rates that apply when livestock from that area is shipped via and fed in transit on the Union Pacific. Those Rio Grande shippers have considerably lower rates with feeding in transit privileges on livestock from Colorado, New Mexico and the southwest than the rates applicable on cattle from that area for feeding on the Union Pacific, and because of the increasing demand for livestock on the Pacific Coast there is practically no available feeder stock supply in Idaho and the Northwest area for stock feeders on the Rio Grande and in southern Colorado.

(10) Stock feeders on the Union Pacific in Idaho, Wyoming and Nebraska buy livestock from the southwest and all other places where available regardless of through rates and transit privileges, and that privilege is not controlling. They pay combination of feeder rates inbound and fat cattle rates outbound on much of the livestock handled by them.

(11) Bean processors on the Rio Grande would gain an unduly preferential advantage over dealers located on the Union Pacific and the Burlington if the prayer of the Rio Grande is granted.

(12) No "pocket markets", as claimed by Rio Grande's witnesses to result from present routes and rates, have been discovered or encountered by these shipper witnesses south or east of Denver or elsewhere in shipping some 136,000 carloads annually of potatoes, onions, fruits and vegetables and others of the same products shipped by Rio Grande's shipper witnesses to the extent of about 28,000 carloads annually.

(13) There are no markets along the Rio Grande for Idaho vegetables and other perishables because those products are grown along that railroad.

(14) Union Pacific tariffs afford a "variety" of ample routes and transit privileges for fruits, vegetables and other products to markets throughout the United States and foreign countries, and in many years' experience shipping such products no need has ever been felt for routing them via the Rio Grande.

(15) Fruits and vegetables, and other perishable articles should move to markets as expeditiously as possible by the most direct route with the fewest interchanges

between carriers. The longer time in transit and the additional interchanges via the Rio Grande would result in deterioration or damage to such articles and loss to shippers and their customers.

(16) Even though through routes are made via the Rio Grande, shippers in Idaho and the northwest will still be dependent on the Union Pacific for refrigerator cars and other equipment, as the Rio Grande does not propose to serve them with its own tracks and facilities.

(17) Union Pacific service has been "highly satisfactory" from the standpoint of car supply, transit time, diversion orders, etc.

(18) Shippers located on the Union Pacific in Idaho and the northwest cannot expect Union Pacific to continue to spend money to give good service if, after it has furnished the cars and borne the expense of assembling the traffic, it is faced with the constant threat of diversion of a large part of the traffic from it to the Rio Grande.

(19) Prompt and dependable rail service is absolutely necessary to the shipping and marketing of the perishable commodities grown in Idaho. The Rio Grande cannot contribute to such service, but on the other hand, will have serious adverse effects upon it.

(20) Time is "of the essence" in handling, assembling and transporting perishable commodities to market, and the Rio Grande's longer route would delay rather than speed up the movement of the traffic.

(21) Shippers located on the Union Pacific in the northwest know from experience that present good serv-

ice of that line cannot be maintained if it is deprived of substantial traffic and revenues by diversion to the Rio Grande.

While in procuring shippers to support its case, the Rio Grande accused the Union Pacific of having a "monopoly" on the traffic which it originates and terminates at points on its line in the northwest area, the undisputed evidence of shippers and others clearly shows that the traffic sought by the Rio Grande in the northwest area is already supplied with abundant transportation service and routes. Moreover, it should be remembered in this connection that the Rio Grande does not propose to construct trackage or to add anything to transportation facilities in the northwest.

The northwest area is served not only by the Union Pacific, but also by the Great Northern, the Northern Pacific, the Milwaukee, the Southern Pacific, the Spokane, Portland and Seattle and numerous short lines of railroad. Transportation by water, coastwise, intercoastal, foreign and Columbia River barges, is available. In fact, the availability and use of water transportation for traffic to and from the northwest has given the shippers very low and depressed rail rates.

The adequacy and sufficiency of rail transportation for the traffic the Rio Grande seeks is admitted by the Commission where it says in its report (R. 62) the Union Pacific facilities are "adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future," and that the evidence shows the Union Pacific "has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line."

In addition to the several transcontinental railroads and short lines, the northwest area is, of course, supplied with the customary motor carrier transportation, both public and private. In Idaho alone, for example, there were 64,151 trucks and 32,607 trailers registered in 1949. These included private, commercial and common carrier vehicles (V. I, 779).

With respect to the adequacy of existing rail transportation facilities and service in that area and their present unused capacity, Witness W. F. Kirk, a Railroad Operations Consultant with more than 50 years of practical experience in railroad operations and in transportation work, including the position of Regional Director of the Railroads, in 24 states as Agent of the Commission and the Office of Defense Transportation during World War II (V. I, 891, 892), testified as follows:

> "Railroad service available to shippers in the States of Idaho, Montana, Oregon and Washington, served by the Milwaukee, Great Northern, Northern Pacific and Union Pacific which were operating with less than a capacity load during the war period, was uniformly good although, due to some local and brief interruptions, it was necessary infrequently to divert some traffic as between these four railroads. However, it was never necessary or logical to reroute any noticeable amount of traffic, either originating or terminating in the above-mentioned states to the D&RGW through the Salt Lake or Ogden gateway.
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> * * * * *
>
> "The four transcontinental railroads serving the states of Idaho, Montana, Oregon and Washington have maintained through freight schedules with connecting lines to and from the east, south and west for many years. These through schedules afford frequent and dependable service to their patrons in those states."

The record shows that some 50 witnesses who supported the Rio Grande ship and receive only about 28,000 carloads annually, and that 120 public and shipper witnesses, shipping 136,000 carloads of freight annually, testified against the Rio Grande.

While the Commission admits (R. 65) that "a large number" of shippers, representatives of state commissions and other organizations opposed the Rio Grande and testified as to the adequacy, efficiency and satisfactory character of service over Union Pacific routes, and that they never had any difficulty in reaching markets via those routes, nor felt any need for the Rio Grande route, the Commission minimizes and obscures this large volume of testimony and disposes of it by saying "[i]t is not practicable to deal with all of this evidence in detail" but that it has been "considered." Yet, it devotes 13 pages of its report (287 I. C. C. 634-647, R. 48-61) to a highly detailed statement and discussion of shipper testimony in support of the Rio Grande, emphasizing their particular individual situations and disclosing obvious solicitude for the desire of those shippers to enhance their profits through rate reductions via the Rio Grande regardless of injury resulting from short-hauling the Union Pacific. One who reads the report with knowledge of the testimony of record would be justified in concluding that the report was designedly written so as to leave the impression that the shipper and public testimony submitted in opposition to the Rio Grande was so lacking in substance, merit or credibility as to justify no place, space or discussion, and that only the Rio Grande's shipper testimony deserved full exposure and discussion in the report.

There is no reason why the testimony of the 120 witnesses who testified against the Rio Grande should not be

accepted at full face value equally as the Commission ha accepted the testimony of the 50 witnesses supporting th Rio Grande.

The tenuous, vague and speculative possible prospec tive use that the Rio Grande's procured witnesses woul make of joint rates via that line clearly resolves, at most into a simple desire for equal rates via an additional rout enabling them to divert their traffic from Union Pacifi routes in "retaliation", for some irrelevant, non-trans portation reason. The Commission, nevertheless, give such testimony full weight and credibility while it give no weight or effect to the testimony opposing the Ri Grande of shippers and receivers of 136,000 carloads an nually of the same kind and types of traffic handled b the Rio Grande's shipper witnesses, to and from the sam producing and marketing areas, whose testimony show beyond question that the shippers and receivers of tha far greater volume of traffic have experienced throughou the years none of the alleged handicaps claimed by Ri Grande's witnesses because of lack of joint rates via tha line with the Union Pacific to and from the northwest and that the absence of such joint rates has presented n obstacle or difficulty in the distribution of their com modities or in reaching adequate market areas freely.

The Commission's statement (R. 65) that the oppo sition of this large number of shipper witnesses arise from their fear of "assumed effects of the diversion fro the Union Pacific of the full amount, or a very large por tion, of the traffic estimated by the Rio Grande as the po tential traffic" that it seeks in this case is wholly er roneous and manifests a thoroughly unrealistic and dis torted conception of the facts and circumstances tha should have governed the Commission's decision in th case.

Many statements and findings in the report lead to a wholly erroneous and incorrect impression of the preponderance of the evidence of record. For example, the statement (R. 57) that "Idaho producers" of fruits and vegetables "find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City" obviously is intended to have readers of the report believe that *all* "Idaho producers" testified to that effect.

The facts are that about 12 "Idaho Producers" and shippers who testified for the Rio Grande ship and receive approximately 10,000 carloads annually of fruits and vegetables and their shipment go to all markets in the 48 states and to Canada, South Pacific, South America, Cuba, South Africa and other points (V. I, 246), and that the 37 "Idaho producers" and shippers of fruits and vegetables who opposed the Rio Grande ship and receive annually over 60,000 carloads of these products, and all of them stated that the lack of joint rates between the Union Pacific and the Rio Grande for this through traffic had never handicapped or interfered with free and wide distribution or effective participation in the markets for their fruits and vegetables.

The further and controlling facts are that 5 witnesses from the State Commissions of Montana, Oregon and Washington, some 37 shippers of fruits and vegetables and 29 shippers of livestock, most of whom were from the "originating" or northwest area, and numerous shippers of other commodities testified most emphatically that the lack of through routes and joint rates via the Rio Grande presented no handicap, obstruction to or disadvantage in their distribution to markets throughout the United States.

The report further is misleading and erroneous in making it appear that Rio Grande shipper testimony is not only of substance and unquestionable credibility but also that it is far more voluminous than it is in reality. For example, in speaking of livestock, the report refers to needs of "[a] number of producers in the northwest area," but it then shows that the Rio Grande witnesses from the northwest who testified about livestock were from a small locality in southeastern Idaho, and the record shows that there were not "a number" but *only two*. (V. I, 485, 507). Not one livestock witness from the vast northwest area except those two, testified for the Rio Grande. In fact, even with its propaganda campaign, the Rio Grande was able to procure only two shipper witnesses from Oregon, Washington and Montana. These were W. S. Miller, representing a canning factory at Milton, Oregon, who said that "the strongest argument" he has for the joint rates is that "it would give us another route in the event storm areas would develop along the Union Pacific" (V. I, 539), and R. E. Titus who actually was not a shipper but was an executive of a forest products association who stated that no one could tell whether the members of that association would use the Rio Grande's route, but that he favored the joint rates via that line because he thought such action "necessary to carry out the national transportation policy" (V. I, 214).

The implication in the report (R. 70) that there are substantial markets at points on the Rio Grande to be "tried" or for the actual sale of substantial quantities of carloads of any commodities, is contradicted by the very clear demonstration in the report (R. 50) that the "small dealers" along the Rio Grande are able to handle only less-than-carload quantities. It is further negatived by the fact that, excepting Denver, Salt Lake City, Provo

and Ogden, all of which are served by the Union Pacific, of the 52 stations or points on the main line of the Rio Grande between Ogden and Denver, according to the official 1940 census, four points had no population, one point had 1; 14 points had less than 50; 20 points had less than 100; 31 points had less than 500; 37 points had less than 1,000; 11 points had more than 2,000 and only 3 points had a population of more than 5,000. The record shows no "need" for joint rates to enable a car from Chicago, for example, to partly unload at Pueblo, Colorado Springs, Grand Junction or Price and further movement via the Rio Grande to the northwest area.

In its discussion of the amount of traffic that might be diverted to the Rio Grande, the Commission concludes as follows (R. 46):

> "Whatever the amount, it would be the result mainly of (a) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (b) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it."

This conclusion squarely contradicts and refutes the ultimate finding that the through routes and joint rates are "necessary or desirable in the public interest." Certainly if the routes and rates are not "necessary" or

"needed" to provide adequate and more efficient, or more economic transportation if shippers who have pretended such need must be induced by solicitation and persuasion to use the Rio Grande as a "bridge route" or to use transit privileges on that line in connection with bridge traffic. The statement that growth of traffic "over" that line in the 1934-1948 period indicates the interest of shippers and receivers on the Rio Grande in development of transit activities on that line refutes any "necessity" for the joint rates to increase "bridge" traffic via the Rio Grande, for the "growth of traffic" has taken place in the absence of the sought through routes and joint rates. The growth of "bridge" traffic over that line without the joint rates also demonstrates that the report is misleading and erroneous in placing the emphasis it does on the importance of transit activities on that line. Transit activities on that line is an obvious "smoke-screen" of the Rio Grande and its supporting shippers to disguise the Rio Grande's real purpose to enhance its financial position by diverting bridge traffic from the Union Pacific.

In view of the Commission's definite and positive assurance, indicated in the finding last quoted, that no traffic will be diverted to the Rio Grande unless it can succeed in soliciting, persuading and inducing shippers to use its line as a bridge route and for transit purposes, it necessarily follows that there is no actual, genuine or real "public interest" in having the through routes and joint rates established. If, as the Commission has found, a substantial amount of the traffic will not flow naturally to the Rio Grande because of recognition by shippers of "some actual necessity or some compelling reason" for using that line for the traffic involved, then the routes and the joint rates are not in the "public interest", *Jamestown, N. Y., C. of C. v. Jamestown W. & N. W. R. Co.*, 195 I. C. C. 289, 292.

Despite its efforts to minimize the amount of traffic that may be diverted to the Rio Grande, the validity of the Commission's order must depend on "need" for the routes and joint rates, which is the equivalent of a finding that the amount of such diversion will be "substantial", otherwise, the order is frivolous, capricious and unlawful.

3. The finding that the commodities specified in the order must be moved to market "over as many routes as possible" is contrary to the requirements of the Act, in conflict with other facts found in the report, and is contrary to the evidence.

The Commission, in an obvious effort to create a justifiable basis for ordering through routes and joint rates via the Rio Grande, asserts that the commodities specified in the order "must be moved to market with expedition and care, and over as many routes as possible" (R. 62). The first part of this assertion and its implications are wholly misleading. First, while shippers testified that expeditious movement of perishable articles was necessary, no shipper testified that those articles "must" move over "as many routes as possible," and there is no suggestion in the testimony that those commodities are not now moving "with expedition and care", and, second, that routing the traffic over the Rio Grande would retard rather than expedite its movement is positively shown by the correct finding (R. 62) in the report that:

> "Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services."

The implication that the traffic is not now moving with "care" and that routing via the Rio Grande would

contribute greater "care" in the movement of the traffic is an obvious distortion of the irrefutable fact that the additional interchanges between the Rio Grande and its connections would add to the probability of damage or injury to the shipments as would the greater distance over its "more onerous," mountain route, and, in addition, there is no evidence whatever to support such implication.

The further implication that an adequate number of routes are not available for flexible, orderly and wide distribution of the specified commodities is without evidential support and is in direct conflict with the correct statement in the report (R. 28) that the transcontinental rates on the specified commodities now applicable via Union Pacific routes and which the Rio Grande seeks to make applicable via its line "generally apply over all routes", although there are many exceptions, the Rio Grande being one such exception because all of the traffic originates and terminates on the Union Pacific routes, which are shorter and direct routes between the origins and destinations of the traffic, and because Section 15(4) of the Act gives the Union Pacific the right to haul the traffic as far as it can in the direction of its destination.

The Commission's assertion that the traffic must move "over as many routes as possible" is plainly contrary to applicable provisions of the Act. As noted earlier, Section 1(4) makes it the duty of common carriers "to establish reasonable through routes with other such carriers". This is far from a duty to establish "as many routes as possible." The requirement is only for establishment of "reasonable through routes" regardless of whether the traffic is of a "general perishable nature" or whether it is ordinary "dead" freight. "The law exacts only what is reasonable from such carriers." *Midland Valley R. R. v. Barkley*, 276 U. S. 482, 485.

No case has been found in which either the Commission or a court has construed the Act as requiring "as many routes as possible" for any traffic of any nature. On the other hand, the assertion that portable traffic must move over as many routes as possible is not only contrary to the plain language of the Act but is also contrary to the Commission's settled administrative interpretations. For example, in *New York Dock Ry. v. P. & O. R. R. Co.*, 32 I. C. C. 568, in dismissing a complaint of a railroad demanding joint rates to improve its financial condition, the Commission held at page 573:

> "The law does not require us to establish through routes and joint rates in all instances where carriers have neglected or refused to do so, but does empower us to do so in proper cases, with the manifest intent of giving effect to the general purposes of the act by securing reasonable facilities to the public. * * *"

At page 575, the Commission said:

> "* * * we can not view with favor an effort to require the establishment of such routes and rates merely to enable a carrier to wrest from its connections, or an agent to wrest from its principal, greater compensation."

In *Lehigh Portland Cement Co. v. Lehigh Valley R. Co.*, 38 I. C. C. 199, the Commission said at page 201:

> "The statute makes it the duty of common carriers subject to the act to establish through routes and just and reasonable rates applicable thereto. Where this duty has been fully met and discharged and there exists both such reasonable through routes and joint rates, and other routes by combination over which no joint through rates apply, the carriers in our opinion are not required to maintain a parity of rates over both such routes, but may properly maintain through joint rates over joint through routes that are somewhat less than the combination of locals used to make

the through rates applicable over the combination through routes, provided that neither rate, under all the facts and circumstances, is more than just and reasonable for the service performed."

In *Kansas City Hay Dealers Assn. v. C. G. W. R. R. Co.*, 49 I. C. C. 372, the Commission said at page 377:

"To compel the application of short-line rates over indirect and longer routes, merely as a means of providing a channel of doubtful benefit to comparatively few shippers, would lay an unnecessary expense upon the railroads against the interest of the public as a whole. When joint rates that are neither unreasonable nor unduly prejudicial are maintained over direct routes adequate response is made to the reasonable requirements of the public, and carriers should not be required to perform wasteful transportation by maintaining the same rates over indirect and more circuitous routes."

In the instant case the joint rates over existing through routes of the Union Pacific and its connections are "neither unreasonable nor unduly prejudicial." In fact, they are expressly found to be reasonable, and the direct routes over which they apply are found adequate to haul any foreseeable volume of traffic (R. 62). On the other hand, the combination rates via the indirect and longer Rio Grande routes are found both unreasonable and unduly prejudicial.

The Commission's assertion that articles specified in the order must move "over as many routes as possible," directly conflicts with the prohibition in Section 15(4) against compelling through routes that short-haul a carrier. In *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, the Court held at pages 276-277:

"The Act does not give the Commission authority to establish all the through routes it may

deem necessary or desirable in the public interest. The general language of paragraph (5) is limited by paragraph (4). The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long haul routes of carriers."

In the case just quoted, the Commission sought "to limit by construction the impact of the short-hauling restriction on its power to establish through routes", *Thompson v. United States*, 343 U. S. 549, 555. In the latter case, as in the instant case, escape from the prohibition against short hauling was sought by the Commission through the expedient of arbitrary factual conclusions as well as erroneous construction. Here, by mere arbitrary and unsupported assertion that the specified commodities must move "over as many routes as possible", the Commission would completely emasculate the short haul prohibition of Section 15(4), for "as many routes as possible" means, as we have said, that perishable articles and the marketing system for their distribution would require through routes at every point where the lines of two or more carriers connect. Such effort to evade or nullify the mandate against short-hauling a carrier is clearly contrary to the purpose of the mandate, and the order is arbitrary and void.

4. The finding that "the shippers in the originating area" of the specified commodities "are debarred from effective participation" in the system for marketing such commodities, is incorrect, capricious and contrary to the evidence.

The Commission's report states (R. 70):

"The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities."

By that statement the Commission would mislead readers of the report to believe that *all shippers* in the originating area testified to that effect. The facts are that *no shipper from that area made such statement*; that no shipper of butter, eggs, or dried beans from that area submitted any testimony; that only two livestock shippers and about 12 fruit and vegetable shippers from that area testified—*not* that they were "debarred from effective competition" but that (regardless of Section 15(4)) they desired all routing restrictions and "gateways" removed.

As noted earlier, 12 "Idaho producers" and shippers who testified for the Rio Grande ship and receive approximately 10,000 carloads annually of fruits and vegetables and their shipments go to all markets in the 48 states and to Canada, South Pacific, South America, Cuba, South Africa and other points (R. 60).

Thirty-seven "Idaho producers" and shippers of fruits and vegetables who testified against the Rio Grande ship and receive annually over 60,000 carloads of these products and all of them stated that the lack of joint rates between the Union Pacific and the Rio Grande had never handicapped or interfered with free and wide distribution or effective participation in the markets for their fruits and vegetables.

Fruits and vegetables constitute the great bulk of the traffic in the specified commodities from the orig-

mating area. Idaho potatoes are included in that traffic and they in turn make up most of the tonnage, approximating an average of some 40,000 carloads annually. All Idaho producers and shippers of potatoes and other vegetables are located in territory served exclusively by the Union Pacific and all of them have the choice of joint rates and transit privileges via the Union Pacific or combination rates with transit privileges via the Rio Grande. Thus, they have precisely equal opportunity for effective participation in the marketing of their products. As stated above, producers and shippers of some 60,000 carloads annually of these products testified definitely and positively, in opposing the Rio Grande's complaint, that the lack of through routes and joint rates via the Rio Grande did not interfere with flexible distribution and marketing of their products.

That the Idaho shippers of potatoes and other vegetables have not been handicapped in their distribution and marketing by the lack of through routes and joint rates via the Rio Grande and have no need for them in the future, has already been shown by many facts. Particular emphasis is given to this fact by shippers who opposed the Rio Grande and by data on pages 96 and 97 of the Commission's decision in *Idaho Public Utilities Comm. v. Alton R. Co.*, 251 I. C. C. 93. It is there shown that in 1939 Maine shipped 40,462 carloads of potatoes and Idaho, 34,522 carloads, but in markets "far more distant from Idaho than from Maine" the Idaho shippers sold very substantial quantities where Maine sold small or insignificant quantities. At page 96 the report states:

> "At Chicago, where in 1938 and 1939 the totals were 15,863 and 16,506, respectively, there were 5,323 carlot unloads of potatoes from Idaho in 1938 and 5,374 in 1939, and there was but 1 carlot unload of Maine potatoes in 1938 and none from that State in 1939."

The following table and comment at page 97 of that report further shows the freedom of movement and effective participation by Idaho producers in the markets:

"Carlot unloads of potatoes, year 1939

At	From Idaho	From Maine
Atlanta, Ga.	218	197
Detroit, Mich.	651	435
Indianapolis, Ind.	294	66
Louisville, Ky.	102	13
Nashville, Tenn.	279	4

"'For several years, the Idaho potato traffic has increased at most, if not all, of the principal markets. At several cities in the East, South and West, carlot unloads of onions from Idaho exceeded unloads from points in most other States."

Thus, the facts are that the Idaho producers have practically taken over markets throughout the United States for their principal products and are selling them even in several foreign countries. These facts clearly contradict instead of furnishing a basis for the Comsion's assertion that shippers in the originating area "are debarred from effective participation" in markets for their commodities. If participation by Idaho producers in all important markets throughout the United States and in several foreign countries is not "effective", it is necessarily due to something other than the lack of through routes via the Rio Grande for it is indisputable that the Idaho products now participate in those markets via the shorter and faster Union Pacific routes. Equal rates via the Rio Grande could not enable them to sell in any market in which they cannot now sell. If there were markets for their products at points on the Rio Grande, they have joint rates to all such points except those served by the Union Pacific and as to those points they have the single factor local rates of that direct line.

The only effect of the Commission's order would be to permit the Rio Grande to divert Idaho fruits and vegetables over its line as a "bridge route" instead of moving as they now do over the Union Pacific to the distant markets such as Chicago, Detroit, Indianapolis and others mentioned in the above table.

The Commission's assertion that shippers in the "originating area" are debarred from effective participation in the markets is plainly a contradiction of the facts of record and furnishes no support or basis for the order.

5. There is no evidence to justify or support the findings that combination rates via the Rio Grande are unjust and unreasonable and that joint rates now applicable via the Union Pacific are reasonable for application via the Rio Grande, and the latter finding is contrary to the evidence.

The Commission's report states (R. 73-74):

"That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes."

Before reaching its "Conclusions" (R. 73), the Commission said:

"The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points, embraced within the findings of unlawfulness herein made."

The Commission is justified in condemning rates as unreasonable or otherwise unlawful only upon substantial evidence. Nor may the Commission require carriers to establish rates until it has found upon such substantial evidence that such rates are reasonable. Not only must there be substantial evidence, but the Commission has the "duty of deciding in accordance with it," *Chicago Junction Case*, 264 U. S. 258, 265. In *Edison Co. v. Labor Board*, 305 U. S. 197, at page 229, this Court held:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The evidence must not only be substantial but of such nature as to enable the Commission "specifically to report the facts and give the reasons" on which it concludes that rates are reasonable or unreasonable, *Beaumont, S. L. & W. Ry. v. U. S.*, 282 U. S. 74, 86. A mere "general statement in the language of the statute" that rates are reasonable or unreasonable is not sufficient in the absence of substantial evidence from which the Commission can make findings of fact which support its ultimate conclusions, *Florida v. United States*, 282 U. S. 194, 213. The evidence must be such as to justify a statement of "[t]he precise grounds for the Commission's determination" and enable it to make "the basic or essential findings required to support the Commission's order," *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

The Commission's statement in this case that the combination rates via the Rio Grande are unreasonable and its statement that the joint rates via Union Pacific routes are reasonable for application via the longer Rio Grande route are invalid and void because they were not only made without substantial evidence, but *without any*

evidence upon which the Commission could determine whether the combination rates or the joint rates were reasonable or unreasonable. *The record is wholly devoid of such evidence.* This is made clear by the Commission itself where it points out that although the Rio Grande submitted a large number of rate comparisons these were limited to comparison of the revenues produced on various commodities by the combination rates compared to those produced by the joint rates and the revenue that would be produced by the joint rates if made applicable via the Rio Grande. The report correctly states (R. 67-68):

> "With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates."

There being no other evidence, it results that the Commission's assertion that the combination rates via the Rio Grande are unjust and unreasonable rests upon the mere fact that they are higher than the joint rates via the Union Pacific, and its assertion that the joint rates are reasonable for application via the Rio Grande rests not upon evidentiary facts concerning their reasonableness, but upon the mere fact that they are lower than the combination rates, that, although the joint rates are admitted by the Commission to be subnormal, depressed

rates resulting from competitive conditions; they are the "going" rates, that they have been established for many years and upon the Commission's erroneous assertion that no one claims the joint rates are below a minimum reasonable level. (For illustrations of the difference between the combination rates and the joint rates, see Appendix to the report (R. 86).)

Plainly, the Commission misconceived and overreached its authority. The combination of local rates may not be condemned as unreasonable merely because it is higher than joint through rates over the same route, and, *a fortiori*, where, as here, the combination rates and the joint rates are not on the same route but the routes of other and different carriers. "A through rate is ordinarily lower than the combination of the local rates," *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 771, footnote; and the "combination rate itself is ordinarily, if not always, higher than the joint through rates." *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 396. "Long hauls have generally been thought entitled to move at a rate less than the sum of the rates for local or short hauls between intermediate points," and this principle of rate-making has "become deeply embedded in the transportation system of the country, and have [has] been approved by the Interstate Commerce Commission, by the federal courts, this one included; and, so far as it has spoken on the subject, by Congress itself," *I. C. C. v. Inland Waterways Corp.*, 319 U. S. 671, 684-685.

Although the Commission finds the joint rates to be reasonable because they are the "going rates," the report does not even suggest any reason why the Commission thinks the combination rates are unreasonable. In fact, throughout the long report there is not a word of discussion concerning the reasonableness or unreason-

ableness of the combination rates or of any evidentiary facts with respect thereto. The subject is not touched upon until the ultimate "conclusion" is stated at the end of the report that the combination rates are unjust and unreasonable (R. 73). This general conclusion in the language of Section 1 of the Act is a complete nullity because the report refers to no basic or evidentiary facts to justify the conclusion, and the record, as we have said, is completely devoid of evidence from which such facts could be stated in the report or from which the conclusion could be drawn. *Florida v. United States*, 282 U. S. 194, 213-215. The mere statement of a conclusion that rates are "unreasonable" must be read in the light of the report as a whole, and is insufficient "unless supported by facts more particularly stated", *U. S. v. Chicago, M., St. P. & P. Ry. Co.*, 294 U. S. 499, 506.

In condemning the combination rates via the longer routes of the Rio Grande because they are higher than the joint rates via the Union Pacific's horter routes and in concluding that the joint rates are reasonable for application via the Rio Grande's longer routes because they are the "going rates," the Commission fails entirely to adjudicate the reasonableness of either of the rates. Even with its administrative "expertise" the Commission is no more capable, under the law, of looking at a rate of "X cents per 100 pounds" and, without more, determining whether the rate is reasonable or unduly prejudicial, than is a jury capable of looking at a defendant accused of crime and, without evidence, determining whether the accused is guilty.

While conceding that rate comparisons may be of some probative value under certain circumstances, for instance when upon adequate evidence one of the rates

has been found reasonable by the Commission, this Court had the following to say on the subject in *Louis. & Nash. R. R. v. United States*, 238 U. S. 1, at page 12:

> "The same is true of determining, by comparison, the reasonableness of freight charges. Until some standard is adopted they may prove nothing—even where the two hauls are over the same mileage. For the rate attacked may tend to show that the others are too low—while they in turn might be relied on to prove that the first is too high. Both may be unreasonably high, or too low because compelled by conditions over which the carrier had no control. Water competition, rail competition, and competition of markets enter so largely into the establishment of rates that mere distance is not necessarily a determining factor—indeed the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road."

The foregoing quotation is controlling of the situation under discussion because neither the combination rates nor the joint rates required by the order have been determined by the Commission to be reasonable except rates on livestock which it prescribed over 20 years ago. In fact, as shown in the Commission's report, page 654, most of the joint rates which the order would require for application via the Rio Grande are subnormal, depressed rates compelled by water and truck competition. Many of them are lower than rates which the Commission has found reasonable, and others have been specifically found by the Commission to be considereably less than "reasonable maximum" rates which the railroads normally would be entitled to charge. *Lettuce from Idaho, Montana, Nevada, and Oregon*, 229 I. C. C. 572, and *Fresh Green Vegetables from Idaho and Oregon*, 253 I. C. C. 143.

As stated in the report (R. 54), the rates on livestock were prescribed in 1931 by the Commission in *Livestock-Western District Rates*, 176 I. C. C. 1, a mileage scale of rates having been prescribed with rates predicated upon the shortest routes between origins and destinations, but the Commission expressly relieved the carriers from maintaining the rates over such short routes where to do so would result in short-hauling them within the meaning of Section 15(4) of the Act. In prescribing those rates the Commission said at page 83 of its report that livestock is a commodity which from its nature "can not sustain a rate level which will produce more than the cost of rendering the service plus a minimum of profit," and that the rates therein prescribed "will do no more than meet these minimum requirements." In other words, the livestock rates prescribed by the Commission were fixed at a subnormal, depressed level because livestock could not bear its "fair share of the transportation burden." Because of the longer distance via the Rio Grande, livestock rates under the Commission-prescribed mileage scale resulted in a rate 19 cents per 100 pounds more than the rate via the shorter route of the Union Pacific on livestock from the northwest area, as shown in its report in the case at bar. In addition, because of its "more onerous" operating conditions, the Commission, as shown in the report (R. 54) authorized the Rio Grande to add an "arbitrary" of 6 cents on livestock moving between points on the line of that railroad. As stated in the report (R. 55), the Union Pacific and other railroads expressed willingness to reduce the 19-cent differential via the Rio Grande to reflect the shorter mileage over that line resulting from its acquisition of a shorter route through the Dotsero cut-off. Despite all of this and without a scintilla of evidence on which to determine whether the livestock rates

it prescribed over 20 years ago have become unreasonable, the Commission's order would require a reduction of 19 cents per 100 pounds in the admittedly depressed, subnormal rates it prescribed on livestock, and a further reduction of 8½ cents discussed in the report on cattle from the northwest area moved via the Rio Grande for feeding or grazing in transit at points on that line or connecting lines east of Denver and Pueblo. A clearer example of arbitrary action by the Commission could hardly be imagined. "A finding without evidence is arbitrary and baseless," *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91.[34]

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34 Circuit Judge Johnsen correctly condemned the Commission's action with respect to livestock rates as follows:

"Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock; Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15(4) of the statute: In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations." (R. 177.)

Admittedly, there was no evidence on which the Commission could determine whether the combination rates were unreasonable, and the only evidence concerning reasonableness of the depressed subnormal joint rates compels a finding that they are less than minimum reasonable rates for application via the Rio Grande's longer route which the report admits to be "less favorably situated" (R. 62), inferior physically and beset by conditions which make its operations "more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein (R. 70)—facts which the Commission admits it has recognized for many years (R. 71) by granting the Rio Grande higher rates than those of other lines. But here, the Commission ignores all of these difficulties and says the combination rates via the "onerous" Rio Grande routes are unreasonable to the extent they exceed the joint rates via Union Pacific's shorter route which is more favorably situated, without onerous operating conditions and with at least a 24-hour shorter time in transit and one or two fewer interchanges.

The Commission's settled rule is that bare comparison of the earnings of one rate with another does not afford evidence upon which to base a finding under Section 1. In *Memphis Cotton Oil Co. v. I. C. R. R. Co.*, 17 I. C. C. 313, 318, the Commission said:

> "The reasonableness of a rate must of necessity depend upon the conditions surrounding the traffic at the time it moves. The length of the haul; the competition to be met, the cost of the service, the value of the service, the density or volume of the tonnage, as well as the general transportation conditions then existing, are factors that have a more or less definite relation to the rate that a carrier may reasonably demand for a transportation service."

In dismissing a complaint alleging violations of Sections 1, 2, 3, the Commission said in *McHenry-Millhouse Mfg. Co. v. N. L., O. & W. Ry. Co.*, 151 I. C. C. 501, at page 502, that:

> "We have repeatedly said that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate."

In *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 192 I. C. C. 192, the Commission said at page 195:

> "A lower rate over other recognized routes and established junctions is not in itself proof that combination rates over the route of movement were unreasonable."

The fact that the joint rates via the Union Pacific are somewhat lower than the combination of rates via the longer Rio Grande line with its dissimilar and costly transportation conditions, conforms to the rule rather than presenting an exception. In *Fargo Commercial Club v. A. & W. Ry. Co.*, 98 I. C. C. 691, the Commission said at pages 723-724:

> "We have consistently adhered to the view in recent years that joint rates should be somewhat lower than the aggregates of the intermediate rates because of the facts that ton-mile earnings should decrease as distance increases and that, as a general rule, a through movement entails less terminal expense than two local movements to and from the intermediate point."

In *Quanah, A. & P. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 205 I. C. C. 253, upon the base comparison of "various joint rates over the direct routes with higher combinations resulting if the traffic moved through the Floydada gateway," the Commission held at page 260:

"Usually the combination is higher than the joint rate, and the mere showing of the difference in amount between them is not sufficient to condemn the combination as unreasonable."

In *Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183, at page 187, the Commission said:

"* * * the combination rates over a route that short-hauls a carrier may justifiably be higher than the joint rates remaining in effect over other routes. *Routing Grain and Grain Products via Chicago, R. I. & P. Ry. Co., supra; Routing via Quanah, A. & P. Ry. Co., supra; Western Pac. R. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127; *Routing of Ores via Southwest Missouri R.*, 220 I. C. C. 110."

As Union Pacific's routes are shorter and are more direct and efficient than the longer routes via the Rio Grande, the rule stated in the Commission's decision in *Kansas City Hay Dealers Asso. v. C., G. W. R. R. Co.*, 49 I. C. C. 372, at page 377, should govern here:

"To compel the application of short-line rates over indirect and longer routes, merely as a means of providing a channel of doubtful benefit to comparatively few shippers, would lay an unnecessary expense upon the railroads against the interest of the public as a whole. When joint rates that are neither unreasonable nor unduly prejudicial are maintained over direct routes adequate response is made to the reasonable requirements of the public, and carriers should not be required to perform wasteful transportation by maintaining the same rates over indirect and more circuitous routes."

If a combination of rates via one route becomes unreasonable and unlawful simply because it is higher than a joint rate between the same points via some other and in this instance a much shorter route, the only remedy

fies in wide open interchange between all lines via every available junction point, regardless of carriers' rights under Section 15(4) not to be short-hauled, regardless of the Commission's consistent holdings that joint through rates should generally be somewhat lower than the combination of rates between the same points, regardless of increased terminal and interchange costs by including additional carriers, and regardless of the fact that the result would be to wipe out many basic rate-making principles on which the rate structure has been built.

Despite its admission (R. 67) that the joint rates are depressed and subnormal, the Commission uses them merely because they are the "going rates" as the measure by which to condemn the combination rates and to determine reasonable rates for application via the longer Rio Grande line through Ogden. This is "not a full discharge by the commission" of its duty to adjudicate and determine the reasonableness of rates, *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510. It is not an adjudication or determination at all. It is simply an arbitrary requirement that the lowest rates charged by carriers over their own routes shall be the maximum rates they may charge over other routes they are forced to establish and which short haul them.

The result of the requirement that the joint rates maintained over the shorter Union Pacific routes be made applicable over the longer Rio Grande routes are portrayed in the following table (original I. C. C. Ex. No. 26), which shows that some of the joint rates are so low that they do not produce a profit even when the traffic moves via the shorter Union Pacific routes while others produce a small profit which would be turned into a considerable loss when spread over the longer mileage of the Rio Grande:

6. There is no basis in law or in facts found by the Commission for its conclusion that combination rates via the Rio Grande are unduly prejudicial to shippers desiring to use that route and unduly preferential of shippers using Union Pacific routes, and the conclusion is contrary to basic findings of fact and the overwhelming preponderance of the evidence.

(a) Are the shippers found to be unduly prejudiced when they ship via the Rio Grande route are the same shippers found to be unduly preferred when they ship via the Union Pacific routes, and since they have the right to select the route of their choice, there is neither a legal nor a factual basis for the Commission's finding of a violation of Section 3(1) of the Act.

It is clear from the statements and findings in the report and from the Commission's ultimate conclusions that the order, as stated earlier, relates entirely to traffic of shippers and receivers located in the so-called "excluded territory" or "northwest area". For example, the report states that shippers and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, "from the excluded territory" are at a serious disadvantage in marketing their products, compared with "competing shippers and dealers located on the Union Pacific" (R. 59), and that "[t]he shippers in the originating area" are debarred from effective participation in the marketing system developed for the specified commodities. Again, under "Conclusions" (R. 73), the westbound monuments are from shippers in Vermont and Georgia to receivers at "destinations in the excluded territory in the northwest area", and the eastbound commodities specified are from shippers at "origins in the excluded territory to destinations" in eastern

and southern United States. The undue prejudice and undue preference of shippers found in the second conclusion is with respect to the specified commodities "from and to the points described in the foregoing finding," that is, the first finding or conclusion that through routes and joint rates are necessary from and to origins and destinations in the "excluded territory," or northwest area.

The shippers and receivers in the "excluded territory" or northwest area include the few who supported the Rio Grande and the far greater number who opposed it. They are *all located on the Union Pacific routes* in the northwest or "excluded territory." All of them have available *the same* Union Pacific routes with *the same* joint rates and *the same* transit privileges, all of them also have available the combination rates with transit privileges via the Rio Grande.

Shippers and receivers located in the northwest area "using, or desiring to use, the Rio Grande routes" have the *same choice* that shippers and receivers "using the Union Pacific routes" have of routing their traffic via either the Rio Grande or the Union Pacific. All of them have the same rates and privileges when they route via the Rio Grande and all of them have the same rates and privileges when they route via the Union Pacific. Clearly the situation thus presented cannot serve as a basis for a lawful finding of undue prejudice and preference within the meaning of Section 3(1) because the *same shippers* and receivers are claimed by the report to be unduly prejudiced when they elect to route their traffic over the Rio Grande and unduly preferred when they elect to route their traffic over the Union Pacific. The undue prejudice found against them in the report when they ship over the Rio Grande is due to the claimed undue preference

they receive when they ship via Union Pacific routes at lower joint rates. In other words, shippers and receivers in the northwest area "using, or desiring to use, the Rio Grande routes," may alternatively prejudice or prefer themselves as and when they choose.

Where, as here, shippers have the choice of becoming at once the prejudiced and the preferred, we submit that their election to become "prejudiced" shippers by routing over the Rio Grande when they have the choice of being the "preferred" shippers by routing over the Union Pacific, does not present a case within the meaning of Section 3(1). It requires unequal treatment of two different shippers to make a violation of Section 3(1)—one who is prejudiced and another who is preferred. The disadvantage and injury of the prejudiced shipper must be shown to result to the advantage and benefit of his commercial competitor claimed to be preferred. *The same shipper cannot be prejudiced or damaged by his own preference or profit.* In short, the Commission cannot make a case of undue prejudice against shippers "using, or desiring to use, the Rio Grande routes" by pointing to the fact that they have lower rates when they elect to route their traffic over the Union Pacific, nor by pointing to other shippers in the northwest area who elect to use the Union Pacific routes instead of the Rio Grande routes with its higher combination rates. The very factual situation affords no basis, to say nothing of "a rational basis" for a finding of undue prejudice or for the order based upon that finding. *Miss. Valley Barge Co. v. U. S.*, 292 U. S. 282, 287.

The very word "preference" carries with it the thought of different treatment of two patrons by the same carrier or carriers and the same is true of the words "prejudice," "advantage" and "disadvantage," used in

Section 3(1). In *Dewey Portland Cement Co. v. Alton & E. R. Co.*, 174 I. C. C. 671, the Commission said at page 685:

> "Undue prejudice under section 3 of the interstate commerce act ordinarily requires the prejudice suffered by one party to be the source of positive advantage to the one alleged to be preferred and that a competitive relationship exists between the parties concerned. *Boston Wool Trade Asso. v. B. & A. R. R. Co.*, 78 I. C. C. 178, 183."

Among numerous other cases in which the Commission has repeated that rule, are *Hess v. Union Pac. R. Co.*, 237 I. C. C. 121, 126-127; *Illinois Coal Traffic Bureau v. Ahnapee & W. Ry. Co.*, 204 I. C. C. 225, 241; *Barrett Co. v. A., T. & S. F. Ry. Co.*, 172 I. C. C. 319; *Evansville Cham. of Com. v. Atchison, T. & S. F. Ry. Co.*, 196 I. C. C. 349, 351; *Welch-Sandler Sand Co. v. Atchison, T. & S. F. Ry. Co.*, 196 I. C. C. 789, 793; and *Fort Smith & W. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 216 I. C. C. 411, 433.

No case can be found in which the Commission has attempted to make out a case of undue prejudice against a shipper by pointing to the same shipper's alleged undue preference, nor is there a case, except the instant one, where carriers have been held guilty of granting an undue or unreasonable preference to shippers located on their lines because they offer lower rates over their routes than the *same shippers* have over another route. We repeat that the Commission cannot use the situation of these shippers and receivers in the northwest area to make out a case of undue prejudice against them when routing over the Rio Grande, by pointing to the fact that the *same shippers* enjoy lower rates when they elect to ship via the Union Pacific, and the Commission's finding of a violation of Section 3(1) is null and void.

(b) Refusal of the Union Pacific and other railroads to equalize availability of transit privileges offered by the Rio Grande with those offered by Union Pacific is not, in law, a violation of Section 3(1) of the Act, and the order requiring such equalization is null and void.

The findings in the Commission's report make it definite and certain that the undue prejudice found therein against shippers desiring to use the Rio Grande is based wholly and solely upon the fact that they cannot take advantage of transit privileges on that line at rates as low as the rates with similar transit privileges are available on the Union Pacific; also that the asserted undue preference of shippers using the Union Pacific is due solely to the fact that they have the same transit privileges that shippers have on the Rio Grande, but at lower rates.

Apart from improvement of the Rio Grande's financial position, the reduction in rates via the Rio Grande required by the order is solely for the purpose of enabling shippers desiring to use the Rio Grande to make use of transit privileges on that line at the same rates they pay when they ship via the Union Pacific. This is made clear at many places in the Commission's report. The report states that the amount of traffic that would be diverted from the Union Pacific by the Rio Grande would depend on the latter's persuasion of shippers and receivers to use its line as an "overhead or bridge route", and upon the Rio Grande's ability to "induce shippers to use transit facilities available on that line" (R. 46). The following language in the report shows more specifically the purpose of the order to equalize the availability of transit privileges on the Rio Grande with those on the Union Pacific (R. 47):

"*Transit.*—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

"The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding."

The report further emphasizes equalization with respect to transit (R. 70):

"For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply."

The following language from the report shows that the primary basis for the order is equalization of transit privileges at points on the Rio Grande with those on the Union Pacific (R. 72):

"As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments west-bound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs east-bound, *who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande*, as compared with the lower rates,

together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3(1) of the act." (Italics added.)

Section 1(4) of the Act makes it the duty of every common carrier subject thereto "to provide and furnish transportation upon reasonable request therefor." The "transportation" which common carriers are thus required to furnish is defined in Section 1(3)(a) of the Act as follows:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

The definition does not include transit privileges in the "transportation" that carriers are required to furnish. Indeed, the Commission itself correctly concludes that transit privileges are not "transportation", but are "commercial operations" (R. 48). This Court accepted that view in *B. & O. R. Co. v. U. S.*, 305 U. S. 507, 525.

The Commission finds (R. 73) that the through routes and joint rates required by its order are necessary and desirable in the public interest in order to provide adequate and more economic "transportation", but as we have shown, the "transportation" via the Rio Grande would be the same under the order as it is now, the only difference being that such "transportation" would be at lower rates which the Commission believes

the Rio Grande could use to induce shippers to ship via its longer route for the purpose of exercising "transit privileges" offered by that line. But, as these "commercial operations" are not transportation service performed by railroads, but consist of various manufacturing, processing, grazing, fabrication, storage and other activities which take place while commodities are "stopped" at some point along the railroad and held in possession of the shipper *between* the performance by the railroad of two separate movements or transporting services, they do not fall within the "transportation" which the Act requires carriers to furnish. They are beyond reach of the Commission's power and may not be made the basis of a finding of undue preference and prejudice in violation of Section 3(1) of the Act, or an order requiring through routes and joint rates, and the Commission exceeds its power in ordering equalization of the cost of using the Rio Grande's transit privileges with the Union Pacific routes, for the Commission may not lawfully order carriers to provide or offer more than the Act makes it their duty to furnish. Certainly, the Commission is without power to equalize opportunities offered by different railroads for "commercial operations". In *Interstate Com. Comm. v. Diffenbaugh*, 222 U. S. 42, 46, this Court said, "[t]he law does not attempt to equalize fortune, opportunities or abilities."

In *Central R. R. Co. v. United States*, 257 U. S. 247, this Court enjoined and annulled an order issued by the Commission under Section 3(1) of the Act requiring 23 railroads to remove undue prejudice caused by the refusal of the Central of New Jersey and the Pennsylvania to establish a creosoting-in-transit privilege on their lines at Newark, New Jersey, while at the same time participating in through routes and joint rates with

other carriers in the middle west and south which other carriers offered that transit privilege on their lines.

The purpose of the complaint and of the order there, as here, was to *equalize different railroads* in the matter of transit privileges. There the railroads had equal rates but the Central and Pennsylvania refused to grant transit privileges offered by the other railroads. Here, the Union Pacific routes offer the same transit privileges offered by the Rio Grande, but refuse to join in equal rates to equalize transit opportunities of the Rio Grande with those of the Union Pacific for shippers from or to the northwest area.

At pages 255-256, the Court pointed out that whether a transit privilege is granted or withheld is a policy matter to be determined solely by the railroad on which the transit point is located, and that one carrier is powerless to control such determination by another. This being true, the Court said a carrier that refused to establish transit privileges on its line could not be held responsible for unjust discrimination even though it participated in joint rates with carriers that offered such privileges on their lines, saying at pages 259-260, that:

> "If this were not so the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of section 3. What Congress sought to prevent by that section as originally enacted was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any

earlier and mandatory legislation has changed in this respect, the purpose or scope of section 3."

If, as in that case, no basis for a finding of unjust discrimination under Section 3 was afforded by the refusal of the Central and Pennsylvania to equalize transit opportunities on their lines with those on connecting lines with which joint rates had already been established; *a fortiori*, no legal basis for a finding under Section 3 is afforded by the Union Pacific's refusal to establish joint rates that short haul it for the purpose of equalizing transit opportunities on the Rio Grande with those on the Union Pacific.

Furthermore, in the instant case the Commission has, without reason or explanation, departed from the norm and principle of its previous decisions with respect to its authority to deal with transit privileges. (See *Sec'y of Agriculture v. United States*, 347 U. S. 645, 653.)

In *Adrian Grain Co. v. Ann Arbor R. R. Co.*, 276 I. C. C. 331, the Commission *refused to require the establishment of joint rates for transit privileges* via through routes that would short haul the Ann Arbor Railroad. All of the new routes sought in that case were longer than existing routes, which is the identical situation in this case. The Commission there expressed the view that the publication of the sought routes would encourage wasteful and uneconomic transportation and would not give reasonable preference to the originating carrier as required by Section 15(4) of the Act. Granting the Rio Grande's demands in this case would likewise encourage from 200 extra miles to as much as 50 per cent more miles of wasteful and uneconomic transportation in addition to short hauling Union Pacific 925 miles on traffic it originates.

In *Laclede-Christy Co. v. Akron, C. & Y. R. Co.*, 276 I. C. C. 519, the Commission dismissed a complaint seeking—

> * * * the *same through charge* on the clay in and the brick out *with transit* at St. Louis as its competitors pay with transit at Mexico, East Mexico, Farber and Vandalia." (p. 525; Italics added.)

The complainant's disadvantage in transportation costs in that case ranged from $47 to $83 per carload more than those of its competitors who had transit privileges at lower rates published by the Gulf, Mobile & Ohio in order "to attract and hold traffic" (p. 524). Finding that longer mileage and greater operating costs—both of which are involved on the Rio Grande—created dissimilarity in transportation conditions with respect to complainant's shipments compared to those of its competitors, the Commission held at page 525:

> "It is not within the province of the Commission to disregard transportation conditions and require an adjustment of rates and charges merely for the purpose of *equalizing or minimizing* the advantages and disadvantages of competing shippers growing out of the geographical locations of plants *for the manufacture of* [sic] *processing of materials in transit. Magor Car Corp. v. Delaware, L. & W. R. Co.*, 144 I. C. C. 135, 138." (Italics added.)

The Commission has always held that transit privileges are purely local to the railroad on which the transit point is located, *Concentration of Cotton at New Orleans*, 83 I. C. C. 18, 20, and it held in *Transit Arrangement on Lumber*, 129 I. C. C. 518, at page 520, that:

> "Connecting lines can not dictate to the road that alone serves the transit point the manner in which joint rates through that point shall be applied

in conjunction with the transit arrangements, so long as they are not deprived of their long haul. *Concentration of Cotton at New Orleans*, 83 I. C. C. 18; *Transit Privileges on Cotton*, 83 I. C. C. 60."

In *Grain From Mobile and New Orleans Transited in South*, 218 I. C. C. 437, at page 440, the Commission said:

> "It is a well-settled principle, however, that the granting or withholding of transit is a matter which may be determined solely by the carrier that serves the transit point. *Transit Privileges on Cotton*, 83 I. C. C. 60; *Transit Privileges on Lumber*, 132 I. C. C. 53; and *Sugar Stored in Transit*, 146 I. C. C. 382. It is clear also that a carrier may not be found guilty of undue prejudice for failing to maintain a transit privilege at points on its line merely because like privileges are in effect at points on the lines of other carriers. *Central R. Co. of New Jersey v. United States*, 257 U. S. 247. In such instances an order requiring the removal of undue prejudice would not permit the carrier an alternative in the method of such removal."

As the carriers comprising Union Pacific routes do not and cannot control either the establishment or cancellation of transit privileges on the Rio Grande or the manner in which rates shall be applied to such privileges, we confidently assert that they have no such legal responsibility for or connection with the alleged disadvantage of shippers using the Rio Grande and its transit privileges as could make out a case of undue prejudice to those shippers or of undue preference of shippers using the Union Pacific within the meaning of Section 3(1). In *Routing Cottonseed to Kansas and Missouri*, 231 I. C. C. 775, at page 779, the Commission held that "a carrier cannot be charged with unlawful prejudice against a community which it does not serve."

(c) Even if the essential foundation existed, which it did not, for finding a violation of Section 3(1), the facts found by the Commission and the testimony of record do not support or justify the conclusion that the combination rates via the Rio Grande are unduly prejudicial to shippers and receivers in the northwest area "using or desiring to use the Rio Grande routes" for westbound shipments of monuments, and eastbound shipments of livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, and butter and eggs, and unduly preferential of shippers and receivers "using the Union Pacific routes."

The majority of the district court held that the "evidence of preference, advantage, prejudice or disadvantage. * * * furnishes no basis for the order under Sec. 3(1)," (R. 164), apparently because "there is no community of interest between the Union Pacific and the Rio Grande" (R. 166).

Circuit Judge Johnsen held that the facts would not permit finding a violation of Section 3(1). He said (R. 178):

> "But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3(1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3(1)."

The Commission in many decisions has pointed out facts which must be clearly shown by evidence in order to enable it to find undue prejudice and undue preference between shippers in violation of Section 3(1) of the Act.

In *Hayes Pump & Planter Co. v. Atchison, T. & S. F. Ry. Co.*, 171 I. C. C. 13, it said at page 19:

> "However, a mere showing of a difference in rates does not establish the existence of undue prejudice or preference. To justify such a finding a competitive relation between the persons, localities, or descriptions of traffic concerned must also be shown."

In *Archer-Daniels-Midland Co. v. Great Northern Ry. Co.*, 171 I. C. C. 192, the Commission said at page 195:

> "Prejudice to be undue and unlawful under section 3 must ordinarily be such that the prejudice suffered by one is a source of positive advantage to another and a competitive relation must exist between the persons or commodities affected."

Definite showing of specific shipments and their origins and destinations must be made to enable the Commission to determine whether one of two competitors is unduly prejudiced. *Kistler Leather Co. v. Baltimore & O. R. Co.*, 171 I. C. C. 669, 673; *Abrasive Co. v. Erie R. Co.*, 183 I. C. C. 103, 106. "Damage by reason of any undue preference which may exist" must be proved. *Alpena Leather Corp. v. Pennsylvania R. Co.*, 185 I. C. C. 106, 108.

Actual competition between the alleged preferred and the prejudiced shippers must be proved before a violation of Section 3(1) can be found. *Dewey Portland Cement Co. v. Alton & E. R. Co.*, 176 I. C. C. 671, 685; *Evansville Chamber of Com. v. Atchison, T. & S. F. Ry. Co.*, 196 I. C. C. 349, 351.

Actual damage through loss of business by reason of unduly prejudicial rate must be proved before a finding can be made that Section 3(1) has been violated, *Barrett Co. v. A., T. & S. F. Ry. Co.*, 172 I. C. C. 319, 332; *E. Cohn & Son v. Cedar Rapids & I. C. Ry.*, 200 I. C. C. 417, 419; *Illinois Coal Traffic Bureau v. Ahnapee & W. Ry. Co.*, 204 I. C. C. 225, 241; *Alphe Lux Co. v. Reading Co.*, 178 I. C. C. 16, 20.

Volume of movement and origins and destinations of actual shipments must be shown. *Abrasive Co. v. Erie R. Co.*, 183 I. C. C. 103, 106.

The Commission cannot make a valid finding of undue prejudice and preference under Section 3(1) unless there is evidence proving that transportation conditions affecting and surrounding both the prejudicial and preferential rate situations are "substantially similar." *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197. In *Clover Splint Coal Co., Inc. v. Louisville & N. R. Co.*, 197 I. C. C. 276, the Commission said at page 277:

> "Before a violation of section 2 of the act can be found, it must appear that the circumstances and conditions are substantially similar. And although section 3 is more comprehensive than section 2 and does not contain the phrase embodied in section 2, 'under substantially similar circumstances and conditions,' nevertheless, it contains words of wider scope, 'in any respect whatsoever,' and as a matter of practical application the thought, if not the words, 'under substantially similar circumstances and conditions,' must be present to the mind in considering under section 3 what preferences or advantages are due or reasonable or are undue or unreasonable." *Board of Trade of Carrollton, Ga. v. Central of Georgia Ry. Co.*, 28 I. C. C. 154. So that it is now well settled that sufficient dissimilarity of circumstances and con-

ditions will prevent what would otherwise be a violation of the statute. See *Ragland Coal Co. v. T. Ry. Co.*, 115 I. C. C. 147, and cases cited therein."

A finding of "substantially similar" transportation conditions is precluded in this case by the fact recognized by the Commission and found in the report (R. 72):

> "There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3(4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred. No such a showing has here been made."

That finding obviously made it impossible for the Commission to make a valid finding of undue prejudice and preference between shippers, for similarity of transportation conditions must be proved by the evidence to justify the latter finding as well as a finding of discrimination.

In view of the Commission's own admission that no such evidence appears in the record, its finding of undue prejudice and preference between shippers is clearly invalid.

The shipper testimony fails completely to meet the requirements laid down by the Commission in its prior decisions.

The record contains no evidence whatever to show that shippers "using the Union Pacific routes" have any preference or advantage whatever over shippers "using, or desiring to use, the Rio Grande routes" unless the dif-

ference in rates constitutes an advantage prohibited by Section 3(1), and the Commission decisions cited above hold that it does not. And, since all of the shippers of traffic to or from the originating or northwest area have equal privilege of routing their traffic via either the Rio Grande or the Union Pacific routes, it is impossible to see how any evidence could show any preference or prejudice to any of them by anything the Union Pacific or Rio Grande is doing.

The record does not show that shippers using or desiring to use the Rio Grande routes have lost business to any competing shipper using the Union Pacific routes, and, indeed, the record contains only the merest general statements that any competition exists between any shippers using or desiring to use the Rio Grande routes with those using the Union Pacific routes. Two or three instances of such general statements appear but are not accompanied by any showing that such alleged competition has resulted in injury, loss or damage to shippers using the Rio Grande routes or in any gain of business by shippers using the Union Pacific routes.

There is no evidence whatever of specific shipments, origins or destinations, and none to show the particular shippers who have the alleged advantage or preference that must be shown to establish the undue prejudice found by the Commission against shippers using the Rio Grande routes.

The assertions we make with respect to the absence or lack of evidence obviously cannot be proved by pointing to any particular page or portions of the record. We cannot point to pages of the record where testimony *is not*. If counsel for defendants deny or dispute our assertions that the record is lacking in evidence in the respects men-

tioned above, then it is their burden to point to the pages of the record on which they contend that such evidence may be found.

While the Commission's report labors to make it appear that shippers and receivers in the "excluded territory" may not have made sales of their products at some points in the southwest because of so-called "pocket-markets," the report does not suggest that any shipper located either in the "excluded territory" or on the Rio Grande has ever lost a sale or any business to any alleged competitor located on or using the Union Pacific. In fact, shippers and receivers in the "excluded territory" who are "using, or desiring to use, the Rio Grande routes" being themselves located on the Union Pacific, could not make such contention, for their rates and privileges are identical to those available to whatever competitors, if any, they might have on the Union Pacific. The report states (R. 49) that in some instances a dealer in building materials located at Salt Lake City has had to "forego business" as far east as Glenwood Springs, Colorado, on the Rio Grande "because of the rate situation," but the discussion of that shipper's situation is clearly irrelevant for the Commission does not find a violation of Section 3 with respect to building materials. Since building materials are not included among the commodities specified in the order in connection with the required through routes and joint rates, it is not understandable why the Commission devotes discussion to that shipper's situation unless it is merely an effort to bolster the report by discussing irrelevant and immaterial circumstances. The same is true of the discussion of farm machinery (R. 50), of wheat (R. 59), and of lumber (R. 60),

(d) **The finding that the substantial differences in transportation conditions found in the report to exist in hauls over the Union Pacific and over the Rio Grande via Ogden between the "excluded territory" and points north and west of the southern and eastern boundaries of Kansas, the Missouri River and the lines of the Union Pacific and Chicago and North Western Railroads from Omaha to Chicago "become relatively insignificant" and that "transportation conditions are substantially similar" for hauls between points in the "excluded territory" and points south and east of the line described, is arbitrary, erroneous, contrary to law and the evidence.**

The findings indicated in the above heading relate to the Commission's Section 3(1) finding of undue prejudice to shippers using the Rio Grande and undue preference to those using the Union Pacific.

As shown by decisions cited above, the Commission may not make a finding of undue prejudice and preference without finding that circumstances and conditions are substantially similar with respect to the shippers alleged to be preferred and the shippers alleged to be prejudiced by his competitor's alleged preference.

In *Kauffman Milling Co. v. Mo. Pacific Ry. Co., et al.*, 4 I. C. C. 417, the Commission succinctly stated the rule at pages 435-436:

> "The statute contemplates and clearly provides for dissimilar conditions that may affect the making of rates by carriers, and in a proper case of that nature it is no less the duty of public tribunals to rec-

ognize dissimilarities that justify exceptional rates than to apply the general principles of the law."

The principle of the decisions by the Commission was declared by this Court early in the history of the Commission. In *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197, the Commission sought to enforce an order requiring railroads to cease and desist from charging any less or different rate for transportation of imported goods than for domestic goods. The Commission was of the view that the fact of importation did not create a dissimilar circumstance, or that if it did the Commission was without authority to consider such dissimilarity. At page 217 the Court held that, "[i]n so construing the act we think the Commission erred." There can be no question, therefore, that where substantial differences or dissimilarities in circumstances and conditions exist a finding of undue preference and prejudice cannot be justified, nor may the Commission prescribe rates which ignore such dissimilar circumstances.

Demonstrating the dissimilar transportation conditions in the instant case, the report recites the following facts and conclusions (R. 61-62):

> "The Union Pacific operates about 9,724 miles of railroad serving over 1,700 points in 13 States. It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte, Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct

routes, the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

"Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity, and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

"The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 per cent and west-bound 1.55 per cent. The Rio Grande's maximum grade is 2 per cent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services."

Concerning the Rio Grande the Commission finds (R. 70):

"Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recognized by the Commission in prior proceedings. See *Livestock, Western District Rates*,

supra, and *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486."

In the language quoted next below, the Commission concludes that there are substantial differences or dissimilarities between transportation conditions over Union Pacific routes and those over Rio Grande routes via Ogden, and its order, seemingly on the ground that the hauls are shorter, purports to give effect to the dissimilarities to and from points in the territory roughly north and west of the southern and eastern Kansas borders, west of cities located on the Missouri River and north of points on the line of the Chicago and North Western Railroad from Omaha to Chicago and the upper peninsula of Michigan. But the Commission then proceeds to ignore these same dissimilarities to and from points in the area south and east of the line just described, saying that "spread over hauls of such great length," the dissimilarities "become relatively insignificant" and that, therefore, as between such points "the transportation conditions are substantially similar" (R. 71).

> "We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls between the excluded territory, on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, *the differences in the transportation conditions* are, in general, *spread over hauls of such great lengths*

that, considered as a whole, they *become relatively insignificant*. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar." (Italics added.)[35]

Thus, by mere "declaration" and "an artificial use of words," *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545, the Commission seeks to overcome and escape the very dissimilarities in circumstances and conditions which it finds in the "more onerous" operating conditions on the Rio Grande, and to overcome a complete absence of evidence concerning transportation conditions elsewhere than on the line of the Rio Grande and a portion of the Union Pacific line.

Under the theory and requirements of the order, the admitted dissimilarities and "more onerous" operating conditions of the Rio Grande would vanish and transportation conditions would become "substantially similar,"

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35 Circuit Judge Johnsen's dissent condemns this arbitrary action of the Commission, saying (R. 176-177):

"All that the Commission says, in brushing aside the transportational differences which I have set out * * * is that, when they are spread over hauls of such great lengths as are here involved 'they become relatively insignificant.'

* * * * * *

"I do not believe that without rational demonstration the Commission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1524 miles (Chicago), the elements of difference which I have set out are so 'relatively insignificant' as to be entitled to be ignored on the question of whether 'more economic transportation' is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportational and service differences existing, as related to the question of 'more economic transportation' under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without establishment of the reality of that horizon for lumping purposes."

for example on the Union Pacific somewhere within the 19 miles between Omaha, Nebraska, where the joint rates *are* required, and Elkhorn, Nebraska, where the joint rates are *not* required.

The dissimilarities in transportation conditions affecting the traffic in question are shown by facts recited in the report to be due entirely to unfavorable and more onerous conditions on the Rio Grande between Ogden and Denver compared to operating conditions on the Union Pacific between McCammon, Idaho, and the Missouri River. Excepting this comparison between conditions on the Rio Grande and the Union Pacific, there is no evidence whatever in the record concerning or comparing transportation conditions on other parts of the Union Pacific or routes in which it participates with other carriers. Therefore, there is not a scintilla of evidence to justify the conclusions (R. 72) that the proved dissimilarity of conditions on the Rio Grande and the Union Pacific "become relatively insignificant" and that "transportation conditions are substantially similar" between points in the northwest area and points south and east of Kansas, the Missouri River and the Chicago and North Western to Chicago.

The conditions on the Union Pacific and the Rio Grande which give rise to the substantial differences found by the Commission in transportation conditions are local to the Rio Grande and the Union Pacific, and those conditions cannot be avoided, eliminated, diluted or made to disappear by the arbitrary and erroneous statement that they "become relatively insignificant" for hauls to the southern and eastern part of the country. The dissimilar conditions are permanently fixed by nature, and even the magic wand of the Commission's "expertise" cannot

make them disappear. No expert can wipe out the "more onerous" Rio Grande location in the Rocky Mountains. There is no escape from the dissimilarities in either long hauls or short hauls, for traffic moved over the Rio Grande must encounter its "more onerous" operating conditions regardless of the length of haul northwest of Ogden or east of Denver. The Commission is without authority to ignore or eliminate these dissimilarities by "spreading" them "over hauls of such great lengths," and the attempt to do so is plainly arbitrary and contrary to the evidence which proves the admitted existence of the dissimilarities.

The Commission's attempt to avoid giving effect to the dissimilarity it found, by the simple expedient of making distance alone controlling in finding undue prejudice, is contrary to law. Even where other relevant circumstances are equal, "mere distance is not necessarily a determining factor—indeed the statute itself (section 4) recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road," *Louis. & Nash. R. R. v. United States*, 238 U. S. 1, 12. *A fortiori*, where, as in the instant case, the Commission has expressly found dissimilar conditions in the "more onerous" operating conditions of the Rio Grande, it is precluded from using distance alone as a means of controlling and eliminating, neutralizing or escaping the dissimilar conditions.

In *Wilhoit v. Missouri, Kansas & Texas Ruy. Co.*, 12 I. C. C. 139, at page 140, the Commission held:

> "Distance is something of a factor in the determination of the reasonableness or unreasonableness of a rate, but to permit it to be a sole or controlling factor would be to introduce discrimination, which would create chaotic commercial conditions under

> which irreparable injury would be done to individuals, firms, and communities without any compensating good resulting to the people or the commerce of the country as a whole."

If the Commission were correct in the method used in this case to eliminate or ignore differences in transportation conditions, then any difference in conditions no matter how great could be disregarded if the Commission says the hauls which encounter the differences are long enough. By this arbitrary process the Commission would make the question whether transportation conditions are dissimilar depend entirely upon distance and would disregard the physical and other characteristics which create the differences. Thus, the Commission would change the law and make itself the sole judge as to whether dissimilarities in transportation conditions must be given effect in a particular case. This it may not do. *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197.

The dissimilarities correctly found by the Commission are beyond control of or correction by the carriers or the Commission and in the face of them a finding of undue prejudice may not be made. In *East Tenn. &c. Ry. Co. v. Interstate Com.*, 181 U. S. 1, at page 18, this Court held:

> "The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, *and does not relate to acts the result of conditions* wholly beyond the control of such carriers." (Italics added.)

Moreover, even if the Commission were legally sound in its theory that it may ignore dissimilar transportation

conditions when "spread over hauls of such great length," its order does not adhere to that theory, as shown by the following examples:

Joint Rates Via Rio Grande Not Required

From	To	Miles
Seattle, Wash.	Galena, Kansas	2,440.8
do	Milwaukee, Wis.	2,699.3
do	Sault Ste. Marie, Mich.	3,044.5

Joint Rates Via Rio Grande Required

From	To	Miles
Brigham City, Utah	Omaha, Nebraska	1,187.7
do	Kansas City, Mo.	1,267.7
do	St. Joseph, Mo.	1,269.7
McCammon, Idaho	Omaha, Nebraska	1,255.0
do	Kansas City, Mo.	1,352.0
do	Tulsa, Okla.	1,427.0

Thus, in applying its theory, the Commission ignores the "more onerous" transportation conditions of the Rio Grande on hauls to markets on the Missouri River that are less than one-half the length of hauls to Sault Ste. Marie, Michigan, and other points where the dissimilar conditions are given effect by *not* requiring the joint rates to such points.

These inconsistent and absurd situations compel the conclusion that the Commission felt it could escape, avoid or nullify the effect of the Rio Grande's "more onerous" transportation conditions to the better markets and traffic centers in the east by giving "lip service" to the same conditions on hauls to the less important traffic areas and centers.

We submit that the process, method or reasoning by which the Commission concludes that the very dissimilari-

ties it necessarily finds to exist in transportation conditions become substantially similar for hauls between the "excluded territory" and the southern and eastern part of the country is irrational, arbitrary, erroneous and contrary to the facts and law, and the order based thereon is null and void.

7. There is no evidence at all to support or justify the finding that maintenance by the Union Pacific of joint rates with the Bamberger Railroad south of Ogden while refusing to participate in like rates with the Rio Grande discriminates against the latter in violation of Section 3(4) of the Act.

The Bamberger Railroad operates between Ogden and Salt Lake City, Utah, and serves intermediate points, most of which are also served by both the Rio Grande and Union Pacific. Union Pacific's joint rates and through routes with the Bamberger have been in effect many years, and its relations with that line are the same as those between the Bamberger and the Rio Grande.

The report correctly states (R. 72) that to support a finding of discrimination under Section 3(4) of the Act it must be shown that transportation conditions over the route alleged to be discriminated against are no less favorable than over the route said to be preferred, but proceeds to find that the Union Pacific discriminates against the Rio Grande by refusing joint rates with it while maintaining them with the Bamberger Railroad.

No evidence whatever was submitted concerning or comparing transportation conditions on the Bamberger's electric line between Ogden and Salt Lake City with conditions on the Rio Grande. When an order is "rendered without any evidence whatever to support it" it must be

enjoined and annulled, *Florida East Coast Line v. United States*, 234 U. S. 167, 185, 188.

In the absence of any evidence, the Commission attempts to support its finding by saying "there is no apparent reason" why similar arrangements should not apply with the Rio Grande and that "it appears that there is no important dissimilarity" between transportation conditions on the two roads (R. 73).

Even if the Commission had knowledge of facts that would prove "no important dissimilarity", such facts would not support its finding because they are not in evidence. "Facts conceivably known to the Commission but not put in evidence will not support an order," *Chicago Junction Case*, 264 U. S. 258, at page 263. "Nothing can be treated as evidence which is not introduced as such," *U. S. v. Abilene & So. Ry. Co.*, 265 U. S. 274, at page 288.

The burden was on the Rio Grande to submit evidence proving similarity of transportation conditions. Its failure to do so cannot be overcome by what is *not shown* or what might *appear* to the Commission outside the record. The Commission is without power to make a finding without evidence, and an order based on such finding is void. *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88; *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541.

V.

The Order Should be Annulled and set Aside Because the Commission Acted Arbitrarily and Unlawfully With Respect to the Essential Matters Discussed Under This Heading.

1. **Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint, and, in ordering through routes and joint rates on the theory that because shippers had intervened, the Rio Grande's complaint became a shipper complaint.**

The Rio Grande alleged in its complaint that combination rates via its line "are unjust, unreasonable and discriminatory" and deprive "the public and the complainant [Rio Grande] of the use of available and reasonable through routes at reasonable and non-discriminatory through joint rates which are necessary and desirable in the public interest."

The Rio Grande did not allege that the rates via its line unduly prejudiced or unduly preferred any shippers, nor did it allege that through routes via its line were necessary or desirable in the public interest, or that existing routes of the Union Pacific and other railroads were unreasonably long compared to routes that could be made via the Rio Grande, or that through routes and joint rates via the Rio Grande to and from the northwest area were needed to provide adequate and more efficient or more economic transportation.

The allegation that its own rates were unreasonable is mere surplusage, for obviously a carrier may not be heard to complain against its own rates. Likewise, the Act accords no right in the Rio Grande to through routes or joint rates, and it does not lie with the Rio Grande to

allege or rely upon the "public interest" or discrimination, undue prejudice or undue preference between shippers. In *Interstate Comm. Comm. v. D., L. & W. R. R.*, 216 U. S. 531, this Court annulled and enjoined an order of the Commission because it granted relief to a railroad under a provision of the Act which gave only shippers a right to complain. In *Interstate Comm. Com. v. Chi., R. I. & Pac. Ry.*, 218 U. S. 88, the carriers contended that an order of the Commission which they sought to enjoin was unlawful because it would foster and build up particular localities in production and distribution to the detriment of other persons and localities. At page 109, the Court rejected this contention, saying:

> "That the [railroad] companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. *Clarke v. Kansas*, 176 U. S. 114, 118; *Smiley v. Kansas*, 196 U. S. 447."

Shippers had intervened in that case as in this case, but the Court said, "[i]t is doubtful if they are properly here, or rather were properly permitted to intervene." In *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, at page 149, this Court held that undue discrimination against shippers "was not a matter of which the railways could complain."

Thus, not only was there no issue of undue prejudice against shippers or the "public" in this case, but there was also the inability or disability of the Rio Grande to raise such issues.

The only issue which the Act gives the Rio Grande the right to raise on complaint to the Commission against

other railroads is the issue of discrimination or undue prejudice against it under the provisions of Section 3(4) which declares that carriers "shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

As shown above, the Rio Grande did not complain that rates via its line were "discriminatory" against it, but the Commission held that the evidence failed to prove discrimination against the Rio Grande (except at points on the Bamberger Railroad), saying that (R. 72):

> "There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3(4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred. No such showing has here been made."

The Commission found (R. 73) that rates via the Rio Grande on the commodities specified in the order are "unjust and unreasonable" for the commodities named in the order, but this finding affords no legal basis whatever for ordering through routes and joint rates, *Thompson v. United States*, 343 U. S. 549, nor would a legal basis for such order have been afforded even if the Commission had found discrimination against the Rio Grande under Section 3(4) of the Act. *Texas & Pacific Ry. v. U. S.*, 289 U. S. 627, 650.

The Commission agreed that the Rio Grande, being a railroad, could not raise an issue under Section 3(1) of the Act of undue preference and prejudice among

shippers (R. 33), and as we have said, the Commission held that the evidence failed to prove discrimination against the Rio Grande under Section 3(4), (except as to points on the Bamberger Railroad which, of course, would afford no legal basis for the order the Commission issued but would justify only an order that discrimination against the Rio Grande cease and desist at those points).

In these circumstances, the Commission clearly should have dismissed the Rio Grande's complaint. Its authority was "to investigate the matters complained of," Section 13(1), and not to transform the case into a shipper case.

However, the Commission proceeded arbitrarily and erroneously to treat the case as if it were the complaint of shippers whose rights under the Act are totally different from and unrelated to the rights of the Rio Grande. Despite the fact that it permitted intervention of shippers only upon condition that their intervention and participation would not "unduly broaden the issues raised in the complaint", and regardless of its own holdings and the authorities cited above that a railroad may not plead or rely upon the rights of shippers or the public, the Commission held that the intervention of shippers raised an issue of undue preference and prejudice under Section 3(1) of the Act and (R. 33), that testimony of shippers raises "a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities" (R. 69).

Having thus arbitrarily created and set up a new and different case by substituting intervening shippers for the Rio Grande as complainant and injecting issues which the Rio Grande's complaint did not and could not

raise, the Commission concluded that through routes and joint rates via the Rio Grande on the specified commodities are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation," and that the combination rates via the Rio Grande on the specified commodities are and for the future will be "unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes" (R. 73).

To treat the case as a shippers' complaint against undue prejudice, or as a "public interest" case involving through routes was not merely to unduly broaden the issues raised by the Rio Grande's complaint, in violation of Rule 72(e) of the Commission's General Rules of Practice, but to raise new issues involving wholly new and different cases under other and different provisions of the Act.

Counsel for the Rio Grande has argued that the shippers who intervened in support of its complaint "have the same status as they would have as original complainants." The obvious purpose of that contention was to induce the Commission to base its order upon rights of shippers and the public if it found, as it did, that the evidence did not sustain the Rio Grande's own case. But the cases cited by the Rio Grande have no bearing on the position of intervenors generally or of those who intervened before the Commission in support of the Rio Grande. The cases are *Chicago Junction Case*, 264 U. S. 258, and *Youngstown Co. v. U. S.*, 295 U. S. 476. Neither case has any bearing upon the status or rights of interveners in proceedings before the Commission. Both were suits under the special jurisdictional and procedural act

of Congress, invoked in the case at bar, to enjoin and annul orders of the Commission. In those cases it is made plain that the right of an intervenor in such suit rests squarely upon the express provision of the special act of Congress declaring that the Commission and any party to a proceeding before the Commission may, as of right, become a party to "any suit wherein is involved the validity of such order," 264 U. S. 267. In *I. C. C. v. Oregon-Washington R. Co.*, 288 U. S. 14, this Court, again because of the special authorization by the same special Act of Congress, held that the Commission, having intervened as a defendant in the district court, could appeal to this Court after the Attorney General of the United States had refused to appeal, since the statute expressly granted authority to such intervenor "to prosecute, defend or continue the proceeding unaffected by the action or non-action of the Attorney General," 288 U. S. 24.

Intervention "is not an independent action, but is ancillary and supplemental to the existing litigation", and must "be in subordination to, and in recognition of, the propriety of the main proceeding," *Adler v. Seaman*, 266 F. 828, 832 (8th C. C. A.).

"* * * when a person, not a party to a pending suit, who is interested in its subject-matter, desires, for his own protection, to assert his independent rights and raise new issues, he must do so by an original bill," *Leaver v. K. & L. Box & Lumber Co.*, 6 F. 2d 666, 667.

"* * * where the intervener joins either plaintiff or defendant in resisting the claims of the other side, he is not entitled to enlarge the issues," *DeSousa v. Crocker First Nat. Bank*, 23 F. 2d 118, 122.

By confusing and substituting for alleged rights of the Rio Grande, those of its solicited and procured shippers and treating the case as a shipper and public interest complaint, the Commission has given the Rio Grande a large part of its demands, even though it was unable to find from the evidence that the Rio Grande had sustained the allegations of its complaint. By this arbitrary action the Commission also circumvents and evades the provision in Section 15(4) which prohibits it from compelling through routes and joint rates to help a carrier meet its financial needs, and would succeed in severely short-hauling the Union Pacific and other railroads, which it found itself unable to justify upon evidence submitted by the Rio Grande in support of its own complaint and upon the only issues it could raise.

The Commission's effort to evade or circumvent the restrictions of Section 15(4) by resorting to sections of the Act which afford rights to shippers or the "public" and thus to divert traffic from one route to another is thoroughly condemned by this Court's decision in *Thompson v. United States*, 343 U. S. 549, at pages 559-560. Such "tinkering with through routes" by the Commission is prohibited, *U. S. v. Great Northern R. Co.*, 343 U. S. 562, 575.

2. The Commission acted arbitrarily and unlawfully in failing and refusing to give any effect to the requirement in Section 15(4) that reasonable preference be given to the originating carrier.

One of the mandates in Section 15(4) to the Commission is—

> "That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses

(a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

There is nothing in the report to indicate that the Commission gave the slightest recognition to this statutory mandate. Yet, the report shows that 101,476 carloads *originated* in 1948 on the Union Pacific in the "excluded territory." Of the total traffic, 157,762 carloads originated and terminated on the Union Pacific that year, 46 per cent originated or terminated on 2,913 miles of Union Pacific branch lines in that territory. Of the eastbound tonnage for that year, 50,349 carloads or 43 per cent of the total were products agriculture, including those specified in the order (R. 45). The report shows (R. 62) that the 2,913 miles of branch lines constitutes more than 50 per cent of the total of 5,606 miles of line of the Union Pacific in that territory and that Union Pacific has invested over $600,000,000 in the routes that would be affected by the diversion of the traffic to the Rio Grande. The unusual proportion of branch line mileage was obviously constructed for the purpose of developing and *originating* traffic in this essentially agricultural area in order to obtain a long main-line haul. The eastbound commodities which would be diverted to the Rio Grande under the Commission's order are agricultural products moving under sub-normal and depressed rates (R. 67), and it is inescapable that the effect of such diversions will necessarily tend toward curtailment of service generally and abandonment of the feeder branch lines on which 46 per cent of the total traffic originates and terminates.

The Commission also ignores the fact that, of the total eastbound movement of 6,473 carloads of animals and animal products in 1948 from Idaho, Montana, Oregon and Washington via the Union Pacific, practically

all of which terminated in the northern half of the eastern half of the United States, 5,094 carloads originated on the Union Pacific in Idaho and Montana and that line would receive an extremely short haul and very little revenue if the movement was via Ogden with the Rio Grande. The Commission further ignores the fact that 61 per cent of all traffic originating on the Union Pacific in Idaho is loaded at branch line stations and incurs very high gathering costs ranging from $18.99 to $106.12 per car (V. I, 849; original I. C. C. Ex. 27).

These facts demonstrate the reasons for and the fairness of the legislative mandate requiring the Commission in compelling through routes that short haul a carrier to give reasonable preference to the carrier that originates the traffic. The necessity of revenues from main line movement of such branch-line traffic is too plain for argument unless the Commission is sympathetic with a policy that potentially forces branch line abandonments and weakening of the Union Pacific financially. Such necessity for revenues and continued maintenance of branch lines clearly must be weighed and balanced against the pretended desire of a few shippers for routes which would divert the traffic to the Rio Grande so they may reconsign or take advantage of transit privileges while the traffic is on that line. The Commission has clearly ignored the mandate to give reasonable preference to the Union Pacific in these circumstances, but instead has based its order entirely upon the pretended desire of the few shippers who supported the Rio Grande. It has departed from the rule laid down by this Court that "both interests should be considered and a fair balance found." *Pennsylvania R. Co. v. U. S.*, 363 U. S. 588, 593.

The failure of the Commission to give any preference to the Union Pacific and other carriers that originate

the traffic, is plainly arbitrary and contrary to the statutory mandate that it shall give reasonable preference to the originating carriers. Its order based on such arbitrary and erroneous action is void.

3. The order should be enjoined and set aside because of its uncertainty, indefiniteness, and conflicting requirements, and because the Commission has exceeded its authority by using its through routes power under Section 15(3) and (4) to require a rate reduction under Sections 1 and 15(1) and to remove undue prejudice and discrimination under Section 3(1) and (4), and to equalize rates via the Rio Grande with rates of the Union Pacific routes.

The Court will not sustain the order if it, together with the report, is found to be indefinite or that its requirements are conflicting or if the report fails to make clear and specific the precise grounds on which the order rests and the exact requirements which it purports to make. *American Express Co. v. Caldwell*, 244 U. S. 617, 627; *Georgia Comm. v. United States*, 283 U. S. 765, 770-771, and *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, in which the Court, in concluding to enjoin the Commission's order in that case and in discussing the uncertainty and conflicting inferences of the report, held at pages 510-511:

> "The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 86; *Florida v. United States*, 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

The first paragraph of the order (R. 21) recites that the Commission has found:

> "* * * (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination."

The second paragraph of the order requires that "the defendants named in the complaints' cease and desist:

> "* * * (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph."

The third paragraph of the order requires "said defendants, and the complainant" (Rio Grande) to establish through routes as described therein, and joint rates "the same" as those maintained over the lines of the Union Pacific through Wyoming.

The fourth paragraph of the order requires "said defendants" to establish and—

> "* * * to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue

prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof."

Uncertainty and vagueness of the order lie in the fact that although, as just indicated, the railroads, including the Rio Grande, are required to establish via the Rio Grande through routes and joint rates "the same" as joint rates applicable via Union Pacific routes through Wyoming, yet the next paragraph of the order further requires "said defendants" to establish rates "which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof." It cannot be discerned from the order whether the latter rates shall also be "joint rates" or local rates, or what the level of rates required to prevent undue prejudice, preference and discrimination shall be. One is left to guess whether the joint rates required in connection with the through routes via the Rio Grande will prevent and avoid undue prejudice, etc., or whether that shall be accomplished by publishing rates other than or different from the joint rates required to be established in the public interest in connection with the required through routes.

Clearly, an order of such uncertainty and indefiniteness should not be sustained in view of the fact that Section 16(8) of the Act penalizes railroads and their officers $5,000 for each day they fail to comply with what they must guess or presume that the order requires.

If it be presumed that unreasonableness of the local rates and undue prejudice caused by them will be cured by publishing the joint rates required in connection with the through routes prescribed in the third paragraph of the order, then it results that the Commission has seized upon its through routes power under Section 15(3) and

(4) to prescribe the remedy for rates found unreasonable under Section 1 and 15(1), and for undue prejudice and discrimination found under Section 3(1) and (4).

Any ground that might have existed for contending that the Commission could seize upon its through route power to compel the exact remedy it desires for violations of other provisions of the Act was wiped out when Section 15(3) was amended in 1910. As originally enacted in 1906, Section 15(3) read (34 Stat. L. 590, Sec. 4):

> "The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through rates shall be operated, *when that may be necessary to give effect to any provision of this Act*, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line." (Italics added.)

The italicized language was deleted in enacting the 1910 amendment (36 Stat. L. 552, Sec. 12). And see *Thompson v. United States*, *supra*, concerning the independent, separate and special purpose of the Commission's through route power.

That the Commission may not so commingle and confuse separate and independent provisions of the Act or seize upon its powers under one provision indirectly to obtain the result it can not attain by use of its direct powers under the provision which confers its basic authority has been thoroughly and sufficiently demonstrated earlier in this brief at pages 97-107 and to avoid repe-

tition we respectfully request consideration of that discussion in connection with the contention here made with respect to the Commission's arbitrary and erroneous action resulting from such misuse and abuse of its statutory powers.

4. The Commission acted arbitrarily and contrary to law in refusing to give weight and effect to evidence showing that diversion to the Rio Grande of any substantial part of the traffic it seeks would result in wasteful transportation and economic waste, and in serious detriment to Union Pacific service and its employes, to certain other railroads and their employes, to numerous communities, and would do violence to the National Transportation Policy.

The Commission is without power to compel through routes and joint rates without first finding that they are necessary or desirable "in the public interest." In *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, this Court, in discussing "public interest" as used in the Transportation Act, 1920, said at page 23: "[t]he public interest is served by economy and efficiency in operation," and, at page 25, that the purpose of Congress in granting by that Act power to the Commission to do specified things in the "public interest" with the ultimate aim of insuring adequate transportation service, was directly related—

> "* * * to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities; * * *."

In *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, at page 277, in construing the 1920 Act, the Court said:

> "By that measure, Congress undertook to develop and maintain, for the people of the United

States, an adequate railway system. It recognizes that *preservation of* the earning capacity, and conservation of the *financial resources, of individual carriers is a matter of national concern;* that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; *that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss.* See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331. *The Act sought, among other things, to avert such losses.*" (Italics added.)

The Commission has heretofore adhered to its own rule that in determining questions involving "public interest" it must give consideration to probable detrimental effects as well as alleged benefits and determine "whether the probable benefits overbalance the probable injuries," *Chicago, R. & Q. R. Co. Control*, 271 I. C. C. 63, 146. In *Chicago, R. I. & G. Ry. Co. Trustees Lease*, 233 I. C. C. 21, 25, the Commission emphatically held that:

> "* * * the welfare of the employees affected is one of the matters of public interest which we must consider in proceeding under section 5(4). * * *."

and this holding was long before there was any specific requirement in Section 5(4) (now 5(2)(f)) that the welfare of employes be considered. The Commission's order in that case was sustained by this Court in *United States v. Louden*, 308 U. S. 225, in which the Court said at page 240:

> "If we are right in our conclusion that the statute is a permissible regulation of interstate com-

merce, the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, as well as the public at large, is undoubted."

Probable detrimental or injurious effects upon the public at large as well as those more immediately concerned is decisive of Commission action in many cases. *Chicago, B. & Q. R. Co., Control*, 271 I. C. C. 63, 165; *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266; *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127; and *Pacific Intermountain Exp. Co.—Control and Purchase*, 57 M. C. C. 341.

The "National Transportation Policy" while serving as a guide to the Commission in interpreting and applying the Act in particular cases, is also a directive to the Commission. It states:

> "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Under the directives of that policy, the burden was upon the Rio Grande to prove to the Commission that granting its full demands would, among other things: (a) Promote safe, adequate, economical and efficient service; (b) Foster sound economic conditions in transportation and among the several carriers; (c) Encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; (d) Encourage fair wages and equitable working conditions; (e) Develop, coordinate and preserve a national transportation system adequate to meet all needs, including national defense.

The Rio Grande did not undertake to submit such proof, but, in the light of the foregoing principles and controlling court decisions, evidence was submitted to the Commission by those who opposed the Rio Grande which showed the transportation and economic waste and the disastrous results upon Union Pacific revenues, service over its routes, and drastic adverse economic effects upon its employes and those of certain other roads, and upon communities served by them, if the Rio Grande succeeded in diverting to its line the entire volume or any substantial part of traffic claimed by it as its "potential". The Commission's report summarizes some of this evidence as follows (R. 65-66):

> "Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four Northwestern States, a total of 157,762, that number was used as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to $49,880,000 yearly.
>
> "Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (*a*) the discontinuance of four trains daily east-bound and four trains daily west-bound between Pocatello and North Platte; (*b*) three trains east-bound and three west-bound daily between North Platte and Council Bluffs; and (*c*) one train east-bound and one west-bound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of

$5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300." Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

"Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed at 5,144, with a total loss of wages of $21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real-estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

"The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect such employees from loss, as conditions upon the establishment of the joint rates and through routes."

But, instead of giving weight and effect to these matters, the Commission plainly sought to evade them.

For example, the report states that there is no specific provision in Section 15(3) or (4) requiring that the welfare of the employes be protected in connection with an order compelling through routes, despite the fact shown above that, regardless of the absence of such specific requirement, the Commission was sustained by this Court in holding that the welfare of employes is a matter of "public interest" which it must consider. *United States v. Lowden, supra.* The Commission next attempts to escape consideration of these matters by saying that it is impossible upon the record to estimate how much traffic might be diverted to the Rio Grande if joint rates were required on all the traffic, or under the terms of its order. "To refuse to consider evidence introduced" or to refuse to decide "in accordance with it" is "arbitrary action," *Chicago Junction Case*, 264 U. S. 258, 265. "Facts and circumstances which ought to be considered must not be excluded," *Morgan v. United States*, 298 U. S. 468, 480.

The Commission's evasion of probable detrimental consequences of its order by asserting its inability to find definitely or to estimate accurately the amount of traffic that might be diverted to the Rio Grande, as well as its statements which imply that little or no traffic will be diverted to the Rio Grande unless its solicitors can persuade and induce shippers to use transit privileges offered by that line in connection with bridge traffic, are diametrically opposed to its ultimate conclusion that the Rio Grande route is "necessary and desirable in the public interest, in order to provide adequate and more economic transportation." If the Commission was unable to ascertain from the record that the Rio Grande route is needed for the movement of a substantial volume of traffic, then there could be no basis for its ultimate conclusion that the route is "necessary" and the order falls

for lack of supporting findings that justify or afford a rational basis for it. The conclusion that the Rio Grande route is "necessary" inevitably implies that a substantial volume of traffic will be diverted over it. The Commission was under the inescapable duty to weigh the injurious and detrimental effects of its order against its expected benefits and to find "a fair balance", *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, 593.

If the required through routes and joint rates are necessary "in the public interest" as the Commission has found, then under the decisions cited above, the same "public interest" required the Commission to weigh the adverse effects as well as alleged benefits and to determine "whether the probable benefits overbalance the probable injuries", *Chicago, B. & Q. R. Co. Control*, 271 I. C. C. 63, 146. In failing and refusing to do so, the Commission acted arbitrarily and unreasonably, and for this reason, in addition to others discussed herein, its order is void.

CONCLUSION

For the reasons stated and discussed above, the Commission's order is unlawful and void in its entirety. The judgment of the district court in Numbers 117 and 119, enjoining and annulling the order in part, should be affirmed and its judgment in Number 118, sustaining the validity of the order in part, should be reversed and the case remanded to the district court with direction to issue the injunction and relief prayed by the plaintiffs in that court.

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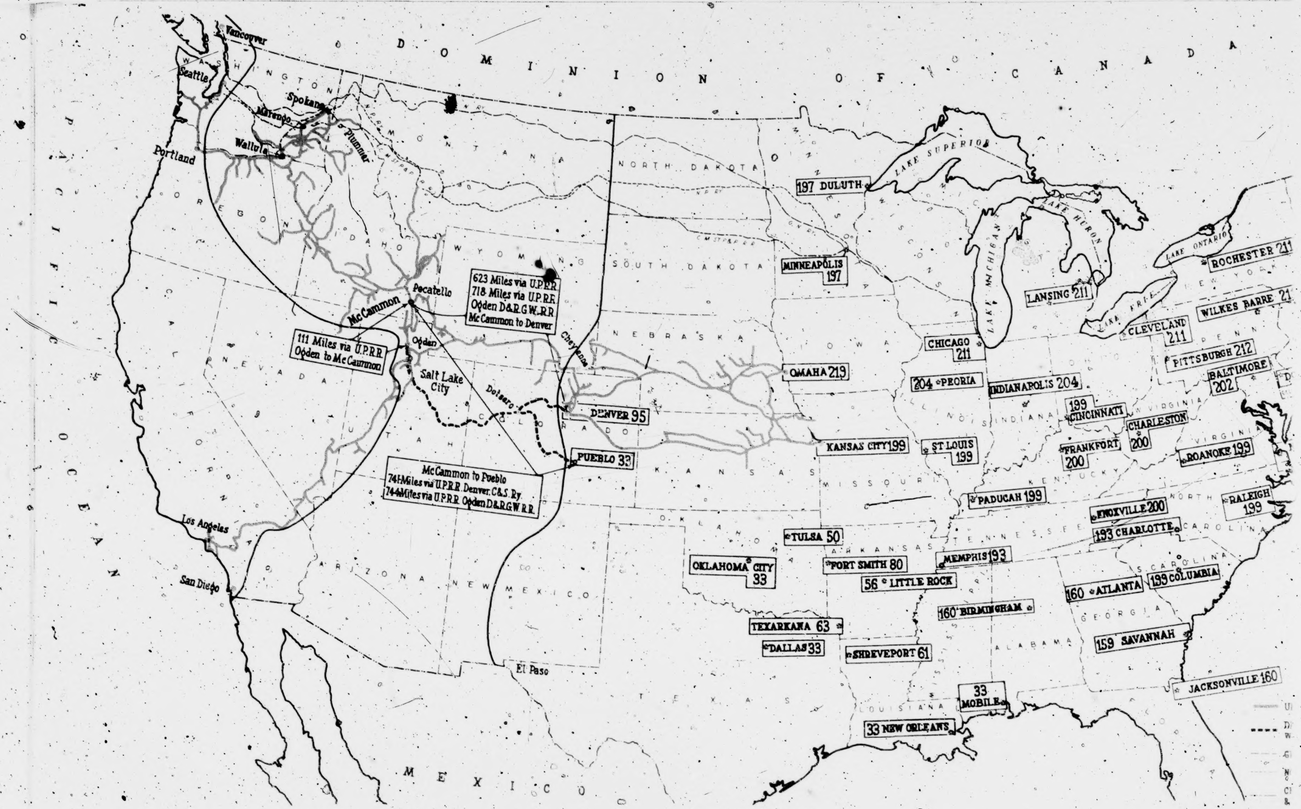
APPENDIX A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Wallula
Pocatello
McCammon
Ogden
Salt Lake City
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718 Miles via UPRR
Ogden D&RGW.RR
McCammon to Denver
111 Miles via UPRR
Ogden to McCammon
McCammon to Pueblo
741 Miles via UPRR Denver C&S Ry
744 Miles via UPRR Ogden D&RGWRR
DENVER 95
PUEBLO 33
Los Angeles
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MEMPHIS 193
56 LITTLE ROCK
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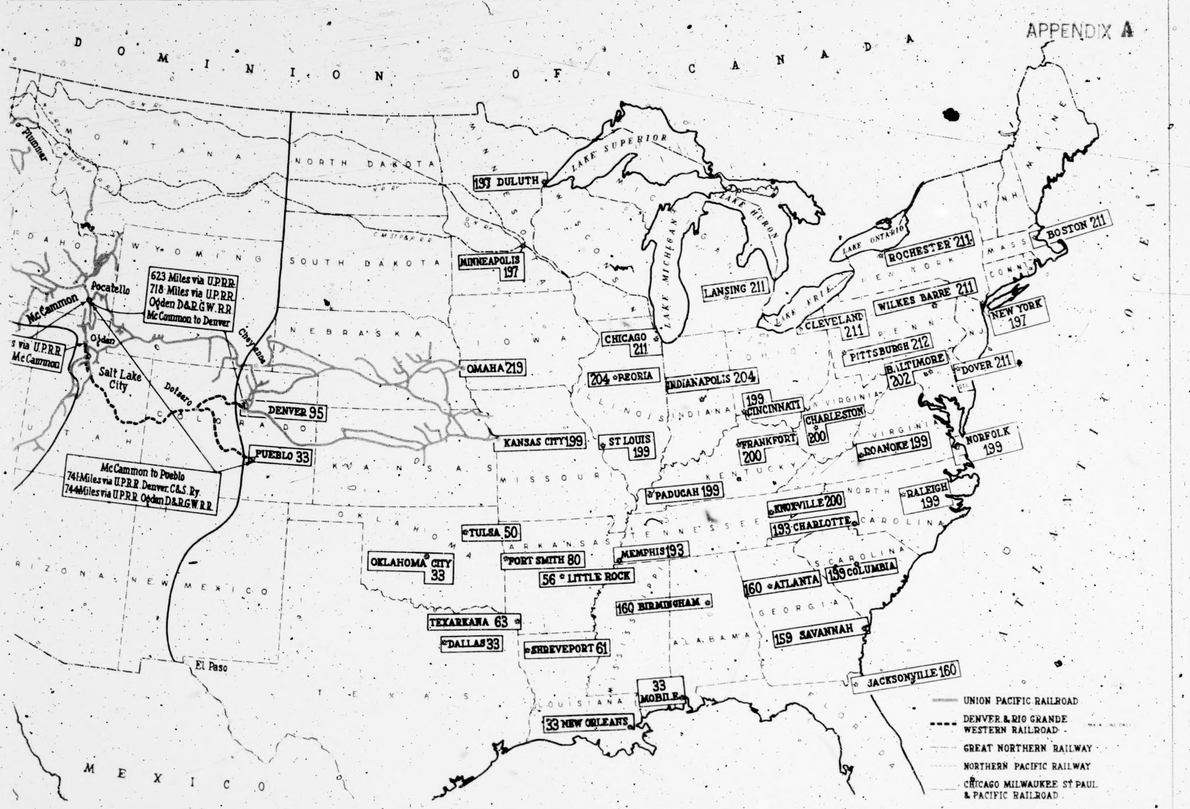
TEXARKANA 63
DALLAS 33
SHREVEPORT 61
159 SAVANNAH
JACKSONVILLE 160
33 MOBILE
33 NEW ORLEANS
UNION PACIFIC RAILROAD
DENVER & RIO GRANDE WESTERN RAILROAD
GREAT NORTHERN RAILWAY
NORTHERN PACIFIC RAILWAY
CHICAGO MILWAUKEE ST PAUL & PACIFIC RAILROAD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PUEBLO 33
El Paso
MEXICO
197 DULUTH
MINNEAPOLIS 197
LANSING 211
ROCHESTER 211
BOSTON 211
WILKES BARRE 211
NEW YORK 197
CLEVELAND 211
PITTSBURGH 212
BALTIMORE 202
DOVER 211
CHICAGO 211
OMAHA 219
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APPENDIX B

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in This Case Are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(3)(a)—

"* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *"

Section 1(4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1(5)—

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3(1)—

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port,

port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15(1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in

violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

Section 15(4)—

"In establishing any such through route the Commission shall not (except as provided in section

3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with anotner practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more effieient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

SUPREME COURT, U. S.
MAR 15 1956
HAROLD B. WILLEY, Clerk

No. 118
Consolidated with Nos. 117, 119, 332, 333 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

WASHINGTON PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSIONER OF OREGON;
BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA;
STATE BOARD OF EQUALIZATION AND PUBLIC SERVICE COMMISSION OF WYOMING;
STATE OF NEBRASKA AND NEBRASKA STATE RAILWAY COMMISSION,

Appellants,

v.

UNITED STATES OF AMERICA;
INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF FOR ABOVE NAMED APPELLANTS

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No. 118
Consolidated with Nos. 117, 119, 332, 333 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

WASHINGTON PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSIONER OF OREGON;
BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA;
STATE BOARD OF EQUALIZATION AND PUBLIC SERVICE COMMISSION OF WYOMING;
STATE OF NEBRASKA AND NEBRASKA STATE RAILWAY COMMISSION,

Appellants,

v.

UNITED STATES OF AMERICA;
INTERSTATE COMMERCE COMMISSION,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF FOR ABOVE NAMED APPELLANTS

OPINIONS BELOW

The majority opinion and the dissenting opinion of the three-judge United States District Court for the District of Nebraska (R. 151) are reported in 132 F. Supp. 72. The report of the Interstate Commerce Commisson (R. 25) appears in 287 I. C. C. 611.

JURISDICTION

This action was brought June 25, 1953, in the United States District Court for the District of Nebraska (R. 3) by the Union Pacific Railroad Company and seven other railroads, against the United States of America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul and set aside the order issued January 28, 1953, by

the Interstate Commerce Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co., et al." Petitions for reconsideration were denied by the Commission on June 10, 1953 (V. II, 1778)*. These appellants intervened as defendants in the Commission proceeding and as plaintiffs in the district court in support of the railroads' suit to enjoin and annul the Commission's order.

The order was issued upon a complaint filed with the Commission by The Denver and Rio Grande Western Railroad Company ("Rio Grande"), a perennially bankrupt and "financial needs" short line railroad, with its western terminus at Ogden, Utah, and its eastern termini at Denver and Pueblo, Colorado. The order (R. 21) requires, among other things, that the Union Pacific and over 200 other railroads establish in connection with the Rio Grande through routes and joint rates "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert for a "bridge"[1] haul

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* Because of duplication in page numbering the printed records in these cases, this abbreviation will be used to refer to pages of Volumes I & II, proceedings before the Interstate Commerce Commission.

1 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates outside of Rio Grande territory: Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

over its line for the admitted purpose of enhancing and improving its financial position. The traffic originates and terminates on through routes of the Union Pacific and other railroads and has been hauled under joint rates maintained over those routes through Wyoming and Nebraska for 75 years between points in the northwest area, embracing the States of Oregon, Washington, Montana and Idaho, and points in the eastern and southern parts of the United States generally east of the Missouri River. The order would result in short-hauling Union Pacific routes at least 925 miles, subjecting them to very large revenue losses.

Ordinarily, demands for an additional route come from shippers on the ground that existing routes are inadequate and that the *proposed* additional route is shorter and is "needed" to provide "adequate and more efficient or more economic" transportation than that provided by existing routes. The order in this case, however, presents the novel and unique situation of an attempt by the Commission and the Rio Grande to short haul Union Pacific routes which are faster, cheaper and shorter (by as much as 50% in some instances) than any route that could be made via the Rio Grande between the origins and destinations of the involved traffic.[2]

Final judgment and decree of the majority of the district court sustaining the validity of the order "in part" and enjoining it "in part" was entered December 20,

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2 The order here reflects the latest of the Commission's long and persistent efforts to evade or "limit by construction the impact of the short-hauling restriction on its power to establish through routes," recognized and discussed by this Court in *Thompson v. United States*, 343 U. S. 549, at pages 555 and 556.

1954 (R. 229). Notice of appeal was filed February 18, 1955 (R. 230). On March 22, 1955, Circuit Judge Johnsen, presiding member of the district court, entered an order extending to June 1, 1955, the time for filing the record and docketing the cases of all appellants in this Court. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101(b). Probable jurisdiction was noted by this Court on October 24, 1955.

STATUTE INVOLVED

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out verbatim in Appendix A hereto:

National Transportation Policy (preceding Section 1), and Sections 1(3)(a); 1(4), 1(5), 3(1), 3(4), 15(1), 15(3) and 15(4).

QUESTIONS PRESENTED

(1) Whether the court erred in refusing to hold that, in this proceeding, brought by the Rio Grande for the admitted purpose of enhancing its financial position by diverting for a "bridge" haul over its line transcontinental through traffic now and for some 50 years moved over Union Pacific routes between points on those routes in the far northwest and points in the eastern and southern parts of the United States, the Commission was prohibited from issuing the order in this case by the provision of Section 15(4) of the Interstate Commerce Act that "[n]o through route and joint rates applicable there-

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3 Jointly with Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, who are filing a brief for those railroads.

to shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs", and that this prohibition may not be evaded or circumvented by the Commission's assertion that in making the order "no consideration has been given to the financial needs" of the Rio Grande.

(2) Whether the court erred in refusing to hold that, in view of the provisions of Section 15(4) of the Interstate Commerce Act (49 U. S. C., § 15(4)), the Commission acted arbitrarily and unlawfully in issuing the order short-hauling Union Pacific routes at least 975 miles, since the Commission found:

(a) That Union Pacific routes have lower rates than the Rio Grande and are shorter, faster, efficiently operated, adequate and have surplus capacity to haul any foreseeable volume of the through traffic involved;

(b) That movement of the same through traffic via the Rio Grande would require over 200 miles additional transportation, at least 24 hours more time in transit, and one or two additional interchange services; and that the Rio Grande maintains higher rates, is less favorably located and has more onerous operating conditions than the Union Pacific or any of the other Western lines.

(3) Whether the court erred in failing to hold that the entire order is void because the Commission misconstrued, departed from and failed to observe the rule and norm of its previous decisions and the controlling statutory standards and criteria of Sections 1(4), 3(1) and (4) and 15(3) and (4), in basing its order:

(a) Upon the premise that the standards and conditions of Section 15(4) (b) [which permit establishment of a proposed route short-hauling ex-

isting routes of other railroads, *only* if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation"] are lawfully observed and applied by the Commission's findings here:

1. of a need for "more" adequate and economic service than that offered by Union Pacific routes, and

2. that the Rio Grande route is "necessary and desirable" to provide "adequate and more economic transportation",

without any finding by the Commission that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes for the involved through traffic between the same origins and the same ultimate destinations;

(b) Upon the premise that the conditions which permit short-hauling other carriers under Section 15(4)(b) can be met and satisfied by merely substituting the lower joint rates applicable over Union Pacific routes for the higher combination rates via the proposed Rio Grande route;

(c) Upon the premise that, under Section 15(4)(b), service over Union Pacific routes may lawfully be condemned and found "inadequate and less economical" than the Rio Grande route for through traffic because, *at points located on and served only by the Rio Grande*, "the Union Pacific routes and the joint rates that apply over them are not available and higher rates apply";

(d) Upon the premise that the Commission may invoke its power under Section 15(3) and (4)(b) for the purpose of making additional transit privileges available by equalizing rates via the Rio Grande with rates applicable over Union Pacific routes;

(e) Upon the criteria that the marketing system for food articles of a perishable nature requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible", although Section 1(4) and the prevailing rule of the Commission's prior decisions require carriers to establish only "reasonable" through routes;

(f) Upon the inconsistent criteria that:

1. food articles of a perishable nature must move to markets "with expedition and care" and "without unnecessary interruptions";

2. the longer Rio Grande route is necessary to permit the through transportation of such articles to be interrupted so that the articles may be held as long as 12 months at points on the Rio Grande for "commercial operations" called transit privileges, and

3. ordinary livestock to stop for grazing or feeding, and marble and granite monuments to stop for partial unloading at points on the Rio Grande fall within the category of perishable food articles found by the Commission to require expeditious, careful and uninterrupted transportation;

(g) Upon the premise that the Commission may lawfully invoke its powers under Section 15(3) and (4) to obtain the remedy it desires for rates found violative of Sections 1 and 3, and that findings of violations of the latter sections afford a lawful basis for ordering the through routes and joint rates.

(4) Whether the Commission may require Union Pacific routes to short haul themselves by establishing through routes and joint rates with the Rio Grande for the sole purpose of permitting through traffic to be stopped at points on the Rio Grande, not served by the

Union Pacific, for "commercial operations" (known as transit privileges), such as storing, processing and cattle grazing, at the same rates the same shippers have when using Union Pacific routes between the same points of origin and the same ultimate destinations.

(5) Whether the court's finding that transportation service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" for through shipments requiring transit at points on the Rio Grande and re-shipment to final destinations beyond its termini, affords a lawful basis for the order short-hauling Union Pacific routes under Section 15(4)(b), which permits short-hauling other railroads only if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

(6) Whether the court erred in failing to review and consider the whole record of evidence and all the issues tendered by the pleadings and arguments of the parties, and in failing to hold that the order is entirely null and void, because:

(a) The order is based upon erroneous interpretations of law, and there is no rational basis or support for the order or any part of it, in the evidence or in the findings made by the Commission;

(b) The Commission *did not make*, and the evidence does not justify or support, findings essential to the validity of the order, among others:

1. that Union Pacific routes are inadequate, inefficient and uneconomic for movement of the involved traffic,

2. that the Rio Grande route is "needed", and that it will provide "more efficient" trans-

portation service than Union Pacific routes (Section 15(4)(b)),

3. that diverting traffic and revenues from Union Pacific routes to the Rio Grande would serve such beneficial purpose as maintaining good service or improving it,

4. that the Rio Grande is efficiently operated, furnishes satisfactory service or has surplus capacity or ability to haul any additional volume of traffic,

5. that diverting the traffic to the Rio Grande's longer route will speed up its movement,

6. that the Rio Grande will generate new or additional traffic or contribute additional transportation facilities in the northwest area, or that existing routes are insufficient or incapable of moving the traffic to and from that area,

7. that by including the Rio Grande route shippers to and from the northwest area will have lower rates than they have via Union Pacific routes,

8. that the overall transportation system or shippers using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line,

9. that shippers have ever made complaint against service rendered by Union Pacific routes for the traffic involved, or demanded that the Rio Grande be included in present through routes;

(c) The evidence does not support or justify the Commission's findings—

1. that the combination of local rates via the Rio Grande are unjust and unreasonable,

2. that the joint rates which now apply over Union Pacific's shorter and more direct

routes are reasonable for application via the longer and more onerous Rio Grande route,

3. that the combination rates via the Rio Grande are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande route or unduly preferential of shippers and receivers using the Union Pacific routes,

4. that the Union Pacific and other railroads discriminate against the Rio Grande in violation of Section 3(4) in maintaining through routes with the Bamberger Railroad at points on its line between Ogden and Salt Lake City, while refusing to make like joint rates with the Rio Grande at the same points,

5. that through routes and joint rates with the Rio Grande are "necessary and desirable" in the public interest to provide "adequate and more economic transportation",

6. that shippers in the northwest producing area (who testified that they sell their products in all markets in all the 48 states and 5 foreign countries) "are debarred from effective participation" in the marketing system, because they must pay higher rates if they ship through traffic via the Rio Grande than the joint rates available to them via Union Pacific routes for the same through traffic moving between the same origins and the same destinations;

(d) The Commission arbitrarily refused to give effect to the requirement in Section 15(4) that reasonable preference be given the originating carriers;

(e) The Commission refused to consider or give effect to the National Transportation Policy and to the evidence showing that diversion to the Rio Grande of any substantial part of the traffic would result in wasteful transportation and economic

waste and in serious detriment to Union Pacific service and its employees, to certain other railroads and their employees and would inflict serious economic injury to numerous communities and the public served by Union Pacific routes;

(f) The Commission arbitrarily commingled and misused its authority under, and the remedies for violations of the separate and independent provisions of Sections 1(4), 3(1) and (4) and Section 15(3) and (4), and its order is vague, uncertain, indefinite and conflicting in its requirements;

(g) Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint and in ordering through routes and joint rates on the theory that because shippers had intervened and testified, the Rio Grande's complaint became a shipper complaint;

(h) The Commission acted arbitrarily and unlawfully in refusing to dismiss the entire proceeding on the ground that it was vitiated and nullified by the fact that shipper witnesses on whose testimony the order is based were admittedly solicited and procured by the Rio Grande for the purpose of helping it win its case.

POSITION AND INTERESTS OF THESE FIVE APPELLANT STATES

These five States were moved to intervene in the proceeding before the Commission and the court because of the overwhelming detriment the shippers and general public of such States would suffer as a result of the diversion of traffic away from the Union Pacific proposed by the Rio Grande. Any such diversion of traffic would immediately affect the service of the Union Pacific to ship-

pers and would also inflict very serious consequences upon employees of the Union Pacific that are now engaged in the handling of such traffic in these five States. Moreover, such diversion, as shown by testimony reviewed hereafter, would greatly impair the capacity of the Union Pacific to continue to provide at lowest cost the transportation service so essential in all this territory.

It was made indisputably clear by these States that in their area there is no substantial need for the new routes and joint rates proposed by Rio Grande and that the granting of proposed relief to this local mountain railroad of Colorado and Utah would adversely affect the economy of all these intervening States.

These five States, representing territory[4] served by long established Union Pacific routes between the Missouri River and the Pacific northwest, oppose Rio Grande proposals to short haul the shortest, swiftest and most economical route to eastern and southern markets, by requiring Union Pacific and over two hundred other railroads to enter into joint through rates with the Rio Grande whose admitted objective is to divert this traffic, primarily from the Union Pacific, in order to obtain a "bridge" haul and thereby improve its financial position. According to Rio Grande the "potential" volume of such traffic moving from the northwest to the east and south, which would be "available for solicitation", amounts to 101,476 carloads annually.[5]

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4 The area of the five States approximates 500,000 square miles, or about one-sixth of the total area of the United States. The population of the five States represented by these appellants is nearly seven million people.

5 As indicated by the Commission (R. 45) the bulk of the traffic sought constitutes agricultural and mineral products of the north-

(Continued on next page)

Being distant from the principal markets, the economic life of the northwest depends upon fast, efficient, low cost transportation. Present transportation facilities and routes to and from this area are more than sufficient and Union Pacific alone is shown to possess an unused transportation capacity of 85%. Piling on additional surplus facilities and unneeded routes will, in the opinion of these States, adversely affect the economic future of this territory and violate the manifest policy and intention of Congress."

The present through route provisions of the Act were adopted in 1940 in order to make the "shortest, quickest, and cheapest routes available."[7] Union Pacific routes meet these tests. Rio Grande routes do not.

(Continued from preceding page)

west, which (R. 87) now travel via Union Pacific "because the Union Pacific routes are shorter." The reverse movement west comprises only 56,286 carloads annually and was given little emphasis by Rio Grande. The only westbound articles included in the order were granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the northwest (R. 22).

The traffic east and the traffic west are entirely independent of each other and should have been so considered. The Commission's order which the Court annulled in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 273, involved only the establishment of "through routes for westbound freight traffic."

6 Congressional policy since 1920 has stressed as paramount economy and efficiency in transportation facilities. *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277. The 1940 declaration of Congress (49 U. S. C. preceding § 1) emphasizes "adequate, economical and efficient service" and this declaration controls the "basic power of the Commission," *American Trucking Assns. v. U. S.*, 344 U. S. 298.

7 In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

"Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes*

(Continued on next page)

STATEMENT

About 172,000 carloads of traffic originate and terminate annually on the lines of the Union Pacific, Great Northern, Northern Pacific, Milwaukee, Southern Pacific and other railroads that have owned and operated for some 75 years thousands of miles of trackage in the ("northwest") area embracing northern Utah, Idaho, Montana, Oregon and Washington. Most of that traffic originates and terminates on the lines of the Union Pacific[8] and moves over its lines through Idaho, Wyoming, Nebraska and Kansas between points in the northwest area and points in the eastern and southern part of the United States over through routes ("Union Pacific routes") and under joint rates maintained by the Union Pacific and other railroads, including those named above. The joint rates have never applied via the Rio Grande except during a short period in the early part of this century, when Union Pacific and two of its subsidiary lines were in receiverships. Having their own shorter

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(Continued from preceding page)

available * * *. The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate.* If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

8 Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands, and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its line.

and direct routes connecting at their eastern termini with other railroads forming the through routes for this transcontinental traffic, the Union Pacific and other carriers serving the northwest area have insisted in retaining their long hauls and therefore have refused to establish through routes and joint rates with the Rio Grande for this transcontinental traffic. The only rates applicable via the Rio Grande for this traffic are the combination or the sum of the local rates of each carrier, and those rates are higher than the joint rates over Union Pacific routes.

Since 1935, the Rio Grande management has sought some method by which it could compel carriers comprising the Union Pacific routes to make their joint rates applicable via its longer and more onerous, mountainous route for a "bridge haul" on traffic from and to the northwest area (V. 1, 48). On August 1, 1949, the Rio Grande filed its complaint with the Commission which resulted in the order involved in these appeals. The complaint alleged that the combination of local rates via the Rio Grande for the involved traffic are so much higher than the joint rates maintained via Union Pacific routes as to prevent the movement of the involved traffic via the Rio Grande, thus depriving the Rio Grande of through freight traffic it might obtain if "equal rates" applied via its line. It alleged that the combination rates were unjust and unreasonable, unduly prejudicial to shippers desiring to use the Rio Grande and that the refusal of the Union Pacific and other defendants named in the complaint to establish joint rates in connection with the Rio Grande the same as the joint rates maintained over Union Pacific routes violated Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act.

Upon filing its complaint, the Rio Grande conducted a vigorous publicity campaign among shippers in the

northwest area and along its own line, condemning the Union Pacific and soliciting and procuring shippers and their organizations to intervene in support of its complaint and testify in such manner as to help it win its case. It succeeded in procuring about 50 of such shippers to intervene and testify, assuring them that by doing so they had nothing to lose but instead they, as well as the Rio Grande, would profit and benefit by an order from the Commission requiring the joint rates demanded by its complaint.

The Rio Grande demanded that the Commission order the Union Pacific and other defendants named in the complaint to establish joint rates on all commodities in connection with the Rio Grande "the same" as the lower joint rates maintained over Union Pacific routes. Realizing that its demands would short-haul the Union Pacific routes 925 miles, Rio Grande's complaint alleged that, as its tracks physically connect with other railroads, through routes "now exist" for the interchange of the involved traffic between its line and the Union Pacific and other railroads and contended that the Commission should prescribe the joint rates without regard to the prohibition in Section 15(4) against short-hauling existing routes. Citing this Court's decision in *Thompson v. United States*, 343 U. S. 549, the Commission rejected that contention and held that prescription of the joint rates demanded by Rio Grande would involve the authority conferred by Section 15(3) as limited by Section 15(4) to prescribe through routes and joint rates.

The Commission found that because of dissimilarities in transportation conditions including the fact that the Rio Grande has "more onerous" operating conditions than any other western line, and that routes via its line would be substantially longer than Union Pacific routes,

the evidence did not prove discrimination against the Rio Grande (except at points on the Bamberger Railroad between Ogden and Salt Lake City). But for the commodities named in the order it found the combination rates via the Rio Grande were unjust and unreasonable and unduly prejudicial to shippers desiring to use that line and unduly preferential to shippers using Union Pacific routes to the extent that the combination rates via the Rio Grande "exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes".

Instead of exerting its direct powers to remedy the violations so found (of Sections 1(4), 3(1) and 3(4) of the Act) the Commission invoked its power under Section 15(3) and 15(4) to order through routes and joint rates, saying that its action here was grounded on the exception to the short haul prohibition in Section 15(4)(b) which permits the Commission to order a new through route short-hauling existing routes if "the Commission finds that the through route, *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation." Purporting to act under that clause, the Commission said a question of "more" adequate transportation was presented as to certain commodities of a perishable nature. It found Union Pacific routes "inadequate" for the novel and untenable reason that they are not available at points located exclusively on the Rio Grande and that the *proposed* Rio Grande route "is necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for the commodities named in the order. It did not find the Rio Grande route was "needed" nor that it would provide "more efficient" or cheaper transportation than that provided by Union Pacific routes.

The order (R. 21) requires the Union Pacific and over 200 other railroads to cease and desist from publishing rates for the articles named in the order in connection with the Rio Grande higher than the rates maintained over Union Pacific routes and from practicing the undue prejudice and preference and unlawful discrimination found in the report. The order further requires the defendants named in the Rio Grande's complaint to establish and maintain "rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination" found in the report. However, neither the report nor the order indicates whether establishment of the rates required will remove the undue prejudice, preference and unlawful discrimination so found, or whether some other and different rates would be necessary to accomplish that result.

In an apparent attempt to justify the use of its through route and joint rates powers the Commission departed from the standards of Section 15(4)(b) which it had expressly invoked, and from the criterion or measure of a railroad's duty under the Act, Section 1(4), which makes it the duty of railroads only "to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto." The report asserts that the present complex and far-flung marketing system for perishable food articles requires that they be moved to market "with expedition and care", and "over as many routes as possible", with "as much flexibility as possible" and without "unnecessary interruptions" (R. 70), to "as many markets and outlets as possible" (R. 56). Thus, the Commission invents a new standard or criterion of as many through routes "as possible" and substitutes that standard for those prescribed by the Act.

The majority of the district court (Circuit Judge Johnsen dissenting on the ground that the order was entirely void because it was based on standards and criteria beyond warrant of the Act) held that there was no evidential or legal basis for the Commission's finding that the combination rates via the Rio Grande are unduly prejudicial or preferential in violation of Section 3(1), and no evidence to support the Commission's finding that the Union Pacific routes are "inadequate and less economical than are the Rio Grande routes", except for shipments actually stopped at points on the Rio Grande (not served by Union Pacific) for certain commercial operations known as "transit privileges", such as grazing cattle, freezing, processing and storing and later reshipment of the articles named in the order to destinations beyond the termini of the Rio Grande. For the latter shipments the court sustained the validity of the order but enjoined and set it aside as to all shipments *not* requiring stoppage for in-transit privileges at points on the Rio Grande.

The Commission held that it could not order through routes and joint rates via the Rio Grande without first finding that the Union Pacific routes were "inadequate" and the court agreed with that view (R. 69, 160).

The Commission condemned Union Pacific routes as "inadequate" on the wholly erroneous ground that they offer lower rates and are not available at points served exclusively by the Rio Grande.

But the majority of the court adopted still another erroneous basis for condemning Union Pacific routes, to the extent it sustained the validity of the order, i. e. that transportation service for shipments of the involved

traffic requiring in-transit privileges *at points on the Rio Grande* was "inadequate and also inefficient and uneconomical" (R. 166), and that for such shipments the through routes and reduced joint rates required by the order were needed to provide adequate and more economic transportation via the Rio Grande.

The majority of the court holds that the absence of transit privileges at points on the Rio Grande justifies the Commission in short-hauling Union Pacific routes by invoking its through routes and joint rates powers and the court further holds that the use of the through routes power is justified as a means of remedying unreasonable rates and unjust discrimination against the Rio Grande at points on the Bamberger Railroad between Ogden and Salt Lake City (R. 167, 168).

SUMMARY OF ARGUMENT

1. This case involves a unique proposal that Rio Grande, with routes from 200 miles to 50 per cent longer than Union Pacific routes, be permitted to short haul the shortest, fastest, most efficient and most economic routes from the Pacific northwest to the eastern markets. The affirmative findings of the Commission as to Union Pacific facilities, service and capacity preclude any jurisdictional conclusion that the proposed route is "needed in order to provide adequate, and more efficient or more economic transportation". Since the undisputed evidence shows Union Pacific routes are "adequate" for the through movement of the involved traffic, there was no occasion to consider the Rio Grande's proposal to establish additional routes via its line.

The majority opinion of the district court concludes that only as to shipments requiring transit on the Rio

Grande is there any basis for a claim of inadequacy. As pointed out hereafter a finding of inadequacy of Union Pacific routes cannot be based on the higher rates charged by Rio Grande in connection with its transit privileges.

Rio Grande, in instituting this action, made no claim that Union Pacific routes are not adequate and has not questioned the economy and efficiency of Union Pacific routes. The Commission findings reflect some of the inefficiency of the mountainous Rio Grande route, but do not portray the full extent of the wastefulness involved in the longer, slower and more circuitous route of the Rio Grande.

The evidence of these five States demonstrates conclusively that the proposed routes are not "needed" and that serious public detriment will be sustained by their establishment. This showing as to "public interest" was given no weight by the Commission.

The shipper testimony, solicited by Rio Grande, is without probative force and is clearly contrary to the overwhelming preponderance of the evidence. Under any reasonable interpretation of statutory requirements the evidential basis or which the order rests is insufficient.

Our contentions are supported by the legislative history of 1940 amendments which demonstrate the intent of Congress to strengthen restrictions on short-hauling, and make it possible for the Commission to establish "shorter" instead of "longer" routes.

2. To construe the statutory provisions as permitting establishment of through routes solely to afford shippers using Rio Grande lower rates in connection with existing transit privileges, will, as held by Circuit Judge

Johnsen in his dissent, make it possible for the Commission to create new routes "from every connecting point in the country against every existing carrier". Transit being a "commercial operation", as held herein by the Commission, and not being a transportation service, the Act cannot be by-passed by sustaining the order on the basis of transit rates. The Commission's authority to deal with transit privileges is wholly independent of its through route and joint rate powers. The decisions uniformly hold that transit is local in character and subject to control by the carrier serving the shipper.

The criteria under which the Commission established through routes here do not conform to the statute. The Act does not authorize as many new routes "as possible" to reach as many new markets and provide as much flexibility "as possible"; and as pointed out below by Judge Johnsen, any such standards would completely destroy the short-haul prohibition in Section 15(4) of the Act.

The Commission failed to find that the proposed route is "needed" or will provide "more efficient" transportation as required by clause "(b)" of Section 15(4) which it expressly invoked. In addition, the Commission distorted the statutory requirement of "adequacy" by a mere finding that addition of the proposed route would make transportation "more adequate".

The Commission's report contains many inconsistent and conflicting findings and even fails to follow and apply the standards and criteria it adopted as the legal basis of its order.

The Commission having invoked the standards of clause "(b)" of Section 15(4) as the basis for its action,

the order must stand or fall under those standards and cannot be sustained at this time under any other standard or provision of the Act. This rule, clearly established by the decisions of this Court, is essential to prevent judicial exercise of "administrative" functions. The effort of Rio Grande and the Government to sustain the order under other provisions of the Act must therefore fail.

The evidence shows that this is a "financial needs" case within the prohibition of Section 15(4) of the Act and for that reason alone the Commission should have dismissed the complaint. Rio Grande could have no other purpose than financial gain in becoming a "bridge"-carrier in the proposed route. Reducing the scope of the Commission's order, as the court below did, does not change the financial gain character of the case.

The Commission's order entirely disregards the requirements of National Transportation Policy established by Congress and this failure, standing alone, invalidates the order under recent decisions of this and other federal courts.

3. The evidence will not support a finding of any violations of the Act by Union Pacific. Moreover, as held by this Court in *Thompson v. United States*, 343 U. S. 549, 560, and other cases, none of the claimed violations of the Act may be used to evade the through route requirements of Section 15(4).

There is an entire absence of evidence to sustain the Commission finding that present combination rates via the Union Pacific are unreasonable. The sole support for such finding in this record is a comparison of commodity rates showing that joint rates on the Union Pacific are

lower than combination rates via the Rio Grande. As this Court has often noted, this is always true and proves nothing. If such a showing justifies establishing a new route, then Section 15(4) is completely nullified.

The rate and other provsions of the Act under a long line of decisions of the Commission and this Court are subordinate to the through routes provision and cannot be used to circumvent the latter requirements.

In view of the admitted dissimilarity in transportation conditions, between the Union Pacific and Rio Grande routes, there can be no finding of undue prejudice under Section 3(1) nor of unjust discrimination under Section 3(4). The burden of proof in this regard was upon Rio Grande and the finding by the Commission of no violation under Section 3(4) required a like finding under Section 3(1). In addition, Section 3(1) gives no rights to Rio Grande since this section is applicable only to shippers and receivers of freight. Intervention of some shippers in support of Rio Grande did not remedy this defect since their intervention was ancillary and in subordination to the rights of Rio Grande.

The proviso to Section 3(1), added in 1940, prevents that section from being used to establish discrimination involving the traffic of "any other carrier". The 1940 legislation expanded Section 3(1) so as to prohibit discrimination against any "region, district" or "territory". The legislative history of this proviso shows that it was added when Section 3(1) was expanded to prevent any such expanded Section 3 from being used to override other provisions of the Act including Section 15(3) and (4). Section 3 cannot be utilized as a basis for any claim of discrimination as to transit privileges.

The decisions relied on by Rio Grande fail to sustain any claim of a violation of the Act. *State of New York v. United States*, 331 U. S. 284, involved "interterritorial class rates" and no question of through routes. The proviso to Section 3(1), added in 1940, was not involved or mentioned in the opinion. *Virginian Ry. v. United States*, 272 U. S. 658; involved claims of discrimination by one railroad of 54 shippers on its own line because their rates were higher than rates of 45 other shippers on the same line of railroad.

4. The Commission has commingled and misused independent provisions of the Act to circumvent Section 15(4). As emphasized by Circuit Judge Johnsen below, this has resulted in great "confusion" in the report and constitutes another "attempt by the Commission to gain a new foot hold, under another disguise". Such scrambling of the provisions of the Act has been condemned by this Court in such cases as *Central R. R. Co. v. United States*, 257 U. S. 247. The Commission has direct and definite powers under Sections 1 and 3. These sections cannot be used to circumvent Section 15(4) and the latter cannot be used to provide reasonable rates under Section 1 or to prevent discrimination under Section 3. An amendment to Section 15 in 1910 eliminated language which prior thereto might have permitted that section to be utilized "to give effect to any provision of this act."

ARGUMENT

I.

Since the Undisputed Evidence Shows and the Commission Found That (1) Union Pacific Routes are Shorter, Faster, Efficiently Operated and Have Surplus Capacity to Handle any Foreseeable Volume of Traffic and (2) Rio Grande Routes are Over 200 Miles Longer, Require Additional Interchanges, Involve More Onerous Operating Conditions and Maintain Higher Rates, the Record Will not Support a Jurisdictional Finding That Proposed Rio Grande Routes are "needed in order to provide adequate and more efficient or more economic transportation" as Required by Section 15(4) (b) of the Act.

The Commission report recognized at the beginning that Rio Grande proposals must satisfy Section 15(4)(b)[9] and that it could not order additional routes via the Rio Grande "unless the existing routes can be found not to provide 'adequate' transportation" (R. 69). The majority of the district court agreed that "only in the event there was inadequacy of transportation can the question of efficiency or economy be reached" (R. 160).

Thereafter the report reviews the evidence and makes affirmative findings as to the efficiency and adequacy of Union Pacific facilities which findings are inconsistent with and contradict the conclusions that Union Pacific routes are "inadequate" and that the proposed new

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9 "* * * any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation." (R. 619.)

routes are needed as required by Section 15(4)(b)."[10]

The majority opinion of the district court sustains the Commission's order only as to shipments "which require in-transit privileges at points on the Rio Grande." As to all shipments from the northwest to initial destinations east of Denver and shipments west with initial destinations in the northwest territory, the majority opinion concludes that "[t]ransportation service is now adequate between those points."

In the next section of this brief we point out that no part of the order may be sustained upon the basis of in-transit privileges on the Rio Grande. As suggested by the dissenting opinion of Circuit Judge Johnsen,

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10 The Commission finds that Union Pacific facilities are:
"* * * adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (R. 62);
that the Union Pacific:
"* * * has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line" (R. 62);
that:
"* * * through service over defendants' [Union Pacific] routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande * * *" (R. 70);
that:
"Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services" (R. 62);
that, because of physical and geographic facts recited in its report and its longer mileage:
"* * * the Rio Grande line is less favorably situated than that of the Union Pacific" (R. 62);
and that:
"* * * as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein." (R. 70.)

Union Pacific routes, may not be declared inadequate upon such a ground.

The very first inquiry, in applying Section 15(4), as this Court said in *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, is to determine whether there "is adequacy of transportation." Unless Union Pacific routes are "inadequate", and there is no evidence to support such a finding herein, a new through route that short hauls the Union Pacific cannot be established.

Having properly made the basic findings of fact that present Union Pacific routes are adequate, the Commission should have ended its inquiry and dismissed the proceeding altogether, for, where existing routes are "adequate" and not unreasonably long, the Commission is without authority to compel other routes that short haul existing routes. Because the Commission ignored the adequacy of existing routes which it undertook to short haul by requiring others, its orders were annulled in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, and in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269."[11]

There is no room for dispute in this record that the use of the shorter single line system of the Union Pacific results in more efficient transportation than the use of the proposed Rio Grande route, which involves two more interchanges between carriers, as well as traversing a

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11 The essentiality of a rational and factually sound finding of "inadequacy" of existing routes or service lies in the fact that it is jurisdictional and, therefore, must be made before the Commission can exert the authority to order additional routes or service. *United States v. B. & O. R. Co.*, 293 U. S. 454; *Florida v. United States*, 282 U. S. 194; *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588; *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538; *Hudson Transit Lines v. United States*, 82 F. Supp. 153, 157, aff. 338 U. S. 802.

longer and more difficult terrain. There is no room for dispute that the use of the single line route of the Union Pacific is more efficient and more economic for the same reasons and for the additional reason that it is considerably shorter.

There can be no question that transportation facilities and services in the entire northwest territory are more than adequate. The territory is served not only by the Union Pacific, but also by the Great Northern, the Northern Pacific, the Milwaukee, the Southern Pacific and certain short line railroads as well as by water and motor carrier service.

It is to be noted, in this connection, that in instituting this proceeding before the Commission, the Rio Grande makes no claim whatever that its route is "needed" as required by Section 15(4), or that Union Pacific routes are inadequate. The position and showing of the Rio Grande disregards this section of the Act.

The report of the Commission finds that Union Pacific facilities "are adequate to move over its own direct routes the present volume of traffic and any additional volume that might be anticipated in the foreseeable future"; that it "has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line"; that there is "much greater curvature in the Rio Grande line than in that of the Union Pacific"; that the "total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific"; that the "Rio Grande as a bridge line would require at least 24 hours additional time in transit * * * and would require one or two more terminal-yard services" (R. 62); and that from Boise, Idaho, for example, to the territory between

Omaha and Chicago "the Rio Grande routes sought via Ogden are longer generally by at least 33 per cent, and range up to more than 50 per cent, than the short routes" (R. 71).

We submit, however, that the full impact of wastefulness established beyond dispute in the record is not portrayed in the report and order. The proof is overwhelming that the Rio Grande is not merely "less favorably situated" but actually "has no value as a service route" on the proposed bridge traffic (V. I, 603). The curvature on the Rio Grande is so great (I. C. C. Ex. 12, p. 9), that a train completes a circle an average of every 5.45 miles. The process of going up and down and around and around the mountains of Colorado, requires 51% more effort from Ogden to Denver, a distance of 606.9 miles, than a trip on the Union Pacific from Pocatello, Idaho, to Cheyenne, Wyoming, a distance of 551.6 miles (V. I, 574).

A particularly significant fact as to wastefulness is the proof relating to average freight car miles per serviceable freight car day which shows that Union Pacific is from 84% to 94% more efficient (I. C. C. Ex. 15, p. 7). This fact, together with the additional interchanges and other delays involved in getting through the Ogden bottleneck, adds up to a tremendous loss. It is conservatively estimated to amount to at least one full day per car (V. I, 641) or a minimum loss of 207,000 car days annually. This waste is estimated to cost $124.33 per car by Witness Oliver or a total of $19,614,549, annually, upon the basis of the full traffic potential claimed by the Rio Grande to be subject to diversion (I. C. C. Ex. 53, p. 3).

Without in any way attempting to exhaust or review all the record upon this subject, we submit that it must be conceded by everyone that the Rio Grande and Union Pacific are not comparable in any sense. The facts concerning the Rio Grande are well known to the public and have been cited by the Commission many times.[12]

The fact is that in practice the Rio Grande route has not been a serviceable route even in emergencies and, for that reason, traffic was not diverted to it during the last

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12. In *Commercial Club, Salt Lake City v. A., T. & S. F. Ry. Co.*, 19 I. C. C. 218, 221-222, the Commission said:

"The Denver and Rio Grande is situated, for the most part, among the mountains. Its cost of construction was high, and the expense of operation is much greater than that of the Union Pacific. It is the claim of this company that we should determine the reasonableness of these rates with reference to the cost of handling the traffic by its line and with reference to its financial necessities and not with reference to the Union Pacific.

"The Denver & Rio Grande was built for the purpose of handling the local business tributary to its line. No railroad would ever have been built where this one is for the main purpose of handling through business like that under consideration. Today its branch lines aggregate two and one-half times the mileage of its main line, over which this traffic passes. The great bulk of its tonnage today is from local business. Its line is longer than that of the Union Pacific between all points."

In *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, (June 30, 1936), two years after the Dotsero cutoff was established, the Commission described the operating conditions over the Rio Grande as follows:

"The operating conditions on the Denver & Rio Grande Western are unusually severe even for Mountain-Pacific territory; because the difficulties encountered are extreme and extensive. We have frequently in the past recognized these conditions and their effect in increasing the costs of operation on this road * * *. Since the hearing, the financial condition of this road has resulted in the filing of a petition in bankruptcy, and on November 18, 1935, trustees of the property were appointed." (pp. 486-487.)

Due to its geographic location and physical characteristics, the Rio Grande has always claimed that it is entitled to higher rates than other carriers and has secured such rates. *Livestock—Western District Rates*, 176 I. C. C. 1, 55-56, 190 I. C. C. 175, 200 I. C. C. 535.

war (V. I, 890). It was not able to handle the traffic tendered to it during the 1949 blizzard emergency (V. I, 684). The truth is that from a public and shipper standpoint the road and its practices are not desirable because, as shown by the record, it has failed to assume its reasonable responsibilities as a carrier (V. I, 665-672).

The matters heretofore reviewed as to the operations of the Rio Grande are of serious concern to these interveners as representatives of the shippers and general public in the affected States. It is apparent that the Rio Grande, as a marginal railroad, has nothing whatever to offer these States. Adding such a road to our transportation system on a wide-open unrestricted routing basis, will inevitably result in serious rate and service problems for our present carriers.

The public service commissions of these five States offered testimony in this case that carefully reflected the present and future transportation needs and problems of the territory of the Union Pacific extending from the Missouri River to Canada and the Pacific Ocean. This showing included evidence by experts on the staff of these commissions, public officials whose responsibility is to know and represent the public interests of these States. These witnesses came to the hearing supported by exhaustive studies and investigations of the needs and interests of their people. Their testimony was supported and confirmed by other witnesses appearing for cities, traffic associations and by individual shippers from such States. Without exception, these witnesses demonstrated that the present transportation facilities in all this territory are more than "adequate", within the meaning of Section 15(4) of the Act, and that any diversion of traffic to the Rio Grande would have the serious effects mentioned earlier in this brief.

As against the relatively few procured witnesses appearing for the Rio Grande with reference to the "public interest" features of this case, the evidence and showing of these interveners were overwhelming.

Who, may we ask, would be in a better position than the highest railroad regulatory officials of these States to judge, from investigation and experience, whether an additional route via the Rio Grande is "needed" by the shippers and public of Washington, Oregon, Montana and the other States? Whose testimony as to the consequences and effects of putting an unneeded route into competition with existing routes, would be better qualified than that of such officials?

The statement by the Commission that it "considered" "all of this evidence", while inserted to bolster the order, provides no legal support whatever.[13]

It is obvious that the Commission gave no weight whatever to the fact that 120 public and shipper witnesses, who ship 136,000 carloads annually to and from the northwest area, testified in opposition to the Rio Grande that the present Union Pacific routes afford highly satisfactory and fully adequate service for the marketing of their products in all states of the Union and elsewhere and that their own experience had disclosed no handicap or disadvantage in the marketing of their products. Against this overwhelming preponderance of testimony,

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13 In *Beaumont, S. L. & W. Ry. v. U. S.*, 282 U. S. 74, 86, Mr. Justice Butler made the following pertinent observation, for the Court, in this connection:

"The general statements in the reports to the effect that the Commission in reaching its conclusions considered all the pertinent evidence add nothing to the prima facie presumption that generally attends determinations of the Commission. Bluefield Co. v. Public Service Commission, 262 U. S. 679, 688-689."

the Commission and its counsel rely upon the testimony of 50 Rio Grande procured shipper witnesses who ship some 28,000 carloads annually of the same products and who admitted that they distribute their products via Union Pacific's existing routes to markets in all 48 States and several foreign countries. (V. I, 240). The order is not only without evidentiary support, but is clearly contrary to the overwhelming preponderance of the evidence.

It has been our position throughout this proceeding that the public interest is dominant and controlling in whatever view is taken of this case and that the Commission has not been given any authority to override or sacrifice the public interest of all of these States in order to provide the Rio Grande with some additional "bridge traffic" revenue.

In *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, the phrase "public interest" in the Transportation Act of 1920 was explained in language that encompasses the wording of both Section 15(3) and Section 15(4), and supports our contention that the new routes proposed by the Rio Grande do not conform to the "public interest" requirements of the Act.[14]

[14] "The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *." (287 U. S. 25.)

It would be necessary before granting any part of the Rio Grande's demands for the Commission to find that there is a real "need" for action "in order to provide adequate, and more efficient or more economic, transportation," and that such relief is "consistent with the public interest." The decision in *Pennsylvania R.*

(Continued on next page)

When the statute uses the term "adequate" in setting up a standard for transportation facilities, it must refer to a reasonable sufficiency of service for the public as a whole. The statute does not contemplate that the "desires" of every last shipper in the northwest territory for additional routes or for as many routes "as possible" must be completely satisfied in order for service to be adequate. *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545.

When the statute states that through routes may be required if "needed" to provide "more efficient" or more "economic" transportation, the statute certainly contemplates, as any dictionary will verify, that the *proposed* routes must be highly capable, effective in operation and involve a thrifty utilization of resources.[15] The record here, and the Commission's own findings show that the Rio Grande has none of these attributes.

The importance of requiring the proof specified in Section 15(4) is well stated by this Court in *U. S. v. Great Northern R. Co.*, 343 U. S. 562, where the economic

(Continued from preceding page)

Co. v. U. S., 323 U. S. 588 speaks of considering both shippers' and carriers' interests, in connection with the public interest, and striking a "fair balance."

This "balance" might be compared to that involved in abandonment cases. *Colorado v. United States*, 271 U. S. 153, 168.

15 In the case of *Kassebaum v. Nebraska State Railway Commission*, 142 Neb. 645, 7 N. W. 2d 464, the Court considered the purpose of the motor carrier act of Nebraska which specified an intent to "promote adequate, economical and efficient service." It was held (142 Neb. 655) that this language required routing "best suitable to the trip."

consequences of diverting traffic to a financially weak carrier are accurately described.[16]

Thompson v. United States, 343 U. S. 549, 555, 556, 558, 559, makes repeated references to attempts of the Commission to evade and disregard requirements of the statute, and the short-haul restriction of Section 15(4).

The proposed report of the examiner in this case termed the testimony of a few Rio Grande shipper witnesses as "representative", despite the fact that a far greater number of shippers of a much larger volume of traffic opposed the Rio Grande. The Rio Grande seized upon this idea in an attempt to magnify the weight and scope of its evidence so as to comply with the substantial evidence rule. But its testimony was not offered or submitted to the Commission as either "typical" or "representative." It was all the Rio Grande was able to procure from shippers, and a far greater number of shippers contradicted the meager offerings of the Rio Grande's shippers.

Those few witnesses procured by Rio Grande, in view of the record, are neither "representative" nor

16 "It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially but can also, at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas. Congress amended section 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs. But the provisions of section 15(4)—the restrictions against short-hauling, the financial needs prohibition and the emergency route provision—all deal with the Commission's power to establish through routes." (343 U. S. 574-575.)

"typical." In their insistence upon "wide open" routing, they are "exceptional" rather than "representative."

The theory that the testimony of a few procured shippers from this vast area may be multiplied in weight and effect by a so-called "typical" evidence rule is equally untenable as a matter of law. Reliance is placed by Rio Grande in this connection on decisions of this Court under Section 13 of the Act, and in rate division cases. We submit that even if such a rule is proper in such cases, the present situation is not comparable and no such rule can be invoked here. To say that a railroad, in the present proceeding, could establish rights by procuring a few shipper witnesses and then magnifying their testimony into a "typical" showing, is not consistent with ordinary principles of justice.

Legislative History of 1940 Amendments Shows That Congress Strengthened Restrictions on Short-Hauling and Made Provision for Establishing Shorter and More Economical Routes.

The Commission recognized that the amendments of 1940 (now Section 15(4)) strengthened restrictions on short-hauling but failed to give effect to additional limitations on its authority.[17] There is nothing in the legis-

17 The Commission report at page 655 contrasts two cases under earlier statutes, saying:

"Since the two decisions last above referred to, section 15(4) has been amended (in 1940), so that now the prohibition against short-hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the through route proposed to be established is needed in order to provide adequate and more efficient or more economic transportation."

lative history[18] of these amendments to suggest that Congress intended to approve such wasteful and inefficient proposals as those of the Rio Grande in this case.

The discussion of Senator Wheeler, Chairman of the Committee on Interstate Commerce, when the 1940 amendments to the Act were under consideration in Congress, demonstrates that the objective was to permit the Commission to establish shorter and more economical routes. Under prior law this Court had held in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, that a route 308 miles long could not be established to short haul one 311 miles which already existed. At page 6054 of the Congressional Record May 20, 1939, Senator Wheeler said of the amendment:

> "It leaves the option of routing with the shipper but under the authority now given the Interstate Commerce Commission it cannot establish a route over the shorter way."

He goes on (p. 6058) to point out that the amendment would abolish any "vested right" in the longer route.[19] In the instant case, the "vested right" is claimed

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18 Consideration of legislative history in this case is appropriate. *Helvering v. Morgan's, Inc.*, 293 U. S. 121.

19 In its report No. 404, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

"Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available* * * *. The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate*. If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

by the longer Rio Grande to short haul the shorter Union Pacific routes.

It is worthy of note in connection with this legislative history that the American Short Line Railroad Association (intervener in support of the Rio Grande in this litigation) stressed that the *Missouri Pacific* decision prevented the establishment of shorter and more efficient routes and that it was in the public interest to effect such economies.

The history of this legislation contradicts any suggestion that it involved delegation of authority to provide wide-open routing or longer and wasteful routes. It is true that some interests have long espoused unrestricted routing but there was no move following the 1940 amendments to place any such interpretation on the new legislation. Recent decisions of the Commission summarized in *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331, emphasize the purpose of avoiding wasteful and uneconomic transportation in authorizing short-hauling routes.[20]

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20 These Commission decisions, in cases since 1940, are reviewed (276 I. C. C. 331) at page 333 as follows:

"Section 15(4) of the act has been in its present form since September 18, 1940. In several proceedings since then, reasonable through routes which short-haul one or more carriers have been prescribed. See D. A. Stickell & Sons, Inc., v. Alton R. Co., 255 I. C. C. 333 (sustained in Pennsylvania R. Co. v. United States, 323 U. S. 588); Allied Mills, Inc., of Virginia v. Alton R. Co. 272 I. C. C. 49; California Milling Corp. v. Atchison, T. & S. F. Ry. Co., 269 I. C. C. 725 and 274 I. C. C. 120. In the first two of those proceedings it appeared that the routes required to be establishd *eliminated expensive out-of-line hauls*, and in the latter proceeding the *routes required were shown to be shorter in many instances* than those which had existed. *In all of those proceedings the routes required were at least as economical, from the standpoint of the carriers* as well as of the shippers as were most of the existing routes.

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Instead of approving wide-open routing, therefore, the 1940 amendments strengthened the restrictions against short-hauling and gave the Commission power to establish shorter and more efficient routes. The Commission's order here, requiring longer and more onerous routes via the Rio Grande reverses the purpose of those amendments.

II.

The Commission Failed to Give Effect to Controlling Statutory Prohibitions, Standards and Criteria and Failed to Apply the Rule and Norm of its Previous Decisions; and the Court Erred in Sustaining a Part of the Commission's Order on the Erroneous Premise That Through Routes and Joint Rates may be Established for the sole Purpose of Making Additional Transit Privileges Available by Equalizing Rates.

In the several subdivisions which follow we discuss the various "statutory standards" which have been disregarded, violated or side-stepped by the Commission in this case. In so doing we approach the matter in accordance with the declaration of this Court that where Congress has prescribed the standards pursuant to which "rights are to be determined", the "precise grounds" of the Commission's a tion are to be scrutinized in order to effect a "judicial review"; and such examination includes ascertainment of whether any "erroneous statutory construction lies hidden in vague findings".[21]

(Continued from preceding page)

"The instant situation differs. All of the routes *sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic* transportation. In addition, because of the circumstances here present, we believe a requirement that the *routes sought to be established would not 'give reasonable preference' to the originating carrier.*" (Italics added.)

21 *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

We shall also review in this section a number of instances where this Court refused to sustain orders because the Commission "has not adequately explained its departure from prior norms and has not "sufficiently spelled out the legal basis of its decision".[22]

A. Through Routes and Joint Rates Cannot be Established for the Purpose of Making Additional Transit Privileges Available by Equalizing Rates.

The majority opinion of the court below mistakenly assumes that there is an "absence of in-transit privileges" on the Rio Grande. The record, however, shows clearly that shippers on the Rio Grande have "intransit privileges". The sole complaint of the Rio Grande is that the rates to which such privileges apply are too high (R. 28). In establishing the through routes and joint rates requested the Commission has lowered the transportation rates and transit costs of shippers pretending a desire to use the Rio Grande's longer and more onerous route.

That portion of the Commission's order upheld by a majority of the district court is sustained solely on the proposition that the claimed absence of "intransit" privileges may be considered in determining whether present routes are "inadequate" under Section 15(4).[23]

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22 *Sec'y of Agriculture v. United States*, 347 U. S. 645, 653; *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87, 94-95; *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504-505, 510-511; *Atchison Ry. v. United States*, 295 U. S. 193, 201-202.

23 "We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. *Pennsylvania R. Co., et al., v. United States, et al.*, 323 U. S. 588, 54 F. Supp. 381."

The dissenting opinion of Judge Johnsen sharply points out that if new routes can be established "in part" to provide additional transit privileges there is no practical limit or restriction on the establishment of new routes by the Commission (R. 173).[24]

The Commission suggested in its report that its "conclusion is also supported" by the "situation with respect to the operation of many of the in-transit privileges and services" (R. 70), but its "conclusons" and findings make no reference to transit. Paragraph 4 of its "conclusions" states that "except as indicated in the preceding findings, the allegations made in the complaint are not sustained" (R. 74).

A Transit Privilege is a "Commercial Operation" not Transportation Within the Meaning of Section 1(3) of the Act.

The statement by the Commission that "transit" constitutes "commercial operations" (R. 48) reflects a conclusion, inescapable from the language in paragraph 3 of Section 1 of the Act, that a "transit privilege" does not constitute transportation which must be furnished by a railroad. This Court approved such conclusion, *B. & O. R. Co. v. U. S.*, 305 U. S. 507, 525. The pertinent language of that paragraph has remained the same since 1906 (34 Stat. 584). Transportation under the Act is defined to include "services in connection with the * * *

24 "If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessarily will reduce the cost of using the new through route as against the combination rate previously applicable."

transfer in transit * * * of property transported." It is the "transfer" of commodities "in transit" that is declared to be transportation, by this language, and not "commercial operations."[25]

In 1914, after the foregoing language had been in the statute eight years, the Commission said in *The Five Per Cent Case*, 31 I. C. C. 351, 408, that—

> * * * a transit privilege is something offered to the shipper in addition to the transportation service. * * *"

Citing and following several decisions of this Court, *Walling v. Baltimore Steam Packet Co.* (C. A. 4), 144 F. 2d 130, in an opinion by Circuit Judge Parker, declares at page 134 that the phrase "services in connection with" has "uniformly been construed to mean service rendered while a shipment is in the custody and control of the carrier or service which the carrier is legally obligated to perform."

Transportation in the "ordinary sense", as stated in *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 122, "comprehends any real carrying about or from one place to another."

It is of course presumed that the "ordinary acceptation" of these terms was intended by the Congress.

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25 Indeed, an "in-transit privilege" is the very opposite of "transit". It is a privilege granted shippers to interrupt the actual transit or movement of their shipments and hold them in their own custody at the point of interruption for periods as long as 12 months for performing such "commercial operations" as grazing cattle, milling grain into flour, storing, etc., and later reshipped to final destination on the through rate as if there had been no interruption to the continuous through transportation movement. This has been called "the fiction of a through rate with transit privilege". *A. T. & S. F. Ry. v. United States*, 279 U. S. 768, 777.

Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 474. Moreover, it is a rule of construction applicable to "business of a public nature" that the "language of such regulations will not be broadened by implication." *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 248.

Our position is not based, as suggested by the majority opinion of the lower court, on the ground that the Commission has "no control" over transit in any situation and that the granting of transit is "subject only to managerial discretion." It is simply our position that transit does not constitute transportation within the meaning of the Act and being a "commercial operation" any control that may exist with reference to it may not be used as a basis for ordering through routes and joint rates under Section 15(4). That position is supported by language in *Great Northern Ry. Co. v. United States*, 81 F. Supp. 921,[26] affirmed *per curiam* 336 U. S. 933.

It must be remembered that the secondary meaning of the term "transit" as the "privilege of stopping over goods in course of carriage"; constitutes "almost the reverse of its primary significance."[27]

The position of the Commission heretofore has been that whatever control it may exercise over transit stems

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[26] The question in that case was whether the Commission's order established a new through route. At page 925 and with reference to transit the opinion said:

"We think that a transit is an accompaniment or supplementary advantage in connection with an existing through route but does not, in itself, create the through route. The existence of a transit implies the existence of the through route. A transit at a particular point is the voluntary or required action of the particular carrier at such point, but a through route is not created by creating a transit."

[27] *Koshland v. Columbia Ins. Co.*, 237 Mass. 467, 130 N. E. 41, 43.

from the 1906 amendment to what is now Section 15(1) of the Act relating to practices.[28] As discussed elsewhere in this brief, Section 15(1) is an independent portion of the Act and contains no authority to override other provisions of the Act such as Section 15(4).

The only authority cited by the majority opinion of the court to support its position that the situation as to transit privileges sustains part of the order is *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588. The opinion of this Court as well as the Commission's report (255 I. C. C. 333) in that case shows that the shipper involved already had ample transit privileges and was located on the Pennsylvania railroad, against which complaint was made, and not, as here, on some other railroad. The facts in the *Pennsylvania* case eliminate it as a precedent for the present case.[29]

The majority opinion of the district court makes a drastic departure from the rule followed by the Commission in previous cases regarding its jurisdiction over transit privileges. Following decisions of this Court, the Commission has repeatedly held that there can be no discrimination levelled at a carrier because some other car-

28. *Spiegle v. S. Ry. Co.*, 25 I. C. C. 71.

29. The through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing 90 cents per ton and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commission's order would result in some 200 miles of additional transportation over the most "onerous" operating conditions of any western railroad, adding $124 per car to transportation cost, two additional interchanges between carriers at an additional cost of $20.44 per car per interchange, and at least one or two days' more time in transit, and would short-haul existing routes at least 925 miles and would deprive some of the appellant railroads of their entire hauls.

rier with which it connects fails to grant equal transit privileges. These former decisions all recognize that transit is local in character and subject to control through the carrier which serves the shipper.[30]

The rule that "transit privileges are treated as a matter local to the railroad on which the transit point is situated", is well settled.[31] No reason is shown in the

30 In *Federal Products Co. v. I. C. R. R. Co.*, 107 I. C. C. 271, a complainant attempted (as in the case at bar) to obtain what the opinion referred to at page 274 as "rate advantage" by the "establishment of similar transit arrangements at Cincinnati". In denying relief the opinion states:

"The Supreme Court of the United States has held that a line which participates in a joint rate is not guilty of undue prejudice in failing to accord a transit service at a point on its line merely because another carrier party to the same joint rate does not accord transit service. Central R. R. Co. v. United States, 257 U. S. 247. In view of that decision the Big Four, which is the only defendant serving both Pekin and Cincinnati, could not be found guilty of undue prejudice. The record shows that it does not grant a similar transit privilege at any point on its lines. The lines which serve Cincinnati in respect of traffic from New Orleans, such as the Louisville & Nashville and the Southern, do not reach Pekin with their own rails and had no voice in the establishment of the transit arrangements at that point. Conversely, the Illinois Central which serves Pekin, does not serve Cincinnati and would be powerless to remove the alleged undue prejudice by establishment of a similar arrangement at Cincinnati." (p. 275)

Similar holdings and statements by the Commission appear in *Montgomery Cotton Exchange v. S. A. L. Ry. Co.*, 109 I. C. C. 579, 585; *White Star Refining Co. v. Illinois T. Co.*, 147 I. C. C. 671, 674; *Meridian Grain & Elevator Co. v. A. & V. Ry. Co.*, 38 I. C. C. 478.

31 *Utah Poultry Producers Co-op. v. Union Pac. R. Co.*, (C. A. 10), 147 F. 2d 975, 976, in a case involving interpretation of a tariff, states:

"Under the rules of the Interstate Commerce Commission governing the making, filing and publishing of tariffs, transit privileges are treated as a matter local to the railroad on which the transit point is situated. The local carrier determines both whether the privilege shall be granted and the condition under which it may.

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instant case for departing from this rule. As shown in the next section of this brief, such rule has long prevented any violation of Section 3 being founded upon the transit situation in this case.

B. The Criteria That as Many new Routes "as possible" may be Required to Provide as Much Flexibility and as Many Markets "as possible", Would Nullify the Short-Hauling Restrictions of Section 15(4).

Section 1(4) creates a general duty on the part of carriers to "establish reasonable through routes". The word reasonable was inserted in this paragraph by the 1940 amendments. Previously the obligation was to "establish through routes" (54 Stat. 900).

The criteria which have been set up by the Commission and the court in this case for measuring the adequacy of existing routes and the duty of railroads to establish additional routes would render all statutory restrictions on short-hauling nugatory. The idea that food articles of a perishable nature require "as wide a dis-

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be exercised. See Central R. Co. of New Jersey v. U. S., 257 U. S. 247, 42 S. Ct. 80, 66 L. Ed. 217."

Roberts, Federal Liabilities of Carriers, (2nd Ed.) Volume I, Section 207, page 486, states:

"Under the rules of the Commission governing the making, filing and publishing of tariffs, transit privileges are treated as a matter local to the railroad on which the transit point is situated. A transit charge is therefore a local charge for which the carrier establishing it is alone responsible, and the mere fact that a carrier participates in joint rates in connection with which a transit arrangement is allowed at points off its line does not make it guilty of undue prejudice by failing to accord transit to a point on its line; for mere participation in joint rates does not make connecting carriers partners, and they can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination."

tribution as possible", "as many routes as possible" and "as many markets and outlets as possible" and that these requirements justify the opening of new routes, constitutes a clear departure from the standards of Section 1(4), and establishes a criterion that may conveniently be used at the whim of the Commission whenever and wherever such articles are shipped. Such an abstract measuring stick amounts to an adoption by the Commission of unlimited short-hauling as advocated by the witnesses of Rio Grande.

The statutory history and requirements previously reviewed demonstrate that any such standard is at war with the design and intent of Congress. "The law exacts only what is reasonable from such carriers", *Midland Valley R. R. v. Barkley*, 276 U. S. 482, 485; *Penna. R. R. v. Puritan Coal Co.*, 237 U. S. 121, 133.

It is these new "standards and criteria" set up by the Commission that are the subject of penetrating analysis in the dissenting opinion of Circuit Judge Johnsen. This Court will want to carefully weigh this entire dissenting opinion, some of the observations of which are quoted below[32] in support of the conclusion that if the

32 "In other words, whenever it is possible physically and practicably to open up a new or an additional through route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use * * *." (R. 171.)

" * * * I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate des-

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standards adopted in this case are the law "then the railroads of the country may as well forget Section 15(4) entirely, as affording them any protection whatsoever against deprivation of their long hauls."

The conclusions set forth in this able dissenting opinion are apparent, as stated by its author, to anyone "who reads the Commission's Report * * * stripped of all the confusion in which the Report has been wrapped." The penetrating analysis in this opinion demonstrates that this case is "but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position" of unlimited short-hauling; and, by use of these false standards to "get the camel's nose under the tent".

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tinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term 'more economic transportation' under section 15(4), in the addition of another carrier's route as a mere 'bridge' line for such traffic. If that be not so, then there is not any situation in which the Commission can not make a finding of 'more economic transportation' for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

"Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to 'as many routes as possible' and 'as much flexibility as possible in the distribution process', so that on this basis, and without regard to any other factor, any existing through route can be called inadequate * * *." (R. 172.)

"The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did." (R. 175.)

Never before, we suggest, has any judge in any court pointed up more devastatingly the "merry-go-round" devices, sustained by the majority of the district court, which have been weaved into a Commission decision; and which, "with a simple brushing aside of transportational conditions, realities and consequences", are claimed to result in "more economic transportation", within the meaning of Section 15(4)(b) of the Act.

C. The Order is Void Because the Commission Departed From and Failed to Make the Findings Required by the Standards of Section 15(4)(b) Which the Commission Expressly Invoked.

In *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, this Court, in an opinion by Mr. Justice Frankfurter, said at page 87 that:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

At page 89 the Court said the Securities Commission's "action must be judged by the standards which the Commission itself invoked", and, pointing out that the grounds urged by counsel to the Court "in support of the Commission's order were not those upon which its action was based", the Court refused to sustain the validity of the order, saying at page 95 that:

> "* * * an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

The Court remanded the case to the Court of Appeals, and in an opinion in the same case upon its return to this Court, 322 U. S. 194, 196-197, the principles quoted above from the Court's first decision were reiterated.

The first of those decisions (318 U. S. at page 94) repeated the settled rule that "orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." The Court further said that the Commission's "action must be measured by what the Commission did, not by what it might have done" and that the action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order * * *" (p. 94).

In the instant case the Commission was specific and explicit in stating the precise standards invoked by it in ordering through routes and joint rates. Although it made findings under other sections of the Act, it found that there were no through routes via the Rio Grande on the traffic concerned, and stated (R. 33),

> "* * * that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation."[33]

Thus, while the Commission recognized all the elements required to be found under section 15(4)(b), its

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[33] Section 15(4)(b) of the Act permits the Commission to order a new route that short-hauls existing ones if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation".

But this authority is "applicable only where the Commission makes the *special findings listed* in the amended Section 15(4)[b]. *Thompson v. United States*, 343 U. S. 549, 555. (Italics added.)

finding and conclusion as to through routes and joint rates was as follows:

> "We conclude: 1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established." (R. 73.)

There is no finding in the foregoing as required by Section 15(4)(b) that the Rio Grande route is "needed" or will provide "more efficient" transportation.

It will be noted that in Section 15(4)(b) the word "adequate" is used conjunctively with the words "more efficient" or "more economic". In *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I. C. C. 333, at page 343, the Commission said:

> "We interpret that exception to mean adequate and more efficient *and* more economic from the public's or shippers' as well as the participating carriers' standpoint." (Italics added.)

The Commission therefore construes the word "or" just before the words "more economic" as meaning "and". That interpretation was sustained by the three-judge court in *Pennsylvania R. Co. v. United States*, 54 F. Supp. 381, in an opinion which was affirmed by this Court, *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, at page 593. Interpretation of the word "or" as meaning "and" has been approved by the courts when such interpretation is necessary to give effect to the clear intention of the legislature. *United States v. Fisk*, 70 U. S. 445. The Commission's interpretation, sustained by this Court, of the word "or" as meaning "and" is necessary to conform clause "(b)" of Section 15(4) with the declared

purpose of the National Transportation Policy to promote "safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers."

As properly construed by the Commission and the Court, before it may exercise the authority granted by Section 15(4)(b) to short haul a carrier, the Commission must find upon substantial evidential facts that the proposed new route is "needed" to and will accomplish each of the three conditions there specified, first "adequate" transportation, second, "and more efficient" transportation than that provided by existing routes, third, and "more economic" transportation than existing routes provide. As the Commission did not, as apparently it could not, find that the Rio Grande route is "needed" for the "bridge" traffic it seeks, or that it will provide "more efficient" transportation for that traffic than Union Pacific routes, it has failed to meet the requirements of the standards it invoked, and the order must be set aside under the rule applied in the *Chenery* cases cited above.

In addition to the defects just discussed, the Commission speaks of the need for "more adequate and economic service." If new routes may be opened up on the theory that the more routes there are the "more adequate" the transportation service will be, then there is, of course, no limit on what the Commission may do in this field. This would be especially true where, as here, the proposed route is deemed "more adequate" simply and solely because (with its rates reduced as required by the order) it will give some shippers lower rates via the Rio Grande than they now have over that line, or because the Union Pacific is not available to shippers located only on the Rio Grande. Such departures from and

loose dealing with specific statutory standards may not be permitted. *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488; *Western Air Lines v. C. A. B.*, 347 U. S. 67, 71; *Delta Air Lines v. Summerfield*, 347 U. S. 74, 79.

The Order may not be Upheld Upon Grounds not Invoked by the Commission.

Apparently realizing that after expressly invoking the standards of Section 15(4)(b) the Commission's departure from and failure to make findings in conformity with all of the requirements of those standards vitiates the Commission's order and requires that it be set aside, counsel for both the Government and the Rio Grande have already indicated in their respective Jurisdictional Statements that they hope to persuade this Court to sustain the order upon some other standard than those of Section 15(4)(b) which the Commission invoked. At page 10 of the Government's Jurisdictional Statement it is asserted that:

> "An independent basis of the Commission's order establishing through routes was its finding that the combination rates between the Union Pacific and the Rio Grande were, to the extent that they exceeded the joint rates via the Union Pacific routes to the same points, unjust and unreasonable and unduly prejudicial of shippers and receivers using the Rio Grande, and unduly preferential of shippers and receivers using the Union Pacific routes, in violation of Section 3(1) of the Act."

The Rio Grande's Jurisdictional Statement states at pages 12 and 27 that the short haul prohibition of Section 15(4) does not apply "[w]here discrimination and undue prejudice is found under Section 3 of the Interstate Commerce Act."

"Thus, counsel for both the Government and the Rio Grande ask the Court in this case to do the very thing it refused to do in *Securities Comm'n v. Chenery Corp., supra*, namely, to sustain the validity of the order upon grounds or standards other than those of Section 15(4)(b) which the Commission expressly and avowedly invoked. While we demonstrate elsewhere in this brief that findings of a violation of Section 3 afford no basis for compelling through routes and joint rates that short haul existing routes, the point here is that even if the Commission could order through routes upon findings under Section 3, it did not purport to do so in this case but instead expressly declared that in ordering through routes and joint rates it was acting upon the authority, standards and requirements of Section 15(4)(b). "Since the decision of the Commission was explicitly based upon the applicability of" those standards and requirements "its validity must likewise be judged on that basis", first *Chenery* case, 318 U. S. 80, page 87.

The Commission having departed from, misapplied and failed to meet the requirements of the standards it explicitly invoked, this Court will not attempt to sustain the order by searching for or spelling out "a more adequate or proper basis" for it, second *Chenery* case, 332 U. S. 194, page 196; *Florida v. United States*, 282 U. S. 194, 215; *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

D. The Order is Void Because This is a Financial Needs Case Within the Prohibition of Section 15(4).

Section 15(4) contains a very emphatic mandate that—

"No through route and joint rates applicable thereto shall be established by the Commission for the pur-

pose of assisting any carrier that would participate therein to meet its financial needs."

This plain and unequivocal language would indicate to any reasonable person that a carrier seeking financial benefits would hardly be a suitable party to institute a proceeding thereunder. Nevertheless, the Commission denied a motion to dismiss the compiaint, saying merely that in reaching its conclusions "no consideration has been given to the financial needs" of the Rio Grande (R. 34).

It became evident quite early in these proceedings that Rio Grande had not been pushed into this litigation by shippers or anyone else. The President of Rio Grande frankly testified at the first hearing that in filing this proceeding against over two hundred defendant railroads, he was not able to get any other railroad to join with him (V. I, 47).[34] He frankly stated that his objective was to obtain more bridge traffic and do better on transcontinental business and thus improve the Rio Grande's financial position (V. I, 48). This line of testimony was also supported by Witness Hogue for the Rio Grande, who said that due to loss of local business they had to get more transcontinental freight (V. I, 69).

The essential nature of this proceeding was recognized by the Commission, when it observed (R. 37-38):

> "The Rio Grande desires to participate as a bridge line on such traffic via its Colorado gateways and Ogden at the joint through rates."

The Commission reviews, in some detail, the increase in "bridge traffic" experienced by the Rio Grande dur-

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34 Rio Grande's President also testified he conferred with Union Pacific's President " regarding our necessity for the competitive joint rates here requested." (V. I, 45.)

ing the past fifteen years and emphasizes that development of "bridge" revenue has offset the trend as to local traffic.[35]

Nowhere in the complaint filed with the Commission is there any allegation or statement that there is any demand by shippers for the routing proposed by the Rio Grande. The complaint does not once mention Section 15(4) of the Act. Throughout the proceeding Rio Grande staked its case on the false assumption that this provision of the Act was not applicable.

U. S. v. Great Northern R. Co., 343 U. S. 562, confirms our position that the financial needs prohibition establishes a new and "independent" restriction against short-hauling.[36]

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35 The concern of the Commission for assisting Rio Grande in obtaining further revenue is reflected in the statements (R. 47):

"Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

"The reasons given for the decline or lack of proportionate growth in traffic originated are (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many sawmills; and (4) loss of local traffic to other forms of transportation.

"The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from connecting lines and terminated."

36 In that case the opinion by Chief Justice Vinson said (343 U. S. 571, 572):

"Appellants would have the Court ignore the fact that the financial assistance prohibition stands as a separate sentence in Section 15(4). Certainly that sentence is gramatically capable of independent significance. * * *

"As revised in 1940, Section 15(4) deals at length with the short haul problem and, in addition, contains the separate sentence prohibiting the establishment of through routes for the purpose of

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Thompson v. United States, 343 U. S. 549, decided the same day, speaks of Section 15(4) as bestowing a "guaranteed right" on a railroad to serve points "via its own lines" (page 559). In rejecting the Commission's argument in that case "as requiring an unwarranted distortion of the statutory pattern", the opinion states:

> "In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage." (p. 560)

Our view that the Rio Grande's request and the Commission's order cannot be sustained under the statute is strengthened by a consideration of the testimony as a whole. When carefully weighed, the proof demonstrates that financial gain for the Rio Grande constitutes the only basis for the proceeding before the Commission. Since the entire traffic involved in this case is transcontinental traffic, the movement of which the Rio Grande desires to share as a "bridge" line, the only purpose that can be served is the aggrandizement of the treasury of Rio Grande railroad.

The letter and spirit of the statute is that the desire for "more money" shall be completely divorced from such proceedings and shall not activate any short-hauling claims. Unless the purpose of the statute is respected in a proceeding so dominated by financial gain as this one, the statute will have little application or effect. This

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assisting a carrier to meet its financial needs. Since this prohibition stands as an independent sentence dealing with an independent problem, we cannot accept appellants' suggestion that the sentence can be ignored unless a short-hauling problem is also involved in the case."

was recognized in the *Thompson* case, *supra*, where this Court said (343 U. S. 559-560):

> "The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of section 15(4), before the Court in United States v. Great Northern R. Co., 343 U. S. 562 (decided this day)."

The majority opinion of the court below mistakenly assumed that in permitting the Commission's order to stand only as to shipments requiring "in-transit privileges at points on the Rio Grande", it would eliminate the charge "* * * that the order was for the purpose of assisting the Rio Grande to meet its financial needs." We submit that no court could by cutting down the scope of a Commission order, change the design, purpose and effect or the validity of an order previously entered. *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87, 94-95. The remedy for violation of the financial needs prohibition must be the abolition of the order, not merely the whittling of it.

The truth is that the present proceeding is merely a continuation of the Chamber of Commerce effort started a hundred years ago to route transcontinental traffic through Denver and Colorado. This effort originated with the proposals in Congress to build the first transcontinental railroad.

History shows that the route to be followed by the Union Pacific became a "burning question" in Congress and "frantic" efforts were made by Denver to become a half-way station on the route. All such pressures were

rejected by President Lincoln who followed General Dodge's recommendation in routing the Union Pacific via the "great open road" out of the Platte Valley.[37]

E. The Commission's Order Disregards and is Inconsistent With the National Transportation Policy of Congress Which is a part of Every Provision of the Act.

It is specifically provided in the "National Transportation Policy"[38] that the provisions thereof shall ap-

37 Sabin, E. L., Building the Pacific Railway, Lippincott, 1919, pp. 22, 27, 30, 135, 140. Galloway, J. D., The First Transcontinental Railroad, Simmons-Boardman 1950, pp. 235-236, 253.

Brigham Young denounced General Dodge from his tabernacle pulpit for not routing the line through Salt Lake City. Dodge, G. M., How We Built the Union Pacific Railway, Senate Document 447, 61 Cong. p. 27. General Dodge later declared: "[t]he Lord had so constructed the country that any engineer who failed to take advantage of the great open road from here west to Salt Lake would not have been fit to belong to the profession * * *" (Ibid., p. 116.)

"* * * the decision of General Dodge to avoid the crossing of the Rocky Mountains directly west of Denver was proved correct when other railroads were built therein." Galloway, J. D., The First Transcontinental Railroad, supra, p. 257.

38 49 U. S. C. A. 1, 54 Stat. 899:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, *adequate, economical and efficient service* and foster *sound economic conditions* in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or *unfair or destructive competitive practices; to co-operate* with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, *adequate to meet the needs* of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions* of this Act shall be administered and enforced with a view to *carrying out the above declaration of policy.*" (Italics added.)

ply to "[a]ll of the provisions of this Act", which shall be "administered and enforced with a view to carrying out" the declaration of policy.

Although the broad and far-reaching questions presented in this case involve some of the most important problems of policy that may arise under the Act, the report of the Commission completely ignores the Congressional directive as to policy. There is not a single reference to transportation policy in the entire discussion of the Commission. This alone, under a very recent three-judge opinion, justifies and requires annulment of the Commission order.[39]

The record shows that practically all of Rio Grande's supporters found their position on the virtues of opening all gateways. They therefore oppose the policy of Congress which has consistently refused to "eliminate the short-hauling restriction on its power to establish through routes."[40] The Commission necessarily based its order on that part of the testimony, for all other shipper witnesses opposed the Rio Grande.

We submit that the proof overwhelmingly establishes that the request of the Rio Grande is not consistent with important provisions of the National Transportation Policy. Instead of promoting economical and efficient service, such proposals will (1) waste long established

39 A three-judge court in *Cantlay & Tanzola v. United States*, 115 F. Supp. 72, reflected the purpose and intent of the Congressional statement of policy when it set aside the order of the Commission which sanctioned reduced petroleum rates of rail carriers, on the ground that the order contained no jurisdictional basic statement or finding with reference to national transportation policy.

40 *Thompson v. United States*, 343 U. S. 549, 556. *United States v. Mo. Pac. R. Co.*, 278 U. S. 269.

and highly improved facilities, (2) impair service throughout Union Pacific territory, (3) increase costs and rates which shippers and the public must pay, (4) adversely and seriously affect public and private interests in States such as interveners, and (5) jeopardize our national defense.

As public administrators of transportation within our respective States, these interveners believe it is of the highest importance that the mandate of Congress as to policy be considered and carried out. It is our position that under this record a fundamental question is presented as to whether the Commission has authority to institute what amounts to wide-open routing. In our opinion, unless this fundamental policy question of unlimited short-hauling receives full consideration, the implications and effects of this decision escape recognition.

All of the traffic involved is "bridge" traffic. The testimony refers to only a few of the thousands of items comprising transcontinental traffic. Since the amount of diversion according to the Commission, depends on the solicitation success of Rio Grande, the Commission's order, in effect, gives Rio Grande a license to hawk business. If that is sufficient to open a gateway, then all gateways may be opened.

We submit that it is clearly inconsistent with the above transportation policy to sacrifice the transcontinental haul of the most efficient carriers over the shortest and most efficient routes in order to provide "bridge" traffic revenue for Rio Grande.

Paraphrasing Mr. Justice Holmes in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, relief cannot be

justified under the established transportation policy in order to put railroads on an "equal footing" or to satisfy the "personal preferences" of certain shippers "desiring" an additional through route or to provide a "variety of routes" or to "search over a wide area" for opportunities. Moreover, relief cannot be justified in order that transcontinental freight may "behold the natural beauties that may be rivaled but not repeated on the other roads." In short, as stated in that opinion, p. 545, "[t]he condition in the statute is not to be trifled away."

The declaration of policy by Congress is not merely a guide for the Commission. As stated by this Court in *United States v. Rock Island Co.*, 340 U. S. 419, this declaration controls the "basic power of the Commission." The paramount and overriding policy of Congress, since 1920, as repeatedly held by this Court, has been to promote economy and efficiency in rail transportation and avoid the "harm to the public" which unrestrained competition between carriers may engender.[41]

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41 *McLean Trucking Co. v. U. S.*, 321 U. S. 67. In that case this Court refers to the "sharp change" in policy adopted in 1920 (p. 80) and the "altered emphasis in railroad legislation on achieving an adequate, efficient and economical system of transportation" (p. 83), reflecting "the product of a long history of trial and error by Congress." (p. 80)

In *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277, Mr. Justice Brandeis observed that "when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

Other cases stress the emphasis on economy and efficiency. *American Trucking Assns. v. U. S.*, 344 U. S. 298, 314. *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, 25.

In *Commission v. Sanders Radio Station*, 309 U. S. 470, 474, it is pointed out that in railroad legislation, Congress has "abandoned the principle of free competition," in favor of the "suppression of wasteful practices."

The wasteful and inefficient practices inherent in the Rio Grande proposals and the Commission's order are in irreconcilable conflict with the requirements imposed by Congress. The "primary aim of that policy" is to "secure the avoidance of waste" as well as the "maintenance of service" which is a "direct concern of the public." *Texas v. United States*, 292 U. S. 522, 530. The invitation to unrestrained solicitation, proposed in the Commission's order, amounts to "cut-throat" competition which has been rejected since 1920. *United States v. Louisiana*, 290 U. S. 70, 74.

The doctrine that transportation acts of Congress constitute remedial legislation and justify liberal interpretation (*Piedmont & Northern Ry. Co. v. Interstate Commerce Com'n*, 286 U. S. 299, 311; *Pennsylvania R. Co. v. United States* (D. C. Md.), 54 F. Supp. 381, 390), would seem to be as applicable to a statement of policy as to any provision in the Act.

It has accordingly been held that under the policy of the Act, disputes are not to be settled "in accordance with the exigencies of particular circumstances" as though only the parties' "private interests or equities were involved", but that, instead, a "rigid adherence to the statutory scheme and standards is required", despite the fact that this "obviously may work hardship in some cases." *Midstate Co. v. Penna. R. Co.*, 320 U. S. 356, 361.

This Court has heretofore deemed legislative policy so important that an expressed or implied policy will be

followed "sacrificing, if necessary, the literal meaning in order that the purpose may not fail."[42]

Gateways are an essential part of the railroad industry. They represent a means of survival in an increasingly competitive economy. Unless the Congressional policy with reference to their preservation is respected, important provisions in the Act will, in effect, be nullified. *Thompson v. United States, supra*, pp. 559-560.

F. Other Inconsistencies and Departures From Prior Decisions.

The Commission report in this case is replete with contradictions and inconsistencies. It adopts, as stated in the dissenting opinion of Judge Johnsen, an "artificial classification" of commodities such as "perishable food articles" and then applies that classification to granite and marble tombstones and to livestock.[43]

The Commission in treating of "perishable food articles" stresses that the controlling factor in opening a new route is that shipment to market must proceed with "expedition and care", and "without unnecessary interruptions". Then the Commission turns around and holds

42 *Ozawa v. United States*, 260 U. S. 178, 194. *U. S. v. Amer. Trucking Ass'ns.*, 310 U. S. 534, 543. *U. S. v. Rosenblum Truck Lines*, 315 U. S. 50, 53. See also: *Holy Trinity Church v. United States*, 143 U. S. 457. *Markham v. Cabell*, 326 U. S. 404. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455.

The Court will not sanction "an evasion of the whole of the policy of the law.". *Sundry Goods, &c. v. United States*, 2 Peters 358, 367.

43 "* * * it has, by means of some artificial classification, included ordinary livestock as a perishable food article (p. 656), saying merely, before doing so, that 'We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway'".

that such shipments should be interrupted for as much as 12 months for transit services while en route to market (R. 70).

The application of such "criteria" to the "little monument dealer" is aptly evaluated by Judge Johnson (R 174).[44]

The findings with reference to the onerous physical features of Rio Grande operations, previously mentioned, although not fairly reflecting the complete dissimilarity of physical and transportation conditions on the Rio Grande compared with the Union Pacific, are nevertheless wholly inconsistent with the conclusion of the Commission that somehow and in some way, when one gets east and south of the Missouri River these natural and irreducible physical dissimilarities in "transportation conditions" disappear and such "transportation conditions" become "substantially similar" (R. 72).

In this connection, Judge Johnsen points out that the "[r]eport does not undertake to show what amount of traffic goes where". The opinion of Judge Johnsen reviews the extensive findings of the Commission report as to the contrasting character of the Union Pacific and Rio

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[44] "I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one 'of 'urgent need' (p. 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of 'as many routes as possible' and 'as much flexibility as possible in the distribution process' for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country."

Grande routes, and concludes that the report makes no "rational demonstration" that the "elements of difference" in transportation can be said to be "relatively insignificant".

The ultimate conclusions of the Commission as to the establishment of new routes are utterly inconsistent with specific findings of the Commission as to efficiency, economies, circuity, adequacy of service, elevation, and transportation needs.

The Commission recognized that under Section 15(4) no relief may be granted "unless the existing routes can be found not to provide 'adequate' transportation" (R. 69). Earlier in the report the Commission praises the fine service of Union Pacific and details some of the proof showing the physical infirmities of Rio Grande service and facilities (R. 62). Without making any specific finding whatever that the new route is "needed" as provided in Section 15(4), the Commission concludes that Union Pacific routes are "inadequate" because they are not available at points on the Rio Grande, and that it is "necessary and desirable in the public interest, in order to provide adequate and more economic transportation", that the Rio Grande route and equal joint rates be established on certain commodities (R. 70, 73). We submit that the findings of adequacy and inadequacy are conflicting and inconsistent, and do not support or justify the order. *Florida v. United States*, 282 U. S. 194, 215.

The Commission concludes that the extent of diversion of traffic will depend upon the success of Rio Grande's "solicitation" and campaign to "persuade" and "induce" shippers to use its "bridge route" (R. 46). It is difficult to understand how that route can be "necessary" or "needed" if its use will depend upon future so-

licitation and persuasion. Here again we are confronted with findings that are irreconcilable with conclusions.

The Commission details the injuries that may occur as a result of diversion of traffic (R. 65), then states that it cannot even "estimate with any degree of accuracy, how much traffic might be diverted" (R. 66) but goes right ahead and establishes the new route without indicating whether or not the interests of these intervenors and others will be injured or whether their injuries are of any consequence. Although the Commission professes to have no idea as to the volume of traffic that will move under this order, it has no hesitation in finding that the terminal bottleneck at Salt Lake City provides sufficient "present facilities" for interchanging with the Rio Grande "the additional traffic * * * which will result under the findings herein made" (R. 73).

We submit that the report and order of the Commission are permeated with "conflicting inferences" and constitute such a hodge-podge of inconsistent findings and conclusions that it does not comply with legal requirements. *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

The Commission's most conspicuous departure from prior decisions concerns livestock where its own prescribed rates "previously recognized and accepted" but not required over routes that "would result in short hauling" are here prescribed without such limit, and without explanation (R. 177).[45]

45 Judge Johnsen states as to these livestock rates:

"I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established gen-

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We have previously noted that the present report of the Commission constitutes a radical departure from a long line of decisions interpreting and applying the through routes provisions of Section 15(4).[46]

In the fourth section of this brief we shall review the commingling and misuse of separate and independent provisions of the Act involved in the Commission decision. This argument reflects repeated departures from the rule of prior decisions in order to achieve the result in the present case. We suggest that the authorities reviewed in Section IV be considered equally applicable to the points now under consideration.

III.

Rio Grande Claims of Violations of the Act and the Finding by the Commission of a Violation of Section 3(1) Cannot be Sustained Upon the Evidence of Record

We emphasize in Section II.C. of this brief that since the Commission based its order on compliance with

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eral livestock scheme, practice and policy which the Commission has previously recognized and accepted. In Livestock, Western District Rates, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short-hauling within the meaning of section 15(4) of the statute * * *. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations."

46 See footnote 20, *ante*, p. 39.

the requirements of Section 15(4)(b), the order cannot be supported by claims that the Commission could have sustained the order under other provisions of the Act.

Without departing from the foregoing position we propose to review at this point the "violations" claimed by Rio Grande, and to demonstrate that the record fails to establish any "violations" which may be used by Rio Grande to obtain any type of relief.

This proceeding was instituted by Rio Grande as a rate and revenue case for the purpose of obtaining a financial advantage it does not presently possess. The complaint mentioned Sections 1(4), 3, 15(1) and 15(3) of the Act (V. I, 9). The Commission stated that the Rio Grande claimed "violations of sections 1(4) and 3 of the Interstate Commerce Act" (R. 28). The Commission said that "undue prejudice and preference" as between shippers was established under Section 3(1) but that no "discrimination" under Section 3(4) against the Rio Grande was shown as to the established routes (R. 73 and 72). The conclusion of the Commission (R. 73-74) mentions no additional provisions of the Act.

The Finding of the Commission That Present Combination Rates via the Rio Grande are Unreasonable is Unsupported by Evidence.

Section 1(4) of the Act makes it a general duty of a carrier to establish "just and reasonable" rates; Section 1(5), which was not specified by Rio Grande or the Commission, provides that all charges shall be "just and reasonable"; and Section 15(1) prohibits "unjust or unreasonable" rates. Section 3(1) prohibits a carrier from giving anyone "any undue or unreasonable preference or

advantage", but provides that this section shall have no application "to the traffic of any other carrier of whatever description".

The Commission made a finding (R. 73) that the combination rates on certain perishable commodities were "unjust and unreasonable" and that present "joint rates" of the Union Pacific would be "reasonable for application" over the Rio Grande routes.

These findings were made not only without substantial evidence but without any evidence upon which the Commission could determine whether the combination rates or the joint rates were reasonable or unreasonable. The statement that rates are reasonable or unreasonable is merely "an artificial use of words", *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 545, and is not sufficient unless there is substantial evidence to back up such findings: *Florida v. United States*, 282 U. S. 194, 213.

The record is wholly devoid of such evidence. This is made clear by the Commission itself where it points out that the Rio Grande submitted a large number of rate comparisons, but that these were limited to comparison of the revenues produced on various commodities by the combination rates compared to those produced by the joint rates and the revenue that would be produced by the joint rates if made applicable via the Rio Grande (R. 67).

There being no other evidence, it results that the Commission's findings that the combination rates via the Rio Grande are unjust and unreasonable rests upon the mere fact that they are higher than the joint rates via the Union Pacific, and its finding that the joint rates are

reasonable for application via the Rio Grande rests not upon evidentiary facts concerning their reasonableness, but upon the mere fact that they are lower than the combination rates.

Some of the considerations which affect the reasonableness of rates were described by the Commission in *Memphis Cotton Oil Co. v. I. C. R. R. Co.*, 17 I. C. C. 313, 318:

> "The reasonableness of a rate must of necessity depend upon the conditions surrounding the traffic at the time it moves. The length of the haul, the competition to be met, the cost of the service, the value of the service, the density or volume of the tonnage, as well as the general transportation conditions then existing, are factors that have a more or less definite relation to the rate that a carrier may reasonably demand for transportation service."[47]

The statement of this Court in *Louis. & Nash. R. R. v. United States*, 238 U. S. 1, 12, that in absence of a "standard" rate comparisons "prove nothing"; in determining the reasonableness of rates, is peculiarly pertinent here.[48]

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47 In *McHenry-Millhouse Mfg. Co. v. N. Y., O. & W. Ry. Co.*, 151 I. C. C. 501, 502, the Commission said:
"We have repeatedly said that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate."

48 "The same is true of determining, by comparison, the reasonableness of freight charges. Until some standard is adopted they may prove nothing—even where the two hauls are over the same mileage. For the rate attacked may tend to show that the others are too low—while they in turn might be relied on to prove that the first is too high. Both may be unreasonably high, or too low because compelled by conditions over which the carrier had no con-

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This Court has said that a "through rate is ordinarily lower than the combination of local rates", *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 771, and the "combination rate itself is ordinarily, if not always, higher than the joint through rate." *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 396.

It is reasonable and to be expected that there shall be differences in service charges "between through shippers over different routes * * * based on relevant differences in the 'circumstances and conditions' of the total transportation services rendered by the carriers." *Baringer & Co. v. U. S.*, 319 U. S. 1, 9.

That long haul through rates should be lower than the total of local rates, has been said by this Court to be beyond argument. *Minneapolis & St. Louis R'd Co. v. Minnesota*, 186 U. S. 257, 262.

There is nothing in the Interstate Commerce Act that requires all carriers to be considered as equal or comparable. As stated by Mr. Justice Brown in *Interstate Com. Commiss. v. B. & O. Railroad*, 145 U. S. 263, 276, the Act "was not intended to ignore the principle that one can sell at wholesale cheaper than at retail."

It is common knowledge that the tariffs of every railroad in this country, including the Rio Grande, carry routing restrictions which preclude application of its

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trol. Water competition, rail competition and competition of markets, enter so largely into the establishment of rates that mere distance is not necessarily a determining factor—indeed the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road." (238 U. S. 12.)

rates to traffic moving over competing lines. If the bare fact that the Union Pacific and other defendants publish some joint rates that are not applicable via the Rio Grande, constitutes a violation of Section 3, then we confidently assert that it would be difficult to find a railroad of any importance in the country that is not in violation of that section. Carried to its logical conclusion, the Rio Grande position is that if the Union Pacific consents to joint rates that short haul it with one of its connections, then it must, to avoid violating Section 3, make equal joint rates with all of its connections, regardless of short-hauling and of dissimilarity of transportation conditions. Obviously, this is incorrect unless the prohibition in Section 15(4) against short-hauling a carrier without its consent is completely nullified by Section 3.

If a combination of rates via one route becomes unreasonable and unlawful simply because it is higher than a joint rate between the same points via some other, and in this instance a much shorter route, the only remedy lies in wide-open interchange between all lines via every available junction point, regardless of carriers' rights under Section 15(4) not to be short-hauled.

We thus find ourselves back where we have been several times in this brief. Regardless of what phase of the case we consider, we always end up with an effort by the Rio Grande to by-pass and avoid the requirements of Section 15(4). It is the settled rule of this Court that this may not be done, *Thompson v. United States*, *supra*, and cases there cited.

A long line of Commission decisions also hold that Section 1 is "subordinate" to Section 15(4) and the Commission will refuse to make a determination as to the reasonableness of rates under such circumstances as would

render "nugatory and meaningless the provisions of Section 15(4)."

49 In *Port of New York Authority v. A., T. & S. F. Ry. Co.*, 144 I. C. C. 514, 517-518, the Commission refused joint rates, saying:

"While we have the power under section 1 to find combination rates unreasonable upon a proper showing, we must in such cases safeguard the carriers' rights under the short-haul provision of section 15 *.* *. In numerous cases we have permitted carriers to cancel joint rates or restrict routing, which had the effect of leaving higher combination rates to apply over certain routes, when it appeared that they did so in order to safeguard their long haul. We have done this on the principle that we have no power to prevent the cancellation of a through route if we could not have established the route as an original proposition. See The Ogden Gateway Case, 35 I. C. C. 131, 140; Routing of Coal from Western Maryland Ry. Mines, 66 I. C. C. 103, 107; Routing of Sheep, 69 I. C. C. 4, 6. Assuming that the record would support a finding under section 1 that the rates over the Hell Gate route are unreasonable to the extent that they exceed the contemporaneous rates over the float routes, the ultimate effect of any order that we might enter would be to open routes that as a practical matter are not now available and render nugatory and meaningless the provisions of section 15(4), if defendants are correct in their contention that certain of them will be short-hauled if the Hell Gate route is opened."

See also, to the same effect: *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127, 130.

That section 1(4) is "subordinate" to Section 15(4) is stated in *North American Coal Corp. v. Pennsylvania R. Co.*, 278 I. C. C. 675, 683; *Tidewater Paper Mills Co. v. B. T. R. R. Co.*, 80 I. C. C. 493, 497; *Lemon Cove-Woodlake Asso. v. A., T. & S. F. Ry. Co.*, 139 I. C. C. 239, where at page 244 the opinion shows that the problem, like here, was one of lower rates:

"Complainants would apparently be just as satisfied with a reduction in the existing rates in connection with the Visalia, as for the establishment of a new through route via Exeter."

The Rio Grande is not interested in "reasonable" rates via its longer and more onerous route. Its complaint alleged and it argued vehemently to the Commission that only "equal" rates will enable it to divert the traffic to its line. In its original brief to the Commission, at page 101, it stated that slightly higher rates on live stock "have proved to be useless" to its line and that

"unless the same level of rates [that apply on Union Pacific routes] is prescribed on the traffic involved via the Ogden gateway and the Rio Grande no practical or useful purpose will be served."

It was this kind of a problem and the potential misuse of Section 1 of the Act that prompted this Court in the recent case of *Thompson v. United States, supra*, page 550, to say that by "using the form of order employed" in that case the Commission could "divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4)."

While the exact provisions of the Act involved in the rate findings herein of the Commission are not made clear by its report, it would appear that, under Rio Grande's complaint, only Sections 1(4) and 15(1) and 15(3) could be considered. Significantly neither of these sections contains any authority whatever to supersede the short haul restrictions of Section 15(4).

Section 15(1) contains general language requiring a "just and reasonable individual or joint rate." But this paragraph, as shown by authorities reviewed earlier, gives no power whatever to establish new routes. The establishment of such routes must be under and in accordance with the "public interest" standard fixed in Section 15(3), but limited by the restrictions contained in Section 15(4).

Even if a Section 3(4) violation had been established, the only relief that could have been given by the Commission was an "alternative" order. The Commission could not, as will be discussed later, use a Section 3 violation in order to circumvent the short haul requirements of Section 15(4). The remedy of an alternative order for

a Section 3 violation is described in *Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, 650.[50]

As a rate case, this present proceeding cannot stand. For the Commission to fix rates merely to "equalize market competition" under these circumstances would, "confuse an economic problem with a transportation problem".[51] And the "facts surrounding" the establishment of rates "in other territories are not of record" in this case and available for a rate decision.[52]

In view of the uniform decisions of the Commission just reviewed, the holdings upon the facts in this case

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50 "Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both * * *. The situation must be such that the carrier or carriers if given an option have an actual alternative."

The necessity and use of alternative orders to remedy Section 3 violations has been the subject of repeated Commission decisions. See *Quanah, A. & P. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 205 I. C. C. 253; *The Ogden Gateway Case*, 35 I. C. C. 134.

51 In *Folger & Co. v. A., T. & S. F. Ry. Co.*, 146 I. C. C. 637, the Commission said:

"We have just repeatedly stated, however, that we can not readjust rates merely in order to equalize market competition."

Referring to an earlier cement rates case, the opinion in *Associated General Contractors v. A., T. & S. F. Ry. Co.*, 144 I. C. C. 305, 309, points out that "those who propose a system of rates, the avowed and sole purpose of which is to promote long-distance competition, confuse an economic problem with a transportation problem."

52 The record in the instant case is subject to the same controlling observation made in *Watson Co. v. B. & O. R. R. Co.*, 146 I. C. C. 523, 529:

"The facts surrounding the establishment of the rates shown as applicable in other territories are not of record. While they may be assumed to be reasonable for application between the points shown it does not follow that the same basis or level, distance alone considered, would be reasonable for application between the points herein considered."

that present combination rates are unreasonable and that the joint rates over Union Pacific routes are reasonable for application via the Rio Grande constitutes a departure from the rule and norm of its prior decisions without justification or explanation. In such situations this Court will refuse to approve the order. *Sec'y of Agriculture v. United States*, 347 U. S. 645.

Neither a Finding of Undue Prejudice Under Section 3(1) nor of Unjust Discrimination Under Section 3(4) can be Made in View of Admitted Dissimilarity in Transportation Conditions Proved by the Evidence.

Except for the Bamberger Railroad south of Ogden (R. 73) the Commission held that discrimination against the Rio Grande under Section 3(4), prohibiting discrimination by one carrier against another, was not sustained by the record because the "transportation conditions" over existing routes were not shown to be similar to those on the Rio Grande (R. 72).

There was a complete absence of any evidence as to transportation conditions on the other rail routes from the Pacific northwest to the east. But there was abundant proof showing dissimilarities between transportation conditions on the Union Pacific route and on the Rio Grande. All of these differences were completely disregarded by Rio Grande, and at no stage of this proceeding has Rio Grande received any encouragement that it could disregard fundamental requirements of Section 3(4) and yet obtain relief thereunder.[53]

53 It is elementary that in order to establish discrimination or a lack of "equal" treatment there must be proof that the transportation conditions involved are similar. Unless this is true there would be

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The Commission's finding that conditions were "less favorable" on the Rio Grande should, standing alone, have been enough to justify a similar result under Section 3(1), which is quoted below.[54] Nevertheless, and despite its finding that dissimilarity in transportation conditions prevented a finding of discrimination against the Rio Grande, the Commission said the combination rates of the Rio Grande unduly prejudiced shippers desiring to use that line.[55] If transportation conditions are not sim-

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a violation of Section 3(4) every time a carrier that interchanged traffic with one connection refused to give up traffic to another carrier with whom it had a physical connection.

The burden was on Rio Grande to establish the similarity of transportation conditions. The Commission was without power, in the absence of such proof, to make the finding the Rio Grande now says it should have made. *Int. Com. Comm. v. Louis & Nash. R. R.*, 227 U. S. 88. *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541.

54 "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

55 The majority opinion below held that there was no legal or factual basis in the evidence to support the Commission's finding that the combination rates were unduly prejudicial in violation of Section 3(1), and the dissenting opinion holds that the evidence furnishes no support for that finding. The questions presented by the appeals of the Rio Grande (No. 117) and the Government (No. 119) challenge that holding, among others, of the district court.

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ilar under Section 3(4) how can they be considered similar under Section 3(1)? That they are not similar is sufficiently demonstrated by the Commission's own findings (R. 71-72) and by the opinion of Circuit Judge Johnsen, which was reviewed earlier.[56]

The Commission rightly held that "complainant," a railroad, could not raise, in its own behalf, an issue under Section 3(1) against another railroad" (R. 33), and rightly observed, but failed to apply its holding, that Rio Grande is "not here as a shipper or receiver of traffic

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The majority held that even if the evidence had proved undue prejudice and preference in violation of Section 3(1) "the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15(3) and 15(4)" and that—

"If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3(1) merely because a shipper entity described in Sec. 3(1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15(4) would be practically emasculated." (R. 164.)

56 Judge Johnsen states in this connection:

"I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3(1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3(1). If the Commission has attempted to predicate the relief which it here granted upon the existence of a violation of section 3(1), I am certain that its action resting on this basis alone could not on these facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15(4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through routes and joint rates in relation to the existing conditions." (R. 178.)

but solely as a carrier seeking to participate in traffic" (R. 68).

Having no rights under Section 3(1), since it applies only to shippers or receivers of freight (*Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, 628), Rio Grande brought certain shippers into the proceeding. This did not improve the legal defect in the position of Rio Grande. In addition, there was not sufficient proof to sustain a violation of Section 3(1) even if Rio Grande shipper witnesses were treated as complainants before the Commission.

The incapacity of Rio Grande to obtain relief under the circumstances is not cured by the participation of a few shippers in this proceeding. Under well-settled legal principles the Rio Grande cannot maintain this action for itself nor as representative of shippers as to whose claim it has no remedial interest and is not the proprietor.[57]

Intervention is, of course, ancillary and in complete subordination to the main proceeding.[58] An "independent

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57 The cases are collected in 67 C. J. S. 899 & 39 A. J. 858. As stated by Chief Justice Marshall in the *Corporation of Washington v. Young*, 10 Wheaton 406:

"No person who is not the proprietor of an obligation, can have a legal right to put it in suit."

58 Summarizing the cases, 39 A. J. 950 states:

"Intervention is not an independent proceeding, but an ancillary and supplemental one which, in the nature of things, unless otherwise provided for by legislation, must be in subordination to the main proceeding, and it may be laid down as a general rule that an intervener is limited to the field of litigation open to the original parties * * *."

controversy" cannot ordinarily be injected into a suit by intervention."[59]

The Rio Grande cannot, of course, rest its case on the claim that it is enforcing a public right. 39 A. J., p. 863. Neither can the Rio Grande assert that it appears in this matter in any "representative" capacity, since it has no "right or interest in common with the persons claimed to be represented." 39 A. J., pp. 921-922; 67 C. J. S., p. 920.

The Proviso to Section 3(1), Added in 1940, Prevents any Finding of Discrimination Here.

In this connection, however, and with reference to Section 15(4) we call attention to the proviso added to paragraph 3(1) in 1940, which states:

> "* * * this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (449 U. S. C., Section 3(1).)

If this proviso means anything it must mean that paragraph 3(1) cannot be applied to sustain discrimination involving the traffic of "any other carrier." In other words, discrimination thereunder is by a carrier between persons it is serving and cannot be applied in the case of claimed discrimination involving the traffic of other carriers. This being true, the language in Section 15(4) "except as provided in section 3" does not permit the

59 39 A. J. 860-61 states:

"* * * it is well settled that if a plaintiff at the time of commencing an action has no valid and subsisting title or right to the subject thereof, his subsequent acquisition, or perfection, of a right or title to the subject of the action during the pendency thereof will not remedy the defect so as to enable him to maintain the action * * *."

requirements of Section 15(4) to be avoided by a finding of a violation under Section 3(1).

This Court has often held that the purpose of a proviso is to take a "class of cases out of the operation of the body of the section to which it is found."[60]

It would therefore appear that the error of the Commission as to Section 3 was in finding a violation of Section 3(1) and in holding that such violation was "closely related" to Section 15 (R. 33), and a basis for establishing a through route.

Legislative History of Section 3(1) Confirms our Position.

Support for our position is to be found in the legislative history which added the proviso to Section 3(1) of the Act. It was added by S. 2009, Section 5(a)(1) in 1940 (54 Stat. 902). This bill was reported at the first session of the Seventy-Sixth Congress. Senate Misc. Reports 11, Serial 10293, Report No. 433.[61]

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60 *McDonald v. United States*, 279 U. S. 12. *United States v. Morrow*, 266 U. S. 531. *American Airlines v. Civil Aeronautics Board*, 178 F. 2d 903, 906 applies this rule to a transportation statute. See also 82 C. J. S. 883.

The Congressional Record reveals that when the 1940 amendments to the Act were being considered by the Congress, the Chairman of the Legislative Committee of the Interstate Commerce Commission (Eastman) wrote a letter to Senator Wheeler as to meanigg of provisos in legislation stating:

"normally a proviso is used to except from the operation of law something which otherwise would be governed by that law * * *" (Congressional Record, Vol. 86, Part 10, page 11619, Sept. 6, 1940.)

61 The report on this Bill stated:

"The importance of a sound transportation system is recognized by all. It is likewise apparent to even the unobserving that this nation cannot enjoy a sound transportation system if its most important carrier faces ruin and chaos."

The original Senate Bill would have granted the Commission complete freedom of the short haul prohibition as advocated by the Commission. The House rejected the Senate Bill. House Misc. Rep. VI, Seventy-Sixth Congress, 1st Session, Report No. 1217.

The first Conference Report, April 26, 1940, appears to have reported Section 3(1) in the form in which it was finally enacted. House Misc. Reports 11, Seventy-Sixth Congress, 3rd Session, Report No. 2016, page 6, Serial 10441.[62]

Upon further disagreement as to the Bill, it appears there was a second Conference Report, dated August 7, 1940. House Misc. Reports V, Seventy-Sixth Congress, 3rd Session, Report No. 2832, Serial 10444. There appears to have been no change in the proposed Section 3(1), (p. 6) and the statement of explanation is identical to that quoted above in the first conference report (p. 65).

That the final enactment in 1940 compromised both extremes and provided strong barriers against the establishment of through routes is shown in the remarks of Senator Wheeler on September 9, 1940.[63]

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62 The statement as to Section 5 of the Bill said:

"Section 6 of the House amendment amended section 3(1) of the Interstate Commerce Act, which makes it unlawful for any common carrier subject to Part I to give any undue preference, or cause undue prejudice, to any person, locality, port, port district, gateway, or transit point, or to any particular description of traffic. The House amendment added the words 'region, district, territory' to the list of places and localities.

"The conference substitute in section 5 retains this amendment and adds a proviso that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (pp. 61-62.)

63 "The conference substitute, section 10(b) contains a compromise provision on this point, permitting the Commission to establish a

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It thus appears that the proviso to Section 3(1) was added along with the expansion of the same section by the 1940 legislation which prohibited discrimination against any "region, district, territory." The proviso was no doubt intended to prevent any attempt to utilize the enlarged Section 3 as a means of overriding other portions of the Act including Section 15(3) and (4). There can be no question but that the Congress intended to retain and strengthen the requirements of Section 15 as against further delegations of authority under Section 3 and other portions of the Act. The true character of this Congressional intention was sensed and expressed by this Court in the recent *Great Northern* and *Thompson* decisions.[64]

Since the only finding of a Section 3 violation entered by the Commission which was favorable to the Rio Grande related to paragraph (1) thereof, the above history and analysis justifies the conclusion that the Commission improperly used subparagraph (1) and should have dismissed the complaint.

In concluding this portion of the argument it is important to observe that even if the theory advanced by Rio Grande is followed of justifying this order under

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through route where it finds that the through route proposed to be established is needed in order to provide adequate and more efficient or more economic transportation, subject to the proviso that the Commission shall give reasonable preference to the carrier by railroad which originates the traffic to the condition that the Commission shall not establish a through route and joint rates applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs." (Congressional Record, Vol. 86, Part II, page 11768).

64 *U. S. v. Great Northern R. Co.*, 343 U. S. 562. *Thompson v. United States*, 343 U. S. 549.

Sections 1 and 3 of the Act, the conclusion is inescapable that no case for relief thereunder is established by the evidence, and the action must be dismissed. Rio Grande therefore does not have any violation of the Act that can be utilized to circumvent the requirements of Section 15(4).

No Discrimination as to Transit Privileges can be Based on Section 3.

The analysis just made as to the history and purpose of the proviso in Section 3(1) demonstrates that no claim can be asserted against the Union Pacific under Section 3 based on transit privileges. Independently of this proviso, however, it is well settled that a transit privilege is local in character, subject to control of the carrier serving the shipper, and provides no legal basis for a finding of a violation of Section 3. The decisions establishing this rule are referred to in the prior section of this brief.

The leading decision of this Court, which has been cited and followed in this respect by the Commission is *Central R. R. Co. v. United States*, 257 U. S. 247. That was a shipper's application for transit. The Commission had granted relief under Section 3. This Court annulled the order, saying the Commission sought to accomplish by "indirection" what is governed and measured by another section of the Act. In so doing this Court stated at page 259 that under the Commission view "the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers."

The majority opinion of the district court in this case follows the decision just cited and quotes it to the effect that what "Congress sought to prevent" by Sec-

tion 3 was "not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers"; and the majority opinion specifically emphasizes that under any other application of Section 3(1) "Sec. 15(4) would be practically emasculated" (R. 164).

Decisions Relied Upon by Rio Grande are Inapposite.

Typical of the argument advanced herein on behalf of Rio Grande is the suggestion of the Government that since this Court in *New York v. United States*, 331 U. S. 284, held that "interterritorial class rates" involving "many carriers" over a large part of the country could be reached by the Commission under Section 3(1), this section "would appear to cover the preference and prejudice which results from the refusal of a single carrier to establish through routes and joint rates with another". (Jurisdictional Statement; page 12.) This is the sort of *non sequitur* that has permeated this case. The *New York* case presented no problem whatever of establishing through routes or joint rates. It involved only a claim of regional discrimination against the south and there is not a single reference in the long opinion to the problem of creating a new through route. Accordingly, whatever authority was exercised under Section 3(1) has no relationship whatever to a through route problem under Section 15(4).

The *New York* decision was heavily influenced by the 1940 amendment to Section 3(1) which "extended" and "enlarged" the language to include any "region". (pp. 297, 299). But no mention was therein made of the proviso which was simultaneously added to this section, as discussed previously, forbidding the application of this

enlarged Section 3(1), to discrimination against the "traffic of any other carrier of whatever description". This proviso was not involved in the *New York* case, but it is certainly applicable to the instant litigation.

In this connection the *New York* opinion stresses that it is not concerned with "discrimination against actual shippers" or "discrimination against a particular commodity" but with discrimination and prejudice against a "territory as a whole" (pp. 309, 334). There isn't the slightest suggestion in the opinion that the long-established rules as to what constitutes discrimination are changed. At page 305 it is emphasized that "mere discrimination does not render a rate illegal under § 3". The holding in the case that discrimination was established is based on the conclusion that differences in rate structures are "not warranted by territorial conditions". (p. 332) The decision cites and follows *Central R. R. Co. v. United States*, 257 U. S. 247, 259, in stating that "mere participation in joint rates does not make connecting carriers partners in discrimination".

The decision in *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, cited by Rio Grande, upheld Commission action in cancelling a tariff on grain to Kansas City that would have excluded other carriers from carrying such grain from Kansas City to the gulf. The opinion points out that there is "no occasion" to consider whether there was a through route on another railroad involved in the case (p. 775) since the shipment to Kansas City and from there to the gulf are "entirely distinct" and do not necessarily involve the same grain (p. 779). The Court holds that the case obviously presents only a rate question and no carrier had any right to "recapture" the traffic at Kansas City (pp. 776, 780).

Texas & Pacific Ry. Co. v. U. S., 289 U. S. 627, presented a claim by Galveston, Texas, that it was prejudiced and New Orleans was preferred in commodity rates on export, import and coastwise traffic. The Commission found that shipping distances were from 162 to 213 miles shorter to the Texas port from interior shipping points than to New Orleans (p. 656). It was held that only Section 3(1) could be considered (p. 633) and since New Orleans carriers "do not reach" the Texas ports "with their own lines" (p. 634) and do not have "effective control" over rates to the latter ports, no discrimination is established, even though there may be "participation in joint rates with the lines to Texas ports" as required by Section 1(4) of the act (p. 648). The opinion cites and follows the *Central Railroad case, supra*, (p. 650) and points out that the principle which is controlling has been followed by the Commission with the approval of the Court "for more than forty years" (p. 654). This principle, the Court holds, bars the use of Section 3 of the act to "divert traffic through the complaining gateway" (p. 639) there being no "power" in section 3 to "build up the Texas ports by diverting export and import traffic to them" (p. 646). This opinion, we submit supports in every way the position of the Union Pacific and the five States in the instant case.

Chicago, I. & L. Ry. v. U. S., 270 U. S. 287, also cited by Rio Grande, involved discrimination of 4 steam railroads in denying an electric line switching services within Michigan City, Indiana, that were granted to each other. While only one of the steam railroads had physical connection with the electric line it was held that each of such roads was an "effective instrument" (p. 293) of discrimination and an alternative order was entered under which the steam roads were "free to remove the dis-

crimination by any appropriate action" (pp. 292-293). As pointed out in *Texas & Pacific Ry. Co. v. U. S., supra*, at page 652, each defendant in the Michigan City case was "solely responsible" for the discrimination in local switching service and the case is readily distinguishable upon such basis.

A case frequently cited by Rio Grande in this case is *Virginian Ry. v. United States*, 272 U. S. 658. That decision not only fails to sustain any contention of Rio Grande but demonstrates that the claims of discrimination and prejudice against shippers herein are not established. The *Virginian* case involved a complaint, not by a railroad seeking to improve its financial position, but by 54 coal shippers located on the Virginian who complained of undue prejudice because their rates to the west were so much higher than rates of 45 competing coal shippers located in the same area on the Virginian Railway.

No question of short-hauling was involved in the *Virginian* case. The order was not "sought or made" under Section 15(3). The complaint did not seek through routes or joint rates, and they were not ordered. The Commission merely ordered the carriers to "cease and desist" from collecting from the 54 mines to western destinations rates in excess of those paid by the 45 mines. There is no suggestion or evidence in the instant case of any competition or discrimination between shippers located on the Union Pacific line and therefore no prejudice or discrimination is available as a basis for a Section 3 order.

Further proof that the *Virginian* case is consistent with our position is found in the reference in the *Vir-*

ginian case (p. 665) to *United States v. Illinois Cent. R. R.*, 263 U. S. 515, and *United States v. Pennsylvania R. R.*, 266 U. S. 191, as involving in "essence" the "same" situation as the *Virginian* case. In the *Illinois R. Co.* case discrimination was found because the "joint through rate" for lumber for a shipper at Knoxo, Mississippi, was "2 cents" higher than on all shippers "within the so-called blanket territory" although the "distance to the northern markets from many of the points on these lines is much greater than the distance from Knoxo, which lies near the centre of the so-called blanket territory" (p. 519). Since a consideration of all transportation factors demonstrated that "discrimination" existed, it was held that the conclusion reached was not "inconsistent" with decisions such as *Central R. R. Co. v. United States*, 257 U. S. 247, cited by carriers (p. 520). The opinion by Mr. Justice Brandeis emphasizes that the "order does not require a reduction of the through rate" (p. 526) since the discrimination may be removed by raising other rates. So here, if as the Commission found but the district court denied, there is any discrimination against shippers using the Rio Grande, the remedy is not the requirement of through routes and joint rates that short haul Union Pacific routes, but, instead, a "cease and desist" order affording the alternative of removing the discrimination by increasing rates of Union Pacific routes or altering both sets of rates. *Texas & Pacific Ry. Co. v. U. S.*, 289 U. S. 627, 650.

In *United States v. Pennsylvania R. Co.*, *supra*, also cited as involving the "same" situation, it was held to be discrimination for two railroads serving one city to grant reciprocal free switching services between plants located on each other's lines but to refuse such arrangement within such city to plants on a third railroad's lines. The

opinion, also written by Mr. Justice Brandeis, says it resulted in undue prejudice where the "facilities in question were granted to some and refused to others" (p. 199).

Both of the two cases just reviewed, involving the "same" situation as the *Virginian* case, demonstrate why this Court said in the recent *Thompson* case, *supra*, in footnote 18, at page 560, that the *Virginian* case "is inapposite". The same reasons make the *Virginian* case "inapposite" to the instant proceeding.

The cases just reviewed fall in the same category as *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136, which upheld a Commission order that "substituted for the through rate of 22 cents" a "joint rate of 16 cents" to Paducah, Kentucky, on certain lumber shipments from the south (p. 142). Since the "order operates merely to introduce reduced joint rates" (p. 143), it was held that "there is no foundation in fact or law" for a claim that the prohibitions in Section 15 with reference to new through routes were "disregarded" (p. 144). The carriers could under the order establish a new through route if they wanted to, but as stated by Mr. Justice Brandeis, the order does "not require" any carrier to "substitute" any new route or "establish an additional route" (p. 143). Moreover, it was held that the case was a rate case under Section 15(1) and not "merely one to prevent discrimination", under Section 3 (p. 145).

IV.

The Commission Arbitrarily Commingled Various Sections of the Act Which Have Independent Significance, and Misused Sections 1, 3 and Parts of Section 15 in Order to Circumvent the Requirements of Section 15(4) and Provide the Remedy Desired by the Rio Grande.

We have demonstrated that Rio Grande has wholly failed to present a case that can be sustained under any individual section of the Act. This being true, it logically follows that the order of the Commission cannot be rested upon any collective consideration or commingling of the various portions of the Act.

Both the majority and minority opinions of the court below agree that no case is established under Section 3(1) of the Act. Neither of these opinions suggests that Section 1 provides any basis for the establishment of the desired through routes. The majority opinion attempts to make a case within the orbit of the order under Section 15(4) by a finding, wholly unsupportable, that present Union Pacific routes are inadequate because shippers must pay a higher rate for shipments involving in-transit privileges on the Rio Grande. Thus, the majority would permit the establishment of a through route and joint rates merely to provide a rate advantage not now possessed by certain shippers if they use the Rio Grande. This constitutes circumvention of requirements in the Act and an intermingling and commingling of sections of the Act—a process that was seized upon by the Commission at the behest of the Rio Grande.

The operation of this process in the majority opinion and the confusion it produces is reflected in its con-

sideration of Section 3(1) of the Act. The opinion states that the Commission made a finding of a violation of Section 3(1), "for the purpose of bringing the order within the authorization of Sec. 3(1)", but that as to a violation of Section 3(1) the Commission may, "correct it irrespective of whether the factual situation authorizes the order under Secs. 15(3) and 15(4) heretofore considered." While denying there was any violation of Section 3(1) the majority opinion first indicates that if such a violation of Section 3(1) did exist, the requirements of Section 15(3) and (4) could be by-passed. Such a position, we have seen, does not reflect the language and particularly the proviso to Section 3(1) and does not represent the law. But after indicating the position that Section 3(1) might be used to destroy Section 15(4), the same opinion holds that "Sec. 15(4) would be practically emasculated" if the Commission could order through routes and joint rates to equalize transportation advantages on competing railroads (R. 164). Yet, the majority opinion holds that the order is "valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3(4) of the Act" at points along the Bamberger Railroad between Ogden and Salt Lake City (R. 168).

The dissenting opinion of Circuit Judge Johnsen respects the independent significance of individual portions of the act.[65] He states (R. 178) that relief could not

[65] Judge Johnsen states:

"I have grave legal doubt whether the Commission's power to establish joint rates under section 15(3) has any relationship to the term 'more economic transportation' in section 15(4), dealing with the Commission's right to open up through routes."

This same opinion describes the "confusion in which the Report has been wrapped" and the "attempt by the Commission to gain a new foothold under another disguise." (R. 174.)

be predicated under Section 3(4), and the result the Commission reached was effected only by an "escape" from "realities through a dissolution of them under the considerations open to the Commission in section 15(4), such as the Commission here attempted". The finding of the Commission as to the Bamberger Railroad, under Section 3(4), represented, according to Judge Johnsen, the "Commission's apparent attempt to strike at as much in the present situation as possible" (R. 179).

In an effort to buttress its order the Commission invoked Sections 15(3) and (4) and said that issues with reference to the "reasonableness of the assailed rates" and "discrimination between connecting lines" were properly presented, and that all of such "issues are closely related and will be considered together" (R. 33). The Commission also said its conclusion and order was "also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services" (R. 70).

The confusion in the Commission's handling of the case and its commingling independent provisions of the Act is shown by the order entered pursuant to its report. It orders three different sets of rates and represents the height of uncertainty and indefiniteness. The requirements in this rate order and the relationship of the various provisions, defy analysis. This result is the natural culmination of the process followed throughout the case by the Commission.

Although purporting to base its order on Section 15(4)(b), there is a complete failure by the Commission to spell out with simplicity and clearness and with reason-

able certitude the ground and basis for its order as required by the decisions of this Court.[66]

That the Commission cannot evade the requirements of Section 15(4) by the "form of its order" was settled in 1952 by this Court in *Thompson v. United States, supra.*[67] This holding was consistent with earlier declarations with reference to the "form" of Commission actions.[68]

The process that was followed by the Commission in this case of scrambling the various sections of the Act and utilizing them promiscuously in order to provide the desired results has been condemned by this Court. Perhaps the leading decision, in view of the precise situation now presented, is *Central R. R. Co. v. United States*, 257 U. S. 247. In that case the complainant, American Creosoting Co., had a plant at Newark that was "connected by switch tracks with the Central and the Pennsyl-

66 *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-511.

67 At pages 559-560, the Court said:

"Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short-haul themselves could be evaded whenever the Commission chose to alter the form of its order. The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4), before the Court in United States v. Great Northern R. Co., 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."

68 In *So. Pacific Co. v. Interstate Comm. Comm.*, 219 U. S. 433, 442, this Court said:

"* * * the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power."

vania" railroads. These carriers refused to "establish there the privilege known as creosoting-in-transit" and claim was made that this refusal was "unjust and unreasonable" in violation of Section 1 of the Act and "also unjustly discriminatory, in violation" of Section 3 (p. 254), because those roads had joint rates with others that offered that transit privilege on their lines.

Complainant joined 21 other "railroads located in the Trunk Line territory and New England" in the action. Relief was denied under Section 1 but granted under Section 3 by the Commission.

The opinion by Mr. Justice Brandeis points out (p. 255) that neither the Central nor Pennsylvania, on which complainant was located "accords the creosoting-in-transit privilege at any points on its lines", nor is the privilege granted by any other carrier in Trunk Line territory so far as is material here. The claimed discrimination arises by reason of "competitors" of complainant with plants in "Mississippi, Indiana, Illinois, Ohio and Pennsylvania"; and the "several railroads on which these plants are located have, each acting independently, established the privilege at the places where those plants are situated".

The respondent railroads in the proceeding did have through routes and "joint rates" passing through the "points at which this privilege prevails and also through Newark" (p. 256). But the opinion holds that the granting of transit is a "matter local to the railroad on which the transit point is situated", the revenue therefrom being retained entirely by the local carrier, and such transit may be granted by a carrier "without consulting connecting carriers" (p. 255).

Granting, the opinion states, that Section 1 may empower the Commission to "determine whether in a particular case a transit privilege should be granted or should be withdrawn", the Commission may not "accomplish by indirection" under Section 3 what it may lawfully do under Section 1 (p. 257). The opinion holds that the two railroads on which complainant was located are "powerless to cause these connecting carriers to withdraw the privilege" (p. 258). The opinion emphasizes at page 259 that to find discrimination under such circumstances would make "the legality or illegality of a carrier's practice" depend "not on its own act, but on the acts of its connecting carriers".

Now, if the foregoing result is true in the case of transit privileges "independently" established by connecting carriers with whom defendant carrier has established through routes and joint rates, then, *a fortiori*, such result would have to be the same, as in the instant case, where through routes and joint rates via the Rio Grande have not been established. By the same reasoning, if it is improper to invoke Section 3 to enforce Section 1, then it is equally improper to attempt the reverse or to use any other section to enforce or circumvent Section 15(4). Moreover, this same line of reasoning prevents Section 15(4) from being used as a vehicle to equalize rates or privileges under Sections 1, 3 or any other provision of the Act.

The Commission has direct and definite power to remedy violations of Sections 1 and 3 of the Act. It cannot seize its through route and joint rate powers to provide reasonable rates under Section 1 or to prevent undue prejudice or discrimination under Section 3. As noted earlier, the Commission in this case has improperly used

its through route power to remedy at least three separate and distinct rate and discrimination findings.

The special power to establish through routes was not conferred until 1906. This power is wholly independent of the authority to pass upon the reasonableness of rates given the Commission in 1887. The power to require joint rates may not be exercised except upon a finding of public interest. *A., T. & S. F. Ry. v. United States, supra.*

There is no authority in Sections 1(4) or 3(4) to order joint rates. If these sections may be used as a basis for a joint rate order then the enactment of Section 15(3) was a useless gesture.

In previous cases the Commission has held that Section 1(4) is "subordinate" to the specific provisions of Section 15 and the authority in Section 15(3) "is subject to the limitations, among others, in section 15(4)."[69]

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69 See *North American Coal Corp. v. Pennsylvania R. Co.*, 278 I. C. C. 675, 679, 683 and cases cited in this brief, *supra*, Section III, footnote 49.

In *Port of New York Authority v. A., T. & S. F. Ry. Co.*, 144 I. C. C. 514, 517, the Commission refused joint rates, saying:

"While we have the power under section 1 to find combination rates unreasonable upon a proper showing, we must in such cases safeguard the carriers' rights under the short-haul provision of section 15 * * *. In numerous cases we have permitted carriers to cancel joint rates or restrict routing, which had the effect of leaving higher combination rates to apply over certain routes, when it appeared that they did so in order to safeguard their long haul. We have done this on the principle that we have no power to prevent the cancellation of a through route if we could not have established the route as an original proposition. See The Ogden Gateway Case, 35 I. C. C. 131, 140; Routing of Coal from Western Maryland Ry. Mines, 66 I. C. C. 103, 107; Routing of Sheep, 69 I. C. C. 4, 6."

In *Nicholson Universal S. S. Co. v. Pennsylvania R. Co.*, 203 I. C. C. 637, it was held at page 647 that what is now Section 3(4) "does not include within its terms any reference to routes."

Legislative History of the Through Route Provision of Section 15 Confirms Our Position.

The legislative history of the through route provision of Section 15 shows that any idea that this provision might be used to enforce other provisions of the Act was dispelled by an amendment made in 1910. Previous to that amendment the provision contained language that the through route power might be utilized "when that may be necessary to give effect to any provision of this Act". In 1910 the quoted language was eliminated.[70]

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70 As originally enacted in 1906 (34 Stat. 590) the through routes provision of Section 15 read as follows:

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, *when that may be necessary to give effect to any provision of this Act*, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

If the italicized language justified the view that the power to order new through routes might be used to enforce other provisions of the Act, the omission of this language after 1910 must be construed as indicating a contrary intention.

CONCLUSION

For the foregoing reasons, this Court should affirm the part of the judgment of the district court involved in the appeals in Nos. 117 and 119 and reverse the portion of the judgment of the district court from which this appeal is taken (No. 118) and remand the case to the district court with direction to issue the injunction and relief prayed by the plaintiffs in that court.

Respectfully submitted,

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PROOF OF SERVICE

I, BERT L. OVERCASH, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 15th day of March, 1956, I served, on behalf of all Appellants herein, copies of the foregoing brief on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

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APPENDIX A

The Pertinent Provisions of the Interstate Commerce Act (United States Code; Title 49), Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(3)(a)—

"* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit,

ventilation, refrigeration or icing, storage and handling of property transported. * * *"

Section 1(4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1(5)—

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3(1)—

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district,

gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15(1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or

property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the

terms and conditions under which such through routes shall be operated. * * *"

Section 15(4)—

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financal needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

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Nos. 117, 118, 119, 332, 333, 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

The Denver & Rio Grande Western Railroad Company, Appellant,

v.

Union Pacific Railroad Company, et al.

No. 118

Union Pacific Railroad Company, et al., Appellants,

v.

United States of America, and Interstate Commerce Commission.

No. 119

United States of America, Interstate Commerce Commission, and Secretary of Agriculture, Appellants,

v.

Union Pacific Railroad Company, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

Washington Public Service Commission, et al., Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

No. 333

Union Pacific Railroad Company, et al., Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

No. 334

United States of America and Interstate Commerce Commission, Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR UNION PACIFIC RAILROAD COMPANY, ET AL., AND WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.

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Appendix A—Order of Interstate Commerce Commission dated January 12, 1953, in Docket No. 30297, Denver & R. G. W. R. Co. v. Union Pac. R. Co., et al.

Appendix B—List of all witnesses who testified before the Interstate Commerce Commission from States of Washington, Oregon, Montana, Idaho and Utah north of Ogden.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, APPELLANTS,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.,
APPELLANTS,

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL.,
APPELLANTS,

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR UNION PACIFIC RAILROAD COMPANY, ET AL., WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company (appellees in Nos. 117, 119; appellants in Nos. 118, 333), and Washington Public Service Commission, Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission (appellees in Nos. 117, 119; appellants in Nos. 118, 332), file this joint reply to the brief of the United States of America, the Interstate Commerce Commission and the Secretary of Agriculture (herein called "Government"), and the brief of The Denver & Rio Grande Western Railroad Company (hereinafter called "Rio Grande").

The "Statement" in the Government's brief omits some factual material which we think important, and also contains conclusory statements of fact and law (see pp. 19, 28 and 33).

The Rio Grande's "Statement" is argumentative and conclusory in certain respects and omits factual aspects which are necessary for proper understanding and consideration of the cases.

In the circumstances and to avoid repetition, the Court's attention is respectfully invited to the Statements of the cases in the briefs of these appellants-appellees (see Railroads' briefs, No. 118, pp. 15-30; No. 333, pp. 9-29; five States' briefs, No. 118, pp. 11-20; No. 332, pp. 5-13).

Introductory

The subject of this litigation is an order—one order—issued by the Interstate Commerce Commission January 12, 1953, upon complaint of the Rio Grande. The order requires the Union Pacific and over 200 other railroads to establish through routes and joint rates in connection with the Rio Grande on the commodities specified in the order which constitute approximately one-third of the total volume of traffic the Rio Grande seeks to divert to its line from the Union Pacific and other railroads. The Union Pacific and other railroads named above were first to attack the order by their complaint filed June 25, 1953, in the Nebraska court (Nebr. R. 3). The Washington Public Service Commission and other State commissions intervened as plaintiffs in that suit (Nebr. R. 97), which sought to enjoin and annul the Commission's order on the ground that it was entirely null and void. A majority of the Nebraska court filed its opinion October 22, 1954, sustaining the Commission's order in part and enjoining and annulling it in part, Circuit Judge Johnsen dissenting on the ground that the order was void and should be enjoined and annulled in its entirety (Nebr. R. 151-179).

The Rio Grande filed suit in the Colorado court October 22, 1953, seeking to enjoin and annul the Commission's *failure* to issue a different and more comprehensive order which would include all commodities instead of those specified in the order actually issued (Colo. R. 1). The Colorado court filed an opinion January 13, 1955 (Colo. R. 279), sustaining the Rio Grande contentions, but upon consideration of motion for new trial and reconsideration, that opinion was modined and did not become final until the court issued its modifying order April 22, 1955 (Colo. R. 363).

The Colorado court held that the Commission had erred in holding that through routes were not already in existence via the Rio Grande for the traffic it sought moving from and to the northwest area in the States of Oregon, Washington, Montana and Idaho, and that this holding by the Commission "prejudiced the entire proceeding." That court remanded the case for further proceedings by the Commission in conformity with the court's opinion and judgment (Colo. R. 361-362). Notwithstanding its holding that the Commission's view that through routes were not in existence via the Rio Grande had "prejudiced the entire proceeding," the Colorado court did not annul or disturb the order actually issued by the Commission granting through routes and joint rates via the Rio Grande for about a third of the traffic, but instead merely enjoined and annulled the Commission's action "insofar as it denied and withheld relief" to the Rio Grande. In other words, the Colorado court purported to enjoin and annul the Commission's *failure* to issue an order, or to make the order actually issued, more favorable to the Rio Grande by including more commodities and traffic than the Commission included in the order it issued.

Although the suit of the railroads and the five States in the Nebraska court sought, as their appeals seek in this Court, to annul and enjoin the order issued by the Commission in its entirety on the ground that it is wholly null and void, and a decision accordingly by this Court on the issues in the appeals from the Nebraska court would necessarily dispose of the whole litigation, the briefs of both the Government and the Rio Grande present as the first question for consideration by this Court whether the Colorado court erred in holding that the Commission was wrong in its finding that through routes and joint rates

were not in existence via the Rio Grande for the involved traffic. This, the Government's brief states at page 57, "was a premise of the Commission's order" and is considered first in the Government's brief. The Rio Grande's brief at page 53 argues that the question whether through routes already existed via the Rio Grande "was from the beginning and is now the first and basic issue in this litigation." That question was not raised or decided in the Nebraska court, since the attack there was upon the Commission's order as issued and not, as in the Colorado court, upon the Commission's *failure* to issue some other and different order upon a different legal or factual premise or basis than that which it adopted as the basis for the order issued.

The Rio Grande's purpose in contending that the "first and basic issue" is whether the Commission erred in holding that through routes were not already in existence via the Rio Grande is, of course, an endeavor on its part to have this Court adopt the theory of the Colorado court and remand the proceedings to the Commission on the assumption that the Commission will feel compelled to issue an order more favorable to the Rio Grande than the order it actually issued.

The Rio Grande's brief asserts at page 36 that the suit in the Nebraska court dealt only with "that part of the Commission's order which granted affirmative relief to the Rio Grande," while the suit in the Colorado court dealt only with "that part" of the order which "denied and withheld" relief to the Rio Grande. This is an erroneous and untenable view of the Commission's order. The Commission issued only *one* order which is reproduced verbatim as Appendix A to this brief. As will be seen from its language, the order is entirely affirmative. It directs the carriers to do what the Commission intends

them to do, and it does nothing else. It is *not* in *two* parts. It contains no "part" which denies or withholds anything from the Rio Grande. There is no order embracing the matter of which the Rio Grande complained in the Colorado court and hence, no basis for judicial review of the subject matter of the Rio Grande's complaint to that court, namely, the Commission's *failure* to make an order which it did not make.

Since the only order issued by the Commission is the order requiring through routes and joint rates (App. A, hereto) which we contended in the Nebraska case, and contend here, to be entirely null and void, we respectfully submit that the appeals from the decision of the Nebraska court should be first presented to and considered by this Court, particularly since a decision agreeing with any of the contentions made in the attack upon the order issued would dispose of the entire litigation, making it unnecessary for this Court to give any consideration to the decision of the Colorado court.

However, if the Colorado case is considered first by this Court, then the first question, as shown in the brief of the five States (No. 332) and of the railroads (No. 333) in the Colorado case, is whether the court erred in failing to dismiss the complaint on the ground that there was no order embracing the matter of which the Rio Grande complained, and the second question for consideration is whether the Colorado court erred in denying the motion to dismiss on the ground that the Rio Grande had no legal right or standing to maintain its suit. Until and unless these questions have been considered and decided in the negative, this Court would have no occasion to reach the question whether the Colorado court was correct in holding that through routes were already in existence

via the Rio Grande for the involved traffic. That question, we submit, however, became moot and is of no legal significance, since the Commission, though finding that through routes did not exist via the Rio Grande, proceeded unhampered by the short-haul prohibition of Section 15(4) to order through routes and joint rates for all commodities which the Commission thought the "public interest" required under the evidence before it.

In this reply brief we shall discuss the Nebraska decision before taking up the Colorado decision.

The Nebraska Decision

The Nebraska Court did not err in holding that the evidence did not support the order as to shipments not requiring stoppage for transit operations at points on the Rio Grande.

The Government's brief, page 75, contends that the Nebraska court "erroneously narrowed the scope of relief granted by the Commission's order." The Rio Grande asserts that the Nebraska court erroneously usurped administrative power and substituted its judgment for that of the Commission, and for that reason the court's judgment should be reversed (brief, pp. 87, 115).

We agree that, insofar as it sustained the Commission's order, the Nebraska court not only usurped administrative powers but also substituted its own standard or basis for the order for that invoked by the Commission. For these reasons and others, we contend that to the extent it sustained the Commission's order, the Nebraska court's decision is erroneous and should be reversed (see railroad brief, No. 118, p. 42, *et seq.*).

We do not agree, however, that the Nebraska court usurped administrative power in annulling and enjoining the Commission's order insofar as it embraces shipments that would not require stoppage-in-transit for processing, storage or other commercial operations at points on the Rio Grande and later shipment beyond its termini: That court's action in this respect was based not upon a "weighing" of the evidence by the court to determine what conclusions should be drawn from it, but upon the court's finding of fact "I" and its conclusion of law that "the evidence does not justify" the Commission's finding that services via Union Pacific routes are inadequate and, hence, does not support a finding that the Rio Grande route is necessary for shipments that do not require transit operations at points on the Rio Grande (Nebr., R. 165, 168). Whether an order is supported by substantial evidence is and always has been a question of law, and the Nebraska court was clearly within its judicial power in holding that the evidence was insufficient to support the Commission's ultimate finding as to shipments not requiring transit operations at points on the Rio Grande. *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91; *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, 140. Moreover, the Commission had already found Union Pacific routes to be adequate, efficient, shorter, faster and with ample capacity to haul "the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (Nebr. R. 62). Indeed, the Commission's conclusion that Union Pacific routes are "inadequate" was not based on evidence at all but upon the physical and geographical fact that they "are not available, and higher rates apply" at points on the Rio Grande, i. e., at points *not* located on Union Pacific routes (Nebr. R. 70).

The interpretation of clause "(b)" of Section 15(4) of the Act urged by the Rio Grande and the Government is untenable and would completely nullify and emasculate the short-haul prohibition of that section.

The Rio Grande's brief argues (pp. 99-101) that the Nebraska court too narrowly interpreted clause "(b)" of Section 15(4) of the Act, which permits the Commission to order an additional route which short hauls existing routes if "the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." In this connection, the Rio Grande argues that in determining whether a proposed additional route is justified under clause "(b)" no consideration should be given to the adequacy, efficiency or economic transportation service of existing routes, but that the basic question is "whether the transportation would be better for the economy of the area involved and the country as a whole" and whether, in this case, present railroad transportation service from and to the northwest area is "as adequate as it would be if through routes and competitive joint rates were in operation over the Rio Grande" and whether "a choice of routes" rather than "one route" would be better for the economy of the northwest area. The Government's brief, page 82, argues to the same ultimate effect.

In the first place, the suggestion that shippers from and to the northwest area have no "choice" of routes but have only "one route" is a fantastic distortion or misrepresentation of fact, for as shown at pages 53-55 of the railroad brief in No. 333, there are now in existence literally millions of through routes with joint rates between the 39,000 stations in the east and south and 2,900 stations in the northwest between which the involved traffic now moves and has moved for more than half a

century. In the second place, the argument that transportation is not "as adequate as it would be" if the Rio Grande route is added, or that the admitted adequacy and efficiency of existing through routes "is no bar to an order" requiring an additional route which short hauls existing routes, are but arguments that transportation service would never be adequate within the meaning of clause "(b)" until every possible through route at equal joint rates has been established via every railroad which connects with other railroads and could be included as a part of a through route between the origin and destination of a shipment. This, of course, would completely nullify and emasculate the short-haul prohibition of Section 15(4) and, indeed, the Government's and Rio Grande's entire argument on the meaning of clause "(b)" is in effect a contention that it should be so interpreted as to deprive trunk line railroads of any protection of their long hauls under the short-haul prohibition.

This Court recently held (1952) in *Thompson v. United States*, 343 U. S. 549, at page 559, that protection of a carrier's long haul is a "right guaranteed by Section 15(4)" of the Act, and warned that no such "unwarranted distortion of the statutory pattern" as the Government and the Rio Grande now urge would be tolerated by the Court. That decision shows at page 555 that this Court has found it necessary to strike down the "Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes" and discloses the Commission's repeated and continuous efforts, through construction or repeal of the short-haul prohibition, to eliminate it entirely.

The interpretation of clause "(b)" for which the Government and Rio Grande now contend is diametrically

opposed to the purpose of legislation which led to the enactment of that clause. In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Cong., 1st Session, the Senate Committee on Interstate Commerce said at page 2:

> "Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available.* * * * The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate.* If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

Surely, legislation enacted for the declared purpose of making the "shortest, quickest, and cheapest routes available" to shippers in lieu of longer, slower and costlier routes, may not be so distorted by interpretation as authorizing the Commission in this case to short haul the shorter, faster, cheaper Union Pacific routes 925 miles by ordering the addition (to the millions of presently existing routes) of the longer, slower, more onerous Rio Grande line which would result in routes from 33 to as much as 50% longer than the present Union Pacific routes (Nebr. R. 62, 70, 71). It is utterly illogical, unreasonable and fantastic to contend that where, as here, the Commission finds existing routes to be shorter, faster, more efficient, less onerous, and adequate to haul any foreseeable volume of traffic between the northwest and the eastern and southern parts of the country, the addi-

tion of the Rio Grande's more onerous, slower, mountainous route is "needed" to provide the "adequate, and more efficient or more economic, transportation" contemplated by clause "(b)" of Section 15(4), or the "adequate, economical, and efficient service" and "sound economic conditions in transportation" sought by the National Transportation Policy, or the "adequate and efficient railway transportation service" which the Commission must consider under Section 15a(2) in prescribing reasonable rates.

This Court has rejected the view that the Commission may short haul existing routes by requiring another route because existing routes do not serve the same territory served by the proposed route, or because shippers or passengers may prefer a larger "choice" of routes, holding that these are not reasons for condemning and short-hauling existing routes, *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 544-545. And see *United States v. Mo. Pac. R. Co.*, 278 U. S. 269.

The sweeping interpretation of clause "(b)", for which both the Rio Grande and the Government contend and which would emasculate the short-haul prohibition and give the Commission complete and unrestricted power to order new through routes that short haul existing routes, is, of course, induced by the Commission's own erroneous interpretation of that clause, in a continuation of its time-worn efforts to overcome and evade the impact of the short-haul prohibition. *Thompson v. United States, supra*, 555. Being unable upon the evidence in this case to condemn the Union Pacific routes as inadequate or to find any ground for condemning them under past precedents or present standards governing its action, the Commission invented a new theory or standard of transportation requirements for perishable food prod-

ucts. Its report states that these products require "as wide a distribution as possible," that growers and producers in the northwest area "need as many markets and outlets as possible," that the marketing system for food articles requires as orderly a distribution of them "as possible" and that such articles "must be moved to market * * * over as many routes as possible," without unnecessary interruptions so that there may be "as much flexibility as possible" in the distribution process (Nebr. R. 56, 70).

We have shown in our openng briefs that the Commission thus completely forsook and departed from the statutory standards requiring "reasonable through routes," Section 1(4), and "adequate, economical, and efficient service" required by the National Transportation Policy, and "adequate, and more efficient or more economic, transportation" contemplated by clause "(b)" of Section 15(4), which it avowedly invoked (railroad brief No. 118, pp. 52-113; States' brief No. 118, pp. 40-69).

The fallacious and untenable interpretation by the Commission of its authority, which the Rio Grande and Government counsel now hopelessly undertake to defend, is aptly and correctly condemned in the dissenting opinion of Circuit Judge Johnsen as follows (Nebr. R. 172-173):

> "Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad serving as a bridge line and further such new route can be de-

> clared to provide 'more economic transportation,' because by placing joint rates in effect the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then *the railroads of the country may as well forget section 15(4) entirely as affording them any protection whatever against deprivation of their long hauls.*" (Italics added.)

The language quoted above (page 12) from the report of the Senate Committee on Interstate Commerce is enough, alone, to condemn and cause this Court to reject the Commission's misinterpretation of its authority to require through routes, and the feeble arguments of counsel for the Rio Grande and the Government to support that misinterpretation. This Court has made legislative history decisive of the construction of statutory provisions in innumerable cases (see Appendix A to dissenting opinion of Mr. Justice Frankfurter in *Comm'r v. Estate of Church*, 335 U. S. 632, 687-689, citing more than 125 "DECISIONS DURING THE PAST DECADE IN WHICH LEGISLATIVE HISTORY WAS DECISIVE OF CONSTRUCTION OF A PARTICULAR STATUTORY PROVISION").

The claimed misinterpretation by the Nebraska court of Sections 3(1), 15(3) and 15(4) of the Act.

The Government in a footnote at page 82 of its brief states that the Nebraska court erred in holding that Section 3(1) of the Act is not applicable to situations where, as in this case, persons alleged to be preferred and those alleged to be prejudiced are located on different railroads, but that the result in this case is the same whether it is analyzed in terms of Section 15(3) and (4) or "whether one looks also to Section 3(1)."

The Rio Grande, at page 102 of its brief, contends that the Nebraska court erred in interpreting and applying all of these provisions and particularly in holding that Section 3(1) is inapplicable to the facts in the instant case. The Rio Grande brief does not make clear the respects in which it claims the majority of the Nebraska court misinterpreted or misapplied any of these provisions except possibly the following holding of that court (Nebr. R. 164):

> "If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3(1) merely because a shipper entity described in Sec. 3(1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15(4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3(1)."

It is noted that the majority of the Nebraska court held that the evidence "furnishes no basis for the order under Sec. 3(1)." We have thoroughly demonstrated, we believe, that the Commission's finding of undue preference and prejudice in violation of Section 3(1) has no basis in law and is not only without support of evidence but is contrary to the overwhelming preponderance of the evidence of record. (Railroad brief No. 118, pp. 194-222; States brief, No. 118, pp. 69-92.)

If the Rio Grande's contention is that the Commission should have ignored the short-haul prohibition in Section 15(4), but should, nevertheless, have granted through routes and joint rates in the exercise of its power under Section 3(1), then its contention is wholly

untenable because there is nothing in Section 3(1) which suggests that the Commission may order through routes and joint rates to remedy undue preference and prejudice. No case can be found in which the Commission attempted to base a through route and joint rate order upon Section 3 of the Act. We think the majority of the Nebraska court erred in failing to hold that the Commission's finding under Section 3(1) is invalid because it is unsupported by evidence and for other reasons set forth in the portions of our briefs just cited.

On this point, the following views of Circuit Judge Johnsen should be adopted by this Court (Nebr. R. 178):

> "But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3(1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3(1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3(1), I am certain that its action resting on this basis alone could not on these facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15(4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through

routes and joint rates in relation to the existing conditions."

All else aside, and the Commission having found that the evidence as to transportation conditions would not support a finding of discrimination against the Rio Grande under Section 3(4) (Nebr. R. 72), Circuit Judge Johnsen is correct in holding that the evidence disclosing the dissimilarities in physical and transportation conditions does not justify the Commission's finding of a violation of Section 3(1) and we have so demonstrated in our briefs at pages just cited.

In connection with its discussion of Section 3(1) and (4), the Rio Grande's brief at pages 102-103 points to the fact that the Union Pacific does maintain through routes and joint rates with the Rio Grande on traffic to and from points in California. The inapplicability of this attempted comparison is made clear by the following undisputed testimony of witness Stilling (Vol. I, 818):

> "All of the routing arrangements via junction points in southern California have been in effect for many years, and those applying in connection with the Union Pacific were established by the Los Angeles and Salt Lake Railroad when it was an independent corporation.
>
> "As stated earlier in my testimony, the Union Pacific obtained control of the LA&SL in April, 1921, and all of the joint rates and through routes established by the LA&SL have been continued in effect. Absence of control of the LA&SL by the Union Pacific until 1921, and the additional fact that *through routes with the Rio Grande via Utah junctions are in many instances materially shorter than Union Pacific long haul routes, creates a situation directly opposite to that involving traffic to and from Idaho,*

Montana, Oregon and Washington where no joint rates have been in effect via the Rio Grande's longer route for almost half a century.

"There is another important difference between the Rio Grande's participation with the Union Pacific in trans-continental traffic to and from Los Angeles and its non-participation in through routes and joint rates to and from Portland, Seattle or Spokane, and that is that the total transportation performed to a point like Chicago is substantially greater from the Northwest than from Los Angeles.

"From Los Angeles to Chicago via Union Pacific, Provo, Utah, Rio Grande, Denver and CB&Q it is 2,293 miles. From Portland via Union Pacific, Ogden, thence Rio Grande and CB&Q it is 2,473 miles or 180 miles farther than from Los Angeles via the Provo route." (Italics added.)

As stated above, there is no language in Section 3(1) or 3(4) which suggests that the Commission has power to order through routes and equal joint rates via the Rio Grande, and it is a plain distortion of the statutory pattern to contend that any such power derives from the provisions of that Section. If this were not so, then the Commission has had the through routes power since the original Section 3 was enacted in 1887, and the enactment of the limited through routes power in Section 15(3) and (4), in 1906 and later amended, was but a useless and idle gesture on the part of Congress. Moreover, since the order in this case was issued upon complaint of the Rio Grande seeking to equalize rates on traffic which it handles or hopes to handle, the proviso to Section 3(1) seems clearly to preclude any application of Section 3(1) or (4) to this case, and, further, the proviso would seem to prevent any use of Section 3 to circumvent Section 15(4) or to confuse or intermingle the provisions of those sections. The proviso reads:

> "That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Even where a shipper is placed at a competitive disadvantage with other shippers because of inadequate service, and higher rates over longer routes, and adequate and more efficient and less costly routes are needed to effect a fair "competitive relation" with other shippers, "the Commission's authority to grant relief is bottomed on §15(3) and (4)" and not upon Section 3 of the Act, *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, 590. But under those circumstances the Commission is not justified in ordering longer more onerous routes, as in this case, to short haul existing Union Pacific routes which it expressly finds to be shorter, faster and adequate to haul any foreseeable volume of the involved traffic. The three-judge district court decision, affirmed by this Court, in the case last cited, held, 54 F. Supp. 381, 392:

> "Of course, the Commission would clearly not be justified in attempting to neutralize the disadvantage of geographical location such as Stickell has, by requiring of a carrier wasteful or additional service, without adequate compensation, even though Stickell might, for competitive or other business reasons, be in dire need thereof."

The through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line or back-haul costing the shipper 90¢ per ton, and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commission's order would result in at least 219 miles additional and wasteful transportation, and routes as much as 50% longer, over the most "onerous" operating conditions of any western

railroad, requiring two more interchanges, one or two days more time in transit, and would short haul existing shorter routes by at least 925 miles and deprive some of the railroads of their entire hauls.

The reference in the Rio Grande's brief (pp. 107-109) to certain routes that could be made in connection with its line that would give the Union Pacific a longer haul than it now obtains in connection with other railroads serving the northwest area affords no justification for the Rio Grande's demands, in the absence of evidence showing similarity of transportation conditions over existing routes and the proposed Rio Grande route. The Commission considered these suggestions of the Rio Grande, as its report clearly shows, but since supporting evidence was lacking, it rejected them in the following language (Nebr. R. 72):

> "As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

"*There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to.* A finding of discrimination under section 3(4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. *No such a showing has here been made.*" (Italics added.)

Testimony of public and shipper witnesses from the northwest area overwhelmingly opposed the Rio Grande and its statements with respect to that testimony are incorrect and misleading.

At page 97 of its brief, the Rio Grande states:

"Most of the shippers who testified before the Commission are located at points in northern Utah, in Idaho, in Oregon and Washington served by the Union Pacific. A summary of the testimony of various shippers and producers of the commodities involved in the order of the Commission is set forth in Appendix F attached hereto. The testimony of these shippers establishes beyond question the need for the competitive joint rates and through routes prescribed by the Commission."

Again, at page 98, its brief states:

"Under the existing rate restrictions imposed by the Union Pacific and its preferred connections, shippers in northern Utah, Idaho, Montana, Washington and Oregon do not have an opportunity of making a selection of routes enabling them more profitably to market their products, and in some cases to 'feel out' the markets at such points as Grand Junction, Pueblo, Colorado Springs and other points in Colorado and Utah served by the Rio Grande via Ogden or Salt Lake City."

The Government's brief, at page 77, states that:

"* * * growers and shippers in the excluded territory [northwest area] are deprived of access to the markets represented by processors and dealers who are served only by the Rio Grande. * * *"

It defies belief that the Rio Grande would, in the face of the record before the Court, attempt to plead and rely upon the situation of shippers in the northwest area and particularly to create the false impression that the testimony of the majority of shippers from that area expressed any need or desire for through routes in connection with the Rio Grande. The record shows exactly the reverse to be true.

Attached as Appendix B to this brief is a list, with appropriate references to the record, of all witnesses who testified before the Commission from Washington, Oregon, Montana, Idaho and Utah north of Ogden. The record shows that 14 witnesses from the State of Washington, including the Public Service Commission of that State, testified in vigorous opposition to the Rio Grande and that *not a single witness from Washington supported its complaint;* that 2 witnesses from the Board of Railroad Commissioners of Montana and 3 important shipper witnesses from that State vigorously opposed the Rio Grande's complaint and *not one witness from Montana supported it;* that the Public Utilities Commissioner of Oregon and 13 shippers of large quantities of traffic from and to that State vigorously opposed the Rio Grande and that *only 2 witnesses from Oregon supported it.*

Despite its vigorous propaganda campaign soliciting witnesses from the northwest area, the Rio Grande was able to procure only 2 witnesses from the large number who testified from the States of Washington, Oregon

and Montana, while 33 witnesses from those States vigorously opposed the Rio Grande. It succeeded in procuring witness Titus (V. 1, 213), who testified that no shipper in his organization had expressed any need for the Rio Grande route and that no one could foretell whether the route would be used until after it was established; and it succeeded in procuring witness Miller (V. I, 531), who said the strongest "argument" he could make for the Rio Grande route was to have it available at equal rates in case other lines were blocked by snow storms—a situation expressly provided for by the emergency provisions of Section 15(4) of the Act.

Even in Idaho, where the Rio Grande particularly concentrated its solicitation of supporting witnesses, it succeeded in procuring only 18 witnesses, while 37 witnesses from Idaho testified vigorously in opposition to the Rio Grande. From Utah north of Ogden only 2 witnesses supported the Rio Grande, while 3 witnesses from that locality opposed it.

To summarize, the Rio Grande was able to procure a total of only 22 witnesses out of the vast area of Utah north of Ogden, Idaho, Oregon, Washington and Montana; 2 of whom were from Oregon, 2 from Utah north of Ogden and 18 from the southeast corner of Idaho; whereas a total of 73 witnesses from that northwest area vigorously opposed the Rio Grande's complaint.

Careful examination of the record shows that some 12 Idaho producers and shippers who supported the Rio Grande ship approximately 10,000 carloads annually of fruits and vegetables and that their shipments go to all markets in the 48 States and to Canada, South Pacific, South America, Cuba, South Africa, and other points (V. 1, 246, 247), while the 37 Idaho producers and ship-

pers who testified in opposition to the Rio Grande ship and receive annually over 60,000 carloads of these products, and all of them stated that the lack of equal joint rates via the Rio Grande had never handicapped or interfered with free and widespread distribution or effective participation in the markets for their fruits and vegetables. (For more complete discussion and analysis of the testimony, both in support of and in opposition to the Rio Grande, see railroad brief, No. 118, pp. 131-181, which includes a discussion of the Rio Grande's admitted solicitation and procurement of the witnesses that supported its complaint.)

The Rio Grande's suggestion at page 97 of its brief that the testimony of witnesses summarized in Appendix F to its brief represents the "typical" attitude and alleged need of routes via the Rio Grande as expressed by shippers in the northwest area is therefore entirely false and wholly misleading. The witnesses whose testimony is summarized in Appendix F to its brief, as clearly appears from examination of the appendix, are not from the northwest area as such but from the southeast corner of Idaho and from Utah, Colorado and Kansas.

The Commission's report clearly shows that the purpose of its order is to afford "relief" to shippers in the northwest area who, the report erroneously asserts, "are debarred from effective participation" in the marketing system for perishable articles. Hence, the witnesses whose testimony is summarized in Appendix F to the Rio Grande's brief is overwhelmingly contradicted, as is the Commission's own assertion, by the testimony of *all* witnesses from the States of Washington and Montana, all but 2 witnesses from the State of Oregon, and 37 as against 18 witnesses from the State of Idaho, and 3 against 2 witnesses from Utah north of Ogden.

The Commission having designed its order for the purported benefit of shippers in the northwest area, despite the denial of the State commissions and shippers in that area that there is any need for routes via the Rio Grande or that they want any "relief" through the medium of the longer, more onerous Rio Grande routes, from the shorter, faster Union Pacific routes which serve them, the testimony of witnesses along the Rio Grande in Utah and Colorado, and other witnesses from Kansas who testified about commodities not included in the order, affords no support for the order or the position of the Rio Grande or the Government, and their counsel are not justified in an attempt to shift the basis of the order from purported "relief" to shippers in the northwest to receivers and processors of commodities generally along the Rio Grande Railroad.

The suggestion in the Rio Grande's brief that shippers in the northwest area have no "choice in the selection of routes" not only contradicts the testimony of practically all shippers from that area but also contradicts the fact discussed at page 54 of the railroads' brief in the Colorado case (No. 333), that there are literally millions of through routes with joint rates in existence and available for shippers' "choice" from and to the northwest, and none of those shippers or any other shippers have ever demanded through routes over the longer, more onerous, Rio Grande line for the involved traffic.

The Rio Grande's assertion that shippers located exclusively on the Union Pacific and other lines serving the northwest area have no "choice" of routes is also fallacious and misleading in view of the inescapable fact that no shipper served exclusively by one railroad has or could have any choice of routes until his traffic reaches

the junction of such railroad with another. In other words, every railroad, including the Rio Grande, "monopolizes" the railroad traffic of shippers located exclusively on its line, at least to the extent that the shipments can move only over the rails of the railroad serving the shipper until shipments reach the end of its line or its junction with another line. For example, the Rio Grande has a complete "monopoly" of all railroad traffic originated and terminated on its line between Provo, Utah, and Denver, Pueblo and Trinidad, Colorado, for the reason that no other railroad connects with the Rio Grande or serves the territory traversed by it between those points (see map, Appendix C, Rio Grande's brief).

The Nebraska court was correct in holding that there was no evidence to support a finding by the Commission that Union Pacific routes are inadequate, or a need for the Rio Grande route for shipments which do not require stoppage-in-transit for storage, processing or other commercial operations at points on the Rio Grande.

Both the Government and the Rio Grande argue that the Nebraska court erred in holding that there is no evidence to support a finding by the Commission that Union Pacific routes are inadequate or that there is a need for the Rio Grande route for shipments which do not require stoppage-in-transit for processing, storage, grazing cattle, or other commercial operations at points on the Rio Grande (Govt. brief, pp. 79-80; Rio Grande brief, pp. 90-93).

The Government's brief states at pages 79-80 that the Nebraska court "ignores the factor of reconsignment privileges," and that this "was a basic feature of the Commission's rationale." The Rio Grande's brief at page 98 asserts that the Nebraska court in sustaining

the order only as to shipments actually stopped for processing, storage or other transit operations at points on the Rio Grande, and enjoining it as to shipments *not* requiring such commercial operations but which might merely be "reconsigned" while moving over the Rio Grande, deprives shippers from the northwest area of an opportunity to "feel out" markets at points along the Rio Grande and, failing to sell at such markets, then to "reconsign" their shipments to points east of the Rio Grande's termini. That argument is made in the apparent view that if the through routes and joint rates are limited to shipments actually stopped for processing and other transit operations at points on the Rio Grande, the quantity of traffic it would be able to divert from Union Pacific routes would be unattractively small or at least not nearly so large as the quantity would be if there were no limitations upon the application of the joint rates via the Rio Grande.

In the first place, as already noted above, the Rio Grande's gratuitous plea for the alleged benefit of shippers from the northwest contradicts their own overwhelming testimony that they neither need nor want the longer routes via the Rio Grande, and also contradicts their testimony that in view of the sparse population of the mountainous area along the Rio Grande, there are no markets there to "feel out," and moreover that fresh fruits and vegetables, which are the principal commodities involved, are freely and plentifully grown in the area served by the Rio Grande and seek markets also in the east and south (see railroad brief, No. 18, pp. 170-171, pointing to the very small population of the points located upon and served exclusively by the Rio Grande).

The Nebraska court held (Nebr. R. 165) that:

> "The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points."

The last sentence in the court's third conclusion of law (Nebr. R. 168) holds:

> "Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking."

While we contend that the Nebraska court erred in failing to hold that the order was entirely void for lack of supporting evidence and numerous other reasons, we submit that the court was within its judicial power and was correct in holding that the evidence did not support the order to the extent indicated in its opinion.

The contention now made by the Government and the Rio Grande that "reconsignment privileges" at points along the Rio Grande "was a basic feature of the Commission's rationale" has no basis in the Commission's own report, except perhaps on the "all possible routes" theory which is plainly untenable and contrary to the stat-

utory pattern and express purpose and provisions of Sections 1(4) and 15(4) of the Act.

The "basic feature of the Commission's rationale" was not reconsignment privileges but shipments that "may be stopped in transit for various commercial operations [at points on the Rio Grande] and reshipped at the balance of the joint rate" (Nebr. R. 48). Indeed, examination of the Commission's report leaves no other conclusion than that transit operations such as processing, storing, grazing, etc., at points on the Rio Grande is the key to or basis upon which the Commission pivoted its order. The report labors painfully in an effort to prove that no matter how adequate, efficient and capable the Union Pacific routes may be, there is nevertheless a reason, namely, transit operations, for perishable traffic from the northwest to move at equal rates through points located on the longer and more onerous Rio Grande route. The following discussion in the report completely refutes the contention that "reconsignment" at points on the Rio Grande was a basic purpose of the order (Nebr. R. 48-49):

> "*Transit.*—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be *stopped in transit* for various *commercial operations* and reshipped at the balance of the joint rate from the point of origin are of great value to shipper, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.
>
> "The Rio Grande, like other railroads, offers a large number of such transit arrangements, *including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling,*

fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. West-bound traffic to that territory is made up for the most part of manufactures and partially manufactured articles, some of which are *stopped for storage, partial unloading at a number of points, and fabrication in transit.*

"'On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the *stoppage-in-transit arrangements offered by that railroad at such Rio Grande points.*

* * * * *

"A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows." (Italics added.)

The discussion in the report of particular commodities which follows the discussion of "transit" clearly shows that the basic idea underlying the report was to permit stoppage-in-transit at points on the Rio Grande for commercial processes and operations of the sort we have emphasized in the above quotation. Indeed, it was not until the Commission reached its "general discussion and ultimate fact findings" that we find any reference to reconsignment privileges. This is found at page 70 of the record in the *Nebraska* case in the following language:

> "For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes."

From the above quotations and the discussion of commodities throughout the Commission's report, it clearly appears, we submit, that the reference to "traffic reconsigned" in the last quotation was merely an afterthought and that the Nebraska court correctly construed the Commission's report as based upon a purported need for perishable articles to be moved over the Rio Grande so that shipments could be stopped for processing, fabrication and other transit operations at points on that line. Since traffic *not* requiring stoppage for processing at points on the Rio Grande can be and is reconsigned as readily and flexibly while moving over the shorter, faster, Union Pacific routes, and as "reconsignment," unlike transit operations, does not require the shipment to be stopped at any particular point or to be taken from the custody of the carrier, there could be no evidence or any reason justifying a finding that there is necessity for such traffic to move through points on the Rio Grande instead of the Union Pacific routes. The error, we submit, of the Nebraska court was not in holding that the evidence would not support a finding that the Rio Grande route was necessary for traffic which might merely be reconsigned, but its refusal to hold that the order is entirely void for lack of supporting evidence and other reasons urged by the plaintiff railroads and five States in the Nebraska court and in this Court.

The Colorado Decision

The Government's opening brief, pages 57-74, thoroughly demonstrates the errors of the Colorado court in its holding that the Commission erroneously found that through routes in connection with the Rio Grande were not in existence for the involved traffic. The Government's brief, however, does not discuss the two questions presented in the Colorado case which must be considered before the through routes question is reached, namely, (1) whether the Commission's *failure* to compel through routes and joint rates for commodities *not* named in the order issued, is an "order" affording a jurisdictional basis for court review, and (2) whether the Colorado court erred in denying motion to dismiss the complaint on the ground that as the Rio Grande admittedly has no legal right to enhance its financial position by diverting traffic from Union Pacific routes, it is without legal right or standing to maintain its suit. Those questions are thoroughly discussed in our separate briefs in the Colorado case, Nos. 332 and 333, and they require no further discussion here, particularly since they are ignored in the Rio Grande's opening brief.

Our briefs in the Colorado case discuss still other questions which are not discussed in the Government's brief, nor mentioned in the Rio Grande's brief.

Also, bearing upon the question whether through routes for the involved traffic already exist via the Rio Grande our briefs in the Colorado case cite important evidential facts and circumstances not mentioned in the briefs of the Government and the Rio Grande. Since our briefs in that case so thoroughly comprehend and disprove all major contentions made by the Rio Grande

in its efforts to support the erroneous decision of the Colorado court, we deem it more appropriate to avoid repetition of the discussions there set forth, by earnestly requesting the Court's thorough consideration of the discussion of the several questions presented in our briefs in the Colorado case. This leaves for discussion in this reply brief only the following points in that case:

The Rio Grande was not prejudiced by the Commission's holding that through routes and joint rates for the involved traffic did not exist via the Rio Grande, and that question became and now is moot because the Commission ordered equal joint rates on all commodities it thought were required in the public interest by the evidence of record.

Implicit in the decision of the Colorado court and in the insistence of the Rio Grande that the question whether through routes already existed via its line for the involved traffic "is now the first and basic issue in this litigation" is the assumption that the Commission necessarily would have ordered joint rates via its line on all of the traffic, or at least would have issued an order far more favorable to the Rio Grande if it had not felt itself "restrained" by the short-haul prohibition of Section 15(4).

We submit that this is a false assumption which cannot be supported by anything that appears in the Commission's discussion in its report of the through routes question or elsewhere in the report. On the contrary, its report clearly shows that the Commission's finding that through routes did not exist via the Rio Grande for the involved traffic and that to establish them would require findings under clause "(b)" of Section 15(4), did not cause the Commission to limit its prescription of

joint rates to the commodities specified in the order, for the Commission undeniably ordered joint rates on all commodities which it felt were justified by the evidence in the public interest. Thus, it was a failure of evidence of "public interest" which limited the prescription of joint rates to the commodities named in the order, rather than any feeling of "restraint" by the Commission from the short-haul prohibition. The Commission, without apparent hesitation, readily made findings in purported compliance with clause "(b)" of Section 15(4) which, so far as the Commission was concerned, eliminated the obstacle of the short-haul prohibition and left it entirely free to order joint rates on all commodities which in its judgment were shown by the evidence to be required in the "public interest." Having removed the obstacle of the short-haul prohibition by findings it considered sufficient to meet the requirements of clause "(b)", the Commission had only to consider the evidence concerning the extent to which public interest required joint rates.

The fact that the Commission did not order joint rates on eastbound lumber or wheat, for example, justifies the assumption or deduction only that it considered the evidence insufficient to require joint rates on those commodities. Otherwise, it needed only to name them in the order. There is not a word in the Commission's report which justifies the assumption indulged by the Colorado court and the Rio Grande that the Commission felt itself "restrained" in the prescription of joint rates because it had found that through routes for the involved traffic were not in existence via the Rio Grande.

A finding of "public interest" is essential to the validity of an order requiring joint rates, even though through routes are already in existence, *U. S. v. Great*

Northern R. Co., 343 U. S. 562, 569, and since that finding depends upon adequacy of evidence, it necessarily follows that it was lack of evidence of public interest and not its finding that through routes were not already in existence via the Rio Grande which prevented the Commission from ordering joint rates on more commodities than those named in its order.

Since the Commission has already, upon its weighing of the evidence, prescribed joint rates on all commodities it considered to be required in the public interest, there is no basis or justification for the assumption that it would have taken a different view of or given the evidence any different weight with respect to public interest if it had found that through routes were already in existence via the Rio Grande for the involved traffic. Consequently, there is no basis or reason for the Colorado court "remanding" the case to the Commission except for the purpose of attempting to control the Commission's administrative judgment and induce it to change its previous appraisal of the evidence concerning public interest. This, of course, is beyond the court's power. (See cases cited in the railroads' brief, No. 333, pages 99-102.)

The fallacy of the contention that its finding that through routes did not already exist via the Rio Grande for the involved traffic "prejudiced the entire proceeding" and restricted the Commission's decision and order is readily demonstrable:

First, by the fact that, despite the alleged prejudice, neither the Rio Grande nor the Colorado court claims that the Commission proceeding was "prejudiced" in so far as it ordered through routes and joint rates and, indeed, the Colorado court very carefully worded its conclusions and final decree so as to prevent reconsideration

of, and thus to "save," that part of the Commission's action which is favorable to the Rio Grande as reflected in the order. This the court undertakes to accomplish regardless of its view that the "entire proceeding" and not merely the part of it that was not favorable to the Rio Grande, was prejudiced because of the claimed basic and fundamental error of the Commission in holding that through routes via the Rio Grande were not already in existence.

Second, the Chief Examiner's proposed report (which is in the record before this Court as an original, but not printed, document) also held that through routes for the involved traffic were not in existence via the Rio Grande and that "[i]n such a situation the limitations upon the Commission's power in Sections 15(3) and 15(4) apply" (Sheet 5). The Rio Grande did not exercise its right to file exceptions to that holding of the Chief Examiner nor did it claim that it was prejudiced by that holding.

The fact that neither the proceeding before the Commission nor the Rio Grande was prejudiced by such holding either by the Chief Examiner or by the Commission, and that neither felt restrained because of such holding, is demonstrated by the fact that the Chief Examiner proceeded to recommend that the Commission order through routes and joint rates in connection with the Rio Grande on *all* commodities, whereas the Commission felt that the evidence failed to prove that public interest required through routes and joint rates for commodities other than those named in the order, and so limited its requirement. In other words, it was not the holding that through routes were not in existence via the Rio Grande but the Commission's limitation of joint rates to commodities for which it thought the evidence showed public

interest required joint rates that caused the Rio Grande to claim it was prejudiced, and the Colorado court to hold, inconsistently, that the entire proceeding was prejudiced, though saving so much of the result of the prejudiced proceeding as was favorable to the Rio Grande.

That the Commission's finding that through routes were not already in existence via the Rio Grande was not the deterrent to an order more favorable to the Rio Grande is further demonstrated by Commissioner Patterson's view that the order should have included lumber and articles taking lumber rates, and by Commissioner Arpaia's separate expression holding that, although in his opinion through routes already existed via the Rio Grande for the involved traffic and that a finding under clause "(b)" of Section 15(4) was not required, he was nevertheless of opinion that under the evidence joint rates via the Rio Grande "are warranted in the public interest only on the commodities for which relief is included in the majority report" and that the Commission should interfere with railroad management by compelling joint rates "only when the reasons for doing so are clear and compelling" and then "only to the extent the public interest actually requires" (Colo. R. 110, 111).

It is clear, we submit, that there is no basis or justification for the Rio Grande's efforts to force these proceedings back upon the Commission in the hope of getting a fresh start and a more favorable order on the basis of the erroneous Colorado decision concerning the existence of through routes via the Rio Grande.

The Rio Grande's "typical shipments" Contention

The Rio Grande argues at pages 65-68 of its brief that "typical shipments are sufficient to support the ex-

istence of through routes generally." That argument is made, of course, in an effort to meet the statement in *Thompson v. United States*, 343 U. S. 549, at page 557, that "[t]hrough carriage implies the existence of a through route whatever the form of the rates charged for the through service." The discussion in the two paragraphs of the opinion (pages 557-559) immediately following the sentence just quoted, plainly shows that in using the term "through carriage" the court meant just what the words mean, *viz.*, through shipments regularly moved between the termini of the route or routes claimed to be "in existence."

The careful and accurate analysis of the evidence made in the Commission's report (Colo. R. 63-65), in the Government's brief (pages 12-18 and 68-72), in the railroads' brief in No. 333 (pages 53-82) and the States' brief in No. 332 (pages 38-66) demonstrate irrefutably the fallacy of the Rio Grande's contention that the few sporadic, accidental and "emergency" shipments it cites as moving over some 15 or 20 routes out of the millions of through routes of which it claims to be a part between the 39,000 stations in the east and 2,900 stations in the northwest area, furnish support for its "through carriage" theory, or its "typical" shipment contention. Obviously, one shipment from one eastern origin over one route via the Rio Grande to one northwest destination is neither proof that such a shipment moved over all or any others of the millions of existing routes nor "typical" of anything concerning the myriad of other routes. The few shipments in 1948 moved via the Rio Grande contrary to the "holding out" and "course of business" of the carriers that moved the 171,989 carloads over Union Pacific routes during that year. The "typical evidence" rule and cases cited at

pages 66-67 of the Rio Grande's brief are beside the point and without application to the situation involved here.

Clearly, the "through carriage" discussion in the *Thompson* case affords no basis for a contention that proof of a movement, for example, from Chicago, Ill., to Pocatello, Idaho, may be accepted as proving the existence of a through route via the Rio Grande from New York, N. Y., to Portland, Ore. (see shipments cited in Rio Grande original—not printed—Exhibit No. 1), for, in that case, the Court expressly held at page 559, that:

> "Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15(4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern."

The Rio Grande's brief asserts that the evidence shows "substantial and typical shipments" moved, but as observed in the Government' brief, pages 69-77, the evidence shows only 55 commercial shipments via the Rio Grande in 1948, while, as shown in the Commission's report (Colo. R. 76) 171,909 carloads moved over Union Pacific routes in 1948. Thus, the 55 cited shipments are not "substantial"; and, since their movement was necessarily limited to no more than 55 routes, they could not by any "stretch" of the typical evidence rule or of any imagination, be "typical" of the total movement during 1948, or of "through carriage" *not* performed via

the Rio Grande over the millions of existing routes over which no movement whatever is shown via the Rio Grande.

The Rio Grande's "burden of proof" Contention

Quarreling with the Commission's finding that the record contains no evidence upon which a finding of discrimination against the Rio Grande could be made because the evidence of record failed to show that transportation conditions over the Rio Grande "are no less favorable" than those over Union Pacific routes, the Rio Grande's brief, pages 73-81, argues at length that upon its mere assertion of discrimination against it, the "burden of proof" or "burden of going forward" fell upon the Union Pacific and other railroads comprising the existing routes to show that transportation conditions over their routes "are sufficiently dissimilar to transportation conditions via the Rio Grande routes through Ogden to excuse the treatment as not unjustly discriminatory."

There are many answers, the first of which annihilates this naive contention: The Commission can not make findings of fact without substantial evidence, for, "A finding without evidence is arbitrary and baseless." *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91. It can not make findings of fact upon the mere failure of one or the other party to discharge its "burden of proof" or the "burden of going forward."

Absent substantial evidence of record, the Commission can only find, as it did here, that there is no evidence upon which to base a finding in support of an allegation in the complaint. In other words, it is not a question whether one party or the other failed to submit evidence, but whether, in the end, the evidence of rec-

ord is sufficient to support allegations of the complaint and findings essential to the validity of the order requested. The Commission cannot make findings or enter a "judgment by default" since its function in a case like this is that of a fact-finding tribunal. Therefore, the cases cited on the "burden of proof" contention in the Rio Grande's brief, pages 73-75, have no bearing upon the Commission's inescapable conclusion that there was no evidence to justify a finding of discrimination against the Rio Grande.

Inconsistently, the Rio Grande next proceeds to argue that there is evidence in the record showing that transportation conditions over its line "are not less favorable" than conditions over Union Pacific routes. It then cites at pages 77-79, the testimony of its President, Wilson McCarthy, which, though showing that the Rio Grande has spent considerable money to improve transportation conditions over its line in the last several years, fails completely to make any comparison whatever of the present transportation conditions over that line with conditions over the Union Pacific routes.

Moreover, the Commission correctly made findings from evidence of record which clearly justified its final conclusion that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein." (Colo. R. 102). It had previously recited facts of record which showed the superiority and more favorable conditions over Union Pacific routes and the "less favorable conditions" over the longer and slower Rio Grande route (Colo. R. 94). In these circumstances the Commission plainly was compelled to conclude that there was no evidence showing that conditions on the Rio

Grande were "no less favorable" than conditions over Union Pacific routes.

Finding itself unable to produce any evidence which would justify short hauling the shorter, faster, more efficient, direct and adequate Union Pacific routes by diverting the traffic to the longer, slower, more onerous mountainous route of the Rio Grande merely to enhance its financial position, the Rio Grande has pursued a strategy or policy of condemning, maligning and vilifying the Union Pacific for its refusal to relinquish its "right guaranteed by Section 15(4)", *Thompson* case, *supra*, to its long haul on traffic originated and terminated on its 5,600 miles of railroad, of which 2,900 miles are expensive branch lines in the northwest area. (See map, App. A, to railroad brief in No. 118.) Although the Rio Grande argues that neither it nor any other railroad has any legal right to hold traffic to its line, its brief characterizes the Union Pacific's refusal to relinquish its long haul on traffic it originates and terminates on its lines in the northwest area as "its own principality," a "whim" (p. 47), a "monopoly" (p. 48), an "over-lordship" (p. 49), "the public is coerced" (p. 49), "[t]he restrictive and arbitrary rate policy of the Union Pacific" (p. 72), "such discriminatory and unreasonably prejudicial practices as the Union Pacific" imposes on the "vast growing and developing" (pp. 81-82) northwest area (which, incidentally, is served by 5 transcontinental railroads and several short lines, the heaviest traffic producing portion of that area being about 1,000 miles from Ogden, the Rio Grande's nearest terminal), "caprice practiced by the Union Pacific in the exercise of its monopoly" (p. 102), "the arbitrary and monopolistic attitude" of the Union Pacific, "assumes the right to discriminate" (p. 103). But such opprobrious epithets may

not be substituted for evidence nor may the Commission rely upon them to make findings and an order more favorable to the Rio Grande.

Decisions cited and relied upon by the Rio Grande are inapposite.

The principal burden of the Rio Grande's argument seems to be that wherever a basis for a finding of undue prejudice and preference in violation of Section 3(1) or discrimination in violation of Section 3(4) exists, the Commission has power to order through routes and joint rates in disregard of the limitations in Section 15(4) of the Act upon its through route powers. (Rio Grande brief, p. 71.)

The error of this contention is thoroughly demonstrated in our opening briefs in the *Nebraska* case, No. 118, railroads' brief, pp. 234-236; states' brief, pp. 93-100; and the railroads' brief in the *Colorado case*, No. 333, pp. 97-98. But, even if the contention were correct, it has no relevance or application here because the Commission disavowed any reliance upon Section 3 as authority for the order issued. It expressly stated (Nebr. R. 33):

> "* * * that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation."

Since the rule laid down by this Court is that "[t]he grounds upon which the administrative order must be judged are those upon which the record discloses that its

action was based." *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87; 332 U. S. 194, 196, the validity of the Commission's order in this case may not be sustained on any ground other than that expressly invoked by the Commission.

The cases cited by the Rio Grande afford no support for its contention that the Commission may order either joint rates or through routes in the exercise of its powers under Section 3(1) or (4) of the Act. *Great Northern Ry. Co. v. United States*, 81 F. Supp. 921, affirmed *per curiam*, 336 U. S. 933, is cited six times in the Rio Grande's brief, but it has no bearing whatever on the instant cases. There, the Commission had previously prescribed joint rates with transit privileges on wheat and established through routes from Montana via Butte to California. See *General Mills, Inc., v. Great Northern Ry. Co.*, 269 I. C. C. 457, at page 460. The carriers granted transit privileges at points south of Butte, but the Great Northern denied them at Great Falls, Montana. The Commission found this denial to be unreasonable and unduly prejudicial to the Great Falls shipper and ordered establishment of transit privileges at that point. Since the through route and joint rates had already been established, the case is wholly inapposite.

U. S. v. Great Northern R. Co., 343 U. S. 562, is also cited several times in the Rio Grande's brief, for example at page 41. The decision in that case merely sustained an order of the Commission which prescribed joint rates and divisions thereof over through routes already in existence over the Montana Western Railroad and the Great Northern Railway. In sustaining the Commission's order, this Court expressly held at page 570 that "[t]he Com-

mission's order in this case did not establish any through route * * *." That case did not involve any diversion of traffic from one carrier to another, "the economic ramifications" of which the Court said at page 574 are quite different from a mere redistribution of revenues "between connecting carriers by determining divisions of revenues received on existing through routes." The Court further held at page 575 that Congress had amended Section 15(4) "to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs." As there was no diversion of traffic from one route or carrier to another in that case, and since such diversion of traffic from Union Pacific routes to its line for the admitted purpose of improving its financial condition is the sole objective of the Rio Grande in this case, the decision in the *Great Northern* case is clearly inapposite.

New York v. United States, 331 U. S. 284, is cited at page 83 and elsewhere in the Rio Grande's brief, but that case is clearly without any bearing whatever on the instant case, for it did not involve any question concerning the establishment of through routes or joint rates, or of diverting traffic from one carrier or route to another. It involved the Commission's power under Section 3(f) and 15(1) of the Act to find and remove undue preference and prejudice as between shippers, localities and regions located in different parts of the country.

The Rio Grande cites *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136, at several places in its brief, but the following language of the decision at page 143 shows that it is without any bearing upon the instant case:

> "The order entered does not require any complaining carriers to substitute the route via Memphis for that via Cairo; nor does it require any to establish an additional route via Memphis. Carriers are left free to furnish the through transportation either via Cairo or via Memphis. The order merely compels a through route and a joint rate of 16 cents to Paducah. *If they elect to continue* the existing through route via Cairo, the order operates merely to introduce reduced joint rates. *If they elect to discontinue* the through routes via Cairo, the order operates to establish through routes and joint rates via Memphis, which the findings of the Commission fully justify." (Italics added.)

The last sentence of the opinion at page 145 further demonstrates the inappositeness of that decision here. It reads:

> "It is not primarily an order to remove discrimination in violation of § 3."

The decision in *Pennsylvania Co. v. United States*, 236 U. S. 351, at page 362, states that:

> "The sole question is whether the Commission exceeded its authority in requiring the Pennsylvania Company to cease and desist from what the Commission found to be a discriminatory practice."

The case did not involve establishment of joint rates, through routes, or the diversion of traffic from one route to another. It clearly has no application here.

Chicago, I. & L. Ry. v. U. S., 270 U. S. 287, cited several times in the Rio Grande's brief, involved the validity of a Commission order which, as stated at page 290:

> "* * * directed the steam railroads to remove the unjust discrimination which the Commission found

was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate carload traffic and to make arrangements with it for reciprocal switching."

The order did not involve establishment of through routes, joint rates or diversion of traffic and is, therefore, irrelevant here.

The Rio Grande's brief repeatedly cites *Virginian Ry. v. United States*, 272 U. S. 658. Our opening briefs in the *Colorado* case thoroughly demonstrate the irrelevance of that decision (states' brief, No. 332, pp. 58, 59; railroads' brief, No. 333, pp. 80-82). That decision did not involve establishment of joint rates, through routes or diversion of traffic from one route to another. The decision states at page 667 that the Commission "found that the combination rate was both unreasonable and discriminatory," but "[i]t did not order joint rates" but prescribed reasonable and non-discriminatory rates and ordered the carriers "to cease and desist" from collecting rates in excess of those prescribed.

Thompson v. United States, 20 F. Supp. 827 (no appeal), is cited at page 95 of the Rio Grande's brief in support of its contention that the Commission has power under Section 3 to order through routes and joint rates without regard to the short-haul prohibition of Section 15(4). But the language of that decision clearly shows it was not such a case. There, the Commission had found that certain carriers discriminated against another carrier and prescribed "alternative methods of removing the discrimination found to exist." The court rejected the contention of plaintiff carrier that the alternative order had the effect of short hauling it, saying that such

assumption "is prophetic and conjectural, and furnishes no adequate basis for injunctive relief," and that—

> "If the plaintiffs shall cancel the joint rates now in effect over circuitous long-haul routes and over noncircuitous routes which do not reserve to them their long hauls, it would seem to be within the power of the Commission, under section 1 (49 U. S. C. A. §1), to require the plaintiffs to show that the combination rates left in effect are reasonable and not otherwise unlawful, as well as to pass upon the reasonableness and lawfulness of such rates, *provided only that the Commission shall not use its power to deal with rates for the purpose of depriving the plaintiffs of their rights, under section 15(4), to their long hauls over noncircuitous routes.*" (Italics added.)

The Rio Grande's brief also cites *Baltimore & O. R. Co. v. United States*, 100 F. Supp. 1002, in support of its contention that the short-haul prohibition of Section 15(4) should be so construed as to nullify or emasculate it, but the decision stands for no such proposition. While the court expressed the view at page 1010 that the Commission would have been justified in basing its short-haul order upon Section 3(1), the court's opinion clearly shows that the order was based upon findings conforming to the clause "(b)" exceptions to the short-haul prohibition of Section 15(4). The Commission's report, 280 I. C. C. 121, expressly found at page 142 that the "proposed through routes are needed in order to provide adequate and more efficient and more economic transportation." The court held at page 1011 that these findings are "sufficient to justify short-hauling" and that the findings were adequately supported by evidence.

This Court's decision in *Thompson v. United States*, 343 U. S. 549, is cited 7 times in the Rio Grande's brief

and at pages 59-63 of its brief the Rio Grande tries desperately to distinguish the *Thompson* case from the cases at bar. We submit, however, that examination of this Court's decision in the *Thompson* case will show that it answers and rejects every principal contention urged by the Rio Grande in its efforts to justify diverting traffic from Union Pacific routes for a "bridge" haul over its line for the admitted purpose of improving its financial condition. (See railroad's brief in *Colorado* case, No. 332, pp. 53-86.)

CONCLUSION

The judgment of the Nebraska district court in Nos. 117 and 119, enjoining and annulling the Commission's order in part, should be affirmed and its judgment in No. 118, sustaining the validity of the order in part, should be reversed and the case remanded with direction to issue the injunction and relief prayed by the plaintiffs in that court.

The judgment of the Colorado district court, Nos. 332, 333 and 334, should be reversed and the case re-

manded to that court with direction to dismiss the complaint.

Respectfully submitted,

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PROOF OF SERVICE

I, ELMER B. COLLINS, attorney for Union Pacific Railroad Company, one of the Appellants-Appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 18th day of April, 1956, I served, on behalf of all Appellants-Appellees herein, copies of the foregoing Reply Brief on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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ELMER B. COLLINS,
Of Counsel for Appellants-Appellees Herein.

APPENDIX A

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

Denver & Rio Grande Western Railroad Company

v.

Union Pacific Railroad Company, et al.

This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination;

It is ordered, That the defendants named in the complaint, according as they participated in the transportation, be and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of

the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD,
Acting Secretary.

(Seal)

APPENDIX B

PUBLIC AND SHIPPER WITNESSES FROM THE NORTHWEST AREA (WASHINGTON, MONTANA, OREGON, IDAHO AND UTAH NORTH OF OGDEN) WHO TESTIFIED BEFORE THE INTERSTATE COMMERCE COMMISSION.

WITNESSES OPPOSING THE RIO GRANDE.

Washington

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Bartlett Burns, Olympia Public Service Commission of Washington	913
J. D. Paul, Seattle Seattle Chamber of Commerce Seattle Traffic Association	916
H. L. Watson, Pacific Gamble Robinson Co., Seattle	927
Alfred P. Graham, Boeing Airplane Co., Seattle	937
Fred H. Tolan, Traffic Consultant, Seattle, for Whatcom County Traffic & Rates Bureau Northwest Produce Association Northwest Furniture Manufacturers Assoc. Northwest Fish Traffic Committee Insulation Material Manufacturers Christmas Tree and Fern Shippers Chemical and industrial raw material shippers	941
Frank Stubbs, Yakima, Stubbs Fruit Co., and	1380
Frank W. Shields, Yakima Yakima Valley Traffic Assoc. Yakima Chamber of Commerce	1381
Frank E. Freshwater, Yakima Northwest Horticultural Council Oregon-Washington-California Pear Bureau	1390
E. S. Prentice, Yakima Westbrook Packing & Storage Co. Prentice Packing & Cold Storage Co.	1392

WITNESSES OPPOSING THE RIO GRANDE (Continued)

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F. Lowden Jones, Walla Walla Walla Walla Canning Co. Walla Walla Chamber of Commerce	1397
Charles Baker, Walla Walla Pacific Supply Cooperative	1412
Donald Wallace, Tacoma Tacoma Chamber of Commerce	1419
Ken H. Klopp, Spokane Spokane Chamber of Commerce White Pine Sash Co. Western Pine Assoc. National Lumber Manufacturers Assoc. National Wooden Box Assoc. National Wood Work Mfrs. Assoc.	1422

Montana

John J. Burke, Butte	994
Willard S. Thompson, Butte Board of Railroad Commissioners of Montana	986
Guy Gray, Dillon Livestock Dealer	1354
Sam W. Ditty, Dillon Livestock dealer	1461
William P Coughlin, Butte Anaconda Copper Mining Co. Montana Power Company	1000

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Oregon

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John H. Carkin, Salem, for 953
Public Utilities Commissioner of Oregon

Frank S. Clay, Portland 956
Portland Freight Traffic Assoc., affiliated with
Portland Chamber of Commerce
Port of Portland
Commissioner of Public Docks
Portland Clearing House Assoc. of Banks
Port of Vancouver, Wash.
Vancouver Chamber of Commerce
Port of Longview, Wash.

Edward Oakes, Ontario 1082
Duncan Brothers & Oakes (cattle)
Valley Wholesale & Warehouse Co.

George B. Carpenter, Ontario 1094
Moffat & Company (cattle dealers)

L. J. Roedel, Baker 1355
Oregon Lumber Company

Fred E. Lanzer, LaGrande 1357
Mt. Emily Lumber Company

Fred E. Kiddle, Island City 1358
Pioneer Flouring Mill Co.
Union Flouring Mill Company
Pacific Northwest Grain Assoc.
North Pacific Miller Assoc.
Pacific Northwest Grain Dealers Assoc.
Pacific Northwest Pea Growers Assoc.

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Oregon (Continued)

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Fred A. Phillips, Baker Dealer in livestock Northwest Livestock Shippers Traffic League Oregon Cattlemen's Assoc. Oregon Wool Growers' Assoc.	1374
Reese Lamb, Freewater F. G. Lamb & Co. (fruit and veg. packers)	1387
George P. Stadelman, The Dalles Stadelman Fruit Co.	1388
Harold A. Cohn, Heppner Oregon Wool Growers' Association	1400
William H. Steiwer, Fossil Rancher—sheep and cattle Oregon Wool Growers' Assoc.	1401
Marion Weatherford, Arlington Wheat grower and shipper Pacific Northwest Grain and Grain Products Assoc. Oregon Wheat Commission Oregon Wheat League	1403
Stanley D. Jenkins, Pilot Rock Pilot Rock Lumber Co. Pendleton Lumber Co. Kerns Company (lumber)	1415

Idaho

C. H. Detweiler, Twin Falls President, Detweiler Bros., Inc., plumbing, heating and contracting business President, Magic Valley Processing Co., manufacturing potato starch	973

WITNESSES OPPOSING THE RIO GRANDE (Continued)

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D. B. Bradshaw, Wendell Honey processor	981
H. L. Finch, Soda Springs Sheep raiser and shipper	1008
J. C. Siddoway, Teton City Farming and livestock	1014
Louis Yoder, Nampa Fruit and vegetable packer	1024
B. M. Tibbitts, Sr., St. Anthony Potato and grain grower and shipper	1029
Ross Clement, Louisville Clement Bros., potato shippers	1034
Robert M. Naylor, Emmett President, Highland Livestock & Land Co., sheep shippers	1041
Lynn R. Parsons, Weiser Potato and onion shipper	1047
H. G. Beckham, Wilder Potato and sheep grower and shipper	1049
C. J. Marshall, Jerome President, C. J. Marshall Produce Co. (plant warehouses at Jerome, Wendell, Shoshone, Dietrich, Twin Falls, and Richfield, Idaho)	1051
Geo. L. Crookham, Jr., Caldwell Seed grower and shipper	1057

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Idaho (Continued)

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J. R. Simplot, Boise Potato, fertilizer, lumber, livestock and ore shipper	1060
M. A. Compton, Boise Compton Fuel Co. Compton Transfer & Storage Co. Olson Manufacturing Co.	1063
Harry W. Morrison, Boise President, Morrison-Knudsen Co., contractors	1088
M. B. Smith, Pocatello Farmer; member Portneuf Grange 229; member Lakeview Pomona Grange 34	1097
Vaughan Stewart, Blackfoot Stewart Produce Co., potato buyer and shipper	1339
H. H. Zimmerli, Pocatello Potato shipper	1343
Albert Carlson, Collins Superintendent, Idaho Potato Starch Co.	1345
Clyde Hess, Idaho Falls Coal, grain and feed business	1347
F. G. Thompsen, Pocatello Beer distributor	1348
E. S. Harper, Idaho Falls Buyer and shipper, potatoes and onions	1360
R. D. Gallafent, Pocatello Owner, Bannock Motor Co., GMC dealer	1368
E. E. Pugh, Springston Sales Manager, Russell & Pugh Lumber Co.	1370

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Idaho (Continued)

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Jay Malvin, Boise Purchasing Agent, Idaho Power Co.	1372
E. E. Parsons, Payette Fruit and vegetable packer and shipper	1376
Marcus A. Pomeroy, Twin Falls Potato grower and shipper	1377
Frank H. Adams, Twin Falls President, Idaho Growers Assn. Potato, bean and onion packer and shipper	1379
Chas. C. Gossett, Nampa Manager, GK Livestock Feeding Co.	1395
W. B. Savage, Kimberly Potato shipper; cattle feeder	1407
LeRoy W. Hays, Caldwell General Sales Manager, Simplot Western Idaho Produce, Inc.	1409
Denny H. Hogue, Twin Falls Potato and onion shipper	1416
Dan J. Cavanaugh, Twin Falls Sheep producer	1417
Emmett A. Torney, Kellogg Office manager, Bunker Hill & Sullivan Mining Co.	1460
Leo J. Falk, Boise President, Falk Mercantile Co.	1463

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Utah North of Ogden

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Marion Olsen, Paradise President, Cache Valley Turkey Growers Assn.	1349
J. C. Stauffer, Willard Livestock shipper; Representative, Box Elder Farm Bureau	1365
Merle G. Hyer, Lewiston Cattle feeder	1104

WITNESSES SUPPORTING THE RIO GRANDE

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Washington	
NONE	
Montana	
NONE	
Oregon	
Reginald T. Titus, Portland Western Forest Industries Association, Portland	213
W. S. Miller, Milton Umatilla Canning Co.	531
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M. M. Bass, Idaho Falls Potato Sales Manager, Idaho Falls Bonded Produce & Supply Co.	242
L. E. Stephens, Blackfoot Potato shipping	247
A. G. Stanger, Idaho Falls Executive Vice-President and Manager, Idaho Falls Bonded Produce & Supply Co. Farmer President, Rexburg Feed & Supply Co.	250

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C. A. Harris, Rexburg and St. Anthony Implement, hardware and oil business, Rexburg and farmer, St. Anthony, Idaho Ashton, St. Anthony, Rexburg and Idaho Falls Chambers of Commerce Intermountain Hardware and Implement Dealers Association and Upper Snake River Valley Grain Growers Assn.	231
C. R. Holden, Idaho Falls Grower and shipper of potatoes	292
P. G. Batt, Caldwell Grower and shipper of fresh fruits and vegetables	420
J. F. Watson, Parma Vice President, J. C. Watson Co., fruit and vegetable shippers	432
Wayne Newcomb, Burley Grower and shipper of potatoes	438
T. S. Vanderford, Aberdeen Grower and shipper of potatoes	472
Jack Adams, Idaho Falls Potato buyer	474
W. B. Long, Twin Falls Grower and shipper of potatoes and fruits	477
L. D. Robbins, Twin Falls Potato shipper	479

WITNESSES SUPPORTING THE RIO GRANDE (Continued)

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Joe Fuller, Pocatello Livestock shipper	485
Anton Poitevin, Idaho Falls President, Idaho Potato Growers, Inc.	500
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J. Cyril Lan, Soda Springs President, Idaho Farm Bureau Federation	551

Utah North of Ogden

LeRoy Snooks, North Ogden Manager, North Ogden Fruit Exchange	196
Lorenzo J. Bott, Brigham City Monument business	388

TOTAL NUMBER OF WITNESSES OPPOSING THE RIO GRANDE FROM THE NORTHWEST AREA	73
TOTAL NUMBER OF WITNESSES SUPPORTING THE RIO GRANDE FROM THE NORTHWEST AREA	22

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Nos. 839, 119

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SECRETARY OF AGRICULTURE, APPELLANTS

v.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JURISDICTIONAL STATEMENT

SIMON E. SOBELOFF,
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Department of Justice,
EDWARD M. REIDY,
General Counsel,
Interstate Commerce Commission,
NEIL BROOKS,
Assistant General Counsel,
Department of Agriculture,
Washington 25, D. C.

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Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1954

NOS. ——

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SECRETARY OF AGRICULTURE, APPELLANTS

v.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Nebraska, Omaha Division, is not yet reported. The report of the Interstate Commerce Commission is reported in 287 I. C. C. 611. The court's opinion, findings of fact, and conclusions of law are set forth in Appendix A, *infra*, pp. 15–51.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce

Commission. The judgment of the district court was entered on December 20, 1954, and separate notices of appeal were filed in that court by appellants on February 17 and 18, 1955. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612; *United States* v. *Capital Transit Co.*, 325 U. S. 357; *United States* v. *Great Northern R. Co.*, 343 U. S. 562.

STATUTE INVOLVED

Sections 3 (1), 15 (3), and 15 (4) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 3 (1), 15 (3), and 15 (4), are set forth in Appendix B, *infra*, pp. 52–54.

QUESTIONS PRESENTED

1. Whether, in narrowing the Commission's order, the district court failed to give proper effect to the provisions of Section 15 (4) and to the Commission's finding thereunder that the establishment of the prescribed through routes was "necessary and desirable" from the standpoint of providing "adequate and more economic transportation" for shippers who could not otherwise participate effectively in the efficient marketing of perishable agricultural commodities.

2. Whether Section 3 (1), prohibiting any carrier from giving any undue preference to any

person, locality, etc., or subjecting any person, locality, etc., to any undue prejudice, may apply to the situation where the persons or localities receiving preference are served by one carrier and those prejudiced are served by another.

STATEMENT

The Denver and Rio Grande Western Railroad Company ("Rio Grande") operates primarily in the States of Utah and Colorado. The Union Pacific Railroad Company ("Union Pacific") operates in the Pacific Northwest and also serves points as far east as Kansas City, Missouri, and Omaha, Nebraska. Its lines interconnect with those of the Rio Grande at Ogden, Utah. Although the Union Pacific has joint rates with other connecting carriers on transcontinental traffic moving to and from the Pacific Northwest through Ogden, it has refused for many years to establish joint rates with the Rio Grande at Ogden. As a result, such traffic can move over the Rio Grande only at combination rates which are substantially higher than the joint rates prevailing on the Union Pacific routes (*i. e.*, the routes established by the Union Pacific and other connecting carriers).

On August 1, 1949, the Rio Grande filed a complaint with the Interstate Commerce Commission asking the agency to prescribe, with respect to the foregoing traffic, joint rates over its allegedly existing through routes with the

Union Pacific. After extensive administrative proceedings, the Commission issued its report on January 12, 1953. 287 I. C. C. 611. The Commission held (pp. 615–619) that through routes over the Union Pacific-Rio Grande lines were not in existence, but found (p. 659) that it was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" that they be established (together with joint rates) for the carriage of certain commodities, principally livestock and perishable agricultural products.[1] The Commission further found (pp. 659–660) that the existing combination rates on these commodities, to the extent that they exceeded the joint rates to and from the same Pacific Northwest points via the Union Pacific routes, unduly prejudiced shippers and receivers using the Rio Grande and unduly preferred shippers and receivers using the Union Pacific routes, all in violation of Section 3 (1) of the Act.[2] The Commission accordingly ordered the establishment of through routes and joint rates for the commodities specified in the report.

[1] The agricultural commodities named in the order are fresh fruits and vegetables, dried beans, frozen poultry, frozen foods and butter and eggs, in carloads.

[2] The Commission also held (pp. 658–660) that the Union Pacific's maintenance of joint through rates on traffic to and from points on the Bamberger Railroad, a 36-mile line in Utah, while refusing to participate in like arrangements on traffic to the same points on the Rio Grande, subjected the latter to discrimination in violation of Section 3 (4) of the Act.

The Commission pointed out (pp. 655–656) that, under this country's "complex but efficient" marketing system, perishable food articles "must be moved to market with expedition and care, and over as many routes as possible"; that such movement requires that "many routes" be open to avoid "unnecessary interruptions of the free flow of such commodities" and to permit a flexible distribution process; and that a "number of services" such as storage and processing of food and grazing of cattle, not usually required in the movement of ordinary traffic, must be provided en route for perishable and semi-perishable commodities. The Commission held further (p. 656) that, although through service via the Union Pacific routes was generally as satisfactory to the shipping public as service via the Rio Grande, this was not true for perishable foods and cattle, since shippers of these commodities "are debarred from effective participation in the widespread system developed for the marketing of such commodities." The Commission stated (*ibid.*) that this conclusion was "supported and emphasized" by the fact that this traffic generally was accorded transit and reconsignment privileges which are "necessary for its efficient marketing," [3] and that

[3] Such privileges, the Commission stated (p. 634), include partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding.

the Union Pacific's routes are, as to traffic which receives such privileges at points on the Rio Grande, "inadequate and less economical" than those of the Rio Grande. The Commission also noted (p. 642) that it is the "general practice" in marketing certain agricultural commodities to divert carloads in transit as markets are found and sales are made; that shippers generally use routes over which joint rates apply so that shipments can be diverted or reconsigned without having to pay a combination of rates; and that, if a sale is lost when a shipment reaches a point through which combination rates apply, it is "frequently necessary to dispose of the shipment at that point at a forced or distress price."

On the issue of undue preference and prejudice, the Commission pointed out (p. 658) that shippers or receivers of the designated commodities who sought transit or reconsignment privileges on the Rio Grande were under a "substantial disadvantage or handicap" as against their competitors who received similar privileges while shipping over the Union Pacific at the lower rates.

In a suit brought by the Union Pacific, the district court modified the order.[1] The court held

[1] The Rio Grande brought a separate suit to review the same order. On January 15, 1955, a three-judge district court for the District of Colorado set the order aside. That court held that the "uncontradicted evidence" established that through routes already were in existence, and it remanded the case to the Commission for further proceedings. *Denver and Rio Grande Western Railroad* v. *United States*

that, although lack of in-transit privileges constituted an "inadequacy of transportation service" justifying the prescription of through routes and joint rates pursuant to Section 15 (3), (4), the evidence supported a finding of inadequacy only insofar as it related to those east-bound commodities which were actually stopped, on shippers' or carriers' instructions, for in-transit services on the Rio Grande. The court stated that such a modification of the order would eliminate short-hauling the Union Pacific except as to "shipments requiring service which is now inadequate and which service the Union Pacific cannot now give." The court further held that the Commission's finding of undue preference and prejudice was legally insufficient because Section 3 (1) outlaws only preferences and prejudices to shippers or localities served by the same carrier, and is not applicable if the persons or localities who receive the preferences are served by a different carrier than those subjected to the prejudices.

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and Interstate Commerce Commission, Civil Action No. 4492, motion for reargument and rehearing denied April 22, 1955. The United States and the Interstate Commerce Commission intend to appeal from the judgment in that case. We are advised that the Union Pacific is also appealing from the decision of the Colorado court.

[5] Circuit Judge Johnsen, dissenting, would have set the Commission's order aside in its entirety. He was of the view that prescription of through routes to provide shippers with an additional route on which transit is available at lower rates does not satisfy the requirement in Section 15 (4) that

THE QUESTIONS ARE SUBSTANTIAL

1. Section 15 (3) of the Interstate Commerce Act authorizes the Commission to establish through routes and joint rates when it deems such action "necessary or desirable in the public interest." Section 15 (4) further provides, however, that the Commission cannot establish through routes which require a carrier to short-haul itself, unless (a) the existing route is unnecessarily long, or (b) the Commission finds that the proposed route is needed to provide adequate, and more efficient or more economic, transportation.[6]

In the instant case, the Commission found that through routes were needed to provide "adequate and more economic transportation." The district court recognized that lack of transit facilities may constitute an "inadequacy of transportation service" under Section 15 (4), but it held that the evidence supported a finding of inadequacy only in the case of shipments actually stopped on the Rio Grande for in-transit services. This holding, we

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the Commission can short-haul a carrier only if necessary to provide "more economic transportation." He also disagreed with the majority view that the preference and prejudice prohibition in Section 3 (1) does not apply if two carriers are involved, but concluded that the facts of this case did not establish unreasonable preference and prejudice.

[6] A carrier is short-hauled when it is required "without its consent, to embrace in such [through] route substantially less than the entire length of its railroad * * *, which lies between the termini of such proposed through route * * *." Section 15 (4).

submit, misconceives the rationale of the Commission's decision; and rests upon an unduly narrow interpretation of the phrase "adequate, and * * * more economic, transportation."

The Commission's ultimate finding that through routes were needed to provide adequate transportation was not based solely (as the district court apparently assumed) upon the shippers' need for in-transit privileges on the Rio Grande. The finding was rested on the broader ground that lack of through routes "debarred" shippers from "effective participation" in this country's distribution system for the marketing of perishable agricultural commodities. The Commission noted that effective functioning of that system requires that "many routes" be open, and it pointed out that a "number of services" which are not required for commodities generally are required en route for the "efficient marketing" of perishable commodities.[1] In short, the need for transit privileges on the Rio Grande was only one of the subsidiary grounds which led the Commission to conclude that through routes were needed to provide adequate transportation.

This Court has stated that, in determining whether through routes are needed to provide "adequate, and more efficient or more economic, transportation," Congress intended that the interests of both carriers and shippers "should

[1] These services require both transit and reconsignment privileges en route.

be considered and a fair balance found." *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, 593. We submit that the Commission properly considered these interests and struck a fair balance when it found that through routes were needed to enable shippers to participate effectively in the "efficient marketing" of perishable agricultural commodities. The question whether Section 15 (4) authorizes the Commission, on the basis of such findings, to establish through routes is a substantial one that is of obvious public importance in the administration of the Act.

2. An independent basis of the Commission's order establishing through routes was its finding that the combination rates between the Union Pacific and the Rio Grande were, to the extent that they exceeded the joint rates via the Union Pacific routes to the same points, unjust and unreasonable and unduly prejudicial of shippers and receivers using the Rio Grande, and unduly preferential of shippers and receivers using the Union Pacific routes, in violation of Section 3 (1) of the Act. The district court held that this ultimate finding was legally insufficient, on the ground that Section 3 (1) prohibits only preference and prejudice to persons or localities located on the lines of the same carrier, and is not applicable if the persons or localities receiving the preference are served by a different carrier than those subjected to prejudice.

We believe that the Commission correctly interpreted Section 3 (1) as applicable to preference and prejudice of the kind here found to exist. Nothing in that Section indicates that it was intended to be limited to cases where the persons receiving the preference and those suffering the prejudice are served by a single carrier or by a group of carriers acting in concert. The Section broadly prohibits "any" carrier from giving any undue preference to any person, or subjecting him to any undue prejudice, "in any respect whatsoever." The Commission found that the Union Pacific, by refusing to establish through routes and joint rates with the Rio Grande, has subjected shippers who use the latter's route to undue prejudice, and, by the same token, has given undue preference to their competitors who use the Union Pacific routes. Such action would appear to violate the statutory prohibition against a carrier subjecting any person to preference or prejudice "in any respect whatsoever."

The district court's holding was based on the dictum in *Central R. Co. of New Jersey* v. *United States*, 257 U. S. 247, 259–260, that the purpose of Section 3 (1) is to prevent unjust discrimination between localities "by the same carrier or carriers." But, as the Court pointed out in *New York* v. *United States*, 331 U. S. 284, 342, that principle means only that "the Commission may not require carriers to do what they are power-

less to perform." In the *New York* case, the Commission found that the relation between the *inter*territorial class rates to Official Territory and the *intra*territorial class rates within Official Territory resulted in an unreasonable preference to Official Territory as a whole and to shippers and receivers of freight located there, in violation of Section 3 (1). The Commission corrected the territorial discriminations by prescribing new class rates, and this Court upheld the order.

If Section 3 (1) can reach differentials between territorial rate levels involving many carriers which serve various points in such territories, *a fortiori* it would appear to cover the preference and prejudice which results from the refusal of a single carrier to establish through routes and joint rates with another. Here the Commission has not directed the Union Pacific to do anything that it is "powerless to perform," but has merely directed it to establish certain operating arrangements with a connecting carrier on traffic to points which they both serve. Cf. *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 648.

3. This Court should hear this appeal not only because it presents substantial questions, but also to resolve the conflicting holdings by two different district courts as to the proper scope of the Commission's order. As we have noted (*supra*, note 4), the Union Pacific and the Rio Grande sought separate review of the order in different

courts. Although in the instant case the district court upheld the Commission's findings that through routes do not exist, the Colorado district court set aside the same order on the ground that through routes do exist, and remanded to the Commission for further proceedings. If through routes already exist, the Commission may be required to prescribe joint rates on a much broader scale than are provided under the order as originally issued or as modified in this case. Thus, although the court below has held that the order goes too far and must be enjoined *pro tanto*, another court of equal jurisdiction has held that the same order does not go far enough and that further administrative proceedings are accordingly required.[8] Only this Court can dissipate the confusion which has resulted from the conflicting decisions in the Nebraska and Colorado district courts.

CONCLUSION

The questions presented by this appeal are substantial and they are of public importance. There is also a serious conflict of decision. It is respect-

[8] As noted (*supra*, note 4), the United States, the Interstate Commerce Commission and the Union Pacific intend to appeal in the *Colorado* case. That case will involve, *inter alia*, the question of the appropriate criteria to be applied in determining when a through route has been established by action of the carriers concerned.

fully submitted that probable jurisdiction should be noted.

SIMON E. SOBELOFF,
Solicitor General.

EDWARD M. REIDY,
General Counsel,
Interstate Commerce Commission.

NEIL BROOKS,
Assistant General Counsel,
Department of Agriculture.

MAY 1955.

APPENDIX A

In the District Court of the United States for the District of Nebraska, Omaha Division

Civil Action No. 76-53

UNION PACIFIC RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before JOHNSEN and COLLET, *Circuit Judges*, and DEIHEHANT, *District Judge*.

COLLET, *Circuit Judge*.

The Denver and Rio Grande Western Railroad Company, hereafter referred to as the Rio Grande, filed a complaint with the Interstate Commerce Commission requesting the Commission to order the Union Pacific Railroad Company (and other lines comprising the Union Pacific System, together with connecting carriers comprising, in all, 221 railroads, which will be referred to as the Union Pacific) to file joint rates over through routes with the Rio Grande for the transportation of freight from and to certain areas. The Commission granted the request as to certain types of freight with substantial territorial limitations. The Union Pacific brings this action to enjoin and set aside the order. A reference to a map of the United States will be helpful in understanding the following summarization of the facts.

The northern terminus of the Rio Grande is Ogden, Utah. From Ogden it runs south through Salt Lake City and Provo, Utah, then southeasterly and east, entering Colorado at about the south central part of that state, thence east and somewhat north through the central part of Colorado to Dotsero, west of Denver, where it divides, one branch going on east to Denver, the other swinging south and east to Pueblo, Colorado. From Denver the Rio Grande line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serve territory in southern Utah, northwestern New Mexico, and southern Colorado. These latter lines are not of special importance in this action. At Denver, Colorado Springs, Pueblo, and Trinidad the Rio Grande maintains joint rates and through routes with lines other than the Union Pacific to destinations east and south of those points.

The Union Pacific (including connecting lines which were defendants in the I. C. C. proceedings) serves the greater part of the east, south and midwestern sections of the United States. Traffic involved in this action from those sections flowing westward over the Union Pacific and connecting lines converges at Denver and Cheyenne, Wyoming, then moves westwardly across the southern part of Wyoming to Ogden and Salt Lake City. One of its lines runs from Salt Lake City south to Provo, Utah, thence southwest to Los Angeles, California.

The Union Pacific also serves the northwestern part of the United States, including that part of Utah north of Ogden, Idaho, Montana, Oregon, and Washington. It is traffic from and to this

latter territory, referred to hereinafter as the northwest territory or area, which is the principal subject of the present controversy.

The Union Pacific maintains joint rates and through routes over its lines and with many connecting carriers from and to the northwest territory through Ogden and Salt Lake City, Cheyenne, Denver, and points east and south to the Atlantic Seaboard and the Gulf of Mexico. For a comparatively short distance, from Ogden through Salt Lake City to Provo, where the Los Angeles line swings southwest, the Union Pacific and the Rio Grande parallel and serve some common points. To and from these points, joint rates and through routes are maintained by the Union Pacific over its lines with the northwest territory and the area east of Cheyenne and Denver served by the Union Pacific. The Union Pacific does not maintain joint through rates with the Rio Grande, with certain exceptions not material in this proceeding. Freight moving from the northwest territory to points in southern Utah and Colorado on the Rio Grande, finally destined to points east of the eastern termini of the Rio Grande, moves on the combination rate, consisting of the total of the Union Pacific rate to Ogden via Union Pacific and the Rio Grande rate from Ogden via Rio Grande to points on the Rio Grande. The same is true of the rates on shipments from points east of Denver to those points on the Rio Grande finally destined to the northwest territory. This combination of rates, or combination rate, as it is called, is considerably higher than a joint through rate. Freight moving from and to the northwest territory from

and to all points east of Denver[1] served by the Union Pacific and connecting carriers has the benefit of joint through rates via Union Pacific, with accompanying in-transit privileges en route, while freight originating on the Union Pacific in the northwest territory and moving to the area east of Denver, which is routed over the Rio Grande, pays the combination rate without in-transit privileges at points on the Rio Grande. The result is that practically all of the long-haul traffic originating in the northwest area and destined to the area east of Denver goes over the Union Pacific all the way on the lower joint and through rates. Since the formal record before the Commission consists of 1,957 pages of testimony, 57 exhibits and 74 verified statements, the foregoing statement is obviously only a salient outline of the basis for the Rio Grande's complaint. For a complete understanding of the intricacies of the case by one unfamiliar with the record, it will be necessary to refer to the extensive report and order of the Commission reported in 287 I. C. C. 611.

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[1] "All points east of Denver" will be used as the designation of all points included in the Commission's order to or from which through routes and joint rates were ordered established by the Union Pacific with the Rio Grande. The Commission's order in this respect was (287 I. C. C. 611, 659):

"We conclude:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite

The Commission ordered the establishment of through routes and joint rates via Ogden or Salt Lake City by the Union Pacific with the Rio Grande for the transportation of granite and marble monuments in carloads from points of origin in Vermont and Georgia to destinations in the northwest area, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from points of origin in the northwest territory to destinations "east of Denver." The order is based upon three primary basic findings. First, that the through routes and joint rates are necessary and desirable in the public interest, in order to provide *adequate and more economic transportation;* second, that the existing joint rates maintained by the Union Pacific are and will be *unjust and unreasonable and unduly prejudicial* to shippers and receivers of freight using or desiring to use the Rio Grande and *unduly preferential to shippers and receivers of freight using the Union Pacific;* third, that the mainte-

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and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, then immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

nance by the Union Pacific of joint rates with the Bamberger Railroad between the northwest area and points on the Bamberger line between Ogden and Salt Lake City, while refusing to establish joint rates with the Rio Grande to and from the same points on the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Sect. 3 (4) of the Interstate Commerce Commission Act. Finding No. 1 has heretofore been quoted in footnote 1. Findings 2 and 3 are set out below.[2] To understand the import of these findings it is necessary to explain the factual theory upon which they are based.

First as to the finding that the rates ordered are necessary and desirable to provide adequate and more economic transportation. Located along the route of the Rio Grande, between Ogden on the west and Denver, Pueblo, and Trinidad

[2] 2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

287 I. C. C. 611, 659–660.

on the eastern termini, are a number of livestock feeders. Some of these are ranchers who graze and feed cattle and sheep. Others are operators of beet sugar plants which produce livestock feed as a by-product and feed the by-product to livestock. These livestock feeders buy cattle and sheep in the northwest area, which are ultimately destined for the market, and ship them to points on the Rio Grande for feeding. Many of the principal livestock markets of the United States are located east of Denver. Without joint through rates with in-transit privileges which would permit these livestock feeders to ship from the northwest area to the feeding points on the Rio Grande and then reship on joint through rates to points east of Denver, Pueblo, and Trinidad, they are at a substantial rate disadvantage with similar livestock feeders following the same practice who are located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific, who reship to points east of Denver. They are also at a substantial rate disadvantage in purchasing livestock in the northwest area in competition with buyers located on the Union Pacific lines west of Denver and Cheyenne who have the benefit of joint through rates and in-transit privileges over the Union Pacific.

Also located on the Rio Grande are a number of industries which clean, package, process, freeze, and store fresh fruits, vegetables, poultry, food products, butter, eggs, and beans, and ship them on east to points beyond Denver, Pueblo, and Trinidad. These industries are at

a comparable rate disadvantage, without in-transit privileges, as livestock feeders, and for the same reasons.

Monument dealers obtaining or shipping granite and marble from Vermont and Georgia are unable to ship full carloads to the northwest territory and have the rate advantage of partially unloading cars at intermediate points on the Rio Grande under in-transit privileges of through routes and joint rates which are available at points located on the Union Pacific.

This finding, which is finding No. 1 quoted in the footnote, is held by the Commission to justify ordering the establishment of through routes and joint rates under Secs. 15 (3) and 15 (4), Title 49 U. S. C. A. Secs. 15 (3) and 15 (4). Sec. 15 (3) empowers the Commission to establish through routes and joint rates when necessary or desirable in the public interest,[3] but Sec. 15 (4) prohibits the Commission from ordering the establishment of through routes by a carrier under Sec. 15 (3) without the carrier's consent if the result would be to short-haul that carrier unless, as provided by Sec. 15 (4), the Commission finds that the through route is needed in order to provide (1) *adequate*, and (2) *more efficient* or *more economic* transportation.[4]

[3] Sec. 15. (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by carriers subject to this part, * * *.

[4] Sec. 15. (4) In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any inter-

The Commission accurately states the legal effect of Sec. 15 (4) in its report (*Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I. C. C. 611) at page 655, as follows:

> Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient, or more economic, transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, which af-

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mediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, * * * (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. * * *

> firmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons, Inc.* v. *Alton R. Co., supra*, the supreme court said that the expression "more efficient or more economic" transportation, as used in section 15 (4), "may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found." These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.
>
> In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

Was there evidence to support the finding of inadequacy? Only in the event there was inadequacy of transportation can the question of efficiency or economy be reached. It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order. There is no evidence to support a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are inadequate. There is abundant support, however, for the finding that the service is inadequate to patrons of the Rio Grande, located on the Rio Grande between Ogden on the west and Denver, Pueblo, and Trinidad on the

east (not served by the Union Pacific between Ogden and Provo), who do not have in-transit privileges with respect to freight moving from the northwest area which is to be reshipped to points east of Denver, if under the law the lack of in-transit privileges may constitute "inadequacy." That is also true as to the service to shippers of marble and granite from Vermont and Georgia to initial points on the Rio Grande who need the in-transit privileges of partial unloading or processing en route, incident to reshipment to final destination points between Ogden in the northwest area. The foregoing inadequacies are based upon the premise that the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15 (4). The Union Pacific vigorously contends that it does not. This question presents the crux of this case. If, as the Union Pacific contends in-transit rights and privileges are matters over which the Commission under the law has no control, the existence or granting of which is subject only to managerial discretion of the carrier, and relate only to economy or efficiency of transportation to the exclusion of considerations of adequacy of transportation, then the lack of in-transit privileges will not suffice as a proper basis for ordering "adequate" transportation. The argument is made in effect that since the transportation facilities are now available over the Union Pacific and the Rio Grande on the higher combination rates, the present nonexistence of in-transit privileges relates only to the cost or economy of transportation. Reference is made to excerpts from

opinions which it is said support the conclusion that the Commission may not under its general regulatory power force a carrier to provide or establish in-transit privileges. The question has many ramifications. We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. *Pennsylvania R. Co.; et al.* v. *United States, et al.*, 323 U. S. 588, 54 F. Supp. 381.

But the inadequacy established by the evidence does not extend to shipments from the northwest area to initial destinations east of Denver. The same is true of shipments of monuments from Vermont and Georgia to points of initial destination in the northwest territory. Transportation service is now adequate between those points. There is ample evidence to support the finding that the establishment of the through routes and joint rates between the northwest area and points on the Rio Grande (not also served by the Union Pacific between Ogden and Provo), as to shipments which require in-transit privileges at points on the Rio Grande for reshipment to points east of Denver, will result in more economical transportation. Differences in mileage and other comparative factors are for the Commission to weigh, evaluate and determine. Its ultimate factual

conclusion may not be overturned when supported by the evidence. But, again, there is no evidence that the service is inadequate or that more economical transportation service will result with respect to shipments from the northwest area to points between Ogden and Provo served by both the Union Pacific and the Rio Grande and to be reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established. The evidence therefore sustains the finding of inadequacy and the need for more economical transportation only as to (1) carload shipments of commodities embraced in the Commission's order from points in the northwest territory destined to points of final destination east of Denver which require in-transit privileges at points on the Rio Grande; (2) shipments of granite and marble monuments from Vermont and Georgia to final destinations in the northwest territory which require in-transit privileges at points on the Rio Grande not also served by the Union Pacific. If the order had been so limited to the evidence it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial

needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15 (4).

The second finding, that the combination rates maintained by the Union Pacific and the Rio Grande are unduly prejudicial to shippers using or desiring to use the Rio Grande and unduly preferential to shippers and receivers using the Union Pacific to the extent they exceed the joint and through rates available to shippers located on the Union Pacific, is made for the purpose of bringing the order within the authorization of Sec. 3 (1). Title 49 U. S. C. A. Sec. 3 (1). That section is as follows:

> SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

The situation which this finding seeks to correct, simply stated, is that the shippers and receivers of the designated commodities located on the Rio

Grande who do not have in-transit privileges and joint and through rates are at an economic disadvantage compared to shippers and receivers located on the route of the Union Pacific who do have joint and through rates and in-transit privileges.

If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3 (d) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15 (4) heretofore considered. But the prejudice and preference prohibited by Sec. 3 (1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3 (1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3 (1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, was different, the purpose of Sec. 3 (1) was there stated as follows (loc. cit. 259–260):

> What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the

same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose of scope of section 3.

If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3 (1) merely because a shipper entity described in Sec. 3 (1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15 (4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3 (1).

The third finding, heretofore quoted, to the effect that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad to and from points in the northwest area and points on the Bamberger line from Ogden to Salt Lake City, inclusive, while refusing to maintain joint rates with the Rio Grande on shipments from the northwest area to the points served by both the Rio Grande and the Bamberger Railroad from Ogden to Salt Lake City, inclusive, discriminates against the Rio Grande, is based on Sec. 3 (4), which is as follows:

> SEC. 3. (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate

> in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting lines in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

The Bamberger Railroad is an electric line operating only from Ogden to Salt Lake City, serving those cities and intermediate points. The Rio Grande serves all points served by the Bamberger. The criterion for determining unlawful discrimination under Sec. 3 (4) is stated by the Commission at page 658 of its order as follows:

> A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred.

The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3 (4) clearly prohibits such discrimination. The Commission's order in this respect is valid under Sec. 3 (4).

Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the

Rio Grande's case before the Commission. We do not find justification for serious consideration of that question.

FINDINGS OF FACT

I

The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points.

II

The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.

III

The record supports the Commission's finding that present transportation service for granite and marble monuments, in carloads, originating in Vermont and Georgia, consigned to initial destination points on the Rio Grande, requiring unloading and in-transit privileges for continued movement to points in the northwest territory, is inadequate and uneconomical and that the establishment of joint rates and through service is necessary in order to provide adequate and more economic transportation for such shipments.

IV

The evidence supports the finding that as to designated items of traffic moving from the northwest area, shippers and receivers of freight located on the Rio Grande are at an economic disadvantage compared with shippers and receivers of freight from the northwest area who are located on the Union Pacific. But there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3 (1).

V

The evidence supports the finding of the Commission, referred to and quoted herein as Finding 3, that unlawful discrimination prohibited by Sec. 3 (4) is being practiced by the Union Pacific in refusing to establish through routes and joint rates with the Rio Grande comparable to those

existing between the Union Pacific and the Bamberger Line on traffic moving from the northwest area to points served by both the Bamberger Line and the Rio Grande between Ogden and Salt Lake City.

Conclusions of Law

I

The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4). The evidence therefore supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities in carloads originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo, and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo, and Trinidad. As to such commodities the order of the Commission is valid under Secs. 1, 15 (3) and 15 (4) of the Act and does not violate the direction of Sec. 15 (4) that reasonable preference be given the carrier which originates the traffic.

II

The evidence supports the finding of the Commission that it is necessary, in order to provide

adequate and more economic transportation of shipments of marble and granite monuments in carloads from points in Vermont and Georgia to points of final destination in the northwest territory, which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area, that through routes and joint rates be established between the Union Pacific and the Rio Grande as to such shipments.

III

To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo, or Trinidad said order is not valid, because Sec. 15 (4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations spec-

ified in this paragraph, that factual premise, essential to the validity of the order, is lacking.

IV

To the extent the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande at Ogden on carload traffic moving from the northwest area to points between Ogden and Salt Lake City, inclusive, served by both the Rio Grande and the Bamberger line, the order is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act.

To the extent stated in the foregoing opinion, findings of fact, and conclusions of law, the order of the Commission will be enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings as it may deem appropriate, consistent herewith.

Copy filed District of Nebraska, Oct. 22, 1954. Mary A. Mullen, Clerk.

Civil Action No. 76–53

Union Pacific R. Co. v. *United States*

JOHNSEN, *Circuit Judge,* dissenting.

The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute. The majority opinion upholds in part the result which the Commission has so reached.

What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is "perishable food articles." Here, as taken from its Report, are the manner and perspective of its approach to the question.

"Growers [of perishable food articles in Idaho, located on the Union Pacific]. * * * market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon, and Washington] need as many markets and outlets as possible."[5] 287 I. C. C. at page 642. To comprehend or evalnate that need, says the Commission, "it is necessary to consider the nature, extent and functioning of our intricate and far-flung commodity marketing system." P. 655. The importance, in our condition of growing population and national development, of having "a constantly expanding flow of diverse commodities" and "particularly articles of food" is emphasized. The comment is made that "A complex but efficient marketing system has been evolved to provide as orderly a distribution of

[5] It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a "bridge" line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles.

food commodities as possible," and the truism is expressed that "Adequate transportation facilities and services are required for the proper functioning of the system." P. 656.

Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

1. "Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible.* This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process* be permitted." [Emphasis mine.] P. 656.

2. "A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semi-perishable commodities." In-transit privileges, "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit," are available at various points on the Union Pacific to through-shipper on the basis of the joint rates applicable over that route, and similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates, by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these additional facilities would be able to enjoy them

on the same basis as those on the Union Pacific. Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union Pacific, "The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities." P. 656.

3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them "from effective participation in the widespread system developed for the marketing of such commodities." In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given "as many routes as possible" and "as much flexibility as possible in the distribution process," because otherwise they will be "debarred from effective participation in * * * the marketing of such commodities."

In other words, whenever it is possible physically and practicably to open up a new or an additional through route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make avail-

able any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15 (4) of the Act, 49 U. S. C. A. § 15 (4), where the element of short-hauling another carrier is involved, as it is here, that such an added through-route must also provide "more efficient or more economic transportation" than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15 (3) to prescribe joint rates and pointing out that joint rates necessarily in the situation will provide "more economic transportation," since they obviously are lower than the previous combination rates.

I have grave legal doubt whether the Commission's power to establish joint rates under section 15 (3) has any relationship to the term "more economic transportation" in section 15 (4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term "more economic transportation" in section 15 (4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportational comparison from the standpoint of the interests of both the public and the carriers—and that the Commission's

power to establish joint rates under section 15 (3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15 (4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term "more economic transportation" under section 15 (4), in the addition of another carrier's route as a mere "bridge" line for such traffic. If that be not so, then there is not any situation in which the Commission cannot make a finding of "more economic transportation" for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to "as many routes as possible" and "as much flexibility as possible in the distribution process," so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and further

such new route can be declared to provide "more economic transportation," because by placing joint rates in effect the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15 (4) entirely, as affording them any protection whatsoever against deprivation of their long hauls.

Here the opening up of a through route over the Rio Grande as a bridge carrier for the transcontinental freight involved will deprive the Union Pacific of a long haul of 975 miles upon such traffic as the Rio Grande is able to solicit away from it. But this is not the sole purport or effect of the Commission's order. If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessarily will reduce the cost of using the new through route as against the combination rate previously applicable.

Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" is, as previously indicated, "perishable food articles." But it has, by means of some artificial

classification, included ordinary livestock as a perishable food article (P. 656), saying merely, before doing so, that "We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway." And it has further held that a little monument dealer, located on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and there in Colorado, on a through rate basis, some individual monuments out of an estimated four-carload lot of monuments per year.[6]

All of this to me is but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advis-

[6] I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of "urgent need" (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of "as many routes as possible" and "as much flexibility as possible in the distribution process" for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country.

able, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that end. But Congress has never been willing to accede to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All this is familiar history in the railroad world, and I shall not bother to go into it further here.

It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out.

I do not mean to make any implication, nor do I here assume to pass judgment, on whether the Ogden gateway is in other manner or to other extent subject to being opened up. All I say is that the philosophy and standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" can not be made the basis for overriding the short-hauling provisions of section 15 (4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the

term "more economic transportation" to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did.

I have previously referred to the fact that most of the traffic that is here involved originates on the branch lines of the Union Pacific, and that on such of this traffic as the Rio Grande is able to solicit to use its route, the Union Pacific will lose a line haul of 975 miles. The Report of the Commission admits that "the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves" is about 200 miles. Page 654. It also recognizes that the Rio Grande is a mountainous route, of higher grades, more circuity, and greater operational costs than the Union Pacific. "The total rise and fall in feet on the Rio Grande is 66.3 per cent greater than

that of the Union Pacific. Other data as to physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services." Page 648.

All of these matters, however, the Commission lightly brushes aside, as not having relationship to the question of "more economic transportation" in the situation, and so leaving it free to hold, as above indicated, that the new through route provides "more economic transportation," because its joint rates necessarily are lower than the previously applicable combination rates. All that the Commission says, in brushing aside the transportational differences which I have set out, as not requiring consideration on the question of "more economic transportation" in the situation, is that, when they are spread over hauls of such great lengths as are here involved, "they become relatively insignificant." Page 658.

The Report does not undertake to show what amount of traffic goes where. It merely says that "About 90 percent of the traffic upon which joint rates are sought via Ogden and the Rio Grande moves to (Missouri River crossings and points east and southeast) and about 10 percent to the Southwest." Page 626. How much terminates at the Missouri River crossing-points or at other midwestern destinations, the Report does not state. As to livestock, however, it certainly is a matter of common knowledge

that the primary markets are Chicago, Omaha, Kansas City and some other Missouri River points. To each of these points, as well as to the Minneapolis and St. Louis markets, the record shows that a haul of 200 miles more, and a transportation time of at least 24 hours longer, as well as at least one or two more terminal-yard services, are involved over the Rio Grande route. I do not believe that without rational demonstration the Commission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1521 miles (Chicago), the elements of difference which I have set out are so "relatively insignificant" as to be entitled to be ignored on the question of whether "more economic transportation" is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportational and service differences existing, as related to the question of "more economic transportation" under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without establishment of the reality of that horizon for lumping purposes.

Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District*

Rates, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory; as related to the differential permitted to be created by other carriers generally in such situations.

This dissent is being written hastily, in order not to delay the filing of the majority opinion, and I shall accordingly not take the time to go into detail on other matters. I agree with the majority that the Commission had no right here

to find a violation of section 3 (1) of the Act against the Union Pacific and its connecting through-route carriers, but the basis for my view is not that adopted by the majority, that a discrimination under this section cannot at all exist, unless the complaining person or entity is located upon the lines of the carrier or combination of carriers claimed to have committed the discrimination. I do not believe that this viewpoint is tenable on the language of section 3 (1), nor on the expressions contained in *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 141, as well as on the plain, contrary assumptions made in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627. But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3 (1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 percent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3 (1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3 (1), I am certain that its action resting on this basis alone could not on these

facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15 (4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through routes and joint rates in relation to the existing conditions.

In the pattern of the Commission's apparent attempt to strike at as much in the present situation as possible, the Commission further, as noted in the majority opinion, required the Union Pacific to establish joint rates with the Rio Grande to and from the same points where it maintained joint rates with the Bamberger Railroad. The Report says: "The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande." P. 659. The brief of the Union Pacific argues pointedly that "No evidence was submitted concerning or comparing transportation conditions on the Bamberger's electric line between Ogden and Salt Lake City with conditions on the Rio Grande." The brief of the Commission makes no denial of the fact that no such evidence is contained in the record. The most that the Commission could properly have said, I think, was that it had not been made to appear by the evidence that there was any important dissimilarity in the conditions on the two roads. But the lack of any such evidence of dissimilarity could hardly afford a basis for a finding of similarity

on the part of the Commission. This segment of the Commission's order is perhaps of relatively small importance in the present controversy. I refer to it simply as being characteristic or in the pattern of the loose and improper basis and manner in which it seems to me that the Commission has dealt with the entire situation.

I would strike down the Commission's order generally, on the basis and manner in which its result has been reached. In taking that position, however, I would again emphasize that I intend no implication that there may not exist some proper basis and some proper manner of reach as to some parts of the Ogden gateway situation. I have not allowed my mind to look at that avenue, in either one direction or the other. The pervading infirmities on which the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right here.

APPENDIX B.

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*, provides as follows:

§ 3. *Preferences; interchange of traffic; terminal facilities.*—(1) *Undue preferences or prejudices prohibited.*

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

§ 15. * * * (3) *Establishment of through routes, joint classifications, joint rates, fares, etc.*

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own

initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

(4) *Through routes to embrace entire length of railroad; temporary through routes.*

In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad

operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation; *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1955

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SECRETARY OF AGRICULTURE, APPELLANTS

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

WASHINGTON PUBLIC SERVICE COMMISSION ET AL., APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE SECRETARY OF AGRICULTURE

SIMON E. SOBELOFF,
Solicitor General, Department of Justice,
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Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*:
Sec. 1 (4) ... 6, 58, 90
Sec. 1 (14) ... 71
Sec. 1 (15) ... 72
Sec. 1 (16) ... 72
Sec. 3 ... 6
Sec. 3 (1) ... 5, 82, 90
Sec. 3 (4) ... 8, 45, 58, 75, 91

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SECRETARY OF AGRICULTURE, APPELLANTS

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION ET AL., APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE SECRETARY OF AGRICULTURE

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[1] The Secretary is a party only to Nos. 332, 333, 334. The issue decided in those cases is briefed under Point II *infra*, pp. 75–88.

OPINIONS BELOW

The report of the Interstate Commerce Commission (Neb. R. 25; Col. R. 59; R. II, 1518)[2] appears at 287 I. C. C. 611. The majority and dissenting opinions of the Nebraska district court in Nos. 117, 118, 119 (Neb. R. 153, 169) are reported at 132 F. Supp. 72. The *per curiam* opinion of the Colorado district court in Nos. 332, 333, 334 (Col. R. 280) is reported at 131 F. Supp. 372.

JURISDICTION

The final judgment of the Nebraska three-judge district court was entered on December 20, 1954 (Neb. R. 210). Separate notices of appeal were filed in that court by appellants on February 17 and 18, 1955 (Neb. R. 226, 229, 230).

The final judgment of the Colorado three-judge district court was entered on February 1, 1955 (Col. R. 361), and a timely motion for new trial or reargument and reconsideration was denied on April 22, 1955 (Col. R. 362). Separate notices of appeal were filed in that court by

[2] The record in this case consists of four volumes. One volume contains the record of proceedings before the Nebraska district court, and references to that record will appear as Neb. R. ——. There is a similar volume covering the proceedings before the Colorado district court, and references to it will appear as Col. R. ——. Two additional volumes contain the record of procedings before the Commission—a record which was put into evidence in both the Nebraska and the Colorado cases. References to these volumes will appear as R. I, ——, and R. II, ——.

appellants on June 20, 1955 (Col. R. 364, 365, 369).

The jurisdiction of this Court rests on 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction of the cases was noted on October 24, 1955, and they were consolidated for oral argument (Neb. R. 245; Col. R. 374).

QUESTIONS PRESENTED

1. Whether the Colorado district court, in setting aside the Commission's order establishing new through routes (and joint rates) for specified commodities on the ground that the "uncontradicted evidence" showed that through routes were already in existence, applied an erroneous standard for determining the existence of through routes and improperly set aside the Commission's finding that such routes did not exist.

2. Whether, in narrowing the Commission's order, the Nebraska district court failed to give proper effect to the provisions of Section 15 (4) and to the Commission's finding thereunder that the establishment of the prescribed through routes was "necessary and desirable" from the standpoint of providing "adequate and more economic transportation" for shippers who could not otherwise participate effectively in the effi-

cient marketing of perishable agricultural commodities.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*, are set forth in the Appendix, *infra*, pages 90–94.

STATEMENT

The general nature of the administrative proceedings

On August 1, 1949, the Denver & Rio Grande Western Railroad Company (referred to as the Rio Grande) filed with the Commission a complaint requesting that the Union Pacific Railroad Company (which, with its leased lines, is referred to as the Union Pacific) be required to establish just, reasonable and non-discriminatory and competitive joint rates with the Rio Grande on freight traffic

(a) between points on or via the Union Pacific in Utah north of Ogden, Idaho,

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[3] The Government's jurisdictional statement in the Nebraska case also raised the following additional question:

"Whether Section 3 (1), prohibiting any carrier from giving any undue preference to any person, locality, etc., or subjecting any person, locality, etc., to any undue prejudice, may apply to the situation where the persons or localities receiving preference are served by one carrier and those prejudiced are served by another."

Further analysis of the case convinces us (see p. 82, n. 20, *infra*) that this Court's determination as to the correctness of the Nebraska court's decision on the issue stated in question 2 above will be dispositive of Nos. 117, 118, and 119.

Montana, Oregon, Washington and British Columbia, and Colorado common points and points east thereof,

(b) between Utah common points on the one hand, and places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia on the other hand.

The Rio Grande's complaint named as additional defendants numerous other railroads with which (or with some of which) the Union Pacific maintains through routes and joint rates.

In its complaint, the Rio Grande contended that through routes already exist for the freight traffic involved. Therefore, it urged that the failure of the Union Pacific to establish competitive joint rates for the traffic in question, when moved on through routes in which the Rio Grande participates, violates Sections 1 (4), 3, and 15 (1) and (3) of the Interstate Commerce Act.

Numerous parties intervened in the Commission proceedings in behalf of the complainant, including the Secretary of Agriculture of the United States, the Public Utilities Commissions of Colorado and Utah, the American National Live Stock Association, other live stock and stock feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce, groups of employees of the Rio Grande, and the American Short Line Railroad Association. Interveners in

opposition to the complaint of the Rio Grande and supporting the Union Pacific and other defendants include the State of Nebraska, the City of Cheyenne, Wyo., the Public Service Commissions of Montana, Washington, Oregon, Wyoming, Nebraska and Kansas, Chambers of Commerce and other associations, certain industrial employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago & Northwestern Railway, and the Wabash Railroad.

In late 1949 and early 1950, extensive hearings were held before a hearing examiner in Salt Lake City, Boise, and Cheyenne. Following an examiner's report, the filing of exceptions and oral argument before the full Commission, the full Commission issued the report and order challenged in these cases. In brief, the Commission held that through routes did not exist over the Rio Grande for the freight traffic in question, but that through routes should be established for specified commodities pursuant to Section 15 (4) of the Act; and that for such commodities, moving in carloads on such through routes, rates not in excess of the joint rates maintained on such commodities on the competitive Union Pacific routes should be established. The Commission also found that the maintenance by the Union Pacific of joint rates to certain points on the Bamberger Railroad, while refusing to participate in joint rates to the same points

on the Rio Grande, subjected the Rio Grande to discrimination in violation of Section 3 (4) of the Act. It ordered elimination of this discrimination. (Neb. R. 26–74.)

The geographical and historical background

The historical, geographic, and traffic background of these cases is set forth in detail in the Commission's report (Neb. R. 34–48). Accordingly, it will be summarized very briefly here.[*]

The Rio Grande operates between Ogden, Utah (its northwestern terminus) and Denver, Colorado, over two routes. By way of the Moffat tunnel the distance is 607 miles, while the route via Pueblo is 782 miles. These are the Rio Grande's main lines. Its eastern connections are the Union Pacific and other railroads with which it connects at Denver, Colorado Springs, Pueblo, Walsenberg and Trinidad. Denver, Colorado Springs and Pueblo are sometimes referred to in this case as the Colorado common points because they are served both by Rio Grande and by Union Pacific or other railroads with which the Union Pacific maintains joint rates.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City, and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City,

[*] A convenient map is appended to the opening brief filed by the Rio Grande (p. 133).

37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line. Salt Lake City and Provo are sometimes referred to as the Utah common points since they are served by both the Rio Grande and the Union Pacific.

The Union Pacific runs west from Omaha to Julesburg in northeastern Colorado. At Julesburg, a line runs southwest to Denver, while the main line goes west through Cheyenne (from which another Union Pacific line runs south to Denver) to Ogden. At Ogden, the Union Pacific's main line connects with the Southern Pacific and the Rio Grande. A Union Pacific line running north from Ogden serves points in Utah north of Ogden and (with its connecting lines) Idaho, Montana, Oregon, Washington, and British Columbia. This last described area is referred to as the excluded area.

The Rio Grande generally participates in through routes and joint rates on transcontinental traffic. However, joint rates do not apply to movements over the Rio Grande between the excluded territory and the Colorado common points and points east. Similarly, with some exceptions, joint rates do not apply to freight traffic moving between the excluded territory and Utah common points south of Ogden. However, such traffic

moves on joint rates over the lines of the Union Pacific and other railroads with which it maintains joint rates. In the absence of joint rates on Rio Grande routes for such excluded-territory traffic, such traffic can be routed over the Rio Grande only at combination rates which are considerably higher than the joint rates which are available on the competitive Union Pacific route via Cheyenne.

The findings and the evidence

1. As to the existence or non-existence of through routes

The Commission found (Neb. R. 33) that

> there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

In 1897, Union Pacific and its controlled lines, the Oregon Short Line Railroad and the Oregon-Washington Railroad and Navigation Company, were in separate receiverships. In that year, the last-named companies established with the Rio Grande, to and from points in the excluded terri-

tory via the Ogden gateway, joint rates equal to the rates then in effect on the line of the Union Pacific through Cheyenne (R. I, 86–88). These joint rates with the Rio Grande via Ogden remained in effect until they were cancelled progressively by the Union Pacific in 1906 and 1912.

Union Pacific has never purported, by formal action, to cancel through routes with the Rio Grande via Ogden. The Assistant Freight Traffic Manager of Union Pacific testified (R. I, 799–800) that:

> The Interstate Commerce Act gives all shippers the right to specify the lines over which their shipments shall move so the Ogden gateway and route via the Rio Grande is actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington. However, most of that traffic originates or terminates at points on the Union Pacific, and it ordinarily moves via the Union Pacific through Wyoming because the joint through rates to and from that territory are restricted so that they will not apply when traffic is interchanged with the Rio Grande at junction points in Utah.[5]

The establishment of the through routes sought by Rio Grande would require Union Pacific to short haul itself within the meaning of Section

[5] See a similar statement by Union Pacific's counsel during the oral argument before the Commission (R. II, 1621).

15 (4) of the Interstate Commerce Act (R. I, 587,°800). No evidence was presented to show that in recent years Union Pacific or any of the other defendant railroads have solicited traffic from and to the areas here concerned for routing over a Rio Grande route on which higher combination rates apply. Rather, it is undisputed that for many years it has been the policy of Union Pacific "to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic" (Neb. R. 32.)..

There was evidence that scattered shipments on through bills of lading are made to and from the excluded territory over the Rio Grande through the Ogden gateway. Exhibit 1, p. 4 (discussed in detail at R. I, 70–76) shows that in 1948, a representative year, 37 carload shipments were made on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment, paper bags, lum-

ber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. It should be noted that all of these shipments were destined to points common to the Rio Grande and the Union Pacific in Utah or Colorado. There was no evidence that any of these shipments moved from the excluded area over the Union Pacific and the Rio Grande via the Ogden gateway to any destination east of the Colorado common points (*i. e.*, points on the north-south line of the Rio Grande between Denver and Trinidad, Colorado).

There was also evidence (R. I, 75) that in 1948 there were 18 carload shipments moved on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden, and

thence by the Union Pacific to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed, hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destination so as to avoid paying the applicable combination rates.

However, the evidence strongly suggests that the above shipments via the Rio Grande and at the higher combination rates may have resulted, at least in substantial part, from shippers' ignorance or inadvertence. Thus, the Rio Grande's vice president in charge of traffic (R. I, 66) noted that "competitive through rates on traffic originating at Missouri River or east thereof and destined to the Union Pacific's closed door territory north of Ogden [via the Rio Grande] do not apply via Pueblo, Colorado, with a population of seventy-five thousand, over any route or combination of routes. This fact is overlooked from time to time by certain shippers who bill cars to unload at Pueblo, which results in higher charges at combination rates." (R. I, 72–

73.) Similarly, the manager of a cold storage plant in Pueblo testified that the plant received farm products from the excluded territory north of Ogden via the Rio Grande "only when a misrouting occurs" (R. I, 304).

Also in 1948, 22 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint through rates were not applicable over that road via the Ogden gateway (R. I, 75–76). Referring to all of the above figures as to eastbound and westbound shipments via Rio Grande in 1948, Rio Grande's vice president in charge of traffic stated that they "reveal that many shippers, large and small, and many railroads, assume a through route exists at competitive freight rates via Rio Grande-Ogden-Union Pacific on westbound traffic, and via Union Pacific-Ogden-Rio Grande on eastbound traffic" (R. I, 76).

In addition to this evidence of isolated commercial shipments, it was also shown that, pursuant to service orders issued by the Commission and in effect during World War II, a substantial number of freight shipments were diverted by the Rio Grande from through routes in which it regularly participates to the routes via Ogden to the

excluded territory. For example, under Interstate Commerce Commission Service Order No. 98, effective November 2, 1942, and cancelled August 17, 1945, the Rio Grande diverted to the Union Pacific at Ogden and Salt Lake City, 8,491 carloads destined to points in Oregon and Washington via the Southern Pacific (R. I, 70).

Also, during World War II, special combination trains of troops in passenger cars and military supplies in freight cars from eastern and southern origins to destinations in the northwest (excluded) area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific (R. I, 71). The rates and charges for these freight movements were not filed with the Commission, but were adjusted under Section 22 of the Act on the basis of the joint rates applicable over the Union Pacific route through Wyoming (R. I, 71).

In February 1949, when the main line of the Union Pacific in Wyoming was blocked by snowstorms, a substantial amount of traffic was diverted from the Union Pacific to the route of the Rio Grande between Denver and its junctions with the Union Pacific in Utah (*e. g.*, Ogden, Salt Lake City) (R. I, 72).

The Commission concluded that neither the scattered commercial shipments in the typical year 1948, nor the shipments routed or diverted over the Rio Grande under wartime or emer-

gency conditions, established that through routes over the Rio Grande on traffic originating in or destined to the excluded territory already existed. As to the wartime and emergency routings and diversions, the Commission stated that "[t]hey show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute 'through routes' within the meaning of that term as used in the act." (Neb. R. 32).

Turning to the scattered commercial shipments in the typical year 1948, the Commission concluded as follows (*ibid.*):

> * * * so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads east-bound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the

same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Referring to all of the shipments via the Rio Grande which have been described above, the Commission stated that "all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the [single] shipment held insufficient to show the existence of a through route in *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.* [155 I. C. C. 313], cited with approval by the Supreme Court in *Thompson* v. *United States* [343 U. S. 549]" (Neb. R. 32–33).

2. As to the need for establishing through routes for particular commodities.

Having found that through routes did not exist over the Rio Grande for the traffic in question, the Commission next considered whether through routes and joint rates should be established over the Rio Grande pursuant to Section 15 (3) and (4).

It is undisputed that requiring the Union Pacific to establish through routes with the Rio Grande on traffic between the excluded territory, on the one hand, and the Utah common points, the Colorado common points, and points east of the Colorado common points, on the other hand, would compel the Union Pacific to short haul itself. Under Section 15 (4), the Commission cannot require a carrier to short haul itself

"unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

Such a determination was made, the Commission concluding (Neb. R. 73):

> That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations

in the Lower Peninsula of Michigan and in Oklahoma and Texas.

The subsidiary findings of the Commission as to the needs of shippers for through routes over the Rio Grande, and the evidence supporting those findings, are summarized below.

Livestock. The Commission's principal findings as to the needs of shippers or consignees of livestock originating in the excluded territory may be stated as follows (Neb. R. 52–54):

In the areas in Utah and Colorado served by the Rio Grande, there are good pasture lands for grazing livestock. In addition to stock produced locally in those areas, substantial quantities are shipped in the summer season from other sections in Colorado, Utah, and surrounding states both for feeding in feed lots and pastures and for grazing on the livestock ranges. There is a large movement of livestock into and out of Colorado. Raisers of livestock and operators engaged in fattening livestock, who are served only by the Rio Grande, generally buy from areas from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit and of reshipping the fattened animals to Denver or markets east of Denver on the balance of the joint rate. Such operators must absorb the difference in the transportation costs, and are not able to purchase livestock economically in the northwest area in competition

with buyers from Iowa, Wyoming, Nebraska, Colorado and Kansas who have the benefit of competitive joint rates from the excluded territory over the Union Pacific routes (Neb. R. 52).

As a result of the curtailment of the use of grazing lands in national forests in Colorado, livestock raisers in that state have switched from raising livestock to fattening such stock by grazing in private pastures. They obtain some of this stock from the northwest areas, particularly Idaho, Montana and Oregon (Neb. R. 52–53).

On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to the Colorado common points and east thereof, via Ogden and the Rio Grande, the rates are on a combination basis, and feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are now able to overbid the Arkansas Valley (S. E. Colorado) feeders on northwest stock when destined to the Missouri River and east thereof (Neb. R. 53–54).

Illustrative evidence in support of the Commission's findings as to livestock is as follows:

The superintendent of livestock operations of the Holly Sugar Corp., Denver, Colo., testified that this company has sugar factories on the Rio Grande in Colorado, including one at Delta, about 35 miles southeast of Grand Junction, and that in a normal year of beet sugar production it has available for feeding at this point from 25 to

60 thousand tons of beet pulp, as well as several thousand tons of molasses. The livestock pens where the animals are fed are adjacent to the sugar factory. This concern also has other factories at Swink, Colo., and points in Montana and Wyoming. It buys livestock in most of the western states and feeds annually from 10 to 12 thousand head of cattle and from 50 to 60 thousand lambs (R. I, 269–272). It purchases livestock on the Union Pacific in Idaho and Montana but cannot move them to Delta for feeding-in-transit at through competitive rates (R. I, 273). The livestock produced in the Northwest, particularly in Idaho and western Montana on the Union Pacific, is of excellent grade for use in feeder operations on the Rio Grande and elsewhere. No livestock has been shipped to Delta because of the application of the higher combination of rates from western Montana. The Union Pacific does not publish, in connection with the Rio Grande, joint through rates from the Northwest to eastern livestock markets on as low a basis as those available to livestock feeders on the Union Pacific, *e. g.*, in Wyoming and Nebraska. This has hindered the feeder operations of the Holly Sugar Corp., as well as other feeders and dealers on the Rio Grande, and favors the operations of livestock dealers and feeders on the Union Pacific (R. I, 274, 277–282).

The chief rate clerk of the traffic department of the Holly Sugar Corp. testified that the rates

on cattle from points in Montana and Idaho to Denver are 31 to 35 cents higher per 100 pounds when routed over the Union Pacific-Rio Grande than they are when routed over the Union Pacific (R. I, 288); that on sheep from these points to Omaha, Kansas City, and Chicago, the rates via the Union Pacific-Rio Grande-Union Pacific are 19 cents per 100 pounds higher than via Union Pacific direct from and to the same points (R. I, 288); that on cattle to Omaha via the Union Pacific-Rio Grande the rates are from 35 cents (from Divide, Montana) to 33 cents (from Idaho Falls) higher than the Union Pacific rates direct; that on cattle to Kansas City the rates via Union Pacific-Rio Grande are 45 cents to 33 cents higher than over the Union Pacific direct from the same two origins, while to Chicago the difference ranges from 57 cents (from Divide) to 33 cents (from Rogerson, Idaho) (R. I, 397).

The general manager of the Producers' Livestock Marketing Association, a marketing association of livestock producers which operates in 14 western states, testified that the association handled about 30,000 carloads of livestock in 1948. Livestock, he stated, is grazed and fed along the Rio Grande between Ogden and Denver (R. I, 310–311). Although a large part of this livestock is produced locally, a substantial amount is shipped in from other nearby areas both for feeding in feed lots and pastures and for summer

range grazing. Most of the sheep brought into the feeding and grazing area come from the Northwest—Idaho, Oregon, Montana, and Washington (R. I, 312). Livestock moving from the feeding and grazing areas via the Rio Grande goes both east and west to slaughter pens and feed yards and pastures, and sells in competition with stock from points on the Union Pacific north of the Rio Grande lines (R. I, 313). Pasturing of livestock on wheat in the wheat-raising states is a growing practice, and wheat pastures of Kansas, for example, offer an important outlet for sheep and lambs from points on the Rio Grande. Billing at joint rates with feed-in-transit is less than the cost of shipments at combination rates. The witness further testified that there is a 19-cent arbitrary on the movement of livestock over the Rio Grande from Ogden on shipments originating on the Union Pacific, and that this reduces the net returns of growers and feeders. The opening of the Ogden gateway to the Rio Grande would have the effect of lowering the rates and increasing the service (R. I, 314–315). See discussion of this arbitrary in the Commission's report (Neb. R. 55).

A livestock operator at Heber, Utah, which is served only by the Rio Grande, testified that he is engaged principally in raising sheep in an extensive livestock area (R. I, 324). This area produces "an extraordinarily good fat lamb."

Some of these lambs are sold for feeding in such midwestern states as Kansas, Iowa and Nebraska. Growers in his area bring in most of their replacements of breeding stock from such states as Idaho and Montana (R. I, 325). The ewes and lambs are brought in from Idaho and Montana under a billing which permits feeding in transit and which is used again in sending the lambs to the market. The arbitrary of 19 cents, applicable on such feeding-in-transit movements via Union Pacific-Rio Grande through Heber to market, means that the returns to the Utah producer would be that much less than the returns to the producer located on the Union Pacific. If such feeder lambs were shipped from the Heber area to Kansas wheat pastures, higher combination rates would apply (R. I, 326–327).

The president and general manager of the Benton Land & Livestock Co., Burns, Colorado, owning 16,000 acres of land and leasing about 30,000 additional acres in Western Colorado, testified that his company does not breed cattle but buys them wherever possible for fattening on its land adjacent to the lines of the Rio Grande. The fattened stock are then shipped to markets, with about 90 percent going to New York (R. I, 331–332). The "opening of the Ogden gateway" would be advantageous to this company in that it would permit it to purchase young livestock in Idaho, Oregon, Washington

and Montana and ship it on joint rates with feeding in transit in Colorado (R. I, 432–433). The company endeavors to buy cattle that can be reshipped at joint rates after feeding in transit. The company has found that because of the lack of through rates on livestock from the Northwest area via the Rio Grande to eastern markets, it cannot compete in buying cattle in that area against buyers from other areas (such as points on the Union Pacific) who enjoy such joint rates, unless it is prepared to absorb the difference between joint and combination rates (R. I, 334, 342–344). Because of the gradual reduction in grazing areas of the national forests, grazers in his territory are changing from breeding operations to feeding operations and are forced to buy livestock for feeding (R. I, 342–344). The opening of the Ogden gateway would give such operators in Colorado and Utah an opportunity to purchase young stock from the Northwest area at a competitive cost (R. I, 341).

The secretary of the Colorado Cattlemen's Assn., Denver, Colo., testified that this association has 5,000 members composed of livestock dealers, feeders and operators who raise cattle and who purchase and market animals requiring feeding in transit. A majority of the big operators in the association go out of Colorado to buy at least a portion of the cattle which they feed. After feeding, the cattle are sold principally through Denver

and Chicago and other eastern markets. Members of the association find it difficult to purchase cattle in the Northwest on a competitive basis for feeding in transit in Colorado because they lack joint rates on which they can reship to eastern markets (R. I, 345–347). The members of the association are interested in having the Ogden gateway opened as they want to buy young stock on a competitive basis for feeding-in-transit (R. I, 349).

The owner of a large ranching and livestock business in Utah and Colorado testified that he purchases breeding stock in the northwest area which he brings into his ranges in Utah and Colorado. In the fall of the year, after feeding on Utah and Colorado ranges, he reships them either to markets in Kansas City, St. Joseph, or to his pasture areas in western Kansas. In the absence of joint rates, such as are available to growers located on the Union Pacific, he must pay "about a 19-cent or 20-cent penalty" on such movements (R. I, 374–375).

An official of the Lincoln Packing Division of the American Stores, Inc., which has cold-storage plants and stores throughout the country, testified that this concern has a storage plant at Pueblo, Colo., on the Rio Grande, with a storage capacity of between 200 and 250 carloads (R. I, 412). This concern engages in storage operations and in the slaughter of livestock. It receives at its

Pueblo plant shipments of lambs which originate in Idaho and Oregon on the Union Pacific. When these shipments move over the Union Pacific via Ogden and the Rio Grande, combination rates are applied, resulting in charges of $70 to $80 more per car than if moved at joint rates applicable via the Union Pacific through Denver. Despite the higher rates via the Rio Grande, the company uses the Rio Grande route because shipments move more expeditiously and suffer less shrinkage. The greater shrinkage on the Union Pacific results from the necessity of stopping cars for feeding in transit at Denver, a necessity which does not exist on the Rio Grande route (R. I, 413–415).

Agricultural commodities. The Commission's findings as to the necessity for through routes and joint rates over the Rio Grande for agricultural commodities (excluding livestock) moving out of the excluded northwest territory, fall into two categories. That is, the Commission found that producers and shippers of such commodities in the excluded territory, and processors and dealers of such commodities who are served only by the Rio Grande, both need such through routes, though partly for different reasons.

(a) *Growers and shippers in the excluded territory need through routes and joint rates via the Rio Grande in order to exercise reconsignment*

privileges effectively. The Commission found (Neb. R. 56–57):

> Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific, and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.
>
> In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.
>
> The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the Central, Southwestern, and Southeastern States. Carloads moved over the Union Pacific to the

> Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. * * *

The importance of reconsignment privileges to shippers of agricultural commodities, and the fact that such reconsignment privileges can be exercised only along routes on which joint rates apply, were illustrated by the following testimony:[6]

The owner of a thousand-acre farm in Idaho is engaged in raising and shipping fresh fruits and vegetables, green peas, lettuce, potatoes, onions, prunes and peaches (R. I., 420). In his business, it is necessary to ship many carloads of produce before they are sold and to sell them "while rolling or in transit." His most important markets are Chicago, Kansas City, St.

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[6] For a further illustration of the significance of diversion or reconsignment privileges, see *Southeastern Vegetable Case*, 200 I. C. C. 273, 278-279.

Louis, the Midwest, and the Southwest, although some cars go to New York. In shipping, he has had many experiences with "distressed cars," which are carload shipments which arrive at points where they can be reconsigned only at higher combination rates. Such points are known as pocket markets (R. I, 421–424). If he could use joint through routes and rates over the Rio Grande, the so-called "pocket markets" could be avoided (R. I, 425–427). He does not think that the opening of the Ogden gateway would reduce the tonnage of the Union Pacific, but, rather, that it would open the "pocket markets" to Idaho products, increasing their consumption by as much as would be diverted away from the Union Pacific (R. I, 427-428).

The vice president and general manager of another large concern, J. C. Watson Co. of Parma, Idaho, testified that his company is engaged in producing, packing, and distributing fresh fruits and vegetables, and ships from 1,500 to 2,000 carloads annually to markets throughout the United States; that it is constantly seeking new markets and supports the Rio Grande's application because joint rates through the Ogden gateway via the Rio Grande would provide a free flow of fruits and vegetables from Idaho to all markets, especially into southwestern territory (R. I, 432–433). He further testified that shipments of fruits and vegetables from Idaho fre-

quently encounter market areas which are called "pocket markets." Thus, shipments reaching points in Kansas not served by the Union Pacific, *e. g.*, Wichita or Hutchinson, cannot be reconsigned, under prevailing rate restrictions, to Kansas City or points east if, for any reason, they are rejected or if the price proves unsatisfactory (R. I, 433). The witness gave examples of the difficulties encountered and the additional expenses incurred when shipments arrive at "pocket markets" (R. I, 434–435).

A member of the executive committee of the Idaho State Grange, a statewide organization consisting of 12,000 members who are farmers, shippers, growers, and dealers in potatoes and grain, testified that it would be to the best interest of Idaho as an agricultural state to have the Ogden gateway opened (R. I, 262–263). Competitive through rates via Ogden and the Rio Grande to markets not now open to producers of that state would be beneficial (R. I, 267).

Moreover, the needs of shippers of agricultural products in the excluded territory for joint rates at which they can reconsign shipments is not limited to reconsignment while shipments are on the Rio Grande routes. Thus, an Idaho shipper testified that he can ship potatoes on joint rates via the Union Pacific and Denver to such points in the southwestern states as Tulsa, Oklahoma City and Fort Worth. However, if he desires to

reconsign the shipment from such a point to a point in the southeastern states, he must pay a higher combination rate. He cannot ship into the southeastern states at joint rates unless he uses the Union Pacific as far as Kansas City. Because of this limitation on reconsignment at joint rates from southwestern to southeastern points, he avoids the risks of "pocket markets" by largely refraining from shipping to points in the southwest (R. I, 292–302).

Other witnesses engaged in producing and shipping potatoes and other vegetables testified as to the need for competitive joint through rates via Ogden and the Rio Grande to enable them to exercise reconsignment privileges effectively (R. I, 252, 292–294; 303–304; 438–440; 467–468; 472).

(b) *Processing and marketing facilities on the Rio Grande are cut off from producers and shippers of agricultural products in the excluded territory.* The Commission found (Neb. R. 69–70) that

> * * * A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be

moved to market with expedition and care, and over as many routes as possible, * * * A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities. * * *

* * * The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. * * *

For example, Skyland Food Corporation operates a frozen food plant at Delta, Colorado, engaging principally in the processing of fruit. The capacity of the plant is 15,000,000 pounds annually and it is operated at about 50 percent of its capacity. While Idaho fruit is desirable, it cannot be used for processing at Delta be-

cause of the lack of joint rates from Idaho via the Rio Grande. If through rates via Ogden and the Rio Grande were available, it could obtain fruits in the Brigham, Utah, area, north of Ogden for processing in transit, and could use apples of "C" grade from Idaho, amounting to several thousand tons annually. (R. 140–149).

The Mountain Ice & Coal Co. operates a cold storage plant at Pueblo, Colo., with a capacity of 74 cars. The principal perishables stored at this plant are apples, frozen foods, butter, eggs, frozen poultry, onions and potatoes. It would be able to store frozen foods from Oregon and Washington, which originate on the Union Pacific lines, if the Ogden gateway were opened by joint rates. Storage customers desire access to as many markets as possible, but the combination rates now in effect limit the flow of Northwest territory products through Pueblo (R. I, 303). While the company can receive shipments via the Union Pacific and Denver, the necessity for a backhaul to Denver means that it can sell in Denver, after in-transit processing, only if it can receive shipments on joint rates via Ogden and the Rio Grande (R. I, 307–308).

A shipper of dried beans at Colorado Springs handles beans originating in California, Wyoming, Idaho, Colorado, and New Mexico. His principal market is in the southeastern section of the United States. He buys beans in Idaho which

he can process in transit at his warehouses, provided the eventual destination is not east of the Missouri River. He is interested in processing Idaho beans in Colorado Springs, but does not do so because most of his markets are east of the Missouri River. (R. I, 406). He stated that he had lost business in many instances because he could not furnish Idaho Red beans and Idaho Great Northern beans in his assorted cars from Colorado Springs (R. I, 407). However, if he purchased Idaho Red beans or the Great Northern beans in Idaho and brought them through Colorado Springs via the Ogden gateway and Rio Grande, he would pay a 39-cent higher rate than via the Union Pacific and Denver (R. I, 408).

A witness testifying for the United States Department of Agriculture, supporting the application of the Rio Grande, stated that it is the position of that Department that the opening of the Ogden gateway route will promote distribution; that the continued inability of shippers to use the Ogden gateway at joint through rates is not in the interest of the general agricultural public (R. I, 1069–1073); that the Department is opposed to the existing routing restrictions on agricultural commodities and is of the view that the small amount of tonnage the Union Pacific would lose if the Ogden gateway were opened commercially would do no substantial harm to that carrier (R. I, 1080–1081).

Granite and Marble Monuments—Westbound: The only westbound commodity, with respect to which the Commission found that through routes and joint rates via the Union Pacific-Rio Grande routes were justified under Section 15 (4), was granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory.

The Commission made the following finding (Neb. R. 52) as to this commodity:

> There is * * * an urgent need for the establishment of joint through rates on [monuments] to destinations in the excluded territory with stop-off privileges at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

The testimony supporting this finding is as follows:

A fabricator and wholesale dealer in granite and marble monuments at Brigham City, Utah, testified that he purchases marble from Georgia and granite from Wisconsin, Vermont, and Minnesota; that he sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington, and would be benefited by joint through rates with transit stopover arrangements on the Rio Grande; that he has dealers in Colorado on the Rio Grande

and with no joint through rates over that road he is "penalized" in getting a car into Northern Utah, Idaho, Montana and portions of Oregon over the Union Pacific (R. I, 388–389). To dealers in the Northwest, he can ship through Rock Springs over the Union Pacific into Ogden, but if he routed cars over the Rio Grande he would lose on the car when it reached the Northwest. He has a dealer at Grand Junction, Colo., and customers at Logan, Utah; Pocatello, Idaho Falls and Boise, Idaho; Butte, Great Falls and Helena, Montana; Spokane, Washington; and Eugene and Portland, Oregon (R. I, 389). It would be a great advantage to this shipper if he could use the Ogden gateway over the Rio Grande (R. I, 390).

The witness stated further that he had transit privileges when he shipped over the Union Pacific out of Omaha, thence into the Northwest; that if he could ship Georgia marble through Grand Junction, Colo. (over the Rio Grande) with stopoff privileges he could handle about four cars a year that way; that, on his shipments from Georgia, practically every car contains marble stones which are reshipped to the Northwest and if he had transit privileges and through rates it would enable him to meet competition (R. I, 390–391). He further stated that his yard is the only one between Denver and Los Angeles and San Francisco, and that there are no manufacturers in the Northwest; that the

granite or marble from Georgia comes through in pool cars, to be finished by the various dealers in the West, and that the cars are stopped at a number of places for partial unloading; and that the nature of the business is such that the dealer has to handle about ten different materials and must ship in the pool cars for that reason (R. I, 392–393). There are dealers whom he cannot always supply, since the cars almost invariably contain some material for either Brigham or for customers at other points in Utah, or in Idaho or Montana. If possible, cars are shipped with some tonnage in them for Grand Junction, but the difficulty is that such cars must terminate on the Rio Grande, and this seldom can be done. Therefore, the only alternative is to ship to Grand Junction in less-than-carload lots, which is prohibitive (R. 392–396).

A retail dealer in monuments at Grand Junction, Colo., supported the testimony of the foregoing witness. He stated that he retails monuments in eastern Utah, western Colorado, and northwestern New Mexico and that it would be very beneficial to him to be able to get pool cars, which he is not now able to do; that he has to buy full carloads on certain items, which results in overstocking; that, if he could have pool car stock delivered, his inventory would be smaller and it would enable him to expand his market considerably (R. I, 398–399); that it fre-

quently happens that he must forego business because the wholesaler cannot readily sell him a part car (to stop in transit at Grand Junction to partially unload) since the cars contain tonnage for others north of Ogden. Such part-car shipments as he gets are included in cars which terminate on the Rio Grande, while if pool cars were operated it would enable him to sell in the Northwest area (R. I, 400). On cross-examination, he stated that he could not do business at a profit unless he could get the materials at a carload rate and that if he has to ship everything at a less-than-carload rate he would have to cease his business (R. I, 403–406).

3. As to the circuity of the Rio Grande's routes

In finding (Neb. R. 73) "that it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation" that the Union Pacific and its connecting lines establish through routes with the Rio Grande on specified commodities originating in the excluded northwest territory, the Commission directed that such routes run only to

> destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately

> north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

As a result, the through routes which the Commission ordered established will not apply on shipments from the excluded territory to points in Colorado east of and including the Colorado common points, Kansas (except Kansas City), Nebraska (except Omaha), North and South Dakota, Minnesota, Wisconsin, and those portions of Iowa and Illinois which lie north of the route of Union Pacific and the Chicago and North Western between Omaha and Chicago.

This ultimate finding was based primarily on differences in operating conditions over the Union Pacific routes and over the Rio Grande routes via Ogden. Thus, the Commission made the following findings in its report (Neb. R. 71–72):

> The differences in the distances between the Union Pacific routes through Wyoming, on the one hand, and the Rio Grande routes sought, on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles,

or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls between the excluded territory, on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago

& North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general, spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

There was evidence that there is much greater curvature in the Rio Grande line than in that of the Union Pacific, and that the total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific.

Extensive evidence as to the circuity of Rio Grande's routes was summarized by the Commission in the form of the following table showing representative destinations and distances from McCammon, Idaho, over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming (Neb. R. 40):

From McCammon, Idaho to—	Via Union Pacific	Distance	Via Rio Grande	Distance	Difference	Circuity via Rio Grande
		Miles		*Miles*	*Miles*	*Percent*
Omaha, Nebr	(1)	1,036	(2)	1,255	219	21.1
Kansas City, Mo	(3)	1,153	(3)	1,352	199	17.2
Minneapolis, Minn	(3)	1,396	(3)	1,593	197	14.1
St. Louis, Mo	(3)	1,428	(3)	1,627	199	13.9
Chicago, Ill	(1)	1,524	(2)	1,735	211	13.8
Pittsburgh, Pa	(1)	1,991	(3)	2,203	212	10.7
Charleston, W. Va	(3)	2,018	(3)	2,218	200	10.0
Columbia, S. C	(3)	2,274	(3)	2,473	199	8.8
Baltimore, Md	(1)	2,319	(2)	2,521	202	8.7
Norfolk, Va	(3)	2,438	(3)	2,637	199	8.2
New York, N. Y	(1)	2,477	(2)	2,674	197	8.0
Tulsa, Okla	(4)	1,377	(5)	1,427	50	3.6
Dallas, Tex	(6)	1,456	(5)	1,489	33	2.3
Fort Smith, Ark	(4)	1,458	(5)	1,538	80	5.5
Memphis, Tenn	(3)	1,593	(5)	1,786	193	12.1
New Orleans, La	(6)	1,979	(5)	2,003	33	1.7
Atlanta, Ga	(3)	2,044	(5)	2,204	160	7.8
Savannah, Ga	(3)	2,327	(5)	2,486	159	6.8

[1] Union Pacific through Wyoming to Omaha.
[2] Union Pacific to Ogden, Rio Grande to Denver.
[3] Union Pacific through Wyoming to Kansas City.
[4] Union Pacific to Pacific Junction, Kans.
[5] Union Pacific to Ogden, Rio Grande to Pueblo.
[6] Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

4. As to the rate situation at the Utah common points

The Commission found (Neb. R. 74):

> That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the Act.

The Bamberger Railroad is an electric railroad operating 36 miles between Ogden and Salt Lake City, points which are also served by the Union Pacific and the Rio Grande. Through routes and joint rates exist on traffic moving to and from points on the Bamberger and from and to

points in the excluded territory via the Bamberger, Ogden and the Union Pacific. However, through routes and joint rates do not exist on traffic moving between the same points over the Rio Grande (R. I, 117). The Commission stated that "it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande" (Neb. R. 73).

The decisions of the district courts

The Colorado Decision. The Rio Grande brought suit in the Colorado district court, seeking to set aside the Commission's order principally on the grounds that (1) the Commission erred in finding that through routes are not in existence via Ogden and the Rio Grande between points in the excluded territory, on the one hand, and the Colorado common points and points east, on the other, and (2) that the refusal of the Union Pacific and its connecting lines to establish competitive joint rates on traffic moving via Ogden and the Rio Grande constituted a violation of Section 3 (4) of the Act. The Colorado district court held that the through routes in question were already established (Col. R. 290, 292). Concluding that the Commission's holding to the contrary had prejudiced the Rio Grande's case (Col. R. 288), the Colorado court remanded to the Commission so that it might determine

whether broader relief should be granted (Col. R. 292).

The Nebraska Decision. The Union Pacific and its connecting lines brought suit in the Nebraska district court, seeking, on various grounds, to set aside the Commission's order insofar as it directed them to establish through routes and joint rates with the Rio Grande. The Nebraska court sustained the Commission's order establishing through routes and joint rates over the Rio Grande for particular commodities, in carloads, originating in the excluded territory "consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad" (Neb. R. 167). The court also sustained the Commission's order as to shipments of marble and granite monuments from points in Vermont and Georgia to points in the excluded territory "which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest [excluded] area" (*ibid.*). Thus, the Nebraska court modified the Commission's order insofar as the order required the establishment of through routes and joint rates on shipments of the specified commodities which do not require unloading or in-transit privileges on the Rio Grande.

The Nebraska court also sustained (Neb. R. 164) that portion of the Commission's order (Neb. R. 74) which found that—

> the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

SUMMARY OF ARGUMENT

I

The Commission found that through routes are not in existence over the Union Pacific and the Rio Grande railroads via the Odgen gateway, between points in the excluded northwest territory and eastern points. Therefore, it approached this case (in which the Rio Grande sought joint rates with the Union Pacific on all through traffic susceptible of movement via the gateway) as one requiring, initially, application of Section 15 (4)—a section which provides that where the establishment of an alternate through route will short haul one of the carriers directed to participate therein (the Union Pacific's situation here) the Commission must determine that certain conditions exist before it may prescribe the new

route. The Commission made ultimate findings meeting the requirements of Section 15 (4). Specifically, it determined that establishment of the prescribed through route for carriage of certain designated commodities was necessary to provide adequate and more economic transportation. The Commission then determined that the establishment of competitive joint rates for these designated commodities, moved over the prescribed alternate route, was necessary and desirable in the public interest—a determination meeting the requirements of Section 15 (3).

The Rio Grande challenged the Commission's order in the Colorado district court because of the Commission's failure to grant broader relief. That court concluded that the Commission had erred in failing to consider the Rio Grande's application free of the limitations imposed by Section 15 (4). In the court's view, a through route via the Ogden gateway already existed and Section 15 (4) was accordingly inapplicable.

A through route, in the statutory sense, does not exist merely because there is a physically practicable route. Carriers are obliged to provide interchange facilities with other lines and to forward and deliver traffic to such other lines. But compliance with this duty does not entail abandonment of a trunk line's right to maintain its long haul as against other carriers which would operate a bridge line and deprive the trunk

line of a portion of that haul. Congress has zealously sought, over the course of many years, to preserve and protect trunk lines against unnecessary short hauling. This is the function of Section 15(4). See *Thompson* v. *United States*, 343 U. S. 549, 555–560.

In short, a route which is physically open may be, for all practical purposes, closed by virtue of the existence of commercial barriers. The fact is that the trunk lines protect, and have already protected, their historic through routes by failing or refusing to join in the adoption of through or joint rates with the numerous lines which are, at one point or another, in a position to serve as bridge lines. Such refusal makes use of the alternate routes more costly and hence non-competitive.

The question decided by the Colorado court was not whether the Ogden gateway should be opened by action of the Commission (and, if so, to what extent). That court decided, in substance, that the Union Pacific, by voluntary action, had already waived the protection afforded by Congress in Section 15(4). We submit that such a waiver is not to be lightly implied. And it should not be implied unless there is a holding out by the trunk line, manifested by conduct which is unequivocal or by a course of business which is fairly representative, to participate in through service over the alternate route. This view finds support in the *Thompson* case, *supra*, though, concededly,

that case is distinguishable on its facts. See, also, *United States* v. *Great Northern R. Co.*, 343 U. S. 562, 574–575.

Special wartime routings and emergency diversions aside, more than 99 percent of the traffic which the Rio Grande seeks the opportunity to carry under joint rates competitive with the Union Pacific's rates has been heretofore moved via the Union Pacific's routes. This is so because even those shippers who would have good reason, all other things being equal, to prefer the Union Pacific-Rio Grande route for particular shipments (*e. g.*, because of the availability of a desired in-transit service at facilities located on the Rio Grande) are deterred by the fact that the combination of local rates which must be paid when the traffic is so routed is prohibitively high. A very small fraction of one percent has moved over the two-carrier route. The Union Pacific has never solicited such traffic (though it has accepted it on through bills pursuant to requests by shippers or other carriers). It appears, moreover, that some or all of this insignificant amount of traffic was routed over the Union Pacific-Rio Grande route because certain individual shippers erroneously assumed that the rates covering transportation via that route were the same as the rates via the Union Pacific routes.

The Commission found that these sporadic and isolated shipments were not sufficient to show a

holding out by the Union Pacific to join in a through route with the Rio Grande and that they were in no sense representative of the Union Pacific's course of business. A detailed examination of the subsidiary findings and evidence upon which this ultimate finding was rested shows that it has a substantial basis. The Colorado court accordingly erred in setting this finding aside and in substituting its independent judgment.

II

In a suit, brought by the Union Pacific (grounded on the contention that the Rio Grande is not entitled to any relief), the Nebraska district court modified the Commission's order. We take issue with that modification insofar as it narrows the measure of relief granted by the Commission in relation to the carriage of designated agricultural commodities (fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs). In other respects, we do not challenge the decision.

The Commission's order directed, *inter alia*, the establishment of through routes and competitive joint rates for the eastbound carriage, via the Ogden gateway, of the above-named agricultural products. This was rested upon an ultimate finding that establishment of such routes and rates was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation * * *."

The Commission's reason for granting the relief in question fall into two categories, the one having to do with in-transit privileges, the other with reconsignment privileges.

Shippers of the designated agricultural commodities are faced with the need of procuring various types of in-transit services (washing, sorting, processing, etc.) while their produce is en route to market. The privilege of stopping carloads in transit for the purpose of securing such services is afforded by the Rio Grande. Many classes of shippers having need for these services are prevented, however, from making use of the facilities and privileges which are available on the lines of the Rio Grande, because, in the absence of joint rates between that railroad and the Union Pacific, the commodities can subsequently be reshipped to eastern markets only at prohibitively high combination rates. Similarly, processors and dealers served only by the Rio Grande are prevented from participating in the marketing of such commodities.

There is further and distinct need on the part of the shipping public in connection with the marketing of the designated commodities. They are perishable or semi-perishable commodities. Moreover, the markets to which they are shipped are fluid, prices being subject to rapid fluctuation. Shippers and dealers customarily meet the special economic problems

incident to trading in these markets by taking advantage of the reconsignment privileges which the railroads widely extend. The ability of shippers and dealers to participate fully and effectively "in the widespread system developed for the marketing of such commodities", necessarily depends upon the availability of numerous and flexible routing arrangements. Thus, if there is a sudden need, because of a shift of market conditions, to reconsign a shipment which has reached a point at which combination rates, rather than joint rates, apply, it may be necessary to dispose of the produce at forced or distress prices. Reconsignment in this situation may be unavailing because the shipper will probably be unable to meet the competition, at other points, of those who have obtained the advantage of joint through rates. The Commission found that numerous shippers of agricultural commodities originating in the excluded northwest territory are being deprived of effective participation in the marketing system because of the absence of joint rates via the Union Pacific and the Rio Grande to markets beyond the Rio Grande—a lack which precludes their use of reconsignment privileges which the Rio Grande extends. In this respect, also, the Commission found that the Ogden gateway should be opened in the interest of providing adequate and economic transportation.

The Nebraska court held that the Commission might appropriately consider the shipping public's need for in-transit services in determining whether existing transportation is adequate and economic. However, the court ignored the important factor of reconsignment privileges. The modification which it effected by its order reflects its consideration of the one factor and its failure to consider the other. Thus, the court's order upheld through routes and joint rates on the agricultural commodities in question when routed from points in the northwest area to initial points of destination on the Rio Grande for the purpose of obtaining in-transit services at those points. But, under the decision, joint rates on these same commodities will not be available in other circumstances.

The Nebraska court thus held, correctly we believe, that the concepts of adequacy of transportation and economy of transportation embrace the needs of the shipping public, and that, given such needs, the Commission may open up an alternate route, even though the carrier which will be thereby short hauled performs an efficient service on its own line. *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, 592–593. The court erred, however, in taking account of the needs of particular shippers for in-transit services while ignoring the no less pressing need of many shippers for reconsignment privileges from which

they are presently excluded by the lack of competitive rates. An examination of the Commission's subsidiary findings and of the evidence shows that this difference in treatment, on the part of the court, whether it was intentional or inadvertent, was unwarranted. The record demonstrates that both types of need exist and that the Commission's order, so far as it relates to the designated agricultural commodities, should not have been narrowed.

ARGUMENT

Introduction

A single order of the Interstate Commerce Commission is involved in these appeals. In its principal aspects, that order requires the Union Pacific and the Rio Grande railroads to establish through routes and joint rates for the carriage, between specified territories, of certain designated commodities (chiefly livestock and perishable agricultural products). The practical effect of the order is to establish rates for those commodities, when carried over the opened route, which will be competitive with the prevailing rates on such traffic when carried over the Union Pacific routes (*i. e.*, when carried without participation by the Rio Grande).

The order involved is narrower in scope than the relief sought by the Rio Grande, which had petitioned the Commission to establish joint com-

petitive rates on *all* commodities moving to and from the so-called excluded territory. It is broader than the Union Pacific desired, since it has been that carrier's position that the Commission lacked basis for prescribing through routes and joint rates with the Rio Grande in respect of *any* commodity.

Both carriers sought relief from the Commission's order, though in different forums. In the suit brought by the Rio Grande in Colorado, the district court held that the Commission had erred in concluding that through routes did not already exist. Holding further that this prejudiced the Rio Grande's case before the Commission, that court remanded to the Commission so that it might determine, "free of any of the limitations imposed by § 15 (4) with respect to establishing through routes" (Col. R. 294), whether the Rio Grande was entitled to the full relief which it had sought.

In the suit brought by the Union Pacific before the Nebraska district court, there was, of course, no challenge by the complainant to the Commission's determination that through routes did not already exist. The claim, rather, was that the evidence and findings did not meet the statutory criteria which must be satisfied before such routes and rates may be established by the Commission. The court found that the evidence and findings supported the Commission's order only in part, and it modified the order accordingly.

Since it was a premise of the Commission's order that through routes for the carriage of the commodities in question were not already in existence, we consider that issue first.

I. The Commission correctly held that through routes are not in existence over the Union Pacific-Rio Grande via the Ogden Gateway

A. The statutory criteria

The Commission held (Neb. R. 33) "that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation."[7]

[7] It also stated, in similar vein (Neb. R. 29-30):

"The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15 (3) and (4) of the act. As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess."

"Through routes," as used in the Interstate Commerce Act, is a term of art. While a through route presupposes physical interconnection between two carriers, the mere connection of two carriers does not show that a through route exists in the statutory sense. Indeed, it is plain that connecting carriers are not subject to the duty of forming through routes in any and all circumstances. *Thompson* v. *United States*, 343 U. S. 549, 553–558. Thus, Section 1 (4) of the Act significantly states that "It shall be the duty of every common carrier * * * to establish *reasonable* through routes with other such carriers * * *" (emphasis added). Carriers are also required to afford reasonable facilities "for the interchange of traffic" with connecting lines and "for the receiving, forwarding, and delivering" of traffic to those lines. Section 3 (4). The duty to interchange and forward, however, falls short of a duty to join in a through route.

The existence of a through route requires, in addition to physical interconnection, that "the participating carriers hold themselves out as offering through transportation service," *Thompson* v. *United States*, *supra*, at 557. Such a "holding out" is most readily and unequivocally manifested when two connecting carriers, by voluntary action, publish rates, whether they be joint rates or so-

called proportional rates,[9] which are less than the aggregate of their respective local rates.[9] It may also be clearly manifested by other conduct, such as open solicitation of through traffic to be carried over a particular route.

The many existing through routes in this country have been established largely by voluntary action of the carriers. See *Thompson*, *supra*, at 554. In the simplest situation, *e. g.*, where railroad A has trackage between points 1 and 2, and railroad B has trackage between points 2 and 3, the railroads invariably offer in unequivocal terms a through service between points 1 and 3. Quite frequently they publish a rate for such transportation which is lower than the aggregate of the local rates between points 1 and 2 and points 2 and 3.[10]

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[9] In *United States v. Great Northern R. Co.*, 343 U. S. 562, 566, n., the Court stated: "When a through rate consists of a combination of rates for intermediate distances, the rate for one segment of the shipment is referred to as a proportional rate where * * * that rate is lower than the local rate over that segment."

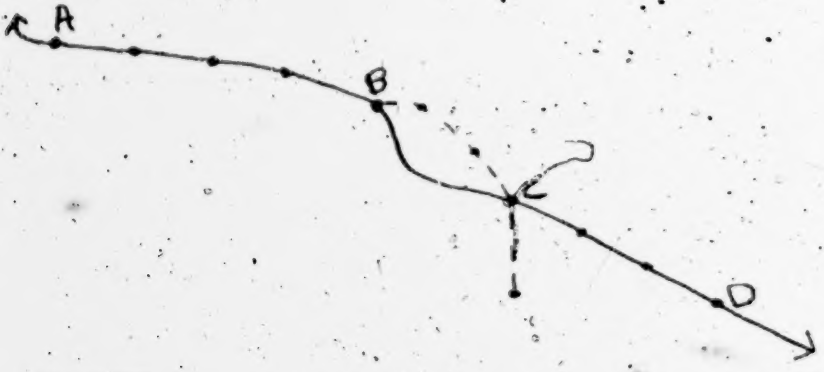
[9] Here, as we note *infra*, a shipper routing traffic over the Union Pacific-Rio Grande route would have been obliged to pay a combination rate consisting of the aggregate of the local rates, and such rate would have been far higher than the joint rate available over the Union Pacific routes.

[10] Of course, charging a combination of local rates would not disprove the existence of a through route. Existence of such a route might also be inferred from movement of a substantial amount of traffic on through bills of lading. Thus, this Court observed in *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 139:

"A 'through route' is an arrangement, express or implied,

The vexing problem—one which has occupied the attention of the Congress, the Commission, and the courts for a good many years—is presented by the situation where there are alternate physical avenues available over which traffic may be routed.

This situation may be illustrated by a simple diagram.



between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through route' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. * * *"

The Commission decision in *Through Routes and Through Rates*, 12 I. C. C. 163, 166–167, to which this Court referred in the *St. Louis Southwestern* decision, stated that the existence of a through route is a "question of fact" and that "such incidents as the billing, the transfer from one carrier to another, the collection and division of transportation charges * * * and other like incidents of the transaction may properly be depended upon for guidance as to the existence of a through route."

The carrier represented by the solid line, we shall suppose, is a trunk line operating between A and D and points beyond. It has a junction at B and C with a short line, represented by the broken line. Let us assume that the short line, quite naturally, would like to share in hauling, between points B and C, eastbound traffic moving on the trunk line from A toward D and westbound traffic moving on that line from D toward A. Let us assume further, however, that the trunk line, also quite naturally, wishes to avoid giving up a part of its long haul and that it quotes through rates for this traffic moved via its lines while refusing to establish competitive through or joint rates on such traffic moved via the short line. May the Commission, in such circumstances, compel establishment of a through route and competitive joint rates on such traffic moved via the short line's tracks?

On this point, Congress has spoken in Section 15 (3) and (4) (*infra*, pp. 91–94). Under Section 15 (3), Congress has granted the Commission the broad power to establish, "whenever deemed by it to be necessary or desirable in the public interest," through routes and joint rates. This power, however, is qualified by Section 15 (4).

The latter provision states in substance that a carrier shall not be compelled to participate in a through route where the effect will be to short

haul if," unless (a) the existing route is unreasonably long (not the situation in the instant case) or (b) "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation."[11]

In the instant case, the Commission found that, so far as transportation of the particular designated commodities was concerned, it was necessary and desirable in the public interest, in order to provide adequate and more economic transportation, to prescribe the establishment of through routes and competitive joint rates. The Colorado court held, however, that the Commission erred in considering Rio Grande's application in terms of ability to meet the criteria stated in Section 15 (4). It was that court's view that the Union Pacific, by voluntary action, had engaged in a course of conduct which evidenced consent to the creation of a through route with the Rio Grande and that accordingly the question

[11] Short-hauling, in the words of Section 15 (4), is to "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route."

[12] Additional provisos in Section 15 (4) are not immediately pertinent. A brief history of the evolution of the so-called short-hauling provisions is found in *Thompson v. United States*, *supra*, at 554–557.

before the Commission should have been decided exclusively by reference to the criteria stated in Section 15 (3), free from the limitations imposed by Section 15 (4).

On this aspect of the case, the question may be restated as follows: What course of conduct sufficiently establishes that a carrier has consented to establishment of a through route? Or, otherwise phrased, when does a carrier waive the protection against short hauling which Congress has carefully written into Section 15 (4)?

Thompson v. United States, supra, was a case in which the trunk carrier quoted through rates on traffic originating on or destined for an intersecting short line when such points were not also served by the trunk line. The essential situation there presented may be stated in terms of the diagram appearing above. Let us suppose that the trunk line pictured in the diagram offered through service from A to B and thence, via the short line, to points on the short line falling short of and not including C. Such a holding-out, *Thompson* teaches, does not constitute an offer to provide through service via the short line as between points B and C.

In the instant case, unlike *Thompson*, *some* traffic (a small fraction of one per cent) actually moved via the Rio Grande between the equivalents of points B and C (that is, moved between excluded territory and common points or be-

yond). This led the Colorado district court to conclude that a through route was already open. But this Court, in *Thompson*, did not hold that if some traffic had moved between B and C it would necessarily follow, irrespective of the amount of the traffic and of the circumstances under which the transportation was performed, that a through route was open—a question which it had no occasion to reach. The Court did indicate, quite clearly we believe, that whether a carrier had acted in such a manner as to hold out through service would depend upon whether the carrier's "course of business" (343 U. S. at 557) negatived or affirmed a readiness to join in through service with the other carrier concerned. The Court's opinion also reflects approval of the Commission's expressed view that a determination whether the routing of shipments over lines of two connecting carriers manifests a holding out to perform through service depends upon an evaluation of all the incidents of the transportation (*ibid.*).[23]

The difficulty in stating categorically whether a through route exists in a particular case inheres, then, in this circumstance: a route physically

[23] In *Thompson*, p. 557, n., the Court also referred to *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, as a case in which "the Commission held that proof of one shipment on a through bill of lading over a certain route was not sufficient to show the existence of a through route because that one shipment was not representative of the carriers' course of business."

open and available for the performance of a through service may be, practically speaking, closed (or virtually closed) by reason of commercial barriers. There are, for example, literally countless routes by which an ingenious shipper might specify the carriage of a carload of goods from New York to Chicago; provided, of course, he were willing to pay an aggregate of rates far higher than the through rate he might enjoy by accepting carriage over an ordinary, established through route. To establish that some shipments have moved between New York and Chicago over many of these variant, physically open routes would not establish that those routes are, in any meaningful sense, open through routes. The simple truth of the matter is that the trunk lines protect, and have always protected, their historic through routes by failing or refusing to join in the adoption of through or joint rates with the numerous lines which are, at one point or another, in a position to serve as bridge lines and to deprive the trunk carriers of their long hauls.[7]

[7] The views expressed in this paragraph are not in conflict, as the district court apparently believed (4 Col. R. 291), with *Virginian R. Co. v. United States*, 272 U. S. 658. There it was held that a through route existed despite the fact that it was commercially closed to some of the lines located in the origin territory, but only because the route was open to numerous other lines similarly situated. See the reference to the *Virginian* case in *Thompson v. United States*, *supra*, at 560, n.

The Commission's view, as expressed in its report (Neb. R. 32), is that sporadic and isolated shipments which take place over a route despite the existence of commercial barriers—shipments which occur for special reasons and in exceptional circumstances, such as ignorance or inadvertence, or unusual and transitory needs, on the part of a few individual shippers who specify abnormal routing—do not show, in and of themselves, that a through route is open. The Commission must consider the totality of circumstances in order to determine what is truly representative of the carriers' course of business. It is also the Commission's view that if a trunk line opens a route for carriage of a particular commodity by quoting a through rate on that commodity in recognition of the fact that special needs of a particular class of shippers justify abnormal routing of that particular commodity, it does not follow that there is an existing through route open for carriage of other commodities as to which the carrier does not purport to make through service available.[15]

These views find full support in the statutory scheme, for to hold otherwise would necessarily

[15] As noted, *infra*, the Union Pacific voluntarily quotes through rates with the Rio Grande on sheep and goats. Note, also, that the Commission has, on various occasions, prescribed through routes on a single commodity without opening those routes to all commodities. See, *e. g., D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I. C. C. 333; *Adriance Irvain Co.* v. *Ann Arbor R. Co.*, 276 I. C. C. 334.

tend to undermine the protection which Congress has so zealously sought to preserve for a carrier's long hauls. See *Thompson, supra*, pp. 554–557. Moreover, as this Court emphasized in *United States* v. *Great Northern R. Co.*, 343 U. S. 562, the Commission's power to alter the patterns of traffic and to divert the flow of traffic from one route to an alternate physical route (by means of prescribing through routes and joint rates) is more circumscribed than its power to divert revenues (by means of prescribing joint rates and divisions thereof) as between two carriers which already participate in a through route.[16]

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[16] The *Great Northern* case turned on a proviso which appears in Section 15 (4) (*infra*, p. 93) and reads as follows:

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

This language, the Court held, did not bar the Commission, in a case involving two carriers (one a feeder and the other a trunk line) which had an existing through route, from prescribing joint rates and divisions thereof for the purpose of providing financial assistance to the feeder line. Had no through route existed, however, the Commission could not have prescribed such a route with a view to accomplishing that purpose. The Court observed that "[i]t is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier." 343 U. S. at 574.

It follows that when the Commission proposes, by rate-making, to divert substantial traffic from the route over which it normally moves to a route over which it does not ordinarily flow, it must find, preliminarily, one of two things: it must find, on the basis of clear and persuasive evidence, that a through route already exists; or it must find, if it concludes that there is no existing through route, that the conditions specified in Section 15 (4) are satisfied and that such a route may be properly prescribed. It may not lightly set aside the protection provided trunk carriers by Section 15 (4). *Great Northern, supra,* at 574–575.

With these criteria in mind, we turn to the question whether the Commission, on the particular facts and findings in this case, properly concluded that a through route was not already open and that Section 15 (4) accordingly applied. We add only that the Commission's judgment on that question, largely factual in nature, is plainly entitled to great weight and should not be disturbed unless found to be arbitrary. Cf. *Board of Trade* v. *United States,* 314 U. S. 534, 546–548.

B. The application of the statutory criteria to the facts of this case

In the instant case, the Commission held that the existence of through routes was not established by proof of the following: (1) 37 eastbound carloads of commercial shipments, in 1948, from the excluded territory, via Ogden and the

Rio Grande, to points in Utah and Colorado served by both the Union Pacific and the Rio Grande, and 18 westbound carloads of commercial shipments, in 1948, from points east of Colorado, via the Rio Grande and Ogden, to the excluded territory; (2) the Rio Grande's diversion of freight traffic from regular through routes in which it participated, to the Union Pacific; via Ogden or Salt Lake City, pursuant to service orders of the Commission issued during World War II; (3) World War II movements of troops and military supplies from the east and south to destinations in the northwest (excluded) area via Rio Grande-Ogden-Union Pacific; or (4) temporary, emergency diversions, because of snow conditions, from the Union Pacific to the Rio Grande, via the latter's Denver and Utah gateways, of traffic to and from the excluded territory.

During the representative year 1948, only a total of 55 carloads of commercial shipments moved eastbound and westbound at combination rates, over the Rio Grande, to or from points in the excluded territory, on the one hand, and the Utah or Colorado common points (or beyond), on the other. There is no evidence that any one of these shipments via the Rio Grande was solicited for movement over the Rio Grande by the Union Pacific or any of the connecting carriers with which it maintains through routes and joint rates. To the contrary, there is substantial evi-

dence that all or some of these shipments via the Rio Grande, at combination rates higher than the joint rates applicable via the Union Pacific, were so routed over the Rio Grande through the ignorance or inadvertence of shippers or originating carriers (Statement, *supra*, pp. 14–15). Obviously, shipments routed via the Rio Grande through ignorance or mistake by shippers or originating carriers do not constitute a "holding out" by the Union Pacific of a through transportation service with the Rio Grande. The routing of these 55 carload shipments via the Rio Grande is not to be regarded as a "course of business" on the part of Union Pacific, since, as the Commission noted (Neb. R. 32), these isolated shipments must be "compared with many thousands in both directions in the same year [1948] from and to the same points at the joint rates over the Union Pacific routes."

Such isolated commercial shipments are in the same category as the isolated shipment which, in *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, was held to be insufficient proof of the existence of a through route. This principle of *de minimis*, in the determination of the existence of a through route apparently was approved by this Court in the *Thompson* case. Its application by the Commission to the facts of this case is reasonable.

During World War II, substantial shipments from points in the south and east were initially

routed to points in the northwest (excluded) territory via Rio Grande-Ogden and carriers other than the Union Pacific (such as the Southern Pacific). Pursuant to wartime service orders of the Interstate Commerce Commission and the Office of Defense Transportation, Rio Grande diverted many of such shipments to the Union Pacific at Salt Lake City or Ogden. These shipments were diverted by Rio Grande and were accepted by Union Pacific under compulsion of law. They do not represent an agreement between carriers for the establishment of through routes, as contemplated by Section 1 (14) of the Interstate Commerce Act. Similarly, the mandatory diversion or interchange of such shipments did not manifest any "holding out" or "course of business" by the Union Pacific to maintain through routes with the Rio Grande via Ogden. As the Commission concluded, such interchanges under governmental compulsion "show only that the Rio Grande routes were physically practicable" (Neb. R. 32), and have no bearing, under the *Thompson* case, on whether "through routes" are in existence.

No greater significance attaches to the initial routing and movement via Rio Grande-Ogden-Union Pacific of mixed trains of troops and military supplies from the south and east to points in the excluded area. These were wartime emergency movements, the routing of which was actually beyond the control of either carrier.

In February 1949, snow conditions on Union Pacific's main line through Wyoming forced it to divert to the Rio Grande, through Ogden on the west and Denver on the east, freight and passenger traffic from and to the excluded territory. However, it is clear that such diversion by the Union Pacific, and the acceptance and delivery of such diverted traffic by the Rio Grande, represented no more than the cooperation in emergencies which is happily commonplace in American transportation. Moreover, it was done under the actual or potential compulsion of the Commission's emergency powers under Section 1 (15) and (16).

We submit that the Colorado district court erred in finding, on the basis of the isolated or emergency shipments discussed above, a "continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at through combination rates, without objection of the Union Pacific or participating railroads, * * * although the volume of traffic involved is comparatively small" (Col. R. 288). In arriving at this conclusion, the district court relied upon statements of Union Pacific representatives that shippers had the right to specify routing via the Rio Grande at combination rates to and from the excluded area. From this, the district court concluded that through routes must be in existence, on the theory that under Section 15 (8) of the Act a shipper

can specify routing only over an existing through route (Col. R. 288).

We believe that the district court's analysis overlooks economic realities. As the Commission found (Neb. R. 32), the Union Pacific's "whole course of conduct * * *, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic." Under these circumstances, Union Pacific's acceptance of isolated shipments on bills calling for routing over the Rio Grande hardly proves a "holding out" that it maintains through routes with Rio Grande. Moreover, there was evidence that such shipments via the Rio Grande were routed by shippers or originating carriers who did not know that joint rates did not apply on the Rio Grande (Statement, *supra*, pp. 14–15). There was no evidence that any of these shipments were made by a shipper who was aware that routing via Rio Grande would be at the higher combination rates.

Similarly, we think that the Colorado district court erroneously concluded from the fact that Union Pacific maintains through routes and rates with the Rio Grande on shipments of sheep and goats that through routes existed for commodities generally. The establishment, either voluntarily or pursuant to an order of the Commission, of a through route for a particular commodity, in recognition of a special need of shippers, does not

create a through route for commodities generally (see *supra*, p. 66). It is not a "holding out" to maintain through routes on all commodities or to all points. *Thompson* v. *United States, supra.*

The Colorado court also found proof of the existence of through routes in the wartime routings and diversions of traffic and in the emergency routings in February 1949. It reasoned that the fact that "the Commission did not invoke its authority under § 15 (4) of the Act to establish temporary through routes * * * indicates that the Commission assumed that through routes were already in existence" (Col. R. 289).

We submit that it should be completely immaterial whether the Commission established temporary through routes before it directed such wartime and emergency routings and reroutings of traffic. Union Pacific was doubtless aware that if it had raised the objection that neither regular nor temporary through routes were in existence, the Commission would have exercised quickly its powers under Section 15 (4) to establish temporary through routes. Clearly, Union Pacific incurred no legal disability because it cooperated in such wartime and emergency traffic movements.

In sum, the Commission was fully justified, on this record, in finding what every informed commercial shipper has long recognized: that the Ogden gateway is closed to traffic to and from so-called excluded territory.

II. The Nebraska district court erroneously narrowed the scope of relief granted by the Commission's order

A. The factors upon which the Commission relied were appropriate under the Act

The Commission's order (Neb. R. 21) opened up the Ogden gateway so as to permit the carriage at competitive joint rates, via the Union Pacific and the Rio Grande, of various designated commodities (ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs) moved, in carloads, from the excluded northwest territory to other specified territory.[17] This was based upon an ultimate

[17] The Commission's order did two other things as well: (1) it established a through route and joint rates, via the Union Pacific and the Rio Grande, for the carriage of granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area (Neb. R. 22); (2) it directed the Union Pacific to eliminate the discrimination, found violative of Section 3 (4) (*infra*, p. 91), which resulted from maintaining joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad, south of Ogden, on the other hand, while refusing to participate in like rates to and from *the same points* on the Rio Grande (Neb. R. 22).

The Nebraska district court sustained the portion of the order relating to granite and marble monuments as to shipments "which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area" (Neb. R. 167). This limitation is consistent with the Commission's rationale (Neb. R. 51–52), and we do not question its propriety.

In addition, the Nebraska court sustained, without any modification, the direction to the Union Pacific to cease dis-

finding, meeting the requirements of Section 15 (3) and (4), that establishment of such through routes and joint rates was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation * * * " (Neb. R. 73). While various members of the Commission would have ordered relief on a broader scale, *i. e.*, would have included additional commodites, there was no disagreement on the proposition that need for relief in respect of the designated commodities was fully established by the record.

The Commission's reasons for granting the relief described in the preceding paragraph fall into two categories, the one having to do with transit privileges, the other with reconsignment privileges.

Shippers and dealers in the designated commodities have an important need for various types of in-transit services, *e. g.*, the grazing and fattening of livestock, and the preparation and processing of foodstuffs, en route to market. The privilege of stopping carloads in transit for the purpose of securing such services is afforded

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crimination as between the Rio Grande and the Bamberger in relation to points which they commonly serve. The Commission had found that there was no "important dissimilarity" which would justify the Union Pacific's distinction in treatment (Neb. R. 73), and the district court found that "[u]pon this record that factual conclusion may not be disturbed" (Neb. R. 165).

by the Rio Grande. Many classes of shippers having need for these services are prevented, however, from making use of the facilities and privileges which are available on the lines of the Rio Grande, because the absence of joint rates between that railroad and the Union Pacific makes the cost of routing the traffic over the Rio Grande prohibitive. As to such traffic, the Commission concluded, growers and shippers in the excluded territory are deprived of access to the markets represented by processors and dealers who are served only by the Rio Grande and who reship such commodities to points beyond the Rio Grande. Similarly, processors and dealers served only by the Rio Grande are deprived of an opportunity to handle agricultural products from the excluded territory. (Neb. R. 57–60, 70.)

The Commission also found that there is a further important need on the part of the shipping public in connection with the marketing of the designated agricultural commodities. The perishable or semi-perishable nature of these commodities, taken in conjunction with the fluidity of the markets to which they are transported, creates special economic problems which can only be satisfactorily resolved if there is great flexibility in the transportation system. Shippers and dealers customarily meet these economic problems by taking advantage of the reconsignment privileges which the railroads

generally extend. For example, a shipment of produce originating in the northwest may be marked at the outset for a destination in the east but reconsigned, one or more times, while en route, so as to reach a destination, perhaps ultimately in another section of the country, such as the southeast, where it may be disposed of with profit. The ability of shippers and dealers to participate effectively "in the widespread system developed for the marketing of such commodities" (Neb. R. 70)—a system "complex but efficient" (Neb. R. 69)—necessarily depends upon the availability of numerous routing arrangements. Thus, if there is a sudden economic need, because of a shift in supply and demand, to reconsign a shipment which has reached a point at which combination rates, rather than joint rates, apply, it may be necessary to dispose of the produce at forced or distress prices. Reconsignment in this situation may be of no avail because the shipper will probably be unable to meet the competition, at other points, of those who have obtained the advantage of joint through rates. The Commission concluded, in the instant case, that numerous shippers of perishable and semi-perishable commodities originating in the excluded northwest territory are being deprived of effective participation in the marketing system by virtue of the lack of joint rates as between the Union Pacific and the Rio Grande—a

lack which substantially precludes the use by these shippers of reconsignment privileges which the Rio Grande extends. In this respect, also, the Commission concluded that the Union Pacific routes, alone, are inadequate and that the interests of the economy would be served by opening up the Ogden gateway so as to permit participation by the Rio Grande.

The Nebraska district court found that the Commission might appropriately consider the shipping public's need for in-transit services in determining whether existing transportation was adequate and economic. The court's opinion, however, ignores the factor of reconsignment privileges. And the court stated in its findings of fact (Finding of Fact II, Neb. R. 166):

> The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.[18]

[18] See, to similar effect, Conclusion of Law II, Neb. R. 167.

The Nebraska court has held, in short, that if one of the designated agricultural commodities is routed initially to a point on the Rio Grande, so that it may receive certain in-transit service (*e. g.*, processing) at that point, joint rates will apply. They will not apply, however, under the decision, to these same commodities routed over the Rio Grande in other circumstances. Thus, the Commission's order is considerably narrowed and the factor of reconsignment privileges, which was a basic feature of the Commission's rationale, finds no expression in the order as modified. We challenge the court's modification insofar as it bears on the establishment of through routes and joint rates for the designated agricultural commodities.

Before turning to a consideration of the Commission's subsidiary findings and the supporting evidence (which show, we believe, that the court was unwarranted in thus narrowing the order), we would emphasize that, from the standpoint of legal significance under the statute, no distinction can properly be drawn between the needs of shippers for in-transit services and their need for reconsignment privileges. Both, in our view, are factors which may be appropriately considered by the Commission in determining

whether existing transportation is adequate and economic.[19]

Congress has not limited the authority of the Commission to establish an alternate through route to the situation in which the existing route is unreasonably long, or to the situation in which the carrier which operates the existing route is providing inadequate or inefficient service on its own line. The Commission may also direct the establishment of the additional through route (and accompanying joint rates) because such additional route is needed, however efficiently the existing route may be run, to provide "adequate, and * * * more economic, transportation" (Section 15 (4)). Adequate transportation and economic transportation, in other words, are concepts which take into account the broad needs of the shipping public. Indeed, the concept of adequacy of transportation, this Court unanimously held in *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, 592–593, "would seem to apply only to the interest of the shipping public," while the term

[19] We are not suggesting, of course, that the Commission may open up additional routes merely by indulging in the abstract hypothesis that, from the standpoint of flexibility, two are better than one, three are better than two, etc. We rely, as shown *infra*, upon specific findings that specific classes of shippers have substantial present needs for the alternate route which would be provided under the Commission's order.

economic transportation may embrace both shippers' and carriers' interests. Plainly, then, the Commission's recognition, in the instant case, that the Union Pacific provides good service on its own lines is no bar to an order which holds that the needs of certain classes of shippers justify, as to certain commodities, the establishment of an additional through route and of the accompanying joint rates which will make that route accessible.[20]

[20] In the preceding discussion, we have put aside, as we shall in the portion of the brief which follows, the Commission's finding that the failure of the Union Pacific to join in the establishment of joint rates with the Rio Grande has been unduly prejudicial of shippers and receivers of the designated commodities using the Rio Grande and unduly preferential of shippers and receivers using the Union Pacific routes, in violation of Section 3 (1) of the Act (*infra*, pp. 90–91). The district court held this ultimate finding legally insufficient because it was of the view that Section 3 (1) prohibits only preference and prejudice to persons or localities on the lines of the same carriers, and is not applicable if the persons or localities receiving the preference are served by a different carrier than those subject to prejudice. For the reasons summarized in our Jurisdictional Statement in No. 119, pp. 11–12, we believe that the court erred in this respect. However, we find that, in the context of the present case, the central findings which show that members of the shipping public have been prejudiced by inability to use the Rio Grande similarly show that the existing transportation is not adequate or economic. Thus, the result here appears to us to be the same whether the case is analyzed strictly in terms of Section 15 (3) and (4), or whether one looks also to Section 3 (1). For the sake of simplicity of presentation, we turn to an analysis of the facts in terms of Section 15 (3) and (4), stating, at the same time, our conviction that this Court should not approve the view expressed below by the Nebraska court as to the scope of Section 3 (1).

B. The Commission's findings and the evidence justify the through routes and joint rates which it prescribed for agricultural commodities

In directing the establishment of through routes and joint rates on particular commodities moving via the Rio Grande to and from the excluded territory, the Commission recognized specific transportation needs of producers, shippers, dealers, and processors of such commodities.

Livestock. The Commission's findings as to livestock originating in the excluded territory may be summarized as follows: livestock (sheep and cattle) produced in the excluded northwest area are considered desirable for feeding and breeding purposes; good pasture lands for grazing livestock are found in areas in Utah and Colorado served by the Rio Grande; persons in these areas engage in fattening livestock, move livestock to the feeding lots, exercise feeding in-transit privileges, and reship stock, on the balance of available joint rates, to other parts of the country; if feeders of livestock at points served only by the Rio Grande desire to buy for feeding purposes livestock produced in the excluded area, they can only move it to their feeding lots and thence to markets beyond the Rio Grande at combination rates higher than the joint rates available to feeders and buyers served by the Union Pacific; thus, the lack of through routes, with competitive joint rates applicable to such routes, for livestock moving from the excluded

territory via the Rio Grande to eastern markets deprives growers in the excluded northwest area of a market for livestock, and deprives feeders in Utah and Colorado of competitive access to feeding stock from the excluded area. The typical evidence set forth in the statement (*supra*, pp. 20–28) clearly supports these findings as summarized above.

Agricultural products (other than livestock). The Commission found, and the record shows, that fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs are produced in the excluded territory and marketed in other parts of the United States. The growers and shippers of these commodities need access to as many markets as possible. Processors and dealers in such commodities who are located on the Rio Grande find it impractical to receive such commodities for storage, packing and other in-transit services because such commodities can move from points in the excluded territory via Ogden to points served only by the Rrio Grande, and thence to markets east of the Rio Grande, only on combination rates. Such processors and dealers are thus at a competitive disadvantage *vis-a-vis* processors and dealers on the Union Pacific who can receive such commodities from the excluded territory and reship them, after in-transit processing, on joint rates. At the same time, growers in the excluded territory are denied

access to the marketing services and facilities served only by the Rio Grande, while the persons providing such facilities and services cannot participate in the handling of such commodities. (Statement, *supra*, pp. 28–36). Thus, it was shown that to make in-transit services on the Rio Grande practically available on such commodities, it is necessary to establish for them through routes via Ogden and the Rio Grande and joint rates applicable to such routes.

The Nebraska court sustained the Commission's findings as to the necessity for through routes and joint rates via Ogden or Salt Lake City and the Rio Grande so as to make in-transit privileges on the Rio Grande available to shippers and receivers of livestock and the other specified agricultural commodities. Accordingly, it held that the Commission could require the establishment of such through routes and joint rates for carload shipments of such commodities "originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, *which require in-transit privileges incident to reshipment* to points east of Denver, Pueblo and Trinidad" (Neb. R. 167; emphasis added).

Since the evidence with respect to livestock showed only a need for through routes and joint rates in connection with the exercise of in-transit privileges on the Rio Grande, we do not contest

the Nebraska court's restriction of such routes and rates, in the case of livestock, to shipments requiring in-transit privileges on the Rio Grande. However, we contend that, as to the remaining agricultural commodities, the Nebraska court erred in confining the Commission's relief to shipments of such commodities which require in-transit privileges on the Rio Grande. The court rejected or overlooked the importance to shippers of the right to reconsign or divert such shipments while en route—a right which can be exercised usefully only to the extent that joint rates are available.

The Commission found that in the marketing of agricultural commodities (other than livestock) originating in the excluded territory, it is a common practice to reconsign or divert carload shipments while they are in transit as markets are found and sales are made. While such reconsignment privileges exist over most railroads, it is necessary for shippers to use routes over which joint rates apply so that such shipments may be diverted to the new destinations at joint rates rather than at higher combination rates. If the shipment has moved to a point from which its diversion to a new destination can be made only at a combination rate, it must often be sold at that point at a distress price. Such points are known as pocket markets. For example, all points on the Rio Grande are pocket markets

with respect to potatoes shipped on joint rates to such points via Ogden from points in the excluded territory; if a sale is lost upon arrival of a shipment at such a Rio Grande station, it can be reconsigned to a destination beyond Denver or Pueblo only at higher combination rates.

Again, there are substantial markets for Idaho fruits and vegetables in the Central, Southwestern and Southeastern states. The Commission found (Neb. R. 56–57) that

> Carloads moved over the Union Pacific to the Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

This condition arises from the fact that the Union Pacific maintains joint rates on such commodities moving from the excluded territory to the south-

eastern states only on shipments which utilize its long haul to Omaha or Kansas City. Shipments which move into the southwest points over the Union Pacific and its connections via Denver cannot be reconsigned or diverted to southeastern points except at higher combination rates. In that respect, as the Commission found, the "southwestern markets are pocket markets." (Statement, *supra*, pp. 32–33.)

If agricultural products could be consigned at joint rates from the excluded northwest area via Ogden and the Rio Grande to points in Oklahoma and Texas, subject to reconsignment at joint rates to southeastern points, broader and more flexible markets would be available to northwest growers and shippers.

It follows that for shippers of agricultural commodities originating in the excluded territory to be able to exercise reconsignment or diversion rights, there must be established for such commodities through routes and joint rates via the Rio Grande which are not restricted, as required by the decision below, to particular shipments which require in-transit services at points on the Rio Grande.

CONCLUSION

The judgment of the Colorado district court (Nos. 117, 118, 119) should be reversed.

The judgment of the Nebraska district court (Nos. 332, 333, 334) should be reversed insofar

as that judgment narrowed the scope of relief granted by the Commission's order in relation to the carriage, over the prescribed through routes and at the specified joint rates, of the following agricultural commodities: fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs. In other respects, the judgment should be affirmed.

Respectfully submitted.

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MARCH 1956.

APPENDIX

Pertinent Provisions of the Interstate Commerce Act

Sec. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, lo-

cality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 3 (4). All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SEC. 15 (3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or

property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

SEC. 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would

make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

SEC. 15 (8). In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established, as

in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the intitial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

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No. 332

In the Supreme Court of the United States

October Term, 1955

Washington Public Service Commission;
Public Utilities Commissioner of Oregon;
Board of Railroad Commissioners of the State of Montana;
State Board of Equalization and Public Service Commission of Wyoming;
State of Nebraska and Nebraska State Railway Commission,

Appellants,

v.

The Denver and Rio Grande Western Railroad Company.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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Appendix B—Final judgment and decree.

Appendix C—Order of district court overruling and denying motion of these appellants and others for new trial.

Appendix D—Opinion of district court.

Appendix E—Order of district court modifying certain pages of opinion.

Appendix F—Pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 1, **et seq.**

In the Supreme Court of the United States

October Term, 1955

No.————

Washington Public Service Commission;
Public Utilities Commissioner of Oregon;
Board of Railroad Commissioners of the State of Montana;
State Board of Equalization and Public Service Commission of Wyoming;
State of Nebraska and Nebraska State Railway Commission,

Appellants,

v.

The Denver and Rio Grande Western Railroad Company.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

Opinion Below

The report of the Interstate Commerce Commission is found in 287 I. C. C. 611. The opinion of the United States District Court for the District of Colorado was filed January 13, 1955, and has not been reported, but is attached hereto as Appendix D. The opinion, by the court's order entered April 22, 1955, was "modified by

substituting for pages 14, 29, 31, 32 and 36 thereof" rewritten pages bearing the same numbers. Copy of that order and the rewritten pages are attached hereto as Appendix E. The court made no separate findings of fact or conclusions of law.

Jurisdiction

This action was brought in the United States District Court for the District of Colorado by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") against the United States of America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul, suspend and set aside "in part" an alleged "order" issued January 12, 1953 (Appendix A hereto), by the Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co. et al." These appellants intervened as defendants in the district court.

The final judgment and decree of the district court, dated February 1, 1955, was entered February 14, 1955. On April 22, 1955, the district court entered an order overruling and denying a motion of these appellants and others for new trial or reargument and reconsideration. Copies of the final judgment and decree and the order entered April 22, 1955, denying that motion are attached hereto as Appendices B and C.

Notice of appeal was filed by these appellants in the United States District Court for the District of Colorado on June 20, 1955.

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479; *Moffat Tunnel League v. U. S.*, 289 U. S. 113; *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *U. S. v. Great Northern R. Co.*, 343 U. S. 562; *Thompson v. United States*, 343 U. S. 549; (see also *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538).

Statutes Involved

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out in Appendix F hereto:

National Transportation Policy (Preceding Section 1), and Sections 1(4), 3(4), 15(1), 15(3), 15(4), 15(8) and 20(11).

Questions Presented

The following questions are presented by this appeal:

I. Does the Rio Grande, which obtained joint through rates on certain commodities under the Commission's order, have legal standing to seek by a suit to enjoin the order, similar rates on all commodities via all possible routes when the granting of such additional relief is subject to administrative determination of public interest requirements under the Interstate Commerce Act.

II. Did the district court err in holding that Rio Grande sustained "pecuniary injury" and had standing

to maintain this action on the ground that the Commission deprived Rio Grande of additional "pecuniary gain" which would be realized if all the joint rates demanded by Rio Grande had been granted.

III. Did the district court err in holding that Rio Grande need not sustain "pecuniary injury" in order to have a "right to judicial review".

IV. Did the district court err in holding that the Commission's finding that "there are at present no through routes, as that term is used in the act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law.

V. Did the district Court, in connection with its holding that through routes were in existence on the "bridge" traffic sought by Rio Grande, err in failing to consider and give effect to the fact that the primary objective of Rio Grande was to participate in the transportation of products from the northwest states to the eastern and southern markets and that not a single movement of such "bridge" traffic is shown to have occurred over the Rio Grande route.

VI. Did the district court, in connection with its holding that through routes were in existence, err in failing to find that the cancellation of joint rates in 1906 and 1912 effectively closed these through routes in accordance with the understanding and "course of business" of the parties concerned and that the conclusion of the Commission in this regard is supported by legislative amendments in 1940 to section 15(3) of the act.

VII. Did the district court, in connection with its holding that through routes were in existence, err in failing to find as the Commission found, that shippers have a right to route traffic via the Rio Grande and Union Pacific at combination of local rates and that the Union Pacific had no right or duty to refuse shipments.

VIII. Did the district court err in holding that the decision of the Commission as to the existence of through routes "obviously prejudiced the entire proceeding" in view of the fact that the Commission's order established through routes and joint rates upon all commodities that it considered upon the evidence to be necessary in the public interest.

IX. Did the district court err in annulling and setting aside only that portion of the Commission's order which "denied relief to the Rio Grande" upon its holding that the Commission's finding as to through routes "obviously prejudiced the entire proceeding".

X. Did the district court err and exceed its powers in making findings of fact favorable to Rio Grande and in ordering the Commission to proceed "in conformity with the opinion and judgment of the court", and the "instructions" therein.

Statement

The Rio Grande's complaint to the Commission demanded that joint rates, in lieu of the present combination of local rates, be established via its line "the same" as joint rates maintained over shorter through routes by the Union Pacific and other defendant railroads named in the complaint for about 172,000 carloads of traffic.

moved annually by those railroads for more than 75 years between points in the northwest area and points in the eastern and southern parts of the country described in the order. The combination rates via the Rio Grande are substantially higher than the joint rates maintained over Union Pacific routes. The Rio Grande's President testified that its purpose in filing the complaint was to improve its financial condition by diverting this traffic from Union Pacific routes for a "bridge" haul over its line.

The order issued by the Commission requires that the Union Pacific and over 200 other railroads establish through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert over its line, short-hauling the Union Pacific routes at least 925 miles and subjecting the Union Pacific and other lines to large revenue losses.[1]

But the Commission did not order through routes and joint rates on about two-thirds of the traffic, and it is for the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, that the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include the remaining two-thirds of the traffic in the order it issued. Such failure is not embraced in the order issued or in any "order" of the Commission.

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[1] The validity of the order issued is now before this Court in Nos. 117, 118, and 119, appeals docketed May 31, 1955, from the final decree of the United States District Court for the District of Nebraska.

The case presents the novel and unique situation of an admitted attempt by the Rio Grande through judicial proceedings to further enhance its financial gains by diverting to its longer line for a "bridge" haul, traffic that originates or terminates on the railroads that have the shortest, fastest and most efficient routes and lowest rates between the points at which the traffic originates and points of its destination.

The Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line for the traffic it seeks, and that the short-hauling prohibition in Section 15(4) was not applicable. It demanded that the lower joint rates maintained over the existing Union Pacific routes be made applicable via its line, and contended that refusal of the defendants named in its complaint to make the joint rates applicable via its line discriminated against it. The Commission held that through routes via the Rio Grande did not exist for the involved traffic but found they were necessary in the public interest to provide adequate and more economic transportation for certain commodities named in the order, and required that joint rates "the same" as maintained over existing Union Pacific routes be made applicable via the Rio Grande to those commodities. The Commission found that the evidence failed to prove the alleged discrimination against the Rio Grande and concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained." The order issued does not, in terms, deny or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks by this suit to divert to its line.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to the traffic it seeks to divert to its line for its financial gain, it has no standing to maintain the suit. The court reversed the Commission and held that through routes via the Rio Grande do exist for the involved traffic, that the Commission had erred as a matter of law and upon the evidence in finding that through routes via the Rio Grande did not exist, and that this finding "prejudiced the entire proceeding" before the Commission. The court, again reversing the Commission, held that the evidence proved discrimination against the Rio Grande, and enjoined and annulled "the order" insofar as it denied and withheld relief from the Rio Grande, and "remanded" the case to the Commission for further proceedings in conformity with the court's opinion, but *only* insofar as the Commission "denied and withheld relief" to the Rio Grande.

These five states, representing territory served by long established Union Pacific routes from the Missouri River to the Pacific northwest, oppose Rio Grande proposals to short haul the shortest, swiftest and most economical route to eastern and southern markets, by requiring Union Pacific and over two hundred other railroads to enter into joint through rates with the Rio Grande whose admitted objective is to divert this traffic, primarily from the Union Pacific, in order to obtain a "bridge" haul and thereby improve its financial position. According to Rio Grande the "potential" volume of such traffic moving from the northwest to the east

and south, which would be "available for solicitation", amounts to 101,476 carloads annually.[2]

Being distant from the principal markets, the economic life of the northwest depends upon fast, efficient, low cost transportation. Present transportation facilities and routes to and from this area are more than sufficient and Union Pacific alone is shown to possess an unused transportation capacity of 85%. Piling on additional surplus facilities and unneeded routes, will, in the opinion of these states, adversely affect the economic future of this territory and violate the manifest policy and intention of Congress.[3]

The present through route provisions of the Act were adopted in 1940 in order to make the "shortest,

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2 As indicated by the Commission, (287 I.C.C. 631) the bulk of the traffic sought constitutes agricultural and mineral products of the northwest, which (p. 623) now travel via Union Pacific "because the Union Pacific routes are shorter." The reverse movement west comprises only 56,286 carloads annually and was given little emphasis by Rio Grande. The only westbound articles included in the order were "granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations" in the northwest (p. 659).

The traffic east and the traffic west are entirely independent of each other and should have been so considered. The Commission's order which the Court annulled in *United States v. Mo. Pac. R. Co.*, 278 U.S. 269, 273, involved only the establishment of "through routes for west bound freight traffic."

3 Congressional policy since 1920 has stressed as paramount economy and efficiency in transportation facilities. *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U.S. 266, 277. The 1940 declaration of Congress (49 U.S.C. preceding § 1) emphasizes "adequate, economical and efficient service" and this declaration controls the "basic power of the Commission." *American Trucking Assns. v. U. S.*, 344 U.S. 298.

quickest, and cheapest routes available." Union Pacific routes meet these tests.

Ordinarily requests for new routes are justified as "needed" and involving "more efficient or more economic" transportation by showing that they are shorter than existing routes. The Rio Grande routes sought herein are unique in that they would short haul the short route by substituting an uneconomic, wasteful, slower route from 33 to 219 miles longer which must go up and down many of the highest mountains in the country.[4]

Long experience has demonstrated to these states that the fantastic wastefulness involved in Rio Grande proposals would ultimately be saddled upon the public

4 Report No. 404, Senate Bill 1261, 75th Cong., 1st Session, page 2. Congressional Record, pp. 6055-6056. 287 I.C.C. 655.

5 At page 648, the Commission reviews some of the proof showing the Rio Grande to be "less favorably situated," and at page 656 it finds that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein." The full impact of wastefulness established beyond dispute by the record is not reflected. This shows that the Rio Grande "has no value as a service route" (R. 1163, 1319); that curvature is so great a train completes a circle every 5.45 miles and requires 51% more effort (Ex. 12, p. 9), at a cost of $124.33 per car (Ex. 15, p. 7; Ex. 53, p. 3), and that freight car days are wasted.

In *Texas v. United States*, 292 U.S. 522, 530, the Court said it is a "primary aim" of present transportation policy of Congress "to secure the avoidance of waste." One of the long expressed purposes of Congress has been to eliminate this kind of "cut-throat" competion. *United States v. Louisiana*, 290 U.S. 70, 74.

In this connection it is significant that practically all shipper witnesses of Rio Grande, including the U.S. Department of Agriculture, supported their position on the ground that notwithstanding the mandate of Congress against short hauling existing routes, all gateways should be opened and unlimited cross-hauling should be the rule.

and shippers of these states." This local marginal mountainous railroad should not be permitted to force its admittance into the transcontinental railroad systems which this region must support.

The overwhelming public detriment that these states and their communities may suffer under Rio Grande proposals includes: (1) reduction in existing service, (2) abandonment of branch lines, (3) waste of present and adequate facilities, (4) increases in unit costs, and (5) destruction of long established channels of trade and commerce.[7]

The differences in rates which Rio Grande now experiences merely reflect differences in transportation conditions which have always characterized sound transportation regulation and practices.[8]

It is clear that what Rio Grande seeks in this proceeding, a rate advantage by circumventing the requirements of the Act, is not appropriate under the Act and is

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6 As noted by the Court in *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U.S. 266, 270, "when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

7 This Court has said that it "could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing." *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U.S. 197, 211.

8 *Barringer & Co. v. U.S.*, 319 U.S. 1, 9. *Brown Lumber Co. v. L. & N. R. Co.*, 299 U.S. 393, 396.

The Act was "not intended to ignore the principle that one can sell at wholesale cheaper than at retail." *Interstate Com. Commiss. v. B. & O. Railroad*, 145 U.S. 263, 276.

inconsistent with previous decisions of the Commission in this field.[9]

The Questions Are Substantial

1. The Commission's order establishes through routes and joint rates for Rio Grande on a specified list of commodities and gives Rio Grande for the first time a right to solicit and transport a substantial volume of traffic that it could not previously carry. Limitations on the scope of the order to the articles therein named reflects the proof as to the various public interest requirements under the Act including the showing as to dissimilarity of transportation conditions. (287 I. C. C. 619, 656.) The Rio Grande has no legal or other right to the traffic it seeks to divert to its line, *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 780. Under such circumstances Rio Grande has no legal standing to seek the assistance of the courts in order to broaden the order and obtain additional "pecuniary gain" that is dependent upon administrative findings of public interest.

The district court conceded that the Commission's order "took nothing away from the Rio Grande which it already had" and on that basis "caused no pecuniary loss to the Rio Grande". It held, however, that failure to give Rio Grande all of the "increase of traffic" and all of the increase of "net earnings" requested may constitute "pecuniary injury" to the Rio Grande.

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9 *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I.C.C. 334, 333, summarizes recent Commission decisions and points out that through routes have been established when they "eliminated expensive out-of-line hauls," or were "shorter" or "were at least as economical;" and were rightly denied in the case being heard since the "routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation" and "would not 'give reasonable preference' to the originating carrier."

We are not aware that any court has previously suggested that a "pecuniary loss" may be shown by a failure to obtain the full amount of "pecuniary gain" requested. No authority whatever is cited by the court in support of this novel doctrine. The cases noted by the court, in this connection, all involve an actual or threatened "loss" of something previously possessed. The question in each case is whether the particular loss constitutes "legal injury".[10]

The district court, we submit, can find no support for its views because in such cases as *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, involving establishment of a union station at Cleveland, this Court held at page 487 that "legal injury" was not shown even though the "financial stability" of a carrier was threatened. The point in such cases, which escaped the district court, is that no "legal injury" was shown notwithstanding such losses. In numerous cases this Court has declared that previously enjoyed rights must be "injuriously affected" in order to have standing to review Commission orders.[11]

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10 In the *Chicago Junction Case*, 264 U.S. 258, the order substituted a "monopoly" for previous "neutral control" of terminal railroads in Chicago and subjected "plaintiffs to irreparable injury" in an amount which the opinion said at page 266 "exceeds $10,000,000," annually.

In *Edward Hines Trustees v. U.S.*, 263 U.S. 143, 147, it was contended by a shipper that railroad property was being taken by the Commission order "without due process of law, in violation of the Fifth Amendment" to the detriment of the shipper, but the Court held that this was not legal injury to the shipper.

In *Sprunt & Son v. United States*, 281 U.S. 249, the order deprived a shipper of a "competitive advantage" of $7.00 per ton previously enjoyed, but the Court held that this was not legal injury and dismissed the suit.

11 Many of the cases are summarized in *Moffat Tunnel League v. U.S.*, 289 U.S. 113, 119. See also *Claiborne-Annapolis Ferry v. U.S.*, 285 U.S. 382, *Alton R. Co. v. United States*, 315 U.S. 15, and compare *Atchison, T. & S. F. Ry. v. United States*, 130 F. Supp. 76.

In support of its decision as to legal standing the district court also suggested that "pecuniary injury" is not "essential to the right of judicial review". As sole support for this new rule of general application in the field of administrative law, the opinion cited two negro segregation cases. The gist of these cases as shown by the *Mitchell* decision is that judicial review may be had where the Commission order deprives a colored person of his constitutional right to "equality of treatment" by being forced to give up a pullman seat "under threat of arrest".[12]

There is no claim herein, even by Rio Grande, that any action of anyone has deprived it of any constitutional rights, and none could be made because, as noted, the Rio Grande has no legal, equitable or other right of any nature to the traffic it wants to divert to its line, *I., T. & S. F. Ry. v. United States*, 279 U. S. 768, 780. Hence, the cases relied on by the district court have no application. It is one thing to suggest that a deprivation of constitutional rights may not necessarily involve "pecuniary" loss; it is quite another thing to say that in cases involving no loss of constitutional or other legal rights, there may be a review without "pecuniary injury."

If either of the theories posed by the district court justifies legal standing, then a vast expansion of judicial review in this field is inevitable. Practically every disappointed applicant before an administrative tribunal

12 In *Mitchell v. United States*, 313 U.S. 80, the Commission had dismissed the complaint of a negro. The other case cited, *Henderson v. United States*, 339 U.S. 816, involved a "denial of dining service" by reason of color when there were "existing and unoccupied facilities."

would have a right to go to court if failure to obtain every "pecuniary gain" requested constitutes a "pecuniary loss" or if "pecuniary injury" is no longer a prerequisite to legal standing to maintain suit.

2. In holding that through routes were in existence the district court stated that its decision was upon a "narrow ground" and for such disposition of the case, "[t]his very brief and sketchy statement of the case will suffice". The Commission, on the other hand, based its contrary conclusion upon a full application of all of the tests declared by this Court to be decisive in *Thompson v. United States*, 343 U. S. 549. These tests include not merely a physical, objective inquiry but subjective matters such as a holding out, consent, custom and "course of business" by all carriers involved.[13] This requires a review of the entire record and history of operations and is not satisfied by a "brief and sketchy" review of the case. *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 488.

In weighing the evidence the Commission recognized, as noted above, that the objective of Rio Grande was to participate "as a bridge line" in the transportation of the products of the northwest region to eastern markets; and as to this traffic no "through shipments" had ever moved "to any destination east of Colorado

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13 Applying the *Thompson* rule the Commission said at page 616:

"* * *It thus becomes necessary to determine whether the carriers in this proceeding 'hold themselves out as offering through transportation service' from and to the points here concerned via the Ogden gateway as indicated by their 'course of business' in respect of traffic over the routes in question."

The *Thompson* opinion at page 557 quotes a Commission Report to Congress that all of the tests therein enumerated "are not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments."

common points", i. e., the eastern termini of the Rio Grande (287 I. C. C. 623, 617). The few shipments in the record in the reverse direction during 1948 were properly regarded by the Commission "as of an isolated nature" in view of the entire record (287 I. C. C. 618).[14]

The district court's statement that there has been a "continuous use of the Rio Grande route" is not supported by the record. Rio Grande's evidence of specific shipments related only to the year 1948. The President of Rio Grande testified that his railroad had no idea of participating in transcontinental traffic until after their modernization program was completed and this program was started only after the Dotsero cut-off was established in 1934. The "Moffat Tunnel Line" under which Rio Grande obtained a shorter line from Denver to Ogden was not acquired until 1947. (287 I. C. C. 622.) The Rio Grande's interest was in California traffic to the extent that it financed the construction of the Western Pacific in 1911 as an outlet to California. (287 I. C. C. 622.) The first indication that anyone in the northwest territory had concerning the desire of Rio Grande to open up through routes to this region was the unprecedented "pamphlet" campaign which the Rio Grande prosecuted among shippers to help it succeed in this litigation (R. 50). As shown by the Commission report at pages 636 and 638-639 reasons advanced for through routes included recent developments.[15]

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14 The *Thompson* case, page 557, follows the rule declared by the Commission in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co.*, 155 I.C.C. 513, that "isolated shipments" are insufficient to establish through routes.

15 The farm machinery business referred to by the Commission at page 636 "was established in 1947." Changes in the "use of grazing lands in national forests" mentioned at pages 638 and 639 were of recent origin.

Rio Grande supporters did not base their testimony on any claim of "continuous use". On the contrary they asserted that the routes were closed and the Ogden along with all other gateways should be opened without regard to the Congressional mandate against short-hauling existing routes.

Upon the basis of the entire record, and the "whole course of conduct of the Union Pacific" covering a period of "many years", the Commission correctly concluded at pages 618-619 that through routes were not in existence; and that any "other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940".

While the district court made the general conclusion that through routes were in existence, it did not define what routes of the many hundreds of thousands that might be created were included in that category. This Court made it clear in the *Thompson* decision, *supra*, at page 559, that the existence of through routes to points "short of Omaha cannot be used as evidence of the existence of a through route to Omaha". Through routes have definitely fixed and known termini, and, under the *Thompson* decision, proof of a shipment from Peoria, Ill., via the Rio Grande to Boise, Idaho, cannot be used as evidence of the existence of a through route via the Rio Grande from New York, Boston or Chicago, for example, to Portland, Oregon. Nor may one shipment from each of 18 eastern origin points via the Rio Grande to 10 destinations in the northwest suffice to prove that any through route exists via the Rio Grande for the traffic

concerned, to say nothing of the hundreds of thousands of through routes of which the Rio Grande claims its line to be a part between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area.

The cancellation in 1906 and 1912 by Union Pacific of joint rates established by the receivership courts in 1897, in view of the history previously reviewed, fully accomplished a closing of the through routes in question. This was the admitted position of Rio Grande until after this Court handed down its decision in the *Thompson* case (June 2, 1952). In its publicity campaign prior to and after the filing of its complaint with the Commission, August 1, 1949, the Rio Grande publicly asserted that its purpose was to "restore" to the northwest the "rates and routes" established by the receivership courts in 1897. As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz", in which it posted 20 questions and answered them with the arguments it thought would convince shippers to aid it in its efforts. These questions clearly and indisputably show that the Rio Grande itself considered that the prior through routes via its line had been "closed" by the cancellation of the joint rates by the Union Pacific.[16]

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16 Among the 20 questions were the following:

" 2 What Is Meant by the 'Closed' Gateway at Ogden?"

" 3 What Is the Effect of the Closed Gateway?"

" 4 How Does the Rio Grande Seek to Open the Ogden Gateway?"

" 5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"

" 6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"

(Continued on next page)

The suggestion of the district court that these routes were not closed disregards the realities of the situation and is in conflict with the understanding of the parties as shown by their conduct. There is no suggestion by the district court of what further action, if any, was required to close the route via the Rio Grande; and under the circumstances the Commission correctly refused to sustain Rio Grande's present position on the basis of a claim with reference to the sufficiency of a tariff change over forty years ago.

In filing this proceeding Rio Grande conceded in its complaint that the cancellation of tariffs by Union Pacific operated "to prevent the movement of freight traffic via the routes" sought and the action of Union Pacific and other defendants "deprives the public and the complainant of the use" of these routes. Ample authority and machinery existed to challenge the right of Union Pacific to close these routes under the tariff amendments made in 1906 and 1912. Neither Rio Grande nor any shipper took any action or made any such contention as is now advanced.[17]

(Continued from preceding page)

"7 Will the Open Ogden Gateway Reduce Freight Rates?"
"8 Will the Open Gateway Provide Improved Service?"
"9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
"11 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
"12. Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
"13 Will Opening of the Ogden Gateway Reduce Railroad Employment in the Closed Door Territory?"
"14 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

17 In *Atlantic Coast Line R. Co. v. U.S.*, 284 U.S. 288, tariff amendments were cancelled which would have closed a through route. The Commission acted in that case under Section 15 (7) of the Act which permits the suspension of tariff changes and which authorizes such suspension upon complaint.

There is nothing new or novel in the closing of a through route by a tariff filing such as occurred here. The Commission in the present case adhered to the rule it has uniformly followed in this regard—a rule that recently was applied in *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202 (August, 1954), where it was held that complainant was "apprised" of the fact that a route was "closed" by the "publication of the joint through rate from and to these points for application over routes other than that used."[18]

The *Thompson* decision rejects the idea that publication of "local" rates as a part of a "combination" through rate constitutes the maintenance of a through route. Such a publication, the opinion holds at page 558, "proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines".

Legislative amendments to Section 15(3) of the Act in 1940 specifically recognize the "canceling" of "any through route or joint rate" by "any tariff or schedule" change. (49 U. S. C. A. 15(3).) The legislative history of this amendment shows that Congress and the Commission recognized for many years that the type of tariff filing made herein by Union Pacific operated to close a through route and that a standard for suspension of such closings should be a part of our statutory system.[19]

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18 In *A., T. & S.F.Ry. v. United States*, 279 U.S. 768, 775, in upholding the "cancellation of the proposed tariff" which would have closed a through route, this Court said, "[i]ts proposed tariff was in effect a withdrawal."

19 The 1940 amendment consists of a new sentence added to Section 15(3). This sentence originated as a "clarifying" amendment to a Bill in 1937 with reference to the "elimination of any existing through route or joint rate." See Senate Report No. 404, 75th Cong. 1st Sess. (S. 1261); Senate Report No. 1970, 74th Cong. 2nd Sess. (S. 1636).

The decision in *Virginian Ry. v. United States*, 272 U. S. 658, provides no support for the district court's opinion. That case involved no question of establishing through routes since they already existed. The language in the opinion as to through routes is dictum. The case presented a clear case of discrimination by one railroad against 54 mine shippers on its own line who were refused the same rates enjoyed by 45 other mine shippers on the same line. It was not even necessary to establish joint rates in that case. Moreover, there was no problem of short-hauling.

This Court has said that the "Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts". *I. C. C. v. Hoboken R. Co.*, 320 U. S. 368, 378. Under this rule the Commission's determination herein that the Union Pacific effectively closed the routes in question is not subject to reversal.

The standard created by the district court herein for determining the existence of through routes assumes that the Union Pacific had the right and duty to refuse and stop shipments over the Rio Grande route in order to protect itself against short-hauling. Any such rule would place an impossible burden on a carrier and deny shippers a fundamental right which the Commission has always recognized of routing their own traffic.[20] Ad-

[20] At page 652 of the report the Commission recognizes and gives effect to the "right" of shippers to "route their own traffic." At page 618 the report points out that the few westbound movements through the gateway were "specified by the shippers" and the only use made of this route arose "by force of shippers or connecting carriers' routing." This occurred, the Commission found, despite the consistent "policy" of the Union Pacific "to guard jealously its long haul." Any other view, the report says at page 619, would completely circumvent the Act.

hering to this position in the recent case of *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202, it was held that although the route chosen by a shipper was "closed" by reason of a tariff publication, this "does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified." The rate for such shipment, the opinion states, would be the "combination rate".

There is nothing in the statutes or in prior decisions of this Court that would require a carrier to erect barriers at gateways in order to avoid the peril of being short hauled.[21]

It is a distortion of Section 15(8) to suggest that under this provision shippers have a right to route traffic only where a through route already exists within the meaning of Section 15(3) and (4). This statute gives a shipper a right always to choose between "two or more through routes". The statute has application only where "two" through routes exist. The rights of shippers where "two" through routes have not been established are not declared or covered by this section. The provision was added in 1910 (36 Stat. 553) as a part of the expansion of Section 15 with reference to the creation of new through routes and it was no doubt intended to protect shippers in the case of duplication of routes resulting from such legislation.

There is no occasion at this late date to conclude that Section 15(8) has been improperly interpreted by the Commission for nearly a half-century.[22]

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21 The "duty of a railway company to receive freight when tendered for transportation" is noted in *Southern Ry. Co. v. Reid*, 222 U.S. 424, 435.

22 Our contention as to the interpretation of this section finds some support in *Lamb v. Moor*, 17 Ga. App. 542, 87 S.E. 837.

The suggestion of the District Court that issuance of "through bills of lading" on the few westbound movements described constituted a recognition of "through route status" contains the fundamental fallacy that the Union Pacific had the right and duty to refuse such lading. All that an employee of Union Pacific did or could do in this connection was to comply with the mandate in Section 20(11) that, when "receiving property for transportation" the railroad "shall" issue a bill of lading therefor.[23]

3. Since, as shown earlier, the limitations on the through routes and joint rates granted the Rio Grande arose from administrative findings concerning public interest and these limitations did not depend upon the Commission's position as to existence of through routes via the Rio Grande, the district court was not justified in declaring that the position of the Commission as to such routes "obviously prejudiced the entire proceeding". Moreover, and in any event the court was not justified, upon the basis of such a finding, in setting aside *only* that portion of the order which "denied relief to the Rio Grande". Anything which is held to prejudice an "entire proceeding" would necessarily vitiate the "entire proceeding", not merely a part thereof.

There is, moreover, in this case no showing that the Rio Grande is "suffering prejudice"[24] because of the

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23 The "duty" to issue a bill of lading is imposed by Congress. *Atchison & Topeka Ry. v. Harold*, 241 U.S. 371, 378.

It was always true that even if a railroad had "no through route" it "was bound to accept goods destined beyond its line for delivery to the next carrier and was required by the statute to give a through bill of lading." *Norfolk & W. Ry. Co. v. Dixie Tobacco Co.*, 228 U.S. 593, 595.

24 *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 43. *See Electric Bond Co. v. Comm'n*, 303 U.S. 419, 443.

Commission's finding that through routes were not already in existence. As noted above, it ordered through routes and joint rates for all commodities found necessary in the public interest, and limitations thereon were imposed by reason of public interest requirements of the Act.

Having made the findings required under Section 15(3) and (4), the Commission was free to feel the scope of its order. *United States v. Merchants &c. Ass'n*, 242 U. S. 178, 186-187. The concurring opinion of Commissioner Arpaia shows clearly that although he thought the desired routes were already "open and available to shippers", in deciding "to what extent" joint rates should be compelled, he concluded that they "are warranted in the public interest only on the commodities for which relief is included in the majority report". (287 I. C. C. 665.) Commissioner Patterson thought lumber and articles taking lumber rates should have been included in the order (287 I. C. C. 664).

4. The district court usurped administrative jurisdiction in declaring that the "facts alleged and the proof before the Commission" established "discrimination adversely affecting the Rio Grande and shippers over its lines", upon the basis of "existing rates and charges". Such a finding was made although the court frankly stated earlier that it was making only a "brief and sketchy" review of the case "since we rest our decision upon a narrow ground". That "narrow ground" related to the existence of through routes. It did not comprehend a review of the evidence or of the complete report of the numerous and complicated legal questions pertaining to rates and discrimination under the various sections of the Act.

In remanding the case the district court annuls and remands only that portion of the case which "denied relief" to the Rio Grande and orders the Commission to take "further proceedings in conformity with this opinion". Included in the opinion the court sets forth what it terms "instructions". Hence, if it heeds the remand, the Commission is prevented from reversing or reconsidering that part of the "prejudiced" proceeding which is favorable to the Rio Grande.

The opinion points to no evidence justifying its conclusion that "discrimination" is established. The Commission, after careful review of the evidence, holds that discrimination under Section 3 (4) is not shown (287 I. C. C. 658) and concludes that the Rio Grande as a "railroad, could not raise, in its own behalf, an issue under section 3(1)" (287 I. C. C. 619).

It is fundamental that the "court must act within the bounds of the statute" permitting judicial review.[25] Heretofore the rule has been that the "function of the reviewing court ends when an error of law is laid bare" and findings such as the above "usurped an administrative function."[26]

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25 *Ford Motor Co. v. Labor Board*, 305 U.S. 364, 373. The applicable statute (28 U.S. Code, Sec. 1336) contains no authority to direct the Commission how to dispose of the case. And see *F.C.C. v. Allentown Broadcasting Corp.*, 75 S.Ct. 855.

26 *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 20.

Such findings constitute a "substitution of judicial for administrative discretion." *Communications Comm'n v. Woko*, 329 U.S. 223, 299. See also *Interstate Comm. Comm. v. Ill. Cent. R.R.*, 215 U.S. 452, 470; *Federal Comm'n v. Broadcasting Co.*, 309 U.S. 134, 144.

Rate orders are "clearly legislative." The *Chicago Junction Case*, 264 U.S. 258, 263.

It is not within the province of the court "to revise the Commission's decision and to enter such judgment as the court may think just." *Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 276.

Unless the district court's opinion is reversed, Rio Grande will be free to go back to the Commission and insist that it enter an order carrying out all the "instructions", observations and declarations in such opinion without reference to or consideration of any independent powers of the Commission. In short, to order joint rates in connection with the Rio Grande on *all* of the traffic. In this regard, as well as upon other phases of this case, as previously noted, the district court has plainly usurped the Commission's discretion and greatly enlarged the nature and scope of judicial review by the present opinion.

Conclusion

These five states can suggest no language which describes the consequences of the district court decision herein better than the words of our late Chief Justice Vinson, when, speaking for this Court, he said that "diversion" of "traffic to the lines of a financially weak carrier" will "cause important changes in the movement of traffic, diverting traffic to a new geographic area *at the expense of* other carriers and *other areas*"; and that Section 15(4) of the Act was amended by Congress to prohibit this sort of "tinkering" with through routes.[27]

After extensive deliberation and careful consideration of the entire record, the Interstate Commerce Commission, which as often noted by this Court,[28] is not unfriendly to "completely" eliminating the "short hauling restriction on its power to establish through routes", frankly declared that the conclusion now reached by the district court as to the existence of through routes, would "set aside the provisions of section 15(3) and (4) of the

27 *U.S. v. Great Northern R. Co.*, 343 U.S. 562, 574-575.

28 *Thompson v. United States*, 343 U.S. 549, 555-556.

act"; and the Commission added that this would be a "result plainly not intended by the Congress" and "a result clearly not in accord with the decision in *Thompson v. United States, supra.*"[29]

As representatives of the shippers and public of the states directly affected we are interested in the preservation of the "right guaranteed by Section 15(4)"[30] because that is our only guarantee that the good service of the shortest, most efficient and most economical transcontinental transportation facilities will continue to be available to us at the lowest possible cost.

We therefore submit that the questions presented by this appeal are substantial and of general public importance and vitally affect the economic condition of a large area of this country.

Respectfully submitted,

BERT L. OVERCASH,
Counsel of Record for Appellants,
State Capitol Building,
Lincoln, Nebraska.

DON EASTVOLD,
ROBERT L. SIMPSON,
C. W. FERGUSON,
JAMES B. PATTEN,
GEORGE F. GUY,
CLARENCE S. BECK,
Of Counsel.

August, 1955.

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29 287 I.C.C. 611, 619.

30 *Thompson v. United States*, supra, p. 559.

PROOF OF SERVICE

I, BERT L. OVERCASH, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 19th day of August, 1955, I served, on behalf of all appellants herein, copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed en-

velope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

Ernest Porter, Esq.
603 Rio Grande Building
Denver 2, Colorado

4. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

5. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

6. On Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company, Inc.; Idaho Farm Bureau; Public Service Commission of Utah; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Structural Steel and Forging Company, by mailing a

copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

BERT L. OVERCASH
Counsel of Record for
Appellants Herein.

APPENDIX A

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

Denver & Rio Grande Western Railroad Company

v.

Union Pacific Railroad Company, et al.

This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination;

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediateely north of points on the lines of

the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD,
Acting Secretary.

(Seal)

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants,

Union Pacific Railroad Company, et al.,
Intervening Defendants.

Filed Feb. 14, 1955

Final Judgment and Decree

The hearing in the above-entitled cause having been held on June 8 and 9, 1953, before Circuit Judge Orie L. Phillips and District Judges Royce H. Savage and William Lee Knous, constituting a District Court of three judges, convened pursuant to Title 28, U. S. C., Sections 2284 and 2325, and all parties being represented by counsel, and the Court having received the evidence offered and heard the arguments of counsel, and the Court being fully advised in the premises and having filed its opinion herein on January 13, 1955, and the Court being of the opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297 is invalid and unlawful insofar as it denied relief to the plaintiff above named;

NOW, THEREFORE, upon the basis of said opinion of this Court dated January 13, 1955, and for the reasons therein set forth, IT IS ORDERED, ADJUDGED AND DECREED that the injunction and other relief prayed for by plaintiff and intervening plaintiffs in the complaint be and the same is hereby granted, and the order of the Interstate Commerce Commission dated January 12, 1953, be and the same is hereby annulled and set aside insofar as it denied and withheld relief to the plaintiff and intervening plaintiffs,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause, insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief to plaintiff and intervening plaintiffs, be and the same is hereby remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of this Court.

DATED this 1st day of February, 1955.

/s/ ORIE L. PHILLIPS
Orie L. Phillips, Chief Judge
United States Court of Appeals

/s/ ROYCE H. SAVAGE
Royce H. Savage, Judge
United States District Court

/s/ WILLIAM LEE KNOUS
William Lee Knous, Judge
United States District Court

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

vs.

United States of America and Interstate Commerce Commission,
Defendants.

Filed Apr 22 1955

Order Denying Motion for New Trial or Reargument and Reconsideration

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Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company; and Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, intervening defendants herein, having seasonably filed their motion for new trial or reargument and reconsideration and this Court having entertained and duly considered said motion and brief of plaintiff in opposition thereto,

IT IS ORDERED:

1. That said motion be and it is hereby overruled and denied;

2. That the Clerk of this Court transmit forthwith copies of this Order to counsel in this case.

DATED at Denver, Colorado, this 22 day of April, 1955.

By the Court:

/s/ ORIE L. PHILLIPS
Orie L. Phillips, Chief Judge
United States Court of Appeals
for the Tenth Circuit

/s/ ROYCE H. SAVAGE
Royce H. Savage,
United States District Judge for the
Northern District of Oklahoma

/s/ WILLIAM LEE KNOUS
William Lee Knous;
United States District Judge.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

No. 4492 Civil

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Messrs. Dennis McCarthy and Robert E. Quirk (Herbert M. Boyle was with them on the brief) for plaintiff.

Mr. E. Riggs McConnell (Messrs. Stanley N. Barnes, James E. Kilday, and Donald E. Kelley, were with him on the brief) for the United States of America, defendant.

Mr. Samuel R. Howell (Mr. Edward M. Reidy was with him on the brief) for the Interstate Commerce Commission, defendant.

Messrs. Elmer B. Collins, F. O. Steadry, L. E. Torinus, Jr., and Eugene S. Davis (Messrs. F. J. Melia, Warren H. Ploeger, Roland J. Lehman, Carson L. Taylor, E. G. Knowles, W. R. Rouse, Nye F. Morehouse, M. L. Countryman, Jr., Edwin C. Matthias, J. C. Gibson, and Joseph H. Miller were with them on the briefs) for intervening railroad defendants.

Messrs. W. J. Hickey, John R. Barry, and Lee J. Quasey (Messrs. Duke W. Dunbar, Frank W. Wachob, William T. Secor, E. R. Callister, Jr., Peter M. Lowe, Paul M. Hupp, Lewe P. Siddons, Dennis O'Rourke, and Alden T. Hill were with them on the briefs) for intervening plaintiffs.

Messrs. William E. Doyle, Robert L. Simpson, Howard B. Black and Bert L. Overcash (Messrs. Don Farsvold, C. W. Ferguson, James B. Patten, Clarence S. Beck, and Richard H. Shaw were with them on the briefs) for intervening defendants.

Before PHILLIPS, Chief Circuit Judge, and KNOUS, Chief District Judge, and SAVAGE, District Judge.

Per Curiam.

This action was brought by the Denver and Rio Grande Western Railroad Company against the United States of America and the Interstate Commerce Commission under the Urgent Deficiencies Act to set aside and permanently enjoin, in part, an order of the Interstate Commerce Commission.

In August, 1949, the Rio Grande filed a complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroad defendants. In such complaint the Rio Grande alleged that the defendants have failed and refused to establish and maintain competitive joint rates on freight traffic with the Rio Grande: (a) via its Colorado and Utah gateways between places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and (b) between Utah common points and places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that through routes now exist and have for many years existed for the interchange of traffic by the Rio

Grande with the Union Pacific at Provo, Ogden and Salt Lake City, Utah, and with the Union Pacific and certain other defendants at Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colorado, as to freight traffic

(a) between points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and

(b) as to freight traffic between Utah common points and points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that the rates and charges applicable to such traffic between the points described via such through routes, with minor exceptions, are based upon the combination of the intermediate local or other rates, which rates and charges, in the aggregate, are substantially higher than the joint rates maintained by the defendants on similar competitive traffic between the same origin and destination places and territories which moves via the Union Pacific or via the Union Pacific and the other defendants, and that such combination rates are unjust, unreasonable and discriminatory, as compared with the competitive joint rates maintained by the Union Pacific or via the Union Pacific and the other defendants on like freight traffic via other competitive routes;

And that the failure and refusal of the Union Pacific and other railroad defendants to establish joint competitive through rates and charges applicable to the freight traffic between the points above described re-

sults in combination through rates which are excessive, unjust, unreasonable and constitute violations of §§1, 3 and 15 of the Interstate Commerce Act[1] and was and is contrary to the national transportation policy, since it deprives the public, shippers and the Rio Grande of the use of reasonable and available through routes and rail facilities at just, reasonable and non-discriminatory through joint rates, which were and are necessary and desirable in the public interest.

The Rio Grande prayed that the Commission enter an order requiring the Union Pacific Railroad and the other defendant railroads to establish and maintain for the future, just, reasonable, and non-discriminatory competitive joint rates on the freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific and its connections in Utah, north of Ogden, Utah; and in Idaho, Montana, Oregon, Washington, and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, and points east thereof; and between (c) the points designated in (a); and (d) Utah common points.

By the challenged order entered on January 12, 1953, the Commission granted some but not all of the relief sought by the Rio Grande. 287 I. C. C. 611. In this action the Rio Grande seeks to have the court enjoin, set aside, annul and remand, with appropriate directions, that part of the order which denied relief sought by the Rio Grande. Union Pacific and other railroads and other persons have intervened with permission of the Court.

1 Hereinafter called the Act.

Section 1, Par. (4) of the Interstate Commerce Act in part provides:

"It shall be the duty of every common carrier * * * to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3, Par. (4) of such Act in part provides:

"All carriers * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper * * *."

Section 13(1) of such Act in part provides:

"That * * * any common carrier, complaining of *anything done or omitted to be done* by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to

satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." (Italics ours.)

Section 15(1) of such Act provides:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall

cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

At the threshhold we are confronted with a motion of the defendants to dismiss on the ground that the Rio Grande is without standing to maintain this suit. We hold that the Rio Grande has such standing. Since we so hold, by reason of our conclusion with respect to the existence of the through routes, the erroneous finding of the Commission on that issue, the erroneous application to the facts by the Commission of certain provisions of the Act, and the rights of the Rio Grande under the provisions of the Act, we shall state in detail our reasons for denying such motion, after a full consideration of the merits.

I.

The Merits

The Rio Grande operates approximately 2400 miles of railroad in Colorado, New Mexico and Utah. From its northern terminus at Ogden, Utah, it runs south to Salt Lake City and Provo, Utah, thence generally east to Dotsero, Colorado, where it divides, one branch going east to Denver, the other southeast to Pueblo. From Denver the line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serving territories in southern Utah, northwest New Mexico and southern Colorado are not of importance in this action.

The Rio Grande has interchange track connections and interchanges traffic with the Union Pacific at Denver,

Colorado, and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and the Western Pacific at Salt Lake City. It has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, Santa Fe and the Colorado & Southern; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo with the Santa Fe, the Colorado & Southern and the Missouri Pacific; at Walsenburg with the Colorado & Southern and at Trinidad with the Santa Fe and the Colorado & Southern.

The Union Pacific, with its leased lines, operates as a single system. From Ogden, Utah, one line of the Union Pacific extends in a southwesterly direction through Salt Lake City and Provo and thence to Los Angeles. Another line extends northwest through Utah, Idaho, Oregon, Washington and Montana, serving what is referred to as the northwest territory, or the closed door territory. From Ogden, the Union Pacific runs generally easterly through Cheyenne and Denver, with eastern termini on the Missouri River at Omaha and Kansas City. At various points on its line it connects and interchanges traffic with the other intervening railroads.

The Union Pacific and other intervening railroads and the Rio Grande participate in through routes and joint rates with each other and with other carriers on transcontinental and other traffic, with certain exceptions. Joint rates generally do not apply in connection with the Rio Grande on traffic originating at or destined to points in Utah, north of Ogden, and in Idaho, Montana, Oregon and part of Washington. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande to and from Ogden,

the higher combination rate, consisting of the aggregate of local rates, applies.

The transcontinental traffic to and from this northwest territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather *[than over the Rio Grande route. This is due in part, to the refusal of Union Pacific to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates is limited by §15(4) of the Act, which declares that, except as provided in §3 of the Act, a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide "adequate, and more efficient or [more economic], transportation." It is further provided that in prescribing through routes the Commission shall, so far as is consistent with the public interest and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier which originates the traffic. The section further provides that no through routes and joint rates applicable thereto shall be established for the purpose of assisting any carrier to meet its financial needs. This section was designed

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 2 of Appendix E.

to restrict the power of the Commission to establish through routes which would short haul a carrier without its consent.

Rio Grande contended at the hearing before the Commission, and contends here, that the routes over which joint rates are sought were in existence and open to traffic at combination rates, and that the Commission was not called upon to establish through routes and, therefore, limitations on its power to do so, imposed by §15(4), are not applicable and need not be considered. It urged that the principal task of the Commission was to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such existing through routes are unjust, unreasonable or discriminatory, in violation of §§1 and 3 of the Act, and contrary to the national transportation policy.

The Commission recognized that the first question for its determination "is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15(3) and (4) of the Act." Only five of the ten participating members of the Commission joined in the report and order of the Commission, wherein it was first determined that through routes were not in existence over the Rio Grande in connection with the Union Pacific through the Ogden gateway. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment of such through routes and joint rates over them must be grounded on findings, as specified in §15(3) and (4). Thus limited in its further consideration of the case, the Commission entered its order:

> "That it is necessary and desirable in the public interest, in order to provide adequate and more eco-

nomic transportation, that through routes and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

In all other material respects the relief requested by the Rio Grande was denied.

This very brief and sketchy statement of the case will suffice, since we rest our decision upon a narrow ground. We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding.

The undisputed evidence bearing upon the crucial question of existing through routes must be summarized. In 1897, the Union Pacific established joint through competitive rates with the Rio Grande to and from points in the northwest area through Ogden. These rates were in effect until canceled by Union Pacific in 1906 from and to some points and in 1912 from and to remaining points. But the through routes were not closed.

Counsel for Union Pacific expressed the opinion at the hearing before the Commission, in response to interrogation by Chairman Alldredge, that the cancellation of the joint rates did not close the through routes and that shippers were free to route via the Rio Grande if they wanted to pay more.

The principal traffic witness of the Union Pacific testified at the hearing that a shipper who was willing to pay the higher combination rate had the right to specify under §15(8) of the Act a route via the Rio Grande. It should be observed that this right exists only when through routes and through rates have been established. This witness further testified that some joint through rates are now published in a Union Pacific tariff for application to shipments of sheep and goats from the northwest area via Ogden and the Rio Grande to points on the Missouri River and east thereof.

A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at through combination rates, without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small. In 1948, which was selected as a

representative year, 37 carload shipments were made on through bills of lading from the northwest area to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific or its connections, but none moved to any destination east of Colorado common points. In the same year, 18 carload shipments were made west bound on through bills of lading from points east and southwest over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific to destinations in the northwest area. In addition, 21 carload shipments moved on through bills of lading from various eastern points to destinations in the northwest area, which were routed over the Rio Grande and Union Pacific, were held by Rio Grande at Denver or Pueblo for change of the routing because the joint through rates were not applicable. The traffic movement to and from the northwest area over the Rio Grande through the Ogden gateway on through bills of lading and at through rates was substantially the same in years prior to 1948 and continued into 1949, until the date of the Commission hearings.

From November, 1942, to August, 1945, a number of shipments were diverted under service orders issued by the Commission from the regularly used routes to the Rio Grande route. During World War II mixed trains of troops in passenger cars and of military supplies in freight cars moved from eastern and southern points on through billing over the Rio Grande via Ogden and Union Pacific to the closed door area. These trains were not routed under service orders issued by the Commission. In 1949, when the main line of the Union Pacific in Wyoming was blocked by snow, the traffic was diverted

over the Rio Grande between Denver and junctions with the Union Pacific in Utah. These latter movements were made under emergency conditions and admittedly do not tend to establish an ordinary course of business between the carriers involved, but the Commission did not invoke its authority under § 15(4) of the Act to establish temporary through routes which indicates that the Commission assumed that through routes were already in existence.

It is well settled that a joint rate is not essential to the existence of a through route. The rate which applies over a through route may be the aggregate of separate rates fixed independently by the several carriers participating in the through route. *St. Louis-Southwestern R. Co. v. United States,* 245 U. S. 136, 139; *Thompson v. United States,* 343 U. S. 549, 556. In *Thompson v. United States, supra,* the court defines a through route as follows:

> "* * * The statutory term 'through route,' used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> "'A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route": as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. Through Routes and Through Rates, 12 I. C. C. 163; 166.'

"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

While the foregoing definition of "through route" compels us to conclude that the through routes contended for by Rio Grande were in existence, the Commission relied on the *Thompson* case in reaching its decision that through routes were not in existence. But the facts in the *Thompson* case are in striking contract with the facts in this case. There, the question was whether a route from Lenora, Kansas, via Missouri-Pacific to Concordia, Kansas, and thence via Burlington to Omaha was a through route. No evidence was presented that any shipment had ever been made from Lenora to Omaha via the Burlington or that the carriers had ever offered through service over that route.

In our case, through routes and joint rates were established in 1897 and the joint rates remained in effect for some fifteen years. While the joint rates were canceled by Union Pacific, nothing was ever done to close the routes and diminished traffic continued to move over the same through routes at the higher through combination rates. Moreover, joint rates were continued in effect as well as through routes in respect to the shipment of sheep and goats from the closed door area through Ogden over the Rio Grande to the Missouri River and beyond. The Union Pacific and other participating railroads have issued through bills of lading, thereby recognizing the through route status. Shipments were diverted from the Union Pacific over the Rio Grande under emergency con-

ditions without having the Commission authorize temporary through routes, which suggest that both the Union Pacific and the Commission assumed the existence of through routes.

The Commission stated in its report and order that "The Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable." Then follows a statement that the establishment of joint competitive rates would result in such routes becoming "effective through routes, a character which they do not now possess." Thus, it appears that the Commission reasoned that the closing of the routes in a commercial sense by applying the higher combination rates terminated the through routes. But, it was held to the contrary in *Virginian Railway Co. v. United States*, 272 U. S. 658. There, of 99 coal mines located on the line of the Virginian, 45 enjoyed through routes and joint rates to the West because of certain trackage arrangements entered into between the Virginian and the Chesapeake & Ohio. As to other complaining mines, the court said, at page 661:

> "* * * But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive. * * *"

In discussing the attack made on the order of the Commission fixing joint non-discriminatory rates, the court stated, at page 666:

> "* * * The Virginian contends that the order is void because the Commission directed the establish-

ment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under § 15(3). But the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination. (Citing cases.) The fact that the combination rates were excessive constituted the only obstacle to the movement."

The intervening railroads argue that Rio Grande had the burden of proving, in order to show the existence of the through routes contended for, an actual movement of traffic between every point in the northwest area and every point in the United States on every railroad east of a north and south line drawn roughly along the eastern boundary of Colorado. They point out that there are some 2,900 railroad stations in the northwest area and some 30,000 stations in the area east of Colorado and that there are undoubtedly hundreds of thousands of through routes available in the published tariffs between the thousands of stations in the involved area of which Rio Grande claims to be a part. This question was not considered by the Commission, and we do not reach it here. In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond. Since the case must be remanded to the Commission for a new hearing, we believe that the Commission should initially pass on the question of whether the burden is on the Rio Grande to show some actual movement of traffic on through billing over each of the possible routes

between the thousands of stations in the involved areas. It might be mentioned in passing that the court in the *Virginian Railway Company* case concluded that "through routes to the west are already in existence," without apparent direct proof of transportation of freight from all points on the Virginian to all points in the west via the Chesapeake & Ohio.

The contention of the intervening railroads that we are not authorized to enter an order remanding the case to the Commission with appropriate instructions is refuted by the recent order entered by the Supreme Court in *Secretary of Agriculture v. United States,* 347 U. S. 645.

II.

The Motion to Dismiss

*[We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We have further concluded that the Commission, in determining whether the Union Pacific Railroad and the other defendant railroads should be required to establish and maintain for the future just, reasonable, and nondiscriminatory competitive joint rates, as prayed for by the Rio Grande, erred as a matter of law in failing to apply the provisions of § 1(4) and § 3(4), rather than the provisions of § 15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in § 1(4) and § 3(4) of the Act. The right of

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 3 of Appendix E.

the Rio Grande to file its complaint with the Commission and seek the relief therein prayed for is clearly given by § 13 of the Act. Under the Act, a carrier is as fully entitled to non-discriminatory treatment as a shipper. See *Chicago Junction* case, 264 U. S. 258, 267, which cites with approval *Pennsylvania Co. v. United States*, 236 U. S. 351, where the complainant sought relief under § 3 of the Act.

The fact that the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief. See *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 135-143; *Mitchell v. United States*, 313 U. S. 80, 92, 93.

The negative portion of the order required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had, and, if considered solely from those points of view, the order caused no pecuniary loss to the Rio Grande.

If the Rio Grande, in the proceeding before the Commission, established its right to the relief prayed for, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and [equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defend-

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[APPELLANTS' NOTE: The language included in brackets is modified by substituted pages 4 and 5 of Appendix E.

ants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of § 1(4) and § 3(4) of the Act.

If the Rio Grande, on its showing before the Commission and an application of the provisions of § 1(4) and § 3(4), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated, if the Rio Grande, under the facts established by the evidence before the Commission, and the application of the provisions of § 1(4) and § 3(4) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]]

While it is our view that the denial of the relief here challenged will result in pecuniary injury to the

2 The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

3 The Chicago Junction Case, 264 U. S. 258, 266, 267.

Rio Grande, we do not think such injury is essential to the right of judicial review. In *Mitchell v. United States*, 313 U. S. 80, Mitchell brought a proceeding before the Commission in which he alleged that the Chicago, Rock Island and Pacific Railway Company, in its purported compliance with an Arkansas statute requiring segregation of the races during transportation did not provide as desirable accommodations for colored as for white passengers traveling in Arkansas over its line, which resulted in unreasonable charges and unjust discrimination against and undue prejudice to colored passengers in violation of §§ 1, 2, 3, and 13 of the Act and the Fourteenth Amendment. The only relief sought was the removal and avoidance in the future of the alleged discrimination and prejudice in the furnishing of accommodations. The Commission, while holding that the matters complained of were prohibited by § 3(1) of the Act, denied the relief prayed for. Mitchell then brought an action in the District Court of the United States for the Northern District of Illinois to set aside the Commission's order. In passing on whether Mitchell had standing to maintain the action, the Supreme Court said, at pages 92 and 93:

> "*First.* The Commission challenges the standing of appellant to bring this suit. We find the objection untenable. This question does not touch the merits of the suit, but merely the authority of the District Court to entertain it. The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not controlling. Rochester Telephone Corp. v. United States, 307 U. S. 125, 143.
>
> "Nor is it determinative that it does not appear that appellant intends to make a similar rail-

road journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids. He presents the question whether the Act does forbid the conduct of which he complains.

"The question of appellant's right to seek review of the Commission's order thus involves the primary question of administrative authority, that is, whether appellant took an appropriate course in seeking a ruling of the Commission. The established function of the Commission gives the answer. The determination whether a discrimination by an interstate carrier is unjust and unlawful necessitates an inquiry into particular facts and the practice of the carrier in a particular relation, and this underlying inquiry is precisely that which the Commission is authorized to make. As to the duty to seek a determination by the Commission in such a case, we do not see that a passenger would be in any better situation than a shipper. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Robinson v. Baltimore & Ohio R. Co., 222 U. S. 506; Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247; Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304; General American Tank Car Corp. v. El Dorado Terminal Co, 308 U. S. 422.

"The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law."

*[There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission,

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 6 of Appendix E.

that he was an aggrieved party, and that he was entitled to judicial review. See, also, *Henderson v. United States*, 339 U. S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform the duty of establishing just and reasonable joint rates, fares, and charges over through routes, and it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

Edward Hines Trustees v. United States, 263 U. S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the] continuation of a so-called penalty charge of $10 per car per day on lumber held at reconsignment points. The court said that the plaintiffs had no absolute right to require carriers to impose penalty charges and that plaintiffs' right was "limited to protection against unjust discrimination." Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines. In the *Chicago Junction* case, *supra*, the court distinguished between an incident of more effective competition and injury inflicted by denying equality of treatment. Just, reasonable, and non-discriminatory joint rates is the equality of treatment which the Rio Grande here seeks.

In *Alexander Sprunt & Son, Inc. v. United States*, 281 U. S. 249, the Interstate Commerce Commission entered an order directed to the railroads operating in Oklahoma, Arkansas, Texas, and Louisiana, which required them to remove in a prescribed manner, undue prejudice and preference caused by their rates on cotton shipped from interior points to Houston and other ports on the Gulf of Mexico. Two actions were brought, one by Sprunt & Son and one by the Texas & New Orleans Railroad Company and other carriers, to enjoin the enforcement of the order. Upon final hearing, the District Court sustained the validity of the order and entered a decree dismissing the bills. None of the carriers appealed from the decree. Sprunt & Son appealed. The court held that the issue of undue prejudice and unjust preference which had been passed upon by the Commission had become moot, because most of the carriers never sought to annul the order and that the carriers who joined in the suit to set it aside had voluntarily severed themselves from the shipper, who objected to it. With respect to the right of Sprunt & Son to maintain the action, the court at pages 254, 255, said:

> "* * * We are of the opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under § 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. * * * But that interest alone did not give

them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where *a right of his own is alleged to have been violated by the order.* * * * In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. *They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled.* The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so." (Italics ours.)

Here, again, the court recognized that mere deprivation of a competitive advantage was not enough and that they were only entitled to reasonable service at reasonable rates and without unjust discrimination. Here, the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings.

In *Pittsburgh & West Virginia Railway Co. v. United States*, 281 U. S. 479, the Commission entered an order authorizing the New York Central Railroad and other rail carriers to join in establishing a union passenger station at Cleveland, through a subsidiary, Cleveland Union Terminals Company. The Wheeling & Lake Erie Rail-

way Company had for some years owned and maintained an independent passenger station at Ontario Street, Cleveland, in the line of the easterly approach to the proposed union terminal. It was apparent that either ownership of or an easement in the Wheeling's site would be indispensable in order to provide the necessary easterly approach to the terminal. Wheeling consented to sell its site and become a tenant in the new terminal. Contracts were made embodying this plan, subject to approval of the Interstate Commerce Commission. Thereupon, Wheeling filed before the Commission two applications for certificates of public convenience and necessity, one permitting it to abandon its Ontario Street station, and the other authorizing it to use the facilities of the union terminal, and pending its completion to use the facilities of the station of the Erie Railroad and the tracks of the Big Four.[4] Pittsburgh & West Virginia Railway, a minority stockholder and connecting carrier of the Wheeling, intervened in opposition to the applications. It opposed them on the ground that the Ontario Street station was ample for both the present and future needs of the Wheeling and that the contracts were disadvantageous to the Wheeling in certain particulars. The Commission found the public convenience and necessity would be served by the granting of both applications and accordingly issued its certificates as prayed for. Pittsburgh & West Virginia Railway then brought an action in the District Court of the United States for the Northern District of Ohio to set aside and annul the order of the Commission. The Supreme Court held that the order did not affect Pittsburgh & West Virginia as a carrier and that the claim that the order threatened Wheeling's

4 Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

financial stability and Pittsburgh & West Virginia's financial interest as a minority stockholder was not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. The court, at page 487, said: "* * * The injury feared is the indirect harm which may result to every stockholder from harm to the corporation," and that the interest of Pittsburgh & West Virginia was insufficient to give it standing to bring the action.

In *Moffat Tunnel League v. United States*, 289 U. S. 113, the Commission had entered an order authorizing the Denver and Rio Grande Western Railroad Company by stock purchase to acquire control of the Denver and Salt Lake Railway Company, called the Moffat Road. In the proceeding before the Commission the Moffat Tunnel Improvement District and the Public Utilities Commission of Colorado had intervened and they brought an action in the District Court of the United States for the District of Delaware to set aside the Commission's order. In holding that the plaintiffs did not have standing to maintain the suit, the Supreme Court said, at page 119:

> "* * * the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. Edward Hines Trustees v. United States, 263 U. S. 143, 148. Sprunt & Son v. United States, 281 U. S. 249, 254. Pittsburgh & W. Va. Ry. v. United States, 281 U. S. 479, 486. Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment, such as may be entertained by members of the public in the territory west of Craig, that the improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points."

The *Pittsburgh & West Virginia Railway* case and the *Moffat Tunnel League* case are obviously distinguishable from the instant case.

With respect to cases relied on by the defendants, the statement by the court in *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476, is apposite. "* * * The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were *unreasonable or discriminated against them.*" (Italics ours.) Here, the existing rates are attacked by the Rio Grande on the ground that they are unjust, unreasonable, and discriminatory as against the Rio Grande and shippers on its line, deny them equality of treatment, and cause injury to them.

It is urged that to maintain the action, equitable grounds for relief must be alleged. But, it should be remembered that in the *Rochester Telephone* case, the court, at page 142, said:

> "* * * An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise

considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. * * *"

Moreover, in overruling *Proctor & Gamble v. United States*, 225 U. S. 282, the court, at page 136, in the *Rochester Telephone* case, *supra*, observed that the shipper in that case "was within the express language of Congress authorizing suits 'to enjoin, set aside, annul, * * * any order of the Interstate Commerce Commission.'"

In the instant case, the Rio Grande, in its complaint, alleges that it was without adequate remedy at law. Clearly, the Rio Grande can maintain no other action which will give it adequate relief or prevent injury to it.

Accordingly, we conclude that the Rio Grande had standing to maintain the action.

The order in so far as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Filed Apr 22 1955

Order

It is ordered by the court that the opinion heretofore filed herein be modified by substituting for pages 14, 29, 31, 32 and 36 thereof the following pages numbered 14, 29, 31, 32 and 36 and by the changes reflected in such last-mentioned pages:

[Substituted Page]

than over the Rio Grande route. This is due, in part to the refusal of Union Pacific to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates under §15(3) is limited by §15(4) of the Act, which declares that, except as provided in §3 of the Act, a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through rate unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide adequate, and more efficient or more economic

[Substituted Page]

II.

The Motion to Dismiss

We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We further conclude that the Commission erred as a matter of law in applying the limitations of §15(4) with respect to the establishment of through routes, in determining whether the Union Pacific and the other defendant railroads should be required to establish and maintain for the future just, reasonable and non-discriminatory competitive joint rates under the provisions of §14(4), §3(4), §15(1) and §15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in §1(4), §3(4), §15(1) and §15(3) of the Act. The right of the Rio Grande to file its complaint with the Commission and seek the relief therein prayed for is clearly given by

[Substituted Page]

equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of §1(4), §3(4), §15(1), and §15(3) of the Act, free of any of the limitations imposed by §15(4) with respect to establishing through routes.

If the Rio Grande, on its showing before the Commission and an application of the provisions of §1(4), §3(4), §15(1) and §15(3), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the

[Substituted Page]

Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated, if the Rio Grande, under the Facts established by the evidence before the Commission, and the application of the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]

2 The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

3 The Chicago Junction Case, 264 U. S. 258, 266, 267.

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There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission, that he was an aggrieved party, and that he was entitled to judicial review. See, also, *Henderson v. United States*, 339 U. S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform their statutory duty to establish just and reasonable joint rates, fares, and charges over through routes, and if it was entitled to such an order, then it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

Edward Hines Trustees v. United States, 263 U. S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the

(Signed) Royce H. Savage
District Judge

(Signed) William Lee Knous
District Judge

(Signed) Orie L. Phillips
Circuit Judge

APPENDIX F

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1 (4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to

part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3 (4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15 (1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers sub-

ject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mini-

ma, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

Section 15 (4)—

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15(8)—

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

Section 20(11)—(in part)

"That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, Dis-

trict of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; * * *."

MAR 1 1956
HAROLD B. WILLEY, Clerk

No. 332
Consolidated with Nos. 117, 118, 119, 333 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

WASHINGTON PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSIONER OF OREGON;
BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA;
STATE BOARD OF EQUALIZATION AND PUBLIC SERVICE COMMISSION OF WYOMING;
STATE OF NEBRASKA and NEBRASKA STATE RAILWAY COMMISSION,

Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR ABOVE NAMED APPELLANTS

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Appendix A—Pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C., §§1, et seq.

No. 332
Consolidated with Nos. 117, 118, 119, 333 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

WASHINGTON PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSIONER OF OREGON;
BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA;
STATE BOARD OF EQUALIZATION AND PUBLIC SERVICE COMMISSION OF WYOMING;
STATE OF NEBRASKA and NEBRASKA STATE RAILWAY COMMISSION,

Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR ABOVE NAMED APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado (R. 279) is reported in 131 F. Supp. 372. The report of the Interstate Commerce Commission (R. 57) is found in 287 I. C. C. 611.

JURISDICTION

This action was brought October 22, 1953, in the United States District Court for the District of Colorado (R. 1) by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") against the United States of America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398,

3284 and 2321-2325, to enjoin, annul, suspend and set aside "in part" an alleged "order" issued January 12, 1953, by the Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co. et al." These appellants intervened as defendants in the district court.

The final judgment and decree of the district court, dated February 1, 1955, was entered February 14, 1955. On April 22, 1955, the district court entered an order overruling and denying a motion of these appellants and others for new trial or reargument and reconsideration (R. 361; 362).

Notice of appeal was filed by these appellants in the United States District Court for the District of Colorado on June 20, 1955 (R. 369).

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). Probable jurisdiction was noted by this Court on October 24, 1955.

STATUTES INVOLVED

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out in Appendix A hereto:

> National Transportation Policy (preceding Section 1), and Sections 1(4), 3(4), 15(1), 15(3), 15(4), 15(8) and 20(11).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

I. Does the Rio Grande, which obtained joint through rates on certain commodities under the Commission's

order, have legal standing to seek by a suit to enjoin the order, similar rates on all commodities via all possible routes when the granting of such additional relief is subject to administrative determination of public interest requirements under the Interstate Commerce Act.

II. Did the district court err in holding that Rio Grande sustained "pecuniary injury" and had standing to maintain this action on the ground that the Commission deprived Rio Grande of additional "pecuniary gain" which would be realized if all the joint rates demanded by Rio Grande had been granted.

III. Did the district court err in holding that Rio Grande need not sustain "pecuniary injury" in order to have a "right to judicial review".

IV. Did the district court err in holding that the Commission's finding that "there are at present no through routes, as that term is used in the act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law.

V. Did the district court, in connection with its holding that through routes were in existence on the "bridge" traffic sought by Rio Grande, err in failing to consider and give effect to the fact that the primary objective of Rio Grande was to participate in the transportation of products from the northwest states to the eastern and southern markets and that not a single movement of such "bridge" traffic is shown to have occurred over the Rio Grande route.

VI. Did the district court, in connection with its holding that through routes were in existence, err in

failing to find that the cancellation of joint rates in 1906 and 1912 effectively closed these through routes in accordance with the understanding and "course of business" of the parties concerned and that the conclusion of the Commission in this regard is supported by legislative amendments in 1940 to Section 15(3) of the act.

VII. Did the district court, in connection with its holding that through routes were in existence, err in failing to find as the Commission found, that shippers have a right to route traffic via the Rio Grande and Union Pacific at combination of local rates and that the Union Pacific had no right or duty to refuse shipments.

VIII. Did the district court err in holding that the decision of the Commission as to the existence of through routes "obviously prejudiced the entire proceeding" in view of the fact that the Commission's order established through routes and joint rates upon all commodities that it considered upon the evidence to be necessary in the public interest.

IX. Did the district court err in annulling and setting aside only that portion of the Commission's order which "denied relief to the Rio Grande" upon its holding that the Commission's finding as to through routes "obviously prejudiced the entire proceeding".

X. Did the district court err and exceed its powers in making findings of fact favorable to Rio Grande and in ordering the Commission to proceed "in conformity with the opinion and judgment of the court", and the "instructions" therein.

STATEMENT

The Rio Grande's complaint to the Commission demanded that joint rates, in lieu of the present combination of local rates, be established via its line "the same" as joint rates maintained over shorter through routes by the Union Pacific and other defendant railroads named in the complaint for about 172,000 carloads of traffic moved annually by those railroads. The traffic originates and terminates on the lines of the Union Pacific, Great Northern, Northern Pacific, Milwaukee, Southern Pacific and other railroads that have owned and operated for some 75 years thousands of miles of railroad trackage in the ("northwest") area embracing northern Utah, Idaho, Montana, Oregon and Washington. Most of that traffic originates and terminates on the lines of the Union Pacific[1] and moves over its lines through Idaho, Wyoming, Nebraska and Kansas between points in the northwest area and points in the eastern and southern part of the United States over through routes ("Union Pacific routes") and under joint rates maintained by the Union Pacific and other railroads, including those named above.

The joint rates have never applied via the Rio Grande except during a short period in the early part of this century, when Union Pacific and two of its subsidiary lines were in receiverships. Having their own shorter and direct routes connecting at their eastern termini with other railroads forming the through routes for this transcontinental traffic, the Union Pacific and other carriers

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1 Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consists of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands, and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its line.

serving the northwest area have insisted on retaining their long hauls and therefore have refused to establish through routes and joint rates with the Rio Grande for this transcontinental traffic. The only rates applicable via the Rio Grande for this traffic are the combination or the sum of the local rates of each carrier, and those rates are substantially higher than the joint rates over Union Pacific routes.

Since 1935, the Rio Grande management has sought some method by which it could compel carriers comprising the Union Pacific routes to make their joint rates applicable via its longer and more onerous, mountainous route for a "bridge haul"[2] on traffic from and to the northwest area. (V. I, 48)*. On August 1, 1949, the Rio Grande filed its complaint with the Commission which resulted in the order involved in these appeals. The complaint alleged that the combination of local rates via the Rio Grande for the involved traffic are so much higher than the joint rates maintained via Union Pacific routes as to prevent the movement of the involved traffic via the Rio Grande, thus depriving the Rio Grande of through freight traffic

2 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's president testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates outside of Rio Grande territory. Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

* Because of duplication in page numbering the printed records in these cases, this abbreviation will be used to refer to pages of Volumes I & II, proceedings before the Interstate Commerce Commission.

it might obtain if "equal rates" applied via its line. It alleged that the combination rates were unjust and unreasonable, unduly prejudicial to shippers desiring to use the Rio Grande and that the refusal of the Union Pacific and other defendants named in the complaint to establish joint rates in connection with the Rio Grande the same as the joint rates maintained over Union Pacific routes violated Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act.

The Rio Grande demanded that the Commission order the Union Pacific and other defendants named in the complaint to establish joint rates on *all commodities* in connection with the Rio Grande "the same" as the lower joint rates maintained over Union Pacific routes. Realizing that its demands would short haul the Union Pacific routes 925 miles, Rio Grande's complaint alleged that, as its tracks physically connect with other railroads, through routes "now exist" for the interchange of the involved traffic between its line and the Union Pacific and other railroads and contended that the Commission should prescribe the joint rates without regard to the prohibition in Section 15(4) against short-hauling existing routes. Citing this Court's decision in *Thompson v. United States*, 343 U. S. 549, the Commission rejected that contention and held that prescription of any of the joint rates demanded by Rio Grande would involve the authority conferred by Section 15(3) as limited by Section 15(4) of the Act to prescribe through routes and joint rates.

The order issued by the Commission[3] requires that

3 The validity of the order issued is now before this Court in Nos. 117, 118 and 119, appeals docketed May 31, 1955, from the final decree of the United States District Court for the District of Nebraska.

the Union Pacific and over 200 other railroads establish through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert over its line, short-hauling the Union Pacific routes at least 925 miles and subjecting the Union Pacific and other lines to large revenue losses.

But the Commission did not order through routes and joint rates on about two-thirds of the traffic, and it is for the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, that the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include the remaining two-thirds of the traffic in the order it issued. Such failure is not embraced in the order issued or in any "order" of the Commission.

The case presents the novel and unique situation of an admitted attempt by the Rio Grande through judicial proceedings to further enhance its financial gains by diverting to its longer line for a "bridge" haul, traffic that originates or terminates on the railroads that have the shortest, fastest and most efficient routes and lowest rates between the points at which the traffic originates and points of its destination.

As stated, the Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line for the traffic it seeks, and that the short-hauling prohibition in Section 15(4) was not applicable. It demanded that the lower joint rates maintained over the existing Union Pacific routes be made applicable via its line, and contended

that refusal of the defendants named in its complaint to make the joint rates applicable via its line discriminated against it. The Commission held that through routes via the Rio Grande did not exist for the involved traffic but found they were necessary in the public interest to provide adequate and more economic transportation for certain commodities named in the order, and required that joint rates "the same" as maintained over existing Union Pacific routes be made applicable via the Rio Grande to those commodities. The Commission found that the evidence failed to prove the alleged discrimination against the Rio Grande and concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained." The order issued does not, in terms, deny or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks by this suit to divert to its line.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to the traffic it seeks to divert to its line for its financial gain, it has no standing to maintain the suit. The court reversed the Commission and held that through routes via the Rio Grande do exist for the involved traffic, that the Commission had erred as a matter of law and upon the evidence in finding that through routes via the Rio Grande did not exist, and that this finding "prejudiced the entire proceeding" before the Commission. The court, again reversing the Commission, held that the evidence proved discrimination against the Rio Grande, and enjoined and annulled "the order" insofar as it denied and withheld relief from the Rio Grande, and "remanded" the case to the Commission for further proceedings in conformity with the court's opin-

ion, but *only* insofar as the Commission "denied and withheld relief" to the Rio Grande.

These five States, representing territory served by long established Union Pacific routes from the Missouri River to the Pacific northwest, oppose Rio Grande proposals to short haul the shortest, swiftest and most economical route to eastern and southern markets, by requiring Union Pacific and over two hundred other railroads to enter into joint through rates with the Rio Grande whose admitted objective is to divert this traffic, primarily from the Union Pacific, in order to obtain a "bridge" haul and thereby improve its financial position. According to Rio Grande the "potential" volume of such traffic moving from the northwest to the east and south, which would be "available for solicitation" and diversion by the Rio Grande to its line amounts to 101,476 carloads annually.[4]

Being distant from the principal markets, the economic life of the northwest depends upon fast, efficient, low cost transportation. Present transportation facilities and routes to and from this area are more than sufficient and Union Pacific alone is shown to possess an unused

4 As indicated in the Commission's report (R. 77, 69) the bulk of the traffic sought constitutes agricultural and mineral products of the northwest, which now travel via Union Pacific "because the Union Pacific routes are shorter." The reverse movement west comprises only 56,286 carloads annually and was given little emphasis by Rio Grande. The only westbound articles included in the order were "granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations" in the northwest (R. 105).

The traffic east and the traffic west are entirely independent of each other and should have been so considered. The Commission's order which the Court annulled in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 273, involved only the establishment of "through routes for westbound freight traffic."

transportation capacity of 85% (V. I, 690). Piling on additional surplus facilities and unneeded routes, will, in the opinion of these States, adversely affect the economic future of this territory and violate the manifest policy and intention of Congress.[5]

The present through route provisions of the Act were adopted in 1940 in order to make the "shortest, quickest, and cheapest routes available."[6] Union Pacific routes meet these tests. Rio Grande routes do not.

Ordinarily requests for new routes are justified as "needed" and involving "more efficient or more economic" transportation by showing that they are shorter than existing routes. The Rio Grande routes sought herein are unique in that they would short haul the short route by substituting an uneconomic, wasteful, slower route from 219 miles to as much as 50 per cent longer which must go up and down many of the highest mountains in the country.[7]

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5 Congressional policy since 1920 has stressed as paramount economy and efficiency in transportation facilities. *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277. The 1940 declaration of Congress (49 U. S. C. preceding § 1) emphasizes "adequate, economical and efficient service" and this declaration controls the "basic power of the Commission." *American Trucking Assns. v. U. S.*, 344 U. S. 298.

6 Report No. 404, Senate Bill 1261, 75th Cong., 1st Session, page 2. Congressional Record, pp. 6055-6056. 287 I. C. C. 655.

7 The Commission reviews (R. 94) some of the proof showing the Rio Grande to be "less favorably situated," and it finds that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein." (R. 102.) The full impact of wastefulness established beyond dispute by the record is not reflected. This shows that the Rio Grande "has no value as a service route" (V. I, 803); that curvature is so great a train completes a circle

(Continued on next page)

Long experience has demonstrated to these States that the fantastic wastefulness involved in Rio Grande proposals would ultimately be saddled upon the public and shippers of these States.[8] This local marginal mountainous railroad should not be permitted to force its admittance into the transcontinental railroad systems which this region must support.

The overwhelming public detriment that these States and their communities may suffer under Rio Grande proposals includes: (1) reduction in existing service, (2) abandonment of branch lines, (3) waste of present and adequate facilities, (4) increases in unit costs, and (5) destruction of long established channels of trade and commerce.[9]

(Continued from preceding page)

every 5.45 miles and requires 51% more effort (Ex. 12, p. 9), at a cost of $124.33 per car (Ex. 15, p. 7; Ex. 53 p. 3) and that freight car days are wasted.

(Pursuant to stipulation of the parties filed with the Clerk of this Court November 9, 1955, exhibits received in evidence by the Commission and sent up in original form as part of the record prepared by the Clerk of the district court are not printed but may be referred to and treated as if they were printed.)

In *Texas v. United States*, 292 U. S. 522, 530, the Court said it is a "primary aim" of present transportation policy of Congress "to secure the avoidance of waste." One of the long expressed purposes of Congress has been to eliminate this kind of "cut-throat" competition. *United States v. Louisiana*, 290 U. S. 70, 74.

In this connection it is significant that practically all shipper witnesses of Rio Grande, including the U. S. Department of Agriculture, supported their position on the ground that notwithstanding the mandate of Congress against short-hauling existing routes, all gateways should be opened and unlimited circuitous hauling should be the rule.

8 As noted by the Court in *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 270, "when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

9 This Court has said that it "could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing." *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197, 218.

The differences in rates which Rio Grande now experiences merely reflect differences in transportation conditions which have always characterized sound transportation conditions, regulation and practices.[10]

It is clear that what Rio Grande seeks in this proceeding, a rate advantage by circumventing the requirements of the Act, is not appropriate under the Act and is inconsistent with previous decisions of the Commission in this field.[11]

SUMMARY OF ARGUMENT

1. The Commission's order established through routes and joint rates on some commodities. Because of Rio Grande's failure to satisfy various "public interest" requirements, additional commodities and routes were not included in the order. There was no "order" as to omitted routes and commodities. The failure of the Commission to grant a broader "order" affords no jurisdictional basis for judicial review. Granting judicial relief to the Rio Grande in such circumstances would necessarily involve the exercise of "administrative" functions by the Court.

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10 *Barringer & Co. v. U. S.*, 319 U. S. 1, 9. *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 396.
The Act was "not intended to ignore the principle that one can sell at wholesale cheaper than at retail." *Interstate Com. Commiss. v. B. & O. Railroad*, 145 U. S. 263, 276.

11 *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331, 333, summarizes recent Commission decisions and points out that through routes have been established when they "eliminated expensive out-of-line hauls," or were "shorter" or "were at least as economical"; and were rightly denied in the case being heard since the "routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation" and "would not 'give reasonable preference to the originating carrier."

Since the order issued granted Rio Grande substantial benefits and as conceded by the district court "took nothing away from the Rio Grande", no "pecuniary loss" was sustained and Rio Grande has no standing to maintain this action. The lower court clearly erred in concluding that the failure of Rio Grande to realize all the "pecuniary gain" requested constitutes "pecuniary injury". No decision of this Court sustains this position. The only case which the district court cited as supporting this view involved an actual annual loss of $10,000,000, by reason of the Commission's order.

The holding of the district court that "pecuniary injury" need not be suffered, to afford judicial review, would extend the right of review to every litigant before the Commission receiving less than its maximum demands. No precedents can be found which sustain this new rule of judicial review. The cases cited by the district court involve the review of Commission orders denying relief to negroes who were deprived of their Constitutional right to equality of treatment. These cases do not support the conclusion of the court since they involve a "loss" and deprivation of rights constituting legal injury.

The claim now made by Rio Grande that review is justified under the Administrative Procedure Act disregards the language therein continuing the same requirements of legal injury for review as set forth in statutes already providing judicial review.

The position of the Commission that through routes and rates did not previously exist resulted in no prejudice to Rio Grande since the Commission held that the requirements of section 15(4) in this regard were satisfied with respect to the commodities named in the order. The limitation of relief to Rio Grande was caused by

"public interest" requirements under the act and not by the position of the Commission as to non-existence of through routes. The Commission's position in this regard became a moot question by reason of the establishment of through routes.

2. The Commission rightly concluded that through routes did not exist on the basis of the various objective and subjective tests prescribed by this Court. The self styled "brief and sketchy statement of the case", by the distfict court, considered only a portion of the record and some but not all of the controlling factors.

The paramount objective of Rio Grande in this case is to share in the "bridge" shipment of agricultural products from the northwest to the eastern markets. Not a single movement of this "bridge" traffic over any proposed route was shown to have occurred. The relatively few movements shown by Rio Grande for the year 1948 were from east to west, and these, as realistically held by the Commission, amounted to only "isolated" shipments that are wholly insufficient to establish a through route.

There was, therefore, no "holding out", no "course of business", no "course of conduct", no "continuous use", which would establish the desired through routes. Undisputed evidence, given no consideration by the district court, showed that it was only in recent years that Rio Grande completed improvements which enabled it to seek these new routes. Earlier when the routes now desired were closed, Rio Grande confined its efforts to building a new outlet to the Pacific coast. The "pamphlet" campaign launched by Rio Grande at the beginning of this proceeding clearly recognized that the desired routes

were closed. Extensive evidence, unnoted by the court below, refutes the idea there has been any "continuous use" of the proposed through routes. And shipper witnesses for the Rio Grande made no claim that routes already existed. They founded their testimony on the desirability of opening all gateways without regard to the Congressional mandate against short-hauling.

The Commission correctly warned that a decision that Rio Grande's showing herein established the existence of through routes would constitute an "open invitation to any shipper to set aside" the requirements of the act by staging a few shipments.

The district court, though holding that the evidence "establishes the existence of through routes" via the Rio Grande, refused to face squarely the consequences of declaring the existence of "hundreds of thousands of through routes" by the kind of showing attempted and ordered a "new hearing" by the Commission as to the extent of through routes. In so doing the Commission was directed to reconsider a question it has already considered and resolved against Rio Grande.

3. The undisputed evidence shows that joint rates, temporarily in effect while the railroads involved were in receivership, were effectively cancelled by Union Pacific in 1906 and 1912 by tariff amendments. All during the period since this cancellation the public and the parties to this proceeding regarded the routes as closed. Neither the Rio Grande nor anyone else took any action to suspend this closing of routes. Under such circumstances the Commission rightly concluded that Union Pacific had done everything required to close such routes.

In amending Section 15(3) in 1940 Congress recognized the long established right of carriers to close routes by cancelling joint tariff rates. This legislation required a showing of "public interest" if the Commission "suspended" the route closing. The legislative history shows this amendment was aimed at preventing "wholesale cancelling of joint and through routes" by tariff amendments.

The decision of the Commission as to the effect of tariff amendments made more than 40 years ago follows repeated decisions of the Commission and this Court and, being supported by evidence, is not subject to review in this action.

4. The Commission correctly held that shippers have a right to route their traffic and Union Pacific had no right or duty to refuse shipments. There is nothing in the law requiring or permitting a road block or embargo to be erected in order to preserve a carrier's right not to be short-hauled. For many years the Commission and this Court have held that a shipper may route his traffic over a "closed" route if he desires to pay the established rates.

Section 15(8) of the Act is not inconsistent with this position. That section applies only when "two or more through routes" have been established and was added in 1910 to protect shippers against the duplication of routes that might result from an expanded Section 15 adopted in that year. The section has no application in cases such as the present where "two or more through routes" do not exist.

The issuance of a through bill of lading on the few bridge shipments moved west over the proposed route in

1948, merely complied with the mandate of Section 20(11) of the Act and constitutes no acknowledgment of a through route. The Union Pacific, under long established decisions, had no right or duty to refuse a through bill of lading to any such shipper.

5. The district court exceeded its powers and usurped administrative authority in finding that "discrimination" against Rio Grande was established. This finding, and the various "instructions" to the Commission contained in the opinion, have the effect, in connection with the "remanding the case to the Commission", of completely tying the Commission's hands. This action was taken by the district court even though it frankly stated that its disposition of the case was based upon a "narrow ground" following a "very brief and sketchy statement of the case". The opinion of the court constitutes in effect a *de novo* review of the record which is beyond the statutory power of review.

ARGUMENT

I.

Rio Grande Does not Have Legal Standing to Maintain This Action.

The Commission's order establishes through routes via the Rio Grande route in both directions and requires joint rates "the same" as rates on Union Pacific routes to be established on the commodities specified, which comprise about a third of the involved traffic. Rio Grande has therefore obtained under the order substantial rights to solicit and haul transcontinental traffic that it could not previously carry. The potential "pecuniary gain" thus realized by the Rio Grande is considerable (esti-

mated to be $11,000,000, annually although the exact dollar volume is not fixed.

Though holding that the Rio Grande has standing to maintain this suit, the district court admitted that to the extent the Commission's order failed to grant Rio Grande the full "relief" requested it:

> "* * * required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had, and, if considered solely from those points of view, the order caused no pecuniary loss to the Rio Grande." (R. 293-294)

The court goes on, however, and theorizes that *if* Rio Grande was entitled to joint rates under Sections 1(4), 3(4), 15(1) and 15(3) independent of Section 15(4), then it failed in the order to secure "a pecuniary gain to which it was entitled", because the "granting of the relief undoubtedly would have resulted in a large increase of traffic" which in turn would increase "operating income, and, no doubt, in its net earnings." This result, the opinion suggests, may constitute "pecuniary injury to the Rio Grande" (R. 294).

At this point it should be immediately noted that if failure to realize all the "pecuniary gain" requested by any applicant in a proceeding before the Commission may constitute sufficient "pecuniary injury" to obtain a judicial review, then every case in which everything that is requested is not obtained may be the proper subject of judicial proceedings.

It is, of course, elementary that a "pecuniary benefit means an increase in one's net worth by the receipt of money or property." *Hays' Estate v. Commissioner of Internal Revenue* (5th C. C. A.), 181 F. 2d 169, 171.

Practically every complainant before the Commission seeks that kind of "benefit". Heretofore, such a "benefit" or "gain" has not been held identical with a "loss" sustained as a result of a Commission order in determining whether a judicial review was available.

The district court does not refer to a single decision upholding its view that failure to obtain all the "pecuniary gain" asked for may constitute "pecuniary" loss and "legal" injury. The cases involving the problem of legal standing, as we shall see, all relate to the sufficiency of the losses therein experienced to amount to "legal injury". These cases clearly define what kind and type of loss—what deprivation of a previously held benefit—is sufficient basis for judicial review.

The only authority mentioned by the court in support of its theory is the reference in footnote 3 to the *Chicago Junction Case*, 264 U. S. 258, to substantiate the statement that "judicial review" is available where an order will cause a carrier to "suffer pecuniary injury", but that case is no support whatever for the reasoning that the Rio Grande suffered "pecuniary injury" by being deprived of a "pecuniary gain" which "undoubtedly would have resulted" from a "large increase in traffic" if all the relief requested had been obtained.

Instead of supporting the lower court, the *Chicago Junction Case* demonstrates why this action cannot be maintained. The order involved in that case permitted the New York Central to take over certain terminal railroads in Chicago and give the Central a "monopoly", thereby replacing the "neutral control" existing prior to the order. That the plaintiff railroads were actually

deprived of business in an annual amount of $10,000,000 annually, is made clear at pages 266-267 of the opinion.[12]

As further stated by this Court in that case, this "loss" was not merely an "incident of more effective competition". It was "injury inflicted" by "denying" plaintiffs the rights and benefits which they *previously enjoyed*, and an amendment of the Act in 1920 specifically "made provision for securing joint use of terminals."

The Rio Grande can point to no revenue it has lost by the present order. It can only claim that the order *demanded* would give it a "large increase in traffic" and a "pecuniary gain." No authority whatever is cited by the lower court that such demand for additional "pecuniary gain" gives Rio Grande a legal standing in this case.

The opinion below cites several decisions of this Court wherein even a "loss" actually resulting from an order did not give the affected party standing to seek review of the order. Cases such as *Edward Hines Trus-*

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12 The opinion states:

"The main purpose of the acquisition by the New York Central was to secure a larger share of the Chicago business. By means of the preferential position incident to the control of these terminal railroads, it planned to obtain traffic theretofore enjoyed by its competitors. Because such was the purpose of the New York Central control, and would necessarily be its effect, these plaintiffs intervened before the Commission. That their apprehensions were well founded is shown by the results. The plaintiffs are no longer permitted to compete with the New York Central on equal terms. A large volume of traffic has been diverted from their lines to those of the New York Central. The diversion of traffic has already subjected the plaintiffs to irreparable injury. The loss sustained exceeds $10,000,000. Continued control by the New York Central will subject them to an annual loss in net earnings of approximately that amount. If, as suggested in *Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 109, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here."

fees v. U. S., 263 U. S. 143, and *Sprunt & Son v. United States*, 281 U. S. 249, were rejected by the district court as involving a "mere deprivation of a competitive advantage" and therefore "not enough" to warrant review in the courts. The deprivation and loss involved in both of those cases was very substantial[13] but the extent of such loss is not as important as the fact that that loss actually occurred. What the district court overlooked is that notwithstanding such losses this Court held that there was no basis for review because a "legal injury" had not been suffered.

The foregoing observation is also applicable to *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, in which plaintiff a connecting carrier and "minority stockholder" sought to review a Commission order establishing a union station in Cleveland. It was held at page 487 that "legal injury" did not exist although the "financial stability" of the carrier directly concerned was threatened and plaintiff's investment imperiled.

The decisions of this Court sustain the proposition that previously enjoyed rights must be "injuriously affected" in order to afford any standing whatever to seek review of a Commission order.[14]

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13 In the *Hines case* it was claimed property was being taken by the Commission's order "without due process of law, in violation of the 5th Amendment." (263 U. S. p. 147.)

In the *Sprunt case* the order caused a shipper to lose a $7.00 per ton advantage which he had enjoyed over his competitors.

14 *Moffat Tunnel League v. U. S.*, 289 U. S. 113, at page 119, cites and summarizes the cases. See also *Claiborne-Annapolis Ferry v. U. S.*, 285 U. S. 382; *Alton R. Co. v. United States*, 315 U. S. 15.

Alabama Power Co. v. Ickes, 302 U. S. 464, 478, states that the "mere fact that petitioner will sustain financial loss" is not sufficient.

The statement in *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 148, that "plaintiffs have no absolute right" to maintain previous competitive advantages is, *a fortiori*, applicable to Rio Grande and requires a conclusion that Rio Grande has no right of any kind in the additional "pecuniary gain" that would be realized under the order requested of the Commission.

The law that should control here, governing the question of standing to maintain suit to review an order of the Commission was unusually well and correctly stated by Chief Judge Moore of the three-judge court that dismissed for lack of standing the complaint in *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76 (affirmed per curiam by this Court Nov. 14, 1955; No. 400, 76 S. Ct. 152). In that case the order authorized one motor carrier to acquire control of another. Fearing stronger competition from the combination of motor carriers than it had previously experienced, the Santa Fe Railway sued to annul the order. The court stated, page 78, that:

> "In this case the Complaint fails to allege that the plaintiffs have suffered or been threatened with any damage or financial injury. It does not allege that any definite legal right of the plaintiffs has been violated, nor that the order of the Commission has created any additional motor carrier service, or increased competition for the plaintiffs. The plaintiffs merely allege that they are in competition with the motor carriers, and that they have a direct interest in the enforcement of the Interstate Commerce Act and the National Transportation Policy."

Distinguishing this Court's decisions in *Chicago Junction Case*, 264 U. S. 258; *Western Pacific v. South. Pac. Co.*, 284 U. S. 47, and *Alton R. Co. v. United States*, 315 U. S. 15, and noting that the Santa Fe was "not threatened with any new competition from new oper-

ating rights which they have not been subjected to in the past", and, hence, no threatened loss of the railroad traffic from any substantial or material "change in the transportation situation", the court held, at page 79:

> "Thus it appears that there is here no right of the plaintiffs which may have been violated by the order of the Commission and, furthermore, there is no damage alleged. In other situations it has been held that even where there may be damage, a plaintiff must have some special and peculiar interest which may be directly and materially affected by the action alleged to be unlawful. L. Singer & Sons v. Union Pacific R. Co., 311 U. S. 295, 61 S. Ct. 254, 85 L. Ed. 198. And where there is no violation of a right, no action may be maintained and no right exists to be immune from lawful competition or the unauthorized financing of such competition. Alabama Power Co. v. Ickes, 302 U. S. 464, at pages 479-480, 58 S. Ct. 300, 82 L. Ed. 374.
>
> "And in Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 59 S. Ct. 366, 369, 83 L. Ed. 543, the Court held one threatened with direct injury by governmental action may not challenge that action 'unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.' There the plaintiffs were held to be without standing to sue because 'the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, * * *.'
>
> "Though the motor carriers in the instant case may, as a combination under joint control with adequate financial backing, offer stronger competition to the railroads than they did previously, we conclude that the railroads have no 'definite legal right' to be immune from this competition and, therefore, are not 'parties in interest' who may maintain this suit."

The District Court Erred in Holding That Rio Grande Need not Sustain Pecuniary Injury to Maintain This Action.

While the precise theory or ground for the court's holding that Rio Grande has standing to maintain this action is uncertain, the emphasis placed on *Mitchell v. United States*, 313 U. S. 80, clearly shows that the court thought that "pecuniary injury" is not "essential to the right to judicial review" as a result of that decision. This Court's holding that Mitchell had a right to review the dismissal of his complaint to the Commission because he was deprived of his *constitutional right* to equal train accommodations, offers no assistance whatever in solving the present case. Here the Rio Grande, in its greatest flights of contention, has never suggested that it is being or has been deprived of any legal or constitutional right by the order of the Commision which it attacks.

This Court said in the *Mitchell* case (p. 94) that the "fundamental individual right" to equality of treatment "guaranteed against state action by the Fourteenth Amendment", prevented compliance with a state statute as to "segregation" of white and colored passengers; and that the provisions of the Interstate Commerce Act carried such guaranty into effect by requiring "equality of treatment".

The entire basis for the proceeding in the *Mitchell* case was the actual deprivation of constitutional rights inflicted upon Mitchell by requiring him to give up a pullman seat and "move into the car provided for colored passengers" and to do this "under threat of arrest"[15] (p. 89).

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15 This Court has made it clear that as to state action, complainants are "deprived of the equal protection of the laws guaranteed by

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Henderson v. United States, 339 U. S. 816, also cited by the lower court, which involved a "denial of dining service" to a colored railroad passenger, is in all respects a holding identical with that in the *Mitchell* case. The action in that case was to review the "railroads current regulations" and "practices", to which complainant had been "subjected" and which deprived him of the "use" of "existing and unoccupied facilities" on trains by reason of his color.

To state, as did the court below, that these constitutional cases do not involve a "pecuniary injury" is but to announce that constitutional rights do not necessarily involve money. It is one thing, however, to suggest actual deprivation of constitutional rights gives a right of review although no "pecuniary" loss has occurred; it is quite another thing to suggest that in cases such as the present, which involve no question of constitutional rights, there may be a review even though there is no "pecuniary injury". If the latter is correct, then what limitation exists on the review of Commission orders? If a plaintiff is entitled to a review because he asked for something he did not receive in full, then the doctrine of "legal injury" as a basis for review is abandoned.

(Continued from preceding page)
the Fourteenth Amendment" by racial segregation (*Brown v. Board of Education*, 347 U. S. 483, 495); and such segregation is a "denial of due process of law guaranteed by the Fifth Amendment." (*Bolling v. Sharpe*, 347 U. S. 497, 500). The latter opinion at page 499 cites *Buchanan v. Warley*, 245 U. S. 60, that restrictions on conveyances based on race are an "unreasonable discrimination, a denial of due process of law."

The constitutional basis for a right of action on account of such "deprivation" of rights is unaffected by the fact that a statute may also prohibit the discrimination. *Flemming v. South Carolina Elec. & Gas Co.*, (4 Cir.), 224 F. 2d 752.

Any such result which amounts to judicial review of *all* Commission orders is neither warranted by the statutes nor consistent with judicial practice.

When the entire opinion of the district court is considered, there is reason to believe that the key to its decision is the position taken as to the necessity of "pecuniary injury". The court must have realized, in view of the long history of restrictive decisions in the field of "legal injury" that a failure to obtain all the "pecuniary gain" that was desired could not be converted into a showing of "pecuniary loss".

The conclusion of the district court, that standing exists, will, if affirmed, inevitably change the whole course of decisions in this field and greatly expand the volume of reviewable decisions of the Commission. This will be true if either of the two theories advanced by the court is adopted. We submit, however, that there is no need for enlarging judicial review of such cases to include those which have never heretofore been regarded as cognizable in court. To do so would place this Court in the position of supervising more and more of the intricate activities of the Commission.

The Administrative Procedure Act Provides no Standing for the Rio Grande to Maintain This Suit.

Realizing that long established principles governing judicial review of Commission orders provide no basis for this action, Rio Grande claims the right to maintain this suit under Sections 1009(a) and 1009(e) of the Administrative Procedure Act (5 U. S. C. § 1009).

Section 1009(e) deals only with the "Scope of Review" (60 Stat. 243), which it limits, and does not pur-

port to give any right of review to anyone.[16] That section must therefore be completely eliminated from consideration.

Section 1009(a) with reference to a right of review must be read with the introductory clause which precedes the section.[17] This clause makes directly applicable to the whole of Section 1009(a) all other statutes relating to the Commission, for the purpose of determining to what extent such statutes "preclude" review. The words "so far as" in such introductory clause "recognizes that the previous law often cut off review to some extent without cutting it off altogether" and the Act was "carefully framed" to leave such "law as it was".[18]

The requirement in the Procedure Act of a "legal wrong" as a basis of review continues in effect the same requirement of legal standing that has always existed and which is reflected in the cases reviewed previously in this brief. See also *Alabama Power Co. v. Ickes*, 302 U. S. 464.

The ground for review also specified in the Procedure Act "adversely affected or aggrieved * * * within the meaning of any relevant statute" does not itself establish any new standard for review since reference must be to a "relevant" statute as the basis of review. The "relevant" statutes in this case are the same statutes

16 *E. Brooke Matlack, Inc. v. United States*, 119 F. Supp. 617, 619.

17 Section 1009(a) states: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—(a) Right of Review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

18 Davis, Unreviewable Administrative Action, 15 F. R. D. 411, 428.

that have been in effect for many years prior to the Procedure Act governing review of Commission orders.[19] These statutes and the decisions of the Court interpreting and applying them demonstrate, as shown before, that Rio Grande has no right to a judicial review of this case.

The provisions of Section 1009(a) of the Procedure Act therefore create no new or additional right to judicial review of Commission orders. Moreover, they do not relax the requirements of judicial review which are applicable to review of Commission decisions. That this legislation was never intended to enlarge the power of judicial review as to such orders is shown by the authoritative Attorney General's Manual and his report to the Senate Judiciary Committee in this regard.[20]

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19. These statutes apply to "any order of the Interstate Commerce Commission." 28 U. S. C. 1336, 1398, 2284. 28 U. S. C. Section 2321 commands that the "procedure" in such appeals "shall be as provided in this chapter." 49 U. S. C. 17(9) provides that review may be had of Commission orders under the foregoing "provisions of law" but "not otherwise."

In *Atchison, Topeka and Santa Fe Ry. Co. v. United States, supra,* the district court held at page 78:

"Plaintiffs also refer to Section 10 of the Administrative Procedure Act, 5 U. S. C. A. § 1009, but it is clear that that Act merely was a declaration of existing law where judicial review is provided. See Transamerica Corp. v. McCabe, D. C., 80 F. Supp. 704.

"Thus the decisions under the Interstate Commerce Act must control the determination of whether the plaintiffs are 'parties in interest' within that Act."

20. This Manual states as to Section 1009(a):

"This statement of the persons entitled to judicial review has occasioned considerable comment because of the use of the phrase 'any person suffering legal wrong.' This phrase was used as one of limitation and not for the purpose of making judicial review available to anyone adversely affected by governmental action. The delicate problem of the draftsmen was to identify in general terms the persons who are entitled to judicial review. As so used, 'legal wrong' means such wrong as particular statutes and the courts

(Continued on next page)

In *Heikkila v. Barber*, 345 U. S. 229, 235, it was held that 'appellant's right to review of deportation orders under the 1917 Act were "not enlarged" by the Procedure Act.[21]

Recent decisions demonstrate that the requirements which have been imposed by this Court under Commission appeal statutes are similar to those imposed by the Administrative Procedure Act.[22]

It has already been noted that a failure to give "pari materia" effect to previous statutes governing review of agency actions will "create confusion" in this

(Continued from preceding page)
have recognized as constituting ground for judicial review. 'Adversely affected or aggrieved' has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action. The determination of who is 'adversely affected or aggrieved * * * within the meaning of any relevant statute' has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' Final Report, p. 83; see also pp. 84-85. The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. More specifically he indicated his understanding that section 10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *The Chicago Junction Case*, 264 U. S. 258 (1924); *Sprunt & Son v. U. S.*, 281 U. S. 249 (1930); *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940); and *Federal Communications Commission v. Sanders Brs. Radio Station*, 309 U. S. 470 (1940). Sen. Rep. p. 44 (Sen. Doc. p. 230). This construction of section 10(a) was not questioned or contradicted in the legislative history."

21 The recent decision in *Shaughnessy v. Pedreiro*, 75 S. Ct. 591, as to review of deportation orders was based on 1952 legislation.

22 Compare *Fahey v. O'Melveny & Myers* (9 Cir.), 200 F. 2d 420, 478, with *Benton v. United States* (D. C., Ga.), 114 F. Supp. 37, 44.

field: *Willapoint Oysters v. Ewing* (9 Cir.), 174 F. 2d 676, 686.

There is no Order Which can Serve as a Basis for Review Herein.

The order of the Commission established through routes and joint rates on some of the commodities demanded by Rio Grande. The order is silent as to routes and rates on the remaining commodities which are sought by Rio Grande in this action. At no place in the order is there any reference to the conclusion reached in the report that only a part of the allegations of the complaint are sustained.

The order thus entered by the Commission carries into effect its conclusions as to what should be done. There being no order as to other traffic, no basis whatever exists for a suit by Rio Grande that encompasses and is limited to such other traffic.

The situation in the present case is comparable to *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, affirmed *per curiam, Brady v. United States, et al.*, 283 U. S. 804. Complainant in that case sought reparation damages exceeding $57,000.00 on the ground he was discriminated against by two railroads in the furnishing of cars. The Commission awarded him $12,838.31. He brought suit claiming "errors of law" were made by the Commission in considering the case. Brady conceded in the three-judge district court that he did not want to enjoin the entire order since he received benefits therein. His object, like that of Rio Grande here, was to obtain a review of that portion of the order that did not give him all that he prayed for before the Commission. Under such circumstances it was held that the suit should be

dismissed since the "recitals" in the Commission's report which fixed the amount of recovery were not subject to review. The court held that the "findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument" and that the court has "no power" to review the findings of the Commission "as upon a writ of error or appeal". The "order" which may be reviewed, the Court concludes, is the "mandate" or "command" given by the Commission (p. 850).

In a later suit by the same complainant (*Baltimore & Ohio R. Co. v. Brady*, 288 U. S. 448, 458) this Court stated:

> "Plaintiff may not adopt the award as the basis of his suit and then attack it".

That is precisely what Rio Grande is attempting to do in this case. The only order that can be challenged grants Rio Grande substantial advantages. The present suit makes no attack on this favorable order but misuses such order as a basis for obtaining relief which the Rio Grande "failed to secure from the Commission." *Standard Oil Co. v. United States*, 283 U. S. 235, 241. A long line of decisions of this Court sustain the position that a plaintiff cannot do this. A number of these cases are cited in *Chicago Junction Case*, 264 U. S. 258 at page 264. Judicial review is refused, this Court states, "not because the order * * * was negative in character", but "because to do so would have involved exercise by it of the administrative function of granting the relief", which the Commission had failed to grant. The application of this rule in *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, to the failure of the Commission to fix divisions of joint rates is particularly pertinent.

Citation and discussion by Rio Grande and the district court of *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, and the abolition of the "negative" order doctrine is beside the point. The reason judicial review cannot be had in this case has nothing to do with the negative order question. The fatal defect in this action, namely, the absence of any "order" embracing the matter complained of, is jurisdictional. There must be an order embracing the matter complained of, for, if not, there is nothing to which the Court's jurisdiction and power to review can attach. Courts may not usurp administrative functions by enlarging and expanding orders of administrative agencies.

Any claim by Rio Grande that the decision of the Commission constitutes "merely preparation for possible action in some proceeding which may be instituted in the future" does not provide a foundation for judicial review. *Shannahan v. United States*, 303 U. S. 596, 599.[23] Citing that decision, the opinion in *American Federation of L. v. National Labor R. Board*, 103 F. 2d 933, 936, declares that a decision or determination of an administrative body "may be definitive" and "may be binding as to all parties concerned" and still not constitute an "order" if it "does not also command or direct a particular thing to be done". There is no "command" in the present order with reference to the commodities and routes which are the subject of this suit by Rio Grande.

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23 A number of decisions of this Court are cited in *Carolina Aluminum Co. v. Federal Power Commission* (4 Cir.), 97 F. 2d 435, 436, in support of the rule that a "mere finding upon which no order is based, even though it may determine a status which may form the basis of future governmental action * * * lacks the fundamental characteristics of an order."

United Gas Pipe Line Co. v. Federal Power Commission (3 Cir.), 206 F. 2d 842, 845, observes that—"Time and again, the Supreme Court has cautioned us that reviewability is limited 'to orders of a definitive character dealing with the merits of a proceeding'."

That the recital portion of the order entered herein refers to the report and opinion of the Commission is of no consequence, as noted in the *Brady* and other cases just reviewed. The classic statement in this connection, which appears in a number of the foregoing cases, is the observation of Judge Learned Hand in *Eckerson v. Tanney*, 235 F. 415, 418:

> "* * * the judgment itself does not reside in its recitals, but in the mandatory portions."

The reference in the order of the Commission to the report and its incorporation is in the first paragraph of the order which is entirely devoted to recitals. Following this paragraph appears the first portion of the order beginning *"It is ordered,"*. Thereafter is set forth three "ordering" paragraphs headed, *"It is further ordered"*. There is not the slightest suggestion in the order as thus drawn of any intention on the part of the Commission to make any "command" or to deal with through routes and joint rates on commodities not named in the order. On the contrary, the reference to the report in the recitals and its total omission in the formal "order" constitutes clear indication that the Commission followed the usual rule and practice and had no thought of making the entire report a part of the order.

The present case is therefore subject to the rule stated by this Court in *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 528, that "matter embodied in a report and not followed by a formal order" is not "subject to judicial review".

It is well settled in both federal and state courts that an opinion is "not a part of the record proper" and a statement in an opinion of a conclusion "even though

couched in mandatory terms, cannot serve as the order or judgment of the court".[24]

There was no order of the Commission specifically covering the traffic which is the subject of review in this action. Since such an order "was not in actual existence" at the time the order was entered, there can be no application whatever of the doctrine of incorporation in this case.[25]

The claim by and on behalf of Rio Grande that the negro discrimination cases, *Henderson v. United States*, 339 U. S. 816, and *Mitchell v. United States*, 313 U. S. 80, involved judicial review where no order had been entered by the Commission, is not true. There was an order of dismissal in both of these cases by the Commission which constituted a complete denial of all relief.[26]

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24 *In re D'Arcy*, 3 Cir. 142 F. (2) 313, 315 citing *England v. Gebhardt*, 112 U. S. 502. See also *Wright v. Gibson* (9 Cir.), 128 F. 2d 865. *Dye Coal Co. v. Evatt*, 144 Ohio St. 233, 58 N. E. 2d 653.

25 The principle is illustrated very well in will cases where it is uniformly held that nothing can be incorporated by reference that was not in existence when the will was executed. *Lawless v. Lawless*, 187 Va. 511, 47 S. E. 2d 431. *Continental Illinois Nat. B. & T. Co. v. Art Institute*, 341 Ill. App. 624, 94 N. E. 2d 602.

26 In the *Henderson case* (339 U. S. 816) at page 826, this Court reversed the District Court "with directions to set aside the order of the Interstate Commerce Commission which dismissed the original complaint."

In the *Mitchell* case (313 U. S. 80) at page 88, this Court referred to the fact that the "Commission dismissed the complaint." At page 92 reference is made to the dissent of five Commissioners to this "dismissal." The final paragraph of the opinion (p. 97) remands the case "with directions to set aside the order of the Commission."

Rio Grande was not Prejudiced by the Position of the Commission as to Through Routes.

The Commission held, in disposing of this case, that the requirements of Section 15(4)(b) for adequate and more economic transportation for the articles named in the order were satisfied, and thereupon established through routes and joint rates. In determining the extent of the relief to be granted, the Commission apparently gave consideration to all pertinent provisions of the Act. After referring to Sections 15(3) and 15(4), the Commission said:

> "In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together." (R. 65)

In limiting the scope of the order the Commission gave effect to the evidence concerning public interest and public need in relation to Rio Grande proposals. Had the Commission found the evidence sufficient in these respects and desired to do so, it could have broadened its relief. The position of the Commission, however, as to non-existence of through routes did not operate to prevent its granting further relief to the Rio Grande.

Our contention that Rio Grande was not prejudiced by the position of the Commission as to through routes is demonstrated by the fact that the Commission ordered through routes and joint rates via the Rio Grande for all commodities it deemed necessary in the public in-

terest as shown by the evidence; and by the dissenting opinion of Commissioner Arpaia. He disagreed with the majority and thought the proposd routes were already "open and available to shippers", but he went on to say that no further relief than that granted was appropriate under the record:

> "The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.
>
> "We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires." (R. 111)

The real obstacle to further relief and more "pecuniary gain" in this case was therefore "public interest" and all the requirements in connection therewith. Rio Grande is in no position to complain about the position of the Commission regarding non-existence of through routes under such circumstances.

Since Rio Grande is not "suffering prejudice" as a result of the position of the Commission, there is no right of review. *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 43. This Court does not consider "hypothetical controversies which may never become real". *Electric Bond Co. v. Comm'n*, 303 U. S. 419, 443. It is fundamental that a reviewing court "will disturb the administrative determination only for prejudicial error", and will give no consideration to claimed errors "which did the complaining party no injury".[27]

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27 The cases are collected in 73 C. J. S., Public Administrative Bodies and Procedure, Section 210, pages 569-570. See also *American Power Co. v. S. E. C.*, 325 U. S. 385.

The Administrative Procedure Act (5 U. S. C. § 1009) has been interpreted as requiring "prejudicial error" as a basis for review. *United States v. Watkins* (D. C. N. Y.), 73 F. Supp. 216, 225 (reversed on other grounds 164 F. 2d 457).

In *Philadelphia Co. v. Securities and Exchange Com'n* (C. A. D. C.), 177 F. 2d 720, 725, it was held that an erroneous "standard" would create "no prejudice" if the Commission "did not think petitioners' case proved by any standard however low."

II.

The Commission Carefully Considered the Entire History and Record Herein and Concluded, in Accordance With Decisions of This Court, That Proposed Through Routes do not Exist Because the Carriers in This Proceeding do not "hold Themselves out as Offering Through Transportation Service" in Connection With the Rio Grande From and to the Points Here Concerned as Indicated by Their "Course of Business". The Lower Court, Without Squarely Meeting This Test on the Basis of the Whole Record, Pointed to Some of the Factors Involved and Erroneously Held That Through Routes Exist.

The "first question for our determination", said the Commission (R. 61), "is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15(3) and (4) of the act". Citing and quoting this Court's opinion in *Thompson v. United States*, 343 U. S. 549, the Commission faces squarely the decisive test which must be applied and states:

> "It thus becomes necessary to determine whether the carriers in this proceeding 'hold themselves out

as offering through transportation service' from and to the points here concerned via the Ogden gateway as indicated by their 'course of business' in respect of traffic over the routes in question." (R. 62)

Recognizing that whether through routes exist is not merely a physical, objective inquiry, under the test established by this Court, the Commission properly considers and reviews every feature of the problem including matters that are subjective—questions of holding out, consent, custom and "course of business" by all the carriers involved. In this connection, this Court in the *Thompson* opinion, *supra*, at page 557, quotes a Commission Report to Congress that the "incidents and circumstances" of shipments which are designated for consideration in determining whether a through route exists are "not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments."

Such an inquiry, the Commission realized, must not only consider the entire picture presented; it must also include a realistic appraisal of the evidence giving effect to the realities of the transportation world and the importance and legal recognition of gateways through this vast country.

In limiting its review and consideration to certain factors or incidents bearing on the problem, the lower court did not, in our opinion, grasp the full significance of the standards and considerations implicit in the yardstick established by this Court. Perhaps the lower court spoke with more truth than it realized when it said:

> "This very *brief* and *sketchy* statement of the case will suffice, since we rest our decision upon a *narrow* ground." (Italics added.)

It did not seem to occur to the lower court that the problem in this kind of case cannot be considered in a legal vacuum. Something more than an interplay of abstract definitions and legal rules is required.

The Commission well knew, and it is supremely important to remember, that, as stated in the Commission's report (R. 69), the objective of the Rio Grande was to "participate as a bridge line" on traffic via "its Colorado gateways and Ogden"; and the primary objective, in this connection, as frankly testified by the Rio Grande's President, was to improve its financial position by cutting in on the Union Pacific haul from the northwest states to the eastern portion of the country. This heavy volume of traffic, moving the many products of the northwest to the east, as pointed out by the Commission (R. 77), comprises "101,476" carloads annually. The movement in the reverse direction amounts to only "56,286" cars. The prize therefore which the Rio Grande wanted "available for solicitation" was primarily the eastward movement.

The actual movements, relied on by the Rio Grande to support the existence of through routes, must be considered against the foregoing background. *Significantly, not a single movement occurred within the category of "bridge" shipments from the northwest to the east.* The Commission said:

> "No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points." (R. 63)

There is therefore in this record no eastward movement whatever of the type traffic which constitutes the

basis and backbone of Rio Grande's aspirations. Moreover, the movements going west include only "18 carload shipments". Viewed in the light of the total volume of traffic involved, the Commission was clearly justified in saying that "all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co., supra*, cited with approval by the Supreme Court in *Thompson v. United States, supra*" (R. 64-65).

The figures on movement placed in the record by Rio Grande related solely to the year 1948. While the Rio Grande later claimed this was a representative year, there was no proof whatever that similar shipments occurred in any prior year. We respectfully challenge the statement of the lower court that a "continuous use of the Rio Grande route" (R. 288) is shown by the evidence and the additional statement that such shipments were "substantially the same in years prior to 1948 and continued into 1949" (R. 289). Quite probably these statements were prompted by the language of this Court, based on ample facts, in *U. S. v. Great Northern R. Co.*, 343 U. S. 562, at pages 563-564, that there the "through routes in question already exist since the carriers concerned have continuously provided through service over the same through routes" and the further statement in the same opinion at page 574 that "through routes over the Montana Western and appellee's lines long have been in existence." But the facts here do not justify any such statement.

The Rio Grande's witness who placed this testimony in the record said he selected 1948 because it was the

"last full calendar year prior to this proceeding". He stated that the problem of misrouting traffic existed "to about the same extent in prior years, and have continued thus far in 1949" (V. I, 76). Such testimony does not constitute any showing whatever of any "bridge" movement for any year other than 1948, and the "bridge" movement in that year is confined to 18 isolated westbound shipments over only 18 of the millions of through routes of which the Rio Grande claims to be a part between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area.

We submit that the conclusions of the Commission as to "course of business" and "course of conduct of the Union Pacific" are irrefutably established by the record and that this case must be judged upon the basis that such findings are absolute and conclusive.[28] Positive and unequivocal testimony of other transcontinental lines serving the northwest area, particularly the Northern Pacific, Great Northern and Milwaukee roads (V. I, 711; 909), proves beyond doubt that their policy, "course of business" and "course of conduct", like the Union Pacific's, has always been and now is, as found by the Commission

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28 The Commission said (R. 64):

> "So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, 'the carriers' course of business' has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open

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(R. 64), "to guard jealously its [their] long haul and not open commercially the Rio Grande routes on this traffic."

We further submit that our contention that no "continuous use" of the proposed routes is shown appears from an examination of the events leading up to the filing of this case and the undisputed testimony in this regard. This phase of the record has been entirely ignored by the lower court including the testimony of Rio Grande's President, Wilson McCarthy. He testified unequivocally that the Rio Grande had no idea of ever participating in transcontinental traffic until a long program of modernization was completed which started after the Dotsero cut-off was established in 1934.[29]

It was only after the program detailed in McCarthy's testimony was completed that his company "reached the conclusion" that the Union Pacific should agree to "joint competitive rates" (V. I, 44), and the program appar-

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commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads east-bound, none to destinations east of Colorado common points, and 18 carloads westbound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report."

29 Mr. McCarthy said:

"The Dotsero Cutoff had just been completed when I began my tenure as co-trustee of the Rio Grande. While this 'cutoff' provided a potential means for the Rio Grande to participate in transcontinental traffic, the physical condition of our company at that time was such that we were in no position to effectively compete for this extremely competitive business from either a service or cost standpoint. Because of long depressed earnings, the Rio Grande's

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ently was not completed until 1947 at the conclusion of a reorganization.

The claim of Rio Grande that the proposed routes are already open is to be contrasted with the testimony of McCarthy that he had "been looking forward to the opening of the Ogden Gateway" for many years (V. I, 55); and his statement that it has been "our hope and our thought" that we "ought" not be "excluded" from the northwest business (V. I, 54).

Any suggestion that the through routes in effect temporarily until 1906 or 1912, continued and were the subject of "continuous use" thereafter is therefore simply not true. This further appears from other historical facts in the record. As mentioned by the Commission (R. 68), the "competitive stresses" which occurred in those early years resulted in the Rio Grande financing "the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast.[30]

The inference is inescapable that the Rio Grande was interested in a route to the San Francisco Bay area on the California coast, and the Rio Grande, until it con-

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trackage and rolling stock were in very poor condition. At that time faster schedules were neither feasible nor possible.

"Therefore, a planned program was immediately progressed with a view towards contributing to a sounder national transportation system by making the Rio Grande a vital link in transcontinental traffic. This embraced strengthening of the personnel, a revamping of the financial structure, and complete modernization of the physical plant." (V. I, 42.)

30 As stated by the Commission (R. 68), "[t]he Western Pacific was opened in July 1911." McCarthy, in referring to the construction of the Western Pacific by Rio Grande, says this route is called "the direct *central* continental route" by his company (V. I, 53.)

ceived this case, never had the slightest idea that any through routes to the northwest area could be claimed against the Union Pacific. These historical facts and unequivocal conduct belie any claim that the Union Pacific did not actually close any routes in 1906 or that there has been "continuous use" of them at all times. Certainly no one in the northwest States which have joined in this brief ever had any notice or knowledge of the contention now made by the Rio Grande. If there is such a thing as estoppel in the law of transportation, this would be an appropriate place to invoke it against the Rio Grande.

The first notice the shippers of the northwest had as to the purpose of the Rio Grande was when it launched its "pamphlet" publicity campaign following the institution of this proceeding. This campaign, in which its President McCarthy participated, refutes any suggestion that shippers in the northwest were making "continuous use" of the proposed routes (V. I, 60). As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz" (I. C. C. Ex. 30), in which it posed 20 questions and answered them with the arguments it thought would convince shippers to aid it in its efforts to "open" through routes via its line in connection with the Union Pacific to and from the northwest area. These questions clearly and indisputably show that the Rio Grande itself considered the prior through routes via its line "closed" by the cancellation of the joint rates by the Union Pacific.[31]

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31 Among the 20 questions were the following:
"2 What is Meant by the 'Closed' Gateway at Ogden?"
"3 What is the Effect of the Closed Gateway?"

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Many other items of proof in this record refute the idea that there was any "continuous use" of any of these proposed routes by anyone. The "distributor of farm machinery" whose testimony was dwelled on at considerable length by the Commission (R. 82) in an attempt to justify a portion of the order herein, operated a business that "was established in 1947". The Commission adverted to more *recent* changes in policy relating to the "use of grazing lands in national forests" (R. 84). Such testimony, as well as much other, shows that the claim of Rio Grande was not founded upon any premise that there had been "continuous use" of existing through routes over a long period of time.

The truth is that the testimony of Rio Grande supporters as a whole was premised on the theory that all gateways here and elsewhere should be opened and the Commission should adopt "competition" as the rule of action in such cases without regard to the Congressional mandate against short-hauling existing routes.

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"4 How Does the Rio Grande Seek to Open the Ogden Gateway?"
"5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"
"6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"
"7 Will the Open Ogden Gateway Reduce Freight Rates?"
"8 Will the Open Gateway Provide Improved Service?"
"9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
"11 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
"12 Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
"13 Will Opening of the Ogden Gateway Reduce Railroad employment in the Closed-Door Territory?"
"14 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

We believe that, in view of the admitted design of the Rio Grande for some years to obtain the opening of the Ogden gateway, the caution of the Commission that permitting a showing of a limited number of isolated movements through the gateway would constitute an invitation to circumvent the Act by "staging" a few shipments, deserves careful consideration.[32]

The court's opinion below reflects some misgiving for its general conclusion that the routes claimed are open when it states that such routes are open to and from certain "points" and a "new hearing" will be necessary to determine whether actual movement of all commodities between all points is necessary in order to completely open the gateway. On the question of establishing "hundreds of thousands of through routes" by the process of saying they already exist, the court concludes that this "question was not considered by the Commission, and we do not reach it here" (R. 292).

It is an error to say the Commission did not consider this question. It did consider the question and resolved it against the Rio Grande. The report notes that at least on paper there were in existence certain through routes with joint rates on "east-bound shipments of sheep or goats" (R. 85). Under well established administrative practice and recognizing that the establishment of through routes must have a direct relationship to the channels

32 The Commission said (R. 65):
"Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*"

of commerce, the Commission refused to suggest that all routes were open to all commodities because such routes exist for eastbound sheep and goats.

Completely overlooked by the lower court in this connection, was the holding of this Court in the *Thompson* case that the existence of through routes to points on the Burlington "short of Omaha cannot be used as evidence of the existence of a through route to Omaha." To hold the contrary, that opinion emphasizes, would mean that a railroad would "lose" a "right guaranteed by Section 15(4)" to its long haul (343 U. S. 549, 559).

The statute, as thus declared by this Court, will not permit any railroad to establish through routes by any "foot in the door" process. To the extent that actual movements constitute a "course of business" and a "holding out" by all railroads concerned and to the extent that all other requirements in connection therewith are met, through routes may come into existence, but only to and from those points and covering those specific commodities embraced therein. Any other rule, as this Court notes, would open wide the opportunity of sacrificing a "guaranteed" right against short-hauling.

Before proceeding to a discussion of certain specific points in the lower court's opinion, we wish to comment on its observation that since the "Commission did not invoke its authority under § 15(4)" in promulgating "service orders" during the war for diversion of certain shipments over the Rio Grande "the Commission assumed that through routes were already in existence" (R. 289). This suggestion illustrates quite well how far the court went in its efforts to find support for its position. With the life of the country at stake, with the Com-

mission and the President in full possession of war powers, we are told by the court that the shipment of "troops" and "military supplies" over the Rio Grande route under direct emergency orders of the government constituted a recognition that the routes already existed, otherwise the Commission itself would have had to initiate a proceeding before engaging in such an activity. The statement of the Commission in this regard shows that, in its effort to saddle an "assumption" upon the Commission, the court completely ignored and distorted the effect of the Commission's finding that these "emergency" shipments have "no bearing upon the issue".[33]

In its desperate efforts to escape application of the short-haul prohibition of Section 15(4), the Rio Grande has insisted throughout these proceedings that through routes via its line for the traffic concerned are already "in existence" because counsel and a traffic witness for the Union Pacific stated or "admitted" on the record that it is physically possible for shippers of the involved traffic to use the Rio Grande as a bridge line if they are willing to pay the higher combination of local rates. The district court also seized upon these statements as supporting its conclusion that through routes already exist via the Rio Grande (R. 288). But the same fact was present, and the same "admission" was necessarily made in *Thompson v. United States* 343 U. S. 548, and rejected by the Court as irrelevant to the question whether through routes already existed. At page 558, the Court said:

33. "These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute 'through routes' within the meaning of that term as used in the act." (R. 64.)

"The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under Section 15(3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines."

III.

The Commission Properly Concluded That Cancellation of Joint Rates in 1906 and 1912 Effectively Closed the Rio Grande Routes. This Conclusion Reflected the Understanding of the Parties and the Absence of any Attempt at the Time to Suspend Closing of the Routes. Legislative Amendments of 1940 Confirm the Commission's Conclusion and the Decision of the Commission, in This Regard, is not Subject to Judicial Review.

We submit that the effect of the cancellation by the Union Pacific in 1906 and 1912 of joint rates established while the railroads involved were in control of the receivership court must be judged, now, in the light of what occurred and did not occur at the time and not by any standard of what might have happened in connection with such cancellation.

The evidence establishes beyond dispute and the complaint of Rio Grande before the Commission concedes, (V. I, 7), that at all times since such cancellation, these tariff cancellations operated "to prevent the movement of freight traffic via the routes" sought by Rio Grande, and the action of the Union Pacific and other defendants

deprives "the complainant [Rio Grande] of the use" of these longer routes for the traffic concerned (V. I, 10). In the opinion below the court stated that the "Commission reasoned that the closing of the routes in a commercial sense * * * terminated the through routes". Earlier in the opinion the court says that the "higher rates effectually close the Ogden gateway" (R. 285).

Nowhere does the court suggest what further should have been done by the Union Pacific in 1906 and 1912 to legally close these routes which, by the tariff change, were held to be "effectually" closed. At no place in the opinion is there any reference to any statute, any regulation or any requirement that was not met by the tariff changes. Moreover, from the standpoint of these five States, which all during this period have been led to believe by the action and position of the Rio Grande that the routes were closed, there is no suggestion of what further steps were required to bring about a closing of the Ogden gateway.

The bare assertion of the court (R. 288) that "the through routes were not closed" and that (R. 291) "nothing was ever done to close the routes", under the circumstances, comes as quite a shock in view of the foregoing record as to what transpired in this connection.

In concluding that the routes were actually closed, the Commission gave recognition to the realities of an uninterrupted history showing these "routes are not considered as open" (R. 62) and during all this period the carriers (including the Rio Grande) did not "hold themselves out as offering through transportation service" (R. 62). This being the ultimate and overriding test, and this test being supported by overwhelming proof, the Commission rightly concluded that no mere technical

claim with reference to the sufficiency of a tariff change over forty years ago could be used to affect its conclusion.

But the Commission's reasoning had more than is mentioned in the court's opinion to support it. The Commission knew that neither it nor anyone else had at any time during this long period made any attempt to suspend the "cancellation" of these rates and the closing of these routes; and, until the instant case, no claim had ever been made by anyone that these through routes continued to exist. Ample statutory authority was available to the Rio Grande and anyone wanting to assert the existence of through routes following these tariff changes.

That such a remedy was open is reflected in many decisions of this Court. In *Atlantic Coast Line R. Co. v. U. S.*, 284 U. S. 288, a Commission order was upheld requiring tariff amendments to be cancelled which would have closed a through route. In approving a lease in that case the Commission had imposed as a condition of approval that "existing and possible through routes" would be preserved (page 291). The tariff amendments would have "excluded from the joint rates traffic" over one of such existing through routes (page 291). The opinion concludes that the Commission properly specified that "an open route" should be continued. In reaching the same conclusion the three-judge district court in that case held (48 F. 2d 239), that without the condition inserted in the lease approval there would have occurred an "abandonment of existing routes" (page 242), and that the Commission was within its authority in acting "to prevent the closing of any gateways and routes then existing" (page 244).

The Commission's action in the case cited was upheld under its general suspension authority in Section

15(7).[34] If in the instant case any objection had existed to the cancellation of tariffs and closing of routes by the Union Pacific in 1906 and 1912 it would have been appropriate and the Commission could have acted under the same provision of the Act.[35] No such action having been taken the route became "closed" as suggested in the foregoing case.

In addition to the matters just reviewed, the Commission also realized that in proceeding as it did the Union Pacific followed statutory authority. The recent decision in *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202, gives appropriate effect to the publication of tariff changes as a means of closing a through route. In that case, a shipper routed a shipment of cattle from Montana to Kansas via a route which had no joint through

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34 49 U. S. C. 15(7). Under this section the Commission may on its own initiative or following complaint suspend any new rate or practice affecting any rate, fare or charge.

35 The Rio Grande was fully aware of its right to object to the closing of the through routes, for it vigorously asserted that right, along with the state commissions of Colorado and Idaho, and numerous other protestants against Union Pacific tariffs proposing to "cancel the joint through passenger fares" then in effect with the Rio Grande. *The Ogden Gateway Case*, 35 I. C. C. 131. Approving the cancellation of the joint fares the Commission held, at page 140, that it had "no power * * * to prevent the cancellation of through routes and joint rates" voluntarily established. Pointing out that the Rio Grande routes were longer, more mountainous and had more severe grades than the Union Pacific, the Commission said, at page 141, that to compel the Union Pacific to short-haul itself against its will, through denying approval of the proposed cancellation of the joint and equal fares with the Rio Grande "would be illogical and arbitrary in the highest degree."

Its lack of power to prevent cancellation of the "through routes and joint rates", the Commission said at page 142, would not deprive passengers of "through service" via the Rio Grande at the higher combination of intermediate fares, for no railroad could "deprive passengers of the right to use its rails" at the "regularly established fares."

rates. In dismissing a complaint for reparation, the opinion cites *Thompson v. United States*, 343 U. S. 549, and states:

> "Therein the Supreme Court makes plain that a route such as that used for the instant shipment may not be regarded as a through route under section 15(4) of the Interstate Commerce Act. Thus, the route used by this shipment was a 'closed' route, and the complainant was apprised of that fact by the publication of the joint through rate from and to these points for application over routes other than that used. This does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified, but it does mean that when such routing is specified and complied with, the carriers concerned have a right to charge a combination rate, provided that each of the factors in such combination does not exceed a maximum reasonable rate for a shipment having origin and destination at the points from and to which such rate applies."

There is nothing new or novel in withdrawing from and closing a route by a tariff filing, *The Ogden Gateway Case*, 35 I. C. C. 131. In *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, in upholding the "cancellation of the proposed tariff", which would have closed a through route, this Court observed: "[i]ts proposed tariff was in effect a withdrawal" (p. 775).

This Court has held that Section 6 of the Act expressly provides for the "changing and superseding" of joint through rates by filing of "new schedules" and that any "through bills of lading" thereafter would be subject to "local rates" and not joint rates. *Kansas City So. Ry. v. Albers Comm. Co.*, 223 U. S. 573, 596-597.

Consistent with the Commission decision in the *Steinmetz* case, *supra*, the courts have not hesitated to hold that previous tariffs may be cancelled by implication in order to give full and complete effect to new tariffs.[36]

The position of the lower court as to the effect of the rate cancellation of Union Pacific and the publication of local rates is contrary to the holding of this Court in *Thompson v. United States, supra*, wherein this Court refused to permit circumvention of the Act by any finding that "the sum of the local rate from Lenora to Concordia published by the appellant and the local rate from Concordia to Omaha published by the Burlington" is an "unreasonable" rate for the "route from Lenora to Omaha via the Burlington" (343 U. S. 553). This Court rejected the idea that publication of "local" rates as a part of a "combination" rate constituted the maintenance or existence of a through route. Such a publication, this Court said, "proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines" (343 U. S. 558).

The *Thompson* decision, in reversing the majority opinion of the lower court therein (101 F. Supp. 48), followed the reasoning of Judge Moore, who filed a dissenting opinion. He fully sustained the Missouri Pacific contention that the suggested route was closed by reason of the fact that combination rates "prevented" a movement of grain even though "a shipment of grain

36 In *Chicago, I. & L. Ry. Co. v. International Milling Co.* (C. A. 8), 43 F. 2d 93, 96, it is held that a "new tariff naming different rates" is effective even though it fails to "state in specific terms that the previously established rate is cancelled." To the same effect is *Crookston Milling Co. v. Great Northern Ry. Co.*; 185 Minn. 583, 242 N. W. 287, 289.

could be made at a tariff composed of a combination of the local rates" (p. 51); and the publication of combination rates was the only effective means the Missouri Pacific had of indicating that the route was closed. Judge Moore specifically declared that the "technicality" of a "commercially closed route" should not be used as "evidence of a through route" (p. 55) in view of the requirements of Section 15(4) as to establishing through routes.

Legislative History of Amendments to Section 15(3) Confirms our Position.

In 1940, Congress adopted an amendment to Section 15(3) specifically recognizing the "canceling" of "any through route or joint rate" by "any tariff or schedule" change and providing a standard for suspension thereof by the Commission.[37]

The language of this amendment appears in Senate Report No. 404, 75th Congress (1937), 1st Session (S. 1261), serial #10076 as a clarifying amendment to legislation under consideration.[38]

37 49 U. S. C. 15(3). The amendment consists of a new sentence added thereto which states.

"If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

38 Senate Report 404 states:

"The Committee on Interstate Commerce amended section 1 of the bill by striking therefrom the words: 'The elimination of any existing through route or joint rate, fare, charge, or classification without the consent of all carriers parties thereto or authorization by the Commission shall be deemed prima facie unreasonable and

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The purpose of this amendment was spelled out precisely in Senate Report No. 1970, 74th Congress (1936), 2nd Session (S. 1636), serial #9988, as follows:

> "The amendment was adopted to prevent any wholesale cancelling of joint and through routes and rates when the Emergency Transportation Act of 1933 expires on June 16, 1936. In Section 4 of that act there is a proviso:
>
> 'that no routes now existing shall be eliminated except with the consent of all participating lines or upon order of the coordinator.'
>
> "The amendment in the bill under consideration makes this a part of the permanent law, throwing the burden of proof that a route is against the public interest on the trunk line."

The history just reviewed demonstrates clearly that Congress and the Commission recognized that for many years the type of tariff change made by the Union Pacific was effecting a closing of routes and by this amendment a standard was established under which such closing of routes could be suspended. The Congressional purpose and recognition implicit in this legislation is not to be defeated even though the full scope thereof may not have been visible to the Commission in some earlier cases.[39]

(Continued from preceding page)

contrary to the public interest' and inserting in lieu thereof the following: 'If any tariff or schedule cancelling any existing through route or joint rate, fare, charge, or classification without the consent of all carriers parties thereto or authorization by the Commission is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest.

"This amendment by the committee was recommended by Commissioner Eastman and is but clarifying.

39 That the amendment to Section 15(3) in 1940 constituted a recognition that routes become closed by tariff amendments unless "suspended by the Commission" is reflected in *Cancelation of*

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The decision in *Virginian Ry. v. United States*, 272 U. S. 658, gives the lower court no support for its views. That case did not involve the closing of routes by tariff changes. It presented the question whether 54 mines on the Virginian railroad were discriminated against by reason of the fact that 45 mines on the same railroad had lower rates that were denied the 54 mines. The dictum in the case as to the existence of through routes with combination rates was irrelevant to the decision. Through routes already were physically open by reason of trackage agreements and reciprocal switching absorptions, and it was wholly unnecessary to consider the requirements of Section 15(4).[40] It was not even necessary to establish joint rates and, as the opinion states, joint rates

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Rates and Routes Via Short Lines, 245 I. C. C. 183. While the opinion suggests that in a "strict technical sense" the tariff amendment would not itself effect a complete "closing of the routes", the opinion points out that "for all practical purposes the routes would be closed" and the "interchange of through traffic" would end (p. 185). It was held by the Commission that the last sentence of Section 15(3), added in 1940, gave the Commission authority to suspend "route" cancellations and as "remedial" legislation permitted the Commission to be free from the "limitations contained in section 15(4)" when acting with reference to the *"cancellation* of joint routes and rates already existent" (pp. 187-188).

40 In prescribing through rates for all mines the Commission and the court in the *Virginian* case did not have to face any problem of creating a new through route. *Wyoming Coal Co. v. V. Ry. Co.*, 96 I. C. C. 359, 98 I. C. C. 488. There was no contention whatever even suggested before the Commission that through routes did not already exist. According to Virginian counsel at page 491 existing rates to the west "reach every station," comprise "local distance tariffs" and are not "merely unreasonable rates" but "impossible rates." Applicants asked the Commission for the same "track connections" provided other mines. The complaining mines were "entirely surrounded by mines" enjoying the lower rates and they were the only mines in the entire Outer Crescent District denied the benefit of "district rates to central territory." (p. 491)

The through route contention made in court in the *Virginian* case was purely an "afterthought" and there was no record to support any such argument.

were not required. There was no problem of short-hauling in the *Virginian* case. The considerations which prompted the conclusion in the instant case by the Commission that through routes have not existed for many years were wholly absent from and not involved in the *Virginian* case. We therefore submit that the lower court was not justified in citing that case in support of its conclusion.

The Commission Finding as to Effect of Tariff Filing by Union Pacific is Conclusive.

The matter of when the Union Pacific closed the routes in question and the interpretation and effect of procedural steps in that connection are all matters peculiarly within the jurisdiction and determination of the Commission. On these matters the decision of the Commission will not be reviewed or reversed there being evidence in the record which supports the Commission's findings.

This Court has stated many times that:

> "* * * The Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts. * * *" (*I. C. C. v. Hoboken R. Co.*, 320 U. S. 368.)

The opinion just cited refers, at page 378, to many cases supporting the above rule and it is observed that the courts properly accept the Commission's findings as to "prevailing conditions and practice."

The conclusion of the Commission in the instant case necessarily took into consideration the conditions and practices in 1906 and 1912 concerning the withdrawal from

through routes, and its decision with reference thereto cannot be set aside. As to whether Union Pacific "complied with the procedural requirements of the Act", the "commission's findings of fact" have always been held to be "conclusive" if based on evidence. *B. & O. R. Co. v. United States*, 298 U. S. 349, 364.

The construction by the Commission of the tariff change of the Union Pacific and its holding that the routes proposed herein by Rio Grande are closed, must be adhered to by this Court unless "plainly wrong". *Great Northern Ry. Co. v. Delmar Co.*, 43 F. 2d 780, 782. The record fully sustains the finding of the Commission that through routes claimed by the Rio Grande were not in existence.

IV.

The Commission Correctly Held That Shippers Have the Right to Route Their Own Traffic and Union Pacific had no Right or Duty to Refuse Shipments.

The opinion of the district court falsely assumes that the Union Pacific had the right and duty to refuse a few shipments tendered over the Rio Grande route in order to protect its right not to be short hauled. Pointing to a few shipments that have physically moved via the Rio Grande over portions of a few of the multitude of existing routes, the court concludes that this shows the Rio Grande route is open for the involved traffic.

If the position of the court is correct then a railroad permits at its peril any movement at local or combination rates over a route that it contends is closed. This would require constant policing or a physical separation or disconnection of railroad tracks and a course of conduct wholly foreign to anything found in the statutes or suggested in Commission regulations.

The Commission's opinion makes it clear that no such fantastic requirements exist in the law. Its report emphasized that the "routes used, or attempted to be used" for the few shipments through the gateway were "specified by the shippers"; and none of this traffic was "solicited" by any defendant railroad, the use being confined to times when despite the jealous guarding of its long haul, the Union Pacific has been "called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing" (R. 64).

Both in the foregoing discussion and later the Commission recognizes and gives effect to the "right" of shippers to "route their own traffic."

The position of the court that in failing to defy shippers and maintain a 24-hour vigil at every gateway, the Union Pacific has lost its right to its long haul, is unsupportable in theory and practical operation; and this position of the court is particularly indefensible in the face of the unequivocal declaration of the Commission that it cannot oppose shippers' routing.

Any other view, as pointed out by the Commission, would enable a carrier to completely circumvent the requirements of Section 15(4).[41]

Adhering continuously to this position, the Commission in the recent case of *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202, states that, although the route

41 "Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*" (R. 65.)

chosen there by a shipper was a "closed" route by reason of the "publication" of the carrier, this "does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified." The rate, the opinion holds, for such shipment, would be the "combination rate." And, see *The Ogden Gateway Case*, 35 I. C. C. 131, where the Commission held at page 142, that no carrier may take steps to "deprive passengers of the right to use its rails * * * at the regularly established fares."

On the matter of the duty of a carrier to accept shipments, this Court in *Southern Ry. Co. v. Reid*, 222 U. S. 424, 435, states:

> "It is undoubtedly the duty of a railroad company to receive freight when tendered for transportation."

The opinion goes on to hold, however, that there can be no transportation "until they had fixed and proclaimed the rate to be charged therefor" (p. 442) covering all shippers at all times. The rate established may either be one which is a "through route and joint rate" or if such has not been established, the "separately established rates, fares, and charges applied to the through transportation" (222 U. S. 443-444).[42]

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42 Citing the foregoing case, *Cleveland, C., C. & St. L. Ry. Co. v. Hayes*, 102 N. E. 34, 38, 181 Ind. 87, 97, states:

"If a through rate has not been fixed, then the shipper in exercising his common-law right of routing cannot make a through shipment, but must make shipment according to the local rates of the respective lines over which the carriage may be undertaken."

A number of cases as to the duties and responsibilities of connecting carriers are cited in *N. Y. Central R. Co. v. The Talisman*, 288 U. S. 239, for the following rule:

"Petitioner and respondent were connecting carriers. As such, each, in the discharge of its duties to the public, owed to shippers of freight in its possession destined to points on or routed over the railway of the other the duty to deliver to the connecting line for further transportation; and each was correspondingly bound to receive and carry." (p. 241)

Section 15(8) has no Application.

It is a distortion of Section 15(8) to suggest, as did the lower court, that this section limits the right of shippers to route traffic to cases where a through route exists. Section 15(8) does not purport to cover the myriad of situations where no through route exists. It merely provides that where "two or more through routes and through rates shall have been established", to which the carrier is a party, the shipper may choose between them. It is only in such "cases" that the statute has any application. The rights of shippers where "two" through routes have not been established are not declared or covered by this section.

Section 15(8) was added to the Act in 1910 (36 Stat. 553) as a part of the expansion of Section 15 with reference to the establishment of new through routes. As an accompanying part of such legislation, it was no doubt intended to serve as protection to the shipper in connection with any duplication of routes that would result from such legislation.

The decision in *Lamb v. Moor*, 17 Ga. App. 549, 87 S. E. 837, sustains the above views. The court there held that an interstate shipment was controlled by the Hepburn act, but no designation of routing in writing was necessary to recover since it "nowhere appears that between the point of delivery for shipment and the point of destination two or more through routes and through rates had been established; to which through routes and through rates the defendant was a party" (p. 837).

A recent case, *E. E. West Petroleum Co. v. Atchison, T. & S. F. Ry. Co.* (8 Cir.), 212 F. 2d 812, involving inter-

mediate rates, reviews very well the "intricate system of lines" and "innumerable physical connections" to be found in our railway system (p. 819) and the "practicality" from a commercial standpoint that must govern the application and interpretation of rates. The court discusses the "complexity of our vast railway systems" and the "expert ingenuity in creating imaginary routes" that is possible under the circumstances (p. 820). The court pays heed, at page 816, to the *Thompson* decision of this Court as preventing the declaration of through routes where the carriers' "course of business" negatives their existence since "they never held themselves out as offering such through service."

Where, as Here, Physical Transfer is Possible and Local Rates Have Been Published, no Railroad may Lawfully Refuse to Issue a Through Bill of Lading.

The lower court suggests that when the Union Pacific "issued through bills of lading" it and the other railroads thereby recognize the "through route status" (R. 288) of the proposed Rio Grande route. This suggestion like those previously discussed, contains the fundamental fallacy that Union Pacific had the right and duty to refuse a through bill of lading.

The issuance of bills of lading to shippers at the combination rates could in no manner be given the effect of recognizing a through route within the meaning of Section 15(3) and (4). The Union Pacific or any other railroad was required by statute when "receiving property for transportation from a point in one State * * * to a point in another State" to comply with the mandate that it "shall" issue a bill of lading therefor. 49 U. S. C. 20(11).

Such a bill of lading, under this statute, constitutes a contract and "fixes" the "route" to be used in the transportation. *Schwalb v. Erie R. Co.*, 161 Misc. 743, 293 N. Y. S. 842. It is "required to be issued by the carrier." *Aradalou v. New York, N. H. & H. R. Co.* 225 Mass. 235, 239, 114 N. E. 297, 299. In issuing the bill of lading, the carrier is performing a "duty" imposed upon it by Congress. *Atchison & Topeka Ry. v. Harold*, 241 U. S. 371, 378.

The question whether there is any "holding out" that constitutes a voluntary establishment of through routes is comparable to the question whether, at common law, a railroad "assumed, or held itself out to the public as assuming" the responsibility for carriage over connecting lines. *Insurance Co. v. Railroad Co.*, 104 U. S. 146, 157; 9 Am. Jur. 986. Such an agreement, it was held, will not be inferred and can be shown "only from clear and satisfactory evidence"; and the receipt and acceptance of goods for shipment beyond the carrier's lines did not constitute any such contract. *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 102, 107. Moreover, as held in the case just cited, there was no holding out of such a contract by a statement on the receipt for goods that the receipt might be "exchanged for a through bill of lading" (p. 109). See also *United States v. Munson S. S. Line*, 283 U. S. 43, 47-48.

It is well settled also that the "mere stating of a through fare on the receipt of the freight" did not imply any undertaking for the entire haul. *Northern Pac. Ry. Co. v. Amer. Trading Co.*, 195 U. S. 439, 459.

While the Carmack amendment changed the originating carrier's liability, it made no other change in the

normal or common law relationship of carriers. *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S. 319; 9 Am. Jur. 993. The Carmack amendment applied whether or not the railroad had a "through route or rate established" and irrespective of the carrier's position that even though it "had no through route" it "was bound to accept goods destined beyond its line for delivery to the next carrier, and was required by the statute to give a through bill of lading." *Norfolk & W. Ry. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 595. This opinion by Mr. Justice Holmes refers to the "compulsory acceptance" of shipments in this connection. See also *Mexican Light Co. v. Tex. Mex. R. Co.*, 331 U. S. 731, involving two bills of lading.

V.

The District Court Exceeded its Powers in Making Findings of Fact and Remanding the Case to the Commission With Instructions to Proceed in Conformity With the Opinion.

The opinion of the district court in its specific findings and in its observations and discussion raised many important questions as to the division of authority between administrative commissions and courts.

In "remanding the case to the commission" the court sets forth what it terms "instructions" (R. 362, 293) for the disposition of the matter by the Commission. Included in these "instructions" are the following findings:

> "Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines * * *." (R. 297)

> "Here the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings." (R. 299)

Having given these "instructions" to the Commission and having made these findings, the court concludes:

> "The order in so far as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion." (R. 302)

We submit that if these findings and "instructions" are "appropriate" then the Commission has only a limited function in such cases, and matters of fact which have heretofore been subject to administrative determination may now be foreclosed by judicial action.

It is elementary that the "court must act within the bounds of the statute" permitting judicial review, *Ford Motor Co. v. Labor Board*, 305 U. S. 364, 373. The applicable statute (28 U. S. C. 1336), authorizing a review of the Commission's orders, gives the court power only to "enjoin, set aside, annul or suspend, in whole or in part, any order" of the Commission. There is no authority contained in the statute to "remand" or make findings of fact and there is a complete omission of any power to direct or instruct the Commission as to its further consideration or disposition of the case.

Throughout the opinion, the district court manifests a tendency to tell the Commission how to handle and determine this case. The court even outlines (R. 292) what further consideration should be given to through routes

by the Commission. At no point in the opinion is there any recognition of the limitations of authority involved in judicial review of orders of the Commission.

The opinion of the court points to no evidence justifying its conclusion that "discrimination" against the Rio Grande is established. The Commission, after review of the evidence, holds that discrimination under Section 3(4) is not shown (R. 104) and concludes that the Rio Grande, as a "railroad, could not raise, in its own behalf, an issue under section 3(1)" (R. 65).

While the reasoning of the district court in this regard is not explicit, the opinion states that "a carrier is as fully entitled to non-discriminatory treatment as a shipper" (R. 293). If this statement implies that the Rio Grande has the same rights under Section 3(1) as a shipper, then the court is clearly in error. *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 149. See also *Henderson v. United States*, 339 U. S. 816, 824.

In making its own findings of fact the lower court "usurped an administrative function", *F. P. C. v. Idaho Power Co.*, 344 U. S. 17; and subjects the present case to the following holding in that case at page 20:

> "* * * the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare."

The decision below would effect a "substitution of judicial for administrative discretion", *Communications Comm'n v. WOKO*, 329 U. S. 223, 229, and destroy the "wide discretion" and "wide latitude" which Congress has delegated to the Commission, *Siegel Co. v. Trade Comm'n*, 327 U. S. 608, 611-613.

Quite early in the history of the Commission this Court reflected that the courts should not "usurp merely

administrative functions" under the "guise of exerting judicial power". *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470. More recently in *Federal Comm'n v. Broadcasting Co.*, 309 U. S. 134, 144, this Court has declared:

> "Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."

At page 143 of that decision, this Court emphasizes that it is the responsibility of the Commission "to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest." The finding of the lower court in the present case would dispense with any such functioning by the Commission.

It is not within the province of a court, as stated in *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 276, "to revise the Commission's decision and to enter such judgment as the court may think just". Such an action, this Court declares, constitutes the exercise of "functions which are essentially legislative or administrative" (page 275). See also *United States v. Jones*, 336 U. S. 641, 651, 666, and *Radio Comm. v. General Electric Co.*, 281 U. S. 464. The order sought by Rio Grande herein is of course a rate order and rate orders are "clearly legislative". The *Chicago Junction Case*, 264 U. S. 258, 263.

It is worthy of note that, despite its numerous errors in attempting to sustain the Commission's order "in part", when the three-judge court for the District of Nebraska came to write its final judgment and decree, it recognized these principles and limitations upon the courts in judicially reviewing an administrative order,

as indicated in the following language (page 211, transcript of record from the District of Nebraska, Nos. 117, 118, and 119)—

> "It is further adjudged and decreed that this Court has no power under the Interstate Commerce Commission Act to determine whether it would be in the public interest and consistent with good transportation practices to put into effect only that part of the order of the Interstate Commerce Commission held to be lawful, without regard to and independent of that part of the order held to be unlawful, and, that question being one which should under the law be determined by the Interstate Commerce Commission in the exercise of its informed judgment in its specialized field * * *."

That court "remanded" the case to the Commission for such further proceedings "as the informed judgment of the Commission may dictate", while the three-judge court for the District of Colorado "remanded" the case to the Commission "for further proceedings in conformity with the opinion and judgment of this Court" (R. 362).

Unless the decision of the district court is reversed the way will be open for the Rio Grande to go to the Commission with the "instructions" in the present opinion and insist that an order be made by the Commission that carries into effect all of the orders, observations and declarations of the district court without reference to or consideration of the independent statutory authority and powers of the Commission. Such a course of procedure would do violence to fundamental concepts of separation of powers and administrative law and invite further and unlimited review of all orders entered by the Commission. *Humphrey's Executor v. U. S.*, 295 U. S. 602, 629-630.

CONCLUSION

The judgment and decree should be reversed and the case remanded to the district court with direction to dismiss the complaint.

Respectfully submitted,

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PROOF OF SERVICE

I, BERT L. OVERCASH, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 15th day of March, 1956, I served, on behalf of all appellants herein, copies of the foregoing brief on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

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APPENDIX A

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to

part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3(4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15(1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers sub-

ject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportaton other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mini-

ma, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

Section 15(4)—

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15(8)—

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however*, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

Section 20(11)—(in part)

"That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, Dis-

trict of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; * * *."

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Nos. 332 and 333

In the Supreme Court of the United States

OCTOBER TERM, 1955

NO. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

NO. 333

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO REVERSE

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Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, appellants in No. 332, and Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great

Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company, and Wabash Railroad Company, appellants in No. 333, move that this Court, without awaiting briefs and oral arguments, reverse the judgment of the district court[1] on the ground that it is so plainly erroneous as not to need further argument.[2]

STATEMENT[3]

This is a direct appeal from a final judgment entered February 14, 1955, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, annulling

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1 Appellants in No. 334, United States of America and Interstate Commerce Commission v. The Denver and Rio Grande Western Railroad Company, also seek to reverse the judgment of the district court described herein.

2 See *Williamsport Co. v. United States*, 277 U.S. 551, 556-557. Counsel for appellants realize that this Court's rules do not expressly provide for a motion to reverse. However, this Court for several years has frequently disposed of similar direct appeals under the same statutory provisions (28 U.S.C. 1253 and 2101(b)) by affirming the three-judge district courts' judgments without awaiting briefs and oral arguments. *Goodman Lumber Co. v. United States*, and *A. O. Smith Corp. v. United States*, 301 U.S. 669 (June, 1937); *Ward Transport Inc. v. U.S.*, 75 S. Ct. 570; *Seaboard Air Line R.R. Co. v. U.S.*, 75 S. Ct. 579; *Interstate Com. Com. v. Mississippi Public Service Com.*, 75 S. Ct. 599.

Power to dispose of such appeals without briefs and oral arguments apparently is the same whether by affirming district court judgments that are plainly correct or by reversing judgments that are plainly erroneous.

In the interests of justice and in the exercise of its "supervisory powers," this Court has frequently granted certiorari and reversed judgments and remanded cases without briefs or oral arguments on the merits. *Smalls v. Atlantic Coast Line R.R.Co.*, 75 S.Ct. 439; *Calvaresi v. United States*, 75 S.Ct. 522; *Smaldone v. United States*, 75 S.Ct. 523; *State of Montana v. State Board of Land Commissioners*, 75 S.Ct. 524; *Bates v. United States*, 75 S.Ct. 529; *Moore v. United States*, 75 S.Ct. 531; *Simon v. United States*, 75 S.Ct. 531.

3 For a more detailed statement of the case see Appellants' Statements as to Jurisdiction, Nos. 332 and 333.

and setting aside an alleged "order" of the Interstate Commerce Commission. On April 22, 1955, the court entered an order overruling and denying a motion for new trial or reargument and reconsideration. The Commission's alleged order resulted from a complaint filed by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") for the admitted purpose of improving its financial condition by diverting for a "bridge" haul over its line traffic originated and terminated on through routes of the Union Pacific Railroad Company and other railroads and hauled under joint rates maintained over those routes through Wyoming and Nebraska for 75 years, between points in the northwest area, embracing the States of Oregon, Washington, Montana and Idaho, and points in the eastern and southern parts of the United States.[4]

The joint rates do not apply via the Rio Grande and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via that line.

The Rio Grande demanded that its line be included at equal joint rates in the many hundreds of thousands of existing through routes between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area just indicated. It made this demand despite the facts, found by the Commission, that the Rio Grande has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles

4 The lines and termini of the Union Pacific and the Rio Grande (main lines) are indicated on the map attached as Appendix A to Statement as to Jurisdiction filed herein by Union Pacific Railroad Company, et al., No. 333.

longer than the Union Pacific and would range from 33 per cent to more than 50 per cent longer than many routes maintained by the Union Pacific with other railroads; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.

The Commission further found that Union Pacific routes are not only shorter and faster than the Rio Grande, but are also efficiently operated, have surplus capacity and are adequate to move over their "direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future"; and it also found that the route of the Rio Grande is longer and "less favorably situated" than that of the Union Pacific, and that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines.

The Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line in connection with the Union Pacific and demanded that the lower joint rates maintained over Union Pacific routes be made applicable via its line, without regard to the short-hauling prohibition in Section 15(4) of the Interstate Commerce Act (App. H, p. 4, Railroad Appellants' Statement as to Jurisdiction, No. 333.

The Commission held that the through routes claimed by the Rio Grande did not exist for the involved traffic within the meaning of Section 15(3) and (4) of the Act and that if through routes and joint rates were ordered via the Rio Grande they would have to be grounded on

findings required by Section 15(4)(b), which permits the Commission to short haul existing routes only if it finds that "the through route *proposed* to be established is needed in order to provide adequate and more efficient or more economic transportation". The Commission found that through routes via the Rio Grande were "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for certain commodities which comprise about one-third of the total volume of the traffic the Rio Grande seeks to divert to its line. The Commission concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained." The order issued requires that joint rates "the same" as those maintained over existing Union Pacific routes be made applicable via the Rio Grande to the commodities named in the order.

The order does not in terms deny, dismiss or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks to divert to its line. For the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include that two-thirds of the traffic in the order it issued.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to improve its financial position by diverting traffic from other railroads, it has no standing to maintain the suit. The court further held that through routes via the Rio Grande are already in existence for the involved traffic, that the Commission erred as a matter of law and upon the evidence in finding

that the claimed routes are not in existence, and that this finding by the Commission "obviously prejudiced the entire proceeding". The court enjoined and annulled the alleged "order" insofar as it denied and withheld relief from the Rio Grande, and "remanded" the case to the Commission for further proceedings in conformity with the court's opinion "insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief" to the Rio Grande (Apps. D, E and F, Railroad Appellants' Statement as to Jurisdiction, No. 333; decision reported August 1, 1955, *Denver & Rio Grande Western R. Co. v. United States*, 131 F. Supp. 372).

ARGUMENT

1. The district court treated the Commission's *failure* to require through routes and joint rates on the remaining two-thirds of the traffic as a "part" or a "negative portion" of the affirmative order issued. But examination of the order (App. C, Railroad Appellants' Statement as to Jurisdiction, No. 333) shows that this is clearly erroneous. While the Commission's *report* ends with the conclusion that, "except as indicated in the preceding findings, the allegations made in the complaint are not sustained", this conclusion is not mentioned in the order issued.

This Court has held that the Urgent Deficiencies Act (38 Stat. L. 219; 28 U. S. C. 1336, 1338) confers no jurisdiction upon the courts to review "matter embodied in a [Commission] report and not followed by a formal order", *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 528. In that case the Commission had made a finding of the amount representing the railroad company's investment in road and equipment. It issued no order, but concluded its report with this statement:

"The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

Rejecting the railroad's contention that the quoted language "amounts to an order", this Court held that jurisdiction to review was lacking because *"the action here complained of* is not in form an order", and, instead, "is a part of a report—an opinion as distinguished from a mandate". (Italics added.)

That Act clearly makes the existence or presence of an "order" embodying the matter complained of prerequisite to jurisdiction to review. There is no such order here. The order issued does not deny, dismiss or withhold anything. There is no "negative portion" of that order. It is a positive mandate to more than 200 railroads to establish in connection with the Rio Grande through routes and joint rates on a third of the traffic it seeks to divert from other railroads. But most assuredly the Rio Grande does not want that order enjoined, for every "part" of it is completely favorable to the Rio Grande, and indeed, it is now defending the validity of that order before this Court, No. 117, *The Denver & Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al.* The Rio Grande is clearly seeking in the instant case to enjoin and annul an alleged "order" that has not been issued, namely, an order "denying" the Rio Grande's demand for through routes and joint rates on the remaining two-thirds of the traffic.[5]

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[5] The order reviewed in *U.S. v. Great Northern R. Co.*, 343 U.S. 562 (No. 451, Oct. Term 1951, Transcript of Record, pages 24-25), "denied" an application to abandon the Montana Western, ordered joint rates in lieu of combination rates, and prescribed divisions of the joint rates.

(Continued on next page)

As stated in *United States v. Atlanta, B. & C. R. Co.*, *supra*, page 528:

> "No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

In *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, the Commission had issued an order requiring certain carriers to establish joint rates, but it declined to comply with the demand of some of the carriers that it also prescribe divisions of the joint rates required. This Court reviewed the affirmative order issued but refused to review the Commission's *failure* to fix divisions, holding that in seeking review of the Commission's failure to fix divisions, the appellants were in effect asking the Court to "exercise administrative authority where the Commission has failed or refused to exercise it". In *Chicago Junction Case*, 264 U. S. 258, the Court cited a number of cases at page 264, in which the Court said, judicial review was refused "not because the order * * * was negative in character," but that this Court declined to interfere "because to do so would have involved exercise by it of the administrative function of granting the relief" which the Commission had failed to grant.

(Continued from preceding page)

And compare orders granting "in part" and denying "in part," applications for motor carrier operating rights. In such proceedings the Commission's report generally relates the extent to which the evidence justifies the application, and an order is entered, as follows:

> "*It is ordered*, That said application, except to the extent granted in said report, be, and it is hereby, denied." (No. MC-61396 (Sub No. 32) Herman Bros. Inc., Extension—Kansas and Other States, June 30, 1955, unreported.)

While the district court said that the fact that "the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief", it is plain that the court either confused the abolition of the "negative order doctrine" by *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, with the jurisdictional necessity for an actual formal order embracing the matter of which the Rio Grande complained, or it attempted to "stretch" the ruling in the *Rochester* case to include a case in which the Commission has issued no order at all embodying its failure to grant all the Rio Grande's affirmative demands. Since that *failure*, and not the affirmative order issued, was the gravamen of the Rio Grande's complaint, the district court plainly should have dismissed the suit for lack of jurisdiction. It is certain that the complaint would have been dismissed for lack of jurisdiction in *Manufacturers Ry. Co. v. United States, supra*, if it had attacked only the Commission's *failure* to fix divisions of the joint rates if had required by its affirmative order.

2. The Rio Grande's complaint to the Commission demanded joint rates that would afford it the opportunity to improve its financial position by short-hauling the appellant railroads 925 miles and diverting for a "bridge" haul over its line through traffic from which the Union Pacific alone earns over $49,000,000 annually. The order issued by the Commission grants the demand to the extent of about one-third of the traffic from which the Union Pacific earns over $11,000,000 annually. The Rio Grande filed this suit in the district court for the purpose of obtaining equal joint rates which it "failed to secure from the Commission" on the remaining two-thirds of the traffic (see *Standard Oil Co. v. United States*, 283 U. S. 235, 241).

The district court conceded that the Commission's failure to grant the full demands "required no affirmative action by the Rio Grande" and took nothing away from the Rio Grande which it already had", and from that standpoint, "caused no pecuniary loss to the Rio Grande", but that, nevertheless, it would prevent the Rio Grande "from enjoying increased traffic and increased earnings" and, therefore, "will result in pecuniary injury to the Rio Grande", giving it a right to judicial review (App. D, pp. 20-21, Railroad Appellants' Statement as to Jurisdiction, No. 333).

Keeping in mind the consistent rulings of this Court, the fact that the Rio Grande's only purpose in prosecuting this suit is to reap financial gain beyond the extent permitted by the Commission's order, and the fact that the Rio Grande has no legal or other right to enhance its financial position by diverting traffic from other railroads, it is clear beyond doubt that the district court erred in holding that the Rio Grande has standing to maintain this suit.

This Court has consistently held that standing to maintain a suit to enjoin an order of the Commission requires a showing that the order assailed subjects the complainant to legal injury, actual or threatened, *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249, 257; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486; *Moffat Tunnel League v. U. S.*, 289 U. S. 113, 119; or that the order would deprive the complainant of something it has long and lawfully possessed, or would disrupt the transportation situation causing the complainant financial or economic

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6 Compare *United States v. Los Angeles R.R.*, 273 U.S. 299, 309-310.

loss, or that the right to maintain such suit rests upon some express statutory provision, *Western Pacific v. South. Pac. Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry v. U. S.*, 285 U. S. 382; *Chicago Junction Case*, 264 U. S. 258, 267; *Alton R. Co. v. United States*, 315 U. S. 15, 19.

This Court also held in *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 780, that:

> "There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originated."

If, as held in that case, the railroads that originate and terminate the traffic have no right to retain it to their lines, or—as argued by the Rio Grande in the district court[7]—have no "absolute" or "unequivocal" right to their long hauls, then, *a fortiori*, the Rio Grande, which neither originates nor terminates the traffic, can claim no semblance of a legal or other right to enhance its financial position by diverting for a "bridge" haul over its line traffic originated and terminated by these railroad appellants and hauled by them for 75 years over their shorter, faster and more efficient routes.

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7 On this point the Rio Grande argued as follows at page 111 of its original brief in the district court:

"Neither the Union Pacific nor any other railroad has an absolute right to the exclusive occupancy of a particular territory or to the traffic which terminates or originates in the territory. *Pennsylvania R. Co. v. United States*, 40 Fed. (2) 921; *Indian Valley R. Co. v. United States*, 52 Fed. (2) 485, and *Chesapeake and Ohio Ry. Co., Construction*, 267 I.C.C. 665, 679. In *United States v. American Railway Express Co.*, 265 U.S. 425, 437, the court held that a carrier has no absolute right to the traffic it originates or to its long haul. Such rights as a railroad may have to its long haul on interstate commerce are granted and limited by the Interstate Commerce Act. Moreover, that Act does not give the originating railroad or any railroad the unequivocal right to its long haul in connection with through routes."

The purpose of the short-hauling prohibition in Section 15(4) of the Act is "to protect the long haul routes of carriers", *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 277, and it is a distortion of that purpose to contend or suggest that there is any hint of a legislative sanction of a right in the Rio Grande to short haul the railroad appellants 925 miles so that it may improve its financial condition by diverting for a "bridge" haul over its line through traffic originated and terminated on the lines of the railroad appellants. Indeed, Section 15(4) requires that the Commission shall—if it orders a new through route—"give reasonable preference to the carrier by railroad which originates the traffic." And that section contains the further mandate that:

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

All of this, we submit, conclusively demonstrates that the Rio Grande has no semblance of a legal or other right to take from Union Pacific routes the traffic it seeks, and, hence, no standing to maintain this suit.

Although the district court refrained from specifying the ground or reason for its holding that the Rio Grande has standing to maintain the suit, it did hold that the Rio Grande here seeks rates that "will result in pecuniary profit to the Rio Grande * * * the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" (App. D, p. 25, Railroad Appellants' Statement as to Jurisdiction, No. 333), and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande", but that such injury is not essential to the right to judicial review. (Id. pp. 20-21.)

In final analysis, and though lacking in clarity and specificity, the court's decision that the Rio Grande has standing to maintain the suit inescapably rests upon the proposition that, regardless of its utter lack of any legal or other right to the traffic it seeks, the Rio Grande has standing to maintain this suit because the Commission failed to grant its demands for an opportunity to reap "pecuniary profit" and enhance its revenues from *all*, instead of a part, of the traffic it seeks to divert for a "bridge" haul over its line.

There is no precedent for the court's holding, and it is directly contrary to the decisions cited above and to the rule laid down by this Court that in order to maintain a suit to enjoin acts of others the complainant must show that he is threatened not only with a "loss" but also one against which he is legally or equitably entitled to protection. *Railroad Co. v. Ellerman*, 105 U. S. 166; *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118. If, as held in the cases just cited, a complainant has no standing to maintain a suit to enjoin acts of others *which threaten even to destroy his business* unless he shows that such acts invade some legal or equitable right of his own, *a fortiori* the Rio Grande has no standing to maintain suit to enjoin the Commission's failure to grant its full demands for "pecuniary profit" to be obtained by diverting to its line traffic to which it admits that it has no semblance of legal or other right, and the refusal of the district court to so hold clearly should be reversed.[8]

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8 The American Short Line Railroad Association and several shipper organizations intervened as plaintiffs supporting the Rio Grande's complaint in the district court. That court did not comment on the question whether the interveners have any "independent" right

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3. The district court, in reversing the Commission's finding that through routes claimed by the Rio Grande are not in existence within the meaning of the Act, misconstrued or refused to be guided by this Court's decision in *Thompson v. United States*, 343 U. S. 549, and by the principles stated in *U. S. v. Great Northern R. Co.*, 343 U. S. 562, concerning proof of the existence of through routes and the legislative policy against diversion of traffic from one carrier for the benefit of another.

Although stating that the definition of "through route" in the *Thompson*[9] case "compels us to conclude

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or standing to sue, but obviously they have not, for, like the Rio Grande, they suffered no loss but, instead, gained a financial benefit from the order, and sought merely to reap "pecuniary profit" beyond and in addition to that permitted by the order. Their right to intervene in the Rio Grande's suit gave them no right to maintain a suit, independent of the Rio Grande's, to enjoin the alleged order. *Sprunt & Son v. United States*, 281 U.S. 249, 252-258; *Schenley Corp. v. United States*, 326 U.S. 432, 435; *Boston Tow Boat Co. v. U.S.*, 321 U.S. 632, 634; *Moffat Tunnel League v. U.S.*, 289 U.S. 113, 120. And since, as we have shown, the Rio Grande had no standing to maintain its suit, the interveners' complaints, along with the Rio Grande's, clearly should have been dismissed by the district court.

9 In the *Thompson* case this Court held at pages 557-558 that:

"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.

"In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under Section 15 (3) and (4) also presupposes

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that the through routes contended for by the Rio Grande were in existence", the district court does not indicate which of the several elements of that definition compels such conclusion, but this Court's opinion in that case clearly shows at page 557 that the existence or absence of a through route is to be determined by consideration of the various incidents which tend "to establish a carrier's course of business with respect to through shipments." It is the "course of business"—not the exceptions to or departures from it—that governs.

The district court merely states that in the *Thompson* case there was no evidence that a shipment had ever been made from terminus to terminus (Lenora, Kans., to Omaha, Nebr., via the Missouri Pacific and Burlington railroads) of the route there in question or that the carriers had ever offered through service over that route. As if to prove a different case, the court then points to 18 shipments moved at combination of local rates in 1948 over the Rio Grande from 18 origins in the middlewest and southwest to destinations in the northwest area and to a few war and blizzard emergency shipments, and 37 shipments that moved from the northwest to destinations *on* the Rio Grande. Neither the latter nor the emergency shipments could prove anything in this case, for the "emergency" shipments are expressly exempted from the short haul prohibition by the last sentence of Section 15(4) to take care of "temporary" emergencies, and the 37 shipments to points on the Rio Grande were not

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such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines.

"through" shipments of the "bridge" traffic sought by the Rio Grande.

The *Thompson* decision, page 557, footnote 13, makes it plain enough that even if the Rio Grande had proved that one or more isolated or sporadic shipments moved via its lines over each of the innumerable routes of which it claims to be a part, it still would have failed to prove "the carriers' course of business". *A fortiori*, its showing here of 18 shipments routed via its line by shippers over 18 of the millions of existing through routes between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area is not even a *scintilla* of proof that the "course of business" of the carriers comprising the myriad of Union Pacific routes is to offer through transportation service in connection with the Rio Grande between the northwest and the eastern and southern parts of the country.[10]

Such a "course of business" is negatived by the fact, mentioned in the district court's opinion, that joint rates with the Rio Grande established by receivership courts in 1897, were cancelled after the receiverships terminated nearly 50 years ago. It is also negatived, as the Commission said, by the steadfast refusal of the appellant railroads during, and even before, that 50-year period to relinquish their long hauls.

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10 At page 559, the *Thompson* decision holds:

"Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1 (4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, *a right guaranteed by Section* 1 (4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington, as requiring 'an unwarranted distortion of the statutory pattern.'" (Italics supplied.)

That the cancellation nearly 50 years ago of the joint rates established in connection with the Rio Grande by the receivership courts in 1897 fully accomplished the "closing" of the through routes in question, is and has been the understanding of all railroads and shippers generally concerned during that 50-year period. It was the understanding of 137 shipper and public witnesses who opposed the Rio Grande and of some 50 witnesses who supported its complaint before the Commission, and it was the understanding of the Rio Grande's President, who testified that, ever since he became affiliated with the Rio Grande he had looked forward "to the opening of the Ogden Gateway". It was the admitted position of Rio Grande until after this Court handed down its decision in the *Thompson* case (June 2, 1952). In its publicity campaign, conducted before and after the filing of its complaint, August 1, 1949, the Rio Grande publicly asserted that its purpose was to "restore" to the northwest the "rates and routes" established by the receivership courts in 1897. As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz", (I. C. C. Ex. 30), in which it posed 20 questions and answered them with the arguments it thought would convince shippers to aid it in its efforts to "open" through routes via its line in connection with the Union Pacific to and from the northwest area. These questions clearly and indisputably show that the Rio Grande itself considered the prior through routes via its line "closed" by the cancellation of the joint rates by the Union Pacific.[11]

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[11] Among the 20 questions were the following:

"2 What is Meant by the 'Closed' Gateway at Ogden?"

"3 What is the Effect of the Closed Gateway?"

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Every relevant or material factor recited in the opinion of the lower court in support of its conclusion that through routes exist as claimed by the Rio Grande was rejected or held insufficient by this Court in annulling the Commission's order in the *Thompson* case, because the order had the effect of reducing the short haul prohibition to "unnecessary surplusage," and was "without evidentiary support under the accepted tests for determining the existence of a through route" (pp. 560, 561).

The Commission in the instant case held that the few sporadic shipments moved in 1948 did not prove the existence of through routes via the Rio Grande for the involved traffic. Applying the principles of the *Thompson* decision, pages 557-558, the Commission correctly concluded that the carriers in this case do not "hold themselves out as offering through transportation service" for the involved traffic, as indicated by their "course of business" and by the Union Pacific's course of con-

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" 4 How Does the Rio Grande Seek to Open the Ogden Gateway?"
" 5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"
" 6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"
" 7 Will the Open Ogden Gateway Reduce Freight Rates?"
" 8 Will the Open Gateway Provide Improved Service?"
" 9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
"11 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
"12 Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
"13 Will Opening of the Ogden Gateway Reduce Railroad Employment in the Closed-Door Territory?"
"14 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

duct over many years in its steadfast refusal to relinquish its long haul. (See App. B, p. 10, Railroad Appellants' Statement as to Jurisdiction, No. 333.)

The district court's decision is vague and lacking in specificity as to the precise reason why it holds that through routes are in existence for the involved traffic via the Rio Grande, but it sanctions a new and unprecedented standard, or set of circumstances, for escaping the short-haul prohibition of Section 15(4) and for determining the existence of through routes, which not only conflicts with the principles laid down in the *Thompson* case, but is also at war with the plain purpose of the Act in conferring the through routes power on the Commission carefully limited so as to protect the long hauls of carriers, *Thompson* case, *supra; United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *I. C. C. v. Columbus & Greenville Ry.*, 319 U. S. 551; *Atlantic Coast Line R. Co. v. U. S.*, 284 U. S. 288, 295.

In *U. S. v. Great Northern R. Co.*, 343 U. S. 562, this Court held at page 575, that:

> "Congress amended Section 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs."

That being so, the district court clearly exceeded its authority in "tinkering" with through routes to enable the Rio Grande to reap additional "pecuniary profit" and to satiate its financial greed.

4. The district court held that the Commission's finding that through routes do not exist via the Rio Grande for the involved traffic "obviously prejudiced the entire proceeding", but the court "remands" the case to the Commission *only* "insofar as it denied and withheld relief" to the Rio Grande. Also contrary to the

Commission's finding, the court made its own administrative finding of fact that continuance of the Rio Grande's combination rates on the traffic not included in the Commission's order would result in discrimination against the Rio Grande and shippers over its line.

Thus, in remanding the case to the Commission "for further proceedings in conformity with this opinion", but only insofar as the Commission denied relief to the Rio Grande, the court would not only prevent the Commission from reconsidering the portion of the "prejudiced" proceeding which is favorable to the Rio Grande, but would also tie the Commission's hands by requiring it to reverse its previous administrative judgment and finding that the evidence did not prove discrimination against the Rio Grande. In short, apart from the fact that neither the Urgent Deficiencies Act (28 U. S. C. §1336) nor any other statute gives the court power to "remand" the case to the Commission, in doing so the court virtually directs the Commission to order joint rates on the remaining two-thirds of the traffic so that the Rio Grande may reap additional "pecuniary profit" from "increased traffic and increased earnings". The court clearly usurps the Commission's administrative authority and renders its functions useless, contrary to decisions of this Court, *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, holding at page 470 that the courts may not "under the guise of exerting judicial authority, usurp merely administrative functions"; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, holding at page 483, that jurisdiction to review orders of the Commission "does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it;" and *Chicago Junction Case*, 264 U. S. 258, 264. Having failed to gain its full de-

mands from the Commission, the Rio Grande turned to the district court to accomplish that objective. But the district court was without authority to aid the Rio Grande in its attempt, by "direction" or by "indirection", to obtain through the court proceeding "the same relief it failed to secure from the Commission", *Standard Oil Co. v. United States*, 283 U. S. 235, 241.

The Urgent Deficiencies Act confers authority only to "enjoin, set aside, annul or suspend in whole or in part any order" of the Commission. In making its own finding of discrimination against the Rio Grande and in "remanding" the case to the Commission for further proceedings in conformity with that finding, the court has plainly violated the elementary principle stated by this Court in *Ford Motor Co. v. Labor Board*, 305 U. S. 364, at page 373, that in exercising the power to review an administrative order—

> "* * * the court must act within the bounds of the statute and without intruding upon the administrative province."

CONCLUSION

For the foregoing reasons and others more fully stated in appellants' jurisdictional statements, we submit that the decision and judgment of the district court are so clearly erroneous as not to need further argument. The judgment should accordingly be reversed by this Court without awaiting briefs and oral arguments and the case remanded to the district court with direction to dismiss the complaint.

Respectfully submitted,

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August, 1955.

PROOF OF SERVICE

I, ELMER B. COLLINS, one of counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 26th day of August, 1955, I served, on behalf of all appellants herein, copies of the foregoing Motion on the several parties thereto and parties to the appeal in No. 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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Nos. 332 and 333

Supreme Court of the United States

OCTOBER TERM, 1953

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL., *Appellants*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

On Appeal From the United States District Court for the District of Colorado

BRIEF OF APPELLEE IN OPPOSITION TO MOTION TO REVERSE

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL., *Appellants,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellants,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

On Appeal From the United States District Court for the District of Colorado

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BRIEF OF APPELLEE IN OPPOSITION TO MOTION TO REVERSE

This brief is filed for appellee, The Denver and Rio Grande Western Railroad Company, herein called the Rio Grande, in opposition to the Motion To Reverse the judgment of the court below recently filed by the appellants in No. 332, Washington Public Service

Commission, et al., and the appellants in No. 333, the Union Pacific Railroad Company, et al.

For the reasons hereinafter stated, the Motion To Reverse should be denied.

PREFATORY STATEMENT

The decision and judgment of the court below is reported as *Denver & Rio Grande Western R. Co.* v. *United States,* 131 F. Supp. 372. In that decision the court dealt with the validity of the order of the Interstate Commerce Commission involved in *Denver & Rio Grande* v. *Union Pacific Railroad, et al.,* 287 I.C.C. 611. The court held that the Rio Grande had standing to maintain the suit and that the order of the Commission insofar as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with its opinion. The court decided, *inter alia,* that on the undisputed evidence before the Commission and by reason of the admissions of counsel and the principal traffic witness of the Union Pacific it erred in refusing to find that through routes existed in connection with the Rio Grande and the Union Pacific via Ogden, Utah, on the traffic and between the originating and destination territories involved.

The gist of the Denver decision is represented by the following pertinent paragraph from the that decision:

> "The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to

have the Commisison apply the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act, free of any of the limitations imposed by Section 15(4) with respect to the establishing of through routes."

The Interstate Commerce Act, viewed as a whole, and without reference to any particular provision was clearly designed to assure, so far as possible, to the country as a whole and to all parts thereof a national and coordinated system of transportation, and not to permit any particular railroad to close off any section or area, and claim a monopoly with respect thereto as to the free flow of traffic to and from the area.

The "closed door" territory in Northern Utah, Idaho, Montana and Washington is one of the largest areas in the United States which a particular railroad claims as its own principality and asserts the right to control the traffic in and from that area, or as a matter of whim or otherwise to prefer certain railroad connections and to discriminate against the Rio Grande so as to exclude that area on traffic moving to and from that area via the Rio Grande. As to freight traffic moving to and from that area, the Union Pacific with the aid of its connections claims the right to say to the public, you may ship over its lines to and from Colorado common points or to and from points east and southeast of the Colorado common points at joint competitive through rates, or you may ship at joint through rates via routes which are longer than the route of the Union Pacific and its preferred connections than the distance via the route of the Rio Grande through Ogden, to wit: To and from Seattle, Wash., to and from Colorado common points or points east thereof via the Southern Pacific at Portland to Ogden, and the Union Pacific or the Rio Grande from Ogden

to Denver, or via the Southern Pacific at Portland through Southern California, Arizona and New Mexico to Kansas City, St. Louis, New Orleans, Chicago or other points. The Union Pacific also maintains joint rates and through routes from points in eastern Washington and Oregon in connection with the Great Northern, the Northern Pacific and the Milwaukee to Minneapolis, Chicago, New York, Cleveland, St. Louis and all points in the east in which it accepts less than 250 mile hauls as against its long haul to Omaha and Kansas City or as against the haul of over 800 miles it would get if the traffic moved via the Union Pacific and the Rio Grande via Ogden.

In the closed door area the Union Pacific has a practical monopoly and it asserts the right, free from any authority of the Interstate Commerce Commission or of the courts, to grant or withhold to other railroads favors as to rates and interchange practices as it sees fit. This is contrary to the provisions and the policy underlying the Interstate Commerce Act which require railroads to act together so as to constitute one national coordinated system of transportation, of which the Rio Grande is as much a part as any other railroad.

The appellee herein, The Denver and Rio Grande Western Railroad Company, instituted proceedings before the Interstate Commerce Commission (which are the proceedings on review here) to challenge the right of the Union Pacific Railroad to maintain such a transportation monopoly.

The Complaint before the Interstate Commerce Commission was filed August 1, 1949. It directly challenged the monopoly and overlordship exercised by the Union Pacific over the business and economic life of

a territory equal in size to twice the area of New England, New York, Pennsylvania and Maryland. A number of interested shippers and organizations and public service commissions intervened. After the taking of voluminous testimony the Interstate Commerce Commission Examiner, Mr. Frank Mullen, rendered a Report according to the Rio Grande and the shippers involved substantially the relief prayed for. Numerous exceptions to the Examiner's Report were filed, followed by voluminous briefs by the parties directly involved (the Rio Grande and Union Pacific), and by various intervenors on each side.

On January 12, 1953, the Commission made its Report and Order—the Order specifically making the Report "a part of the Order", by reciting in the Order that the "report is hereby referred to and made a part hereof". This Report and Order accorded relief to the Rio Grande and to the shippers involved with respect to certain named commodities and denied relief with respect to all other commodities to and from the Union Pacific's "closed door territory". Among the ten commissioners who participated in the Interstate Commerce Commission decision (one, Commissioner Knudsen, having disqualified himself), there was a wide difference of opinion, and several varying separate written opinions filed. Although there was a concurrence of six on the measure of relief granted as to the named commodities, there was a tie vote of five to five on what was alleged in the complaint and treated by all of the Commissioners as the basic issue of the case, namely, whether as claimed by the Rio Grande *through routes* were in existence so as to entitle the Rio Grande to relief apart from Section 15(4) of the Act which imposes limitations on the Commis-

sion with respect to the establishment of *through routes* when none exist.

The Report which is made a part of the Order shows on its face that only four of the ten voting members actually approved and adopted the Report and Order purportedly made "By the Commission". A reference to the Report (287 I.C.C. 611) shows:

(1) that Commissioner Patterson *concurred in part*, but thought the report inconsistent in failing to grant relief on lumber;

(2) that Commissioner Arpaia *concurred*, but *thought that through routes existed*, but would limit the competitive joint rates to the commodities as granted in the "master" report;

(3) that Commissioner Lee *concurred in part*, but *thought that through routes existed*, and would extend the relief;

(4) that Commissioner Mahaffie (with whom Commissioners Splawn and Cross joined) *dissented in part*, but *thought that through routes existed*, and would extend the relief.

Whatever is otherwise said of what the "Commission Decided" or did not decide, it is clear that there was no decision by a majority of the Commission on the first and foremost question of the existence of *through routes*, and that the failure of the Commission to decide this question colored and distorted its whole approach to the case.

The Denver court held that under the undisputed evidence before the Commission and by reason of the admissions of counsel and the chief traffic witness of the Union Pacific, that as a matter of law *through routes* existed, and that the Commission in considering the

matter erred in imposing upon itself the necessity of proceeding under the stringent limitations of Section 15(4). The Denver court also remanded the case to the Commission for further proceedings in accordance with the law as determined by that court with respect to the existence of *through routes*.

BACKGROUND OF CASE

Before dealing directly with the points relied upon by the appellants it is deemed appropriate briefly to describe the Rio Grande and the issues before the Commission and before the court below. The Rio Grande is a common carrier by railroad engaged in transportation of persons and property in intrastate, interstate and foreign commerce. It operates 2400 miles of railroad in Colorado, New Mexico and Utah. It has interchange track connections and interchanges traffic with the Union Pacific Railroad at Denver and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, Utah, and the Western Pacific at Salt Lake City. It also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo with the Santa Fe, the Colorado and Southern and the Missouri Pacific Railroad; at Walsenburg, Colo., with the Colorado and Southern and at Trinidad, Colo., with the Santa Fe and the Colorado and Southern.

The Rio Grande filed its complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroads. The complaint alleged, *inter alia*, that the failure and refusal of the defendant railroads to establish joint competitive through rates and competitive through routes via

Ogden, Utah, and the Rio Grande on interstate and foreign freight traffic, in carloads, and in other quantities, resulted in through rates which are excessive, unjust, unreasonable and discriminatory in violation of Section 1, Section 3 and Section 15 of the Interstate Commerce Act and that such action is contrary to the national transportation policy since it deprives the public, shippers, and the Rio Grande of the use of available and reasonable through rates and rail facilities at just, reasonable and non-discriminatory through joint rates which are necessary and desirable in the public interest.

Plaintiff requested the Commission to enter an order requiring the Union Pacific Railroad Company and other railroad defendants to establish and maintain for the future just, reasonable, and non-discriminatory competitive joint rates and through routes on freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific Railroad Company and its connections in Utah north of Ogden, Utah, and in Idaho, Montana, Oregon, Washington and British Columbia, herein called the closed door area, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colo., and points east thereof; and between Utah common points and the closed door territory served by the Union Pacific railroad and its connections already described.

The complaint also alleged that the through rates and charges applicable to such traffic between the points described via such through routes were and are based upon the combination of the intermediate, local or other rates which rates and charges in the aggregate were and are substantially higher than the

joint through rates maintained by defendant railroads on similar freight traffic between the same origin and destination places and territories which moves via the Union Pacific and the other defendant railroads; that the combination rates applicable on the traffic and between the territories described via said through routes of the Rio Grande and defendant railroads were and are unjust, unreasonable, and discriminatory and unduly prejudicial as compared with the competitive joint rates maintained by the Union Pacific railroad or via the Union Pacific and other defendant railroads on like freight traffic via other competitive routes.

At Ogden, Utah, looking west, the Union Pacific has two diverging lines of railroad which are in the shape of a large "Y". One line extends in a southwesterly direction through Salt Lake City and Provo, Utah, and Las Vegas, Nev., to Los Angeles, Calif. Between points on that line and Colorado common points and points east thereof, the Union Pacific maintains competitive joint through rates and through routes on all freight traffic in connection with the Rio Grande via Salt Lake City and Ogden. The other line of the Union Pacific extends in a northwesterly direction from Ogden through Utah, Idaho, Oregon, Washington and Montana. This is the closed door territory to and from which the Union Pacific and its connections refuse to maintain competitive joint rates on freight traffic via the routes of the Rio Grande through Ogden or Salt Lake City, except on sheep and goats from that territory to certain points and on lumber to Canon City, Colo.

Competitive joint rates and through routes were established in connection with the Rio Grande via

Ogden and Salt Lake City on the traffic and between the territories involved in 1897 by the Oregon Short Line Railroad Company and the Oregon Railroad and Navigation Company at a time when these two companies and the Union Pacific were in separate receiverships. The through routes thus established are still in effect since they have not been canceled by the Union Pacific or by any of its connecting railroads. By August 1906 the Union Pacific had reacquired control over the Oregon Short Line and the Oregon Railroad and Navigation Company, and between August 1906 and December 1915 it caused the joint rates for application via the Rio Grande to be canceled; but no action was taken then or later by the Union Pacific or the other interested railroads to cancel the through routes.

At page 1160 of the transcript of the hearing before the Commission at Boise, Ida., A. J. Stilling, the principal traffic witness of the Union Pacific, unequivocally stated that the through route via the Ogden gateway and the Rio Grande is open and available to shippers who are willing to pay through rates based on the aggregate of the intermediate local rates of the various carriers in the route. Stilling stated that—

> "The Interstate Commerce Act gives all shippers the right to specify the lines over which their shipments shall move so the Ogden gateway and route via the Rio Grande is actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington."

Counsel for the Union Pacific made a like admission at pages 2368 and 2369 of the transcript of the oral argument before the Commission on October 16, 1952,

as the result of a colloquy between himself and Chairman Alldredge on the question whether the tariffs which canceled the joint rates in 1906-1915 closed the route via the Rio Grande through Ogden. That colloquy ended as follows:

> "Chairman Alldredge: Do you think that closes this route for this traffic?
>
> "Mr. Collins: No, I don't think so, if they want to pay more, if they want to route via the Rio Grande and pay the price."

As is shown by Appendix 2 attached to this brief, the Commission granted the relief sought by the Rio Grande on nine commodities. The suit in the court below was filed by the Rio Grande upon the grounds that the refusal of the Commission to grant all of the relief sought was arbitrary and capricious, contrary to the statutes, and contrary to the evidence.

Although in the Statements As To Jurisdiction recently filed with the Court by the appellants they insist that the questions presented by their appeals are substantial and of general public importance and that a decision by this court is essential, their Motion To Reverse in practical effect repudiates the points they made in their Jurisdictional Statements. The Motion To Reverse is not only premature, but is not authorized by the Revised Rules of Practice of this court. The citations recited on page 2 of the Motion do not support the right of the appellants to file it. Moreover, in each instance where the case reached this court on appeal the action of the court *affirmed* the judgment *per curiam* on motions to affirm and in no such case cited did this court reverse the judgment of the court below. The other cases cited by the appellants

reached the court on petitions of *certiorari*. In the certiorari cases cited the court granted the petitions for certiorari and reversed the judgments. The appellants cited no decision of this court that reached the court on a statutory appeal which reversed the judgment below after Jurisdictional Statements were filed and before probable jurisdiction was noted.

Footnote 1, page 2 of movants' "Motion to Reverse" should be mentioned in passing. Although it is true that appellants in No. 334, United States of America and Interstate Commerce Commission, seek in their appeal to reverse the same judgment of the district court, the United States of America and the Interstate Commerce Commission have not filed any "Motion to Reverse" and do not join in the "Motion to Reverse" here under consideration, but the United States of America and the Interstate Commerce Commission set forth in their "Jurisdictional Statement" that this appeal involves substantial questions which need full hearing and clarification and settlement.

ERRORS OF STATEMENT AND OF RELEVANCY

An obvious effort has been made in the "Motion to Reverse" to confuse the real issues in the litigation. Only one or two of these will be referred to, but they should be negated because they have been repeated in the "Statement as to Jurisdiction" also filed by the Union Pacific.

It is represented at page 3 of the "Motion to Reverse" that the Rio Grande admittedly filed its complaint for the purpose of improving its financial condition. This is both an error of statement and an error of relevancy. No carrier ever filing a complaint before the Commission would be justified in the eyes of its

stockholders, and even of the public, if it did not in some manner have the objective of improving its financial condition. But the right to file such a complaint is not based upon pecuniary gain. It is filed in order to vidicate a statutory right. There was nothing alleged in the complaint with respect to improving the Rio Grande's financial condition.

There is appended to the "Jurisdictional Statement" of the Union Pacific, and reference is made to it in the "Motion to Reverse", a map which undertakes to represent that the distances to all points east and south of Colorado common points are longer if the traffic is routed over the Rio Grande than if routed over the Union Pacific. This map is based on routings purposely selected as favorable to the Union Pacific. Other maps and charts introduced into the record show situations favorable to the Rio Grande. It would seem unfair on a motion of this kind to leave the Court with the impression that this particular map represents the full and complete facts with respect to comparative distances. Presentation of matters of this character should await a full hearing of the case.

On page 9 of the "Motion to Reverse" figures are set forth as to what the Union Pacific might lose in case the Rio Grande were granted relief in accordance with the prayer of its complaint before the Interstate Commerce Commission, and what it might lose, if the Rio Grande were granted the lesser relief which the Commission accorded. These figures are not conceded by the Rio Grande. They are theoretical and self-serving and not properly a part of a "Motion to Reverse". Many other argumentative conclusions are set forth in the Motion. They can only be properly considered and tested upon a full hearing of the appeal.

It is asserted that the Rio Grande admittedly has no right to the traffic is is seeking. This is an error of relevancy. No carrier has a right to traffic. It is the shipper and not the carrier who determines how the traffic shall be carried. If the Rio Grande has no right to the traffic, neither has the Union Pacific, because as is disclosed by the evidence there are shippers in the area and elsewhere who even in the face of the higher rates enforced by the Union Pacific on routings over the Rio Grande have nevertheless routed their shipments over the Rio Grande.

Reference is here made to these errors of statement and of relevancy only to show that because of their very nature they are not matters which, on a summary motion, can be fully discussed, considered and disposed of.

THE PRINCIPAL POINTS RELIED UPON BY APPELLANTS

The Motion To Reverse is based principally upon three points:

1. That the decision of the Commission is not an order;

2. That even if the decision of the Commission is held to be an order, the Rio Grande has no standing to maintain the suit, and

3. That the court erred in deciding that the Commission erred, as a matter of law, in finding that the through routes via the Rio Grande, the Union Pacific, et al., via the Ogden Gateway are not through routes within the contemplation of Section 15 (3) and (4) of the Interstate Commerce Act and that this error, which resulted in self-imposed restrictions upon the authority of the Commission to establish reasonable

and non-discriminatory joint rates, prejudiced the entire proceeding. (*Denver & Rio Grande Western R. Co.* v. *United States*, 131 F. Supp. 372, 378-379).

Even when the appellants dealt with each of these points they were unable to resist the temptation to ramble off into the merits of the case which are unrelated to the points.

As to the first point: For the convenience of the court there is attached hereto as Appendix 1 to this brief a copy of the order of the Commission of January 12, 1953. It will be observed that the first paragraph of that order specifically states that the report containing the findings of fact and conclusions of the Commission "is hereby referred to and made a part hereof." There is also attached hereto as Appendix 2 the conclusions of the Commission which appear in its report, 287 I.C.C. 611, at page 659. We shall deal with the three points described in the order in which they are stated.

In support of the contention that the decision of the Commission involved in these appeals is not an order, the appellants rely very heavily on *United States* v. *Atlanta, B. & C. R. Co.*, 282 U.S. 522. The decision in that case is distinguishable from the facts of the instant case. In that case there is involved a complicated accounting situation growing out of the receivership and reorganization of the Atlanta, Birmingham and Atlantic Railway Company, 117 I.C.C. 181, and in the supplemental report of the Commission in the same case, 117 I.C.C. 439, 443. The order of the Commission in the case cited which authorized the new company to issue preferred and common stock imposed certain conditions with respect to the

accounting classification of "investment in road and equipment." When the new company set up its books it did not comply with those conditions. As a result of a further hearing and reconsideration of the questions involved, the Commission issued its report in *Atlanta, B. & A. Ry. Co. Reorganization,* 158 I.C.C. 6, 13, 14, in which it stated the value of the property of the railroad for rate making purposes and prescribed accounting rules and regulations but entered no order to which its report and finding was a part. The concluding paragraph of the last decision reads as follows:

> "Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

It will be seen that in that case the Commission merely stated that the company will be expected to adjust its accounts in accordance with its finding within 60 days from the service of its report. The findings there are not only not in the form of an order but did not purport to be an order.

That decision should be compared with the recent decision of the court in *Henderson* v. *United States,* 339 U.S. 816, which reversed with directions to remand the decision of the court below that sustained the decision of the Commission in *Henderson* v. *Southern Ry. Co.,* 269 I.C.C. 73, 78, wherein the Commission found that under the revised rules of the Southern Railway, Henderson was not subjected to unreasonable

prejudice and disadvantage. The Commission did not enter an order. In that case the United States on brief and oral argument supported the appellant on the ground that it was clear that he had standing to institute the suit and to bring the proceedings since he was an aggrieved party, free to travel again on the Southern Railway. This court sustained that view and overruled the Commission by finding that Henderson was subject to undue prejudice in violation of Section 3 of the Interstate Commerce Act and remanded the case with directions. It will thus be seen that in the *Henderson* case this court considered a decision of the Commission on which no order was entered, despite the old decision of the court in the *Atlanta, B. & C. R. Co.* case, 282 U.S. 522.

The fact that the order of the Commission in the instant case does not use the word "dismissed" is of no significance since, as was cogently stated in the *Rochester Telephone* case, 307 U.S. 125, at page 142:

> "The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same."

The discussion of this general question by Mr. Justice Frankfurter at page 142 and other pages of the *Rochester Telephone* case is a complete answer to the contentions of the appellants that that part of the decision of the Commission which denied the relief sought by the Rio Grande and which is involved in the appeals here under consideration is not an order and therefore is not subject to review by this or any other court.

The appellants have also relied to a large extent upon *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S.

235, to support its position. In *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, the court upheld the right of the Government as a plaintiff and shipper to maintain a suit against itself. At page 436 of its opinion in that case, after referring to the doctrine of the *Standard Oil* case, the court made the statement that—

> "This doctrine was wholly abandoned in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125."

We will now discuss *Manufacturers' Ry. Co.* v. *United States*, 246 U.S. 457, another decision relied on by the appellants. The facts of that case are so completely different from the facts in the instant case as to make it wholly inapplicable. In *Manufacturers Ry. Co.* v. *United States*, a failure by the Commission "to fix divisions" was held not to be subject to judicial review because it involved a failure or refusal of the Commission to exercise its administrative authority. In the instant case, which was in all respects an adversary proceeding between active litigants, while the question of the existance of *through routes* was initially a mixed question of law and fact to be decided by the Commission, yet after the taking of evidence and extended hearings and arguments with a record before it in which the evidence on this issue was undisputed the issue became a question of law. The Commission's failure to resolve it was not merely a failure to make an administrative finding. It was a failure to correctly apply the law to the undisputed facts before it. The usual rule with respect to a mere administrative finding not being subject to judicial review became inapplicable and cannot and should not prevent the court examining into the question and deciding as a matter of law upon the whole record

whether *through routes* were in existence. This is exactly what the Denver court did.

It should be pointed out that both the *Atlanta* case and the *Manufacturers* case above referred to and so heavily relied upon by the movants were decided prior to the *Rochester Telephone* case, the *Youngstown* case, the *Mitchell* case and prior to the Administrative Procedure Act.

We shall now discuss the second point made by appellants, which is that even if the decision of the Commission is an order subject to review, the Rio Grande has no standing to bring or to maintain the suit in the court below. In dealing with this question the appellants indulge in a discussion of the right of one railroad to capture or recapture traffic which it originates or which moves by other railroads. Obviously such facts are wholly irrelevant to the question whether the Rio Grande has a right to maintain the suit. The court below did not err in finding that the Rio Grande has a sufficient interest to maintain the suit, the decision in which is here the subject of appeal.

Section 13(1) of the Interstate Commerce Act affirmatively provides that any person, firm, corporation, company, or association, *or any common carrier*, may file a complaint with the Commission against anything done or omitted to be done by any other common carrier subject to the provisions of this act, in contravention of such provisions, and that if the defendants in such a complaint do not satisfy the complaint, and there be any reasonable ground for investigating the complaint, it shall be the duty of the Commission to investigate it. Thus the Interstate Commerce Act conferred upon the Rio Grande, a

common carrier, the statutory right to complain against the Union Pacific and the other defendants of things which they did or failed to do in contravention of the provisions of the Interstate Commerce Act.

Paragraph (4) of Section 1 of the Interstate Commerce Act imposes upon common carrier railroads the duty to furnish transportation upon reasonable request and to "establish reasonable through routes with other such carriers, (and water carriers) and just and reasonable rates * * * applicable thereto; * * *." That section also imposes the duty upon railroads establishing through routes "to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates * * * to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Paragraph (1) of Section 3 makes it unlawful for any common carrier subject to the Act

> "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be con-

> strued to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Paragraph (4) of Section 3 provides:

> "All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, * * *."

The cited provisions of the Interstate Commerce Act impose duties upon common carriers by railroad subject to that act which are independent of the authority of the Commission to enforce obedience to those duties, which authority is principally in Sections 12 and 15 of the Act. These provisions coupled with Section 13(1) confer the right to complain where a railroad such as the Rio Grande is unable to persuade connecting lines to comply with them. It, therefore, follows that where, as here, it is claimed by the Rio Grande that the Union Pacific and the other railroad defendants before the Commission violate the Interstate Commerce Act by their failure and refusal to participate with the Rio Grande in the maintenance of reasonable and non-discriminatory joint rates, rules, and regulations with respect to the operation of through routes and have failed and refused to accord reasonable, proper and equal treatment in the matter of rates and the interchange of traffic, such railroad defendants have violated the provisions of the Interstate Commerce Act. They have also violated the

statutory rights of the Rio Grande conferred in the provisions of that act.

Section 1398 of Title 28 U.S. Code provides—

> "Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

In addition to the decision in the *Rochester Telephone* case there are numerous other decisions of this court which support the right of the Rio Grande to maintain the suit, the subject of this appeal. In *Youngstown Sheet & Tube Co.* v. *United States*, 295 U.S. 476, 479, in which contentions similar to those made here by the appellants were rejected by the court, it held that

> "The appellants were entitled to bring and maintain this suit to set aside the order. They were parties to the proceeding before the Commission, had a pecuniary interest in the rates and were affected by the order. The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were unreasonable or discriminated against them."

The court below had jurisdiction to review the order of the Commission under 28 U.S.C. § 1398 of the Judicial Code. The complaint of the Rio Grande in that court alleged that it not only has a pecuniary interest in the issues raised; but that the order, unless remanded to the Commission for correction of errors alleged, will cause the Rio Grande irreparable injury

in that the alleged unjust, unreasonable and unjustly discriminatory rates, routes and practices of the defendant railroads that will be perpetuated by the order, violate the statutory right of the Rio Grande to participate on equal terms in the revenues from through traffic at joint competitive through rates and through routes under the provisions of the Interstate Commerce Act. The fact, that the part of the order of the Commission here involved is negative is not a bar to the right of the Rio Grande to maintain the suit.

In *Mitchell* v. *United States*, 313 U.S. 80, this Court considered the decision and order of the Commission in *Mitchell* v. *C. R. I. & P. Ry. Co.*, 229 I.C.C. 703, in which the Commission held that the treatment accorded Mitchell by the railroads which he claimed was unjustly discriminatory was neither that nor unduly prejudicial under the provisions of the Interstate Commerce Act. This Court did not hesitate to substitute its judgment for the judgment of the Commission in determining that the treatment accorded Mitchell was unjustly discriminatory and unduly prejudicial under the provisions of the Interstate Commerce Act. It based its reversal on that ground and not on the constitutional ground mentioned in the decision since, at page 93 of the opinion of the Court, it said that

> "He (Mitchell) presents the question whether the Act does forbid the conduct of which he complained."

In *Henderson* v. *United States*, 339 U.S. 816, this Court reversed and set aside a decision of the Interstate Commerce Commission in *Henderson* v. *Southern*

Ry. Co., 269 I.C.C. 73, in which no order was entered but which held that the practice of the Southern Railway in the treatment of negroes in its dining cars was not unduly prejudicial or preferential. Like the *Mitchell* case, this Court did not hesitate to substitute its judgment as to what constituted undue prejudice for the judgment of the Commission. Each of these cases were remanded with directions.

In *The Chicago Junction Case*, 264 U.S. 258, which dealt with an order of the Commission that authorized, but did not require, the New York Central to purchase control of the Chicago Junction Railway, the Court sustained the right of the Pennsylvania Railroad, the Baltimore and Ohio, and other competitors of the New York Central to maintain the suit to set aside the order of the Commission. It was there claimed by the defendants that the plaintiffs, as competitors, did not have a sufficient legal interest to permit them to bring or to maintain this suit. In that case the Court was moved in part by the consideration that the plaintiff railroads would lose large sums of money by virtue of the control of the Chicago Junction by the New York Central; that they were parties to the proceeding before the Commission and thereby acquired the right to sue, and also had such a right under Section 212 of the Judicial Code (28 U.S.C. Section 41(27) note). The Court stated, 264 U.S., at page 267, apropos of the large loss sustained by the railroad plaintiffs:

> "This loss is not the incident of more effective competition. Compare *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148, 44 Sup. Ct. 72, 68 L. Ed. . It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Com-

merce Act, as fully entitled as any shipper. *Pennsylvania Co.* v. *United States*, 236 U.S. 351, 35 Sup. Ct. 370, 59 L. Ed. 616."

In *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, the plaintiff sought to enjoin the consummation of loans made by the Federal Emergency Administrator to four municipal corporations in Alabama. In its right to bring the suit the plaintiff relied strongly on the decision of this court in *The Chicago Junction Case*. However, the Court held that the Alabama Power Company did not have the right to bring the suit or to maintain it and, at page 483 of its opinion, 302 U.S., it distinguished *The Chicago Junction Case* from the *Alabama Power* case by stating that the suit in *The Chicago Junction Case* was brought by certain railroad companies to set aside an order of the Commission authorizing a competing company to acquire a terminal and that in *The Chicago Junction Case* "* * * this court held that the right to sue arose in virtue of a special interest recognized by certain provisions contained in Transportation Act 1920, 41 Stat. 456, and under section 212 of the Judicial Code, 28 U.S.C.A. Section 41(27) note, which gave any party to a proceeding before the Commission the right to become a party to any suit wherein the validity of an order made in the proceeding is involved."

The right of the Rio Grande to bring and to maintain the suit in the court below under the Interstate Commerce Act is also sustained by *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60; *American Trucking Ass'n.* v. *U.S.*, 326 U.S. 77; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 435; *Barrett Line, Inc.* v. *United States*, 326 U.S. 179; *Skinner & Eddy Corporation* v. *United States*, 249

U.S. 557; *United States* v. *New River Co.*, 265 U.S. 533; *Alton R. Co.* v. *United States*, 287 U.S. 229, and the revealing and comprehensive opinion by Judge Parker in *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462.

In addition to the right of the Rio Grande to bring and to maintain the suit under the statutes cited, that right is buttressed by Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 1009. That act gives

> "Any person suffering a legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof."

In *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346, 348, where the plaintiff sued to set aside the action of the Federal Maritime Board which granted a subsidy to a competitor, the court pointed out that while the plaintiff had not suffered any legal wrong he is within the terms of the second clause of Section 10(a) as a person "adversely affected or aggrieved" and that if these words mean affected or aggrieved in a legal sense they would add nothing to the phrase "Any person suffering a legal wrong." In these circumstances the court held that the plaintiff, being a person that was adversely affected or aggrieved, had the right to maintain the suit. In doing so the court relied upon *Federal Communications Com'n.* v. *Sanders Bros. R. S.*, 309 U.S. 470. The conclusion of the court and the position taken by the Rio Grande is also supported by *American P. & L. Co.* v. *Securities & Exchange*

Com'n., 325 U.S. 385; *State of Oklahoma v. United States Civil Serv. Com'n.*, 330 U.S. 127, and *Shaughnessy v. Pedreiro*, 75 S. Ct. 591.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009, also supports the right of the Rio Grande to bring and maintain this suit since it gives Federal courts jurisdiction to compel agency action "unlawfully withheld or unreasonably delayed" or to hold unlawful and set aside agency action, findings and conclusions found to be "not in accordance with law" or "short of statutory right." In addition to the arguments already made, the Rio Grade contends that by refusing to grant the relief prayed for in the instant suit the Commission unlawfully withheld action to which the Rio Grande is entitled.

The third point emphasized by the appellants is that the court below erred in deciding that the Commission erred as a matter of law in finding that the through routes via the Rio Grande, the Union Pacific, and other railroads through Ogden are not through routes within the contemplation of Section 15(3) and (4) of the Interstate Commerce Act. A reading of the opinion of the court below will quickly reveal that it gave this question very serious consideration. That opinion supports the view of the court below that the Commission misconstrued the decision of this Court in *Thompson v. United States*, 343 U.S. 549.

The *Thompson* case involved an order of the Commission entered in *Omaha Grain Exchange v. Missouri Pacific*, 278 I.C.C. 519. In that case the complainant did not assert that through routes existed or that joint rates and through routes should be established. It assumed that through routes existed for the movement

of grain from Lenora, Kans., and other points on the Missouri Pacific west of Concordia, Kans., to Omaha, Nebr., in connection with the Burlington at Concordia because (a) physical track connections for the interchange of traffic existed at Concordia between the Missouri Pacific and the Burlington, and (b) joint rates existed on grain from Lenora, Kans., and the other points involved via Concordia, Kans., and the Burlington to local or non-competitive points on the Burlington which are intermediate to Omaha.

The Commission found that the rates assailed were unreasonable to the extent that they exceed rates on grain traffic from the same origin points to Kansas City. That finding was made on the assumption that through routes on grain traffic from Lenora, Kans., and other points on the Missouri Pacific west of Concordia existed in connection with the Burlington through Concordia to Omaha. There was no evidence in that case that through transportation service on grain had ever been offered or performed from Lenora to Omaha via the Burlington.

The opinion of the Court in the *Thompson* case recites that the United States, having joined in the defense of the Commission's order in the District Court and on a motion to affirm in this Court, filed a memorandum conceding that the Commission erred in finding that through routes over the Burlington line already exist.

In the *Thompson* case, 343 U.S. 549, at page 557, the Court referred to the decision of the Commission in *Through Routes and Through Rates*, 12 I.C.C. 163, 166, and of this court in *St. Louis Southwestern Ry. Co. v. United States*, 245 U.S. 136, 139, in each of which

decisions a through route was defined as "an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregate of separate rates fixed independently by the several carriers forming the through route; as where the 'through rate' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation."

This Court also stated apropos of this question at page 557 of its opinion in the *Thompson* case:

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

As we have already stated, there was no evidence in the *Thompson* case that through transportation service on grain had ever been offered or performed from Lenora, Kans., and the other points to Omaha via the Burlington.

What is a "holding out" as announced in the *Thompson* case, *supra?* In any form of business it does not require active, affirmative solicitation of business. The merchant who has his shop on any street, with his door open to the public, holds himself out to accept business and thus solicits business. There is a "holding out" whether he receives a large or a small amount of

business and whether his prices are higher or lower than a shop up the street. There is only a lack of holding out when he refuses to accept business. Under the undisputed evidence in the case and under its own admissions, the Union Pacific never refused to accept through shipments and issue through bills of lading over the Rio Grande where a shipper to or from the "closed door territory" was willing to pay the higher combination rate. As shown by the evidence and as set forth in the decision in the *Denver* case, and in spite of the higher rates, substantial shipments via the Rio Grande on through bills of lading issued by the Union Pacific were made during the years immediately preceding the institution of proceedings before the Commission. Thus the evidence showed that the contention that *through routes* were commercially closed was pure theory.

Through routes and joint competitive rates admittedly exist on shipments to and from Southern California and Nevada points on the Union Pacific to and from eastern points via the Rio Grande at Salt Lake City and Ogden, and on shipments to and from Seattle via the Union Pacific through Portland, thence Southern Pacific via Ogden and Rio Grande on the Union Pacific. Since the Union Pacific has its own line from Ogden and Salt Lake City to Denver and thence to Omaha and Kansas City, it is obvious that it does not either in the east, in California, or in Seattle solicit shippers to route traffic via these routes in connection with the Rio Grande at Ogden even though joint rates and through routes exist. It is, therefore, clear that in the *Thompson* case this court could not have meant that the holding out requires affirmative solicitation by particular railroads over

particular through routes as a test for determining whether through routes exist. The significance of the decision in the *Thompson* case is that a through route will be found to exist both in fact and in law where there is a holding out in the sense of a willingness to accept and transport the traffic or where as in the instant case a substantial volume of traffic has moved via the Rio Grande on through bills of lading issued by the Union Pacific or eastern railroads for movement via the Rio Grande through Ogden and the Union Pacific with the acquiescence of the Union Pacific and the other railroad defendants before the Commission.

The Union Pacific claims that when the joint rates via the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company were canceled between August 1906 and December 1912, the through routes were commercially closed. But there is nothing in the Interstate Commerce Act that says that the cancellation of a joint rate, without more, cancels a through route. There are many expressions of this court, the Commission, and of lower courts to the contrary. The decision of this court in the *Virginian Railway* case, 272 U.S. 658, 667, was confirmed in that respect by this court in *Thompson* v. *United States*, 343 U.S. 549, and in *United States* v. *Great Northern*, 343 U.S. 562, where, at page 572, the court said:

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this Court expressly has approved Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates. As a result, the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes."

In dealing with this question the Commission in its report in the instant case, 287 I.C.C. 611, at page 616, stated that the testimony of numerous shippers indicates that the routes via the Ogden Gateway and the Rio Grande "are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be open to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess."

In the light of the facts before the Commission in the instant case which show that in a ten year period there was a movement of more than over 24,000 carloads of traffic between various eastern points via the Rio Grande, the Ogden Gateway and the Union Pacific and its connections, it is impossible to reconcile the finding of the Commission that no through routes exist with the decision of this Court in *Virginian Ry. Co.* v. *United States,* 272 U.S. 658; *Great Northern* v. *United States,* 81 F. Supp. 921, affirmed in 336 U.S. 933; *United States* v. *Great Northern,* 343 U.S. 562, or with the *Thompson* case.

In the *Virginian Railway* case this Court rejected as "without legal significance" the contention of the railroads that routes which were commercially closed as the result of excessive and discriminatory combination rates are not through routes within the meaning of the Interstate Commerce Act. In reaching that conclusion Justice Brandeis first pointed out (pp. 660-661) that of 99 coal mines located on the Virginian Railway, 54 were denied the opportunity of reaching western markets, even though accessibility to such

markets was physically possible through a junction of the Virginian and the Chesapeake & Ohio. In that connection Justice Brandeis said:

> "But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these fifty-four mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive. The complainants contended before the Commission that the existing rate schedule to the West subjects them to unjust discrimination, and, also, that the combination rates are unreasonable."

At page 667 of the *Virginian Railway* case the Court stated that where through routes exist Section 15(3) of the Act does not require that "The Commission must make a special finding of public interest before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law." To the same effect is the decision of this court in *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U.S. 768, 776.

Appendix 3, attached hereto, contains a sketchy outline of the evidence of record before the Commission and before the lower court which shows the large and continuous movement of traffic via the route of the Rio Grande in connection with eastern railroads and the Union Pacific at Ogden, some of which moved on bills of lading issued by the Union Pacific or by its connections, in which it concurred.

The evidence described in Appendix 3 is in marked contrast with the evidence and the issues in the

Thompson case, 343 U.S. 549, at which page the court said:

> "But there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line or that the carriers have ever offered through service over that route * * *."

In addition to the movement of traffic in the instant case via the Rio Grande and the lack of any traffic in the *Thompson* case, there are other factors in the instant case which distinguish it from the *Thompson* case. We have already referred to the fact that joint competitive rates and through routes were established via the Rio Grande via Ogden and Salt Lake City on the traffic and between the territories involved in 1897; that the through routes thereby established are still in effect since they have not been canceled by the Union Pacific or other railroads; that in the period of August 1906 and December 1915 the Union Pacific caused the joint competitive rates for application over the Rio Grande via Ogden to be canceled, but that no action was taken then or later by the Union Pacific or other railroads to cancel the through routes.

It is too well settled to require argument that under the Interstate Commerce Act the cancellation of joint rates does not, without more, cancel through routes. This was recognized by this Court in its decision in *United States* v. *Great Northern*, 343 U.S. 562, and in other cases.

In *Routing via Quanah, A. & P. Ry. Co.*, 220 I.C.C. 137, 139, the Commission not only held that the cancellation of a joint rate did not cancel the through route; but also that when a joint rate is canceled it is the duty of the railroad to leave in effect over the

through route combination rates which in the aggregate will be just, reasonable and otherwise in accordance with the standards of the Interstate Commerce Act. That decision was sustained in *Thompson* v. *United States*, 20 Fed. Supp. 827. See also in this connection *Quanah, A. & P. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 226 I.C.C. 201, 208; *Routing Grain and Grain Products via Chicago, R. I. & P.*, 198 I.C.C. 117; *Grain and Grain Products*, 161 I.C.C. 709; and *Routing on Iron and Steel Articles*, 168 I.C.C. 175.

Section 6(1) of the Interstate Commerce Act affirmatively recognizes the existence of through routes in the absence of joint rates. The pertinent part of Section 6(1), 49 U.S.C., § 6, provides:

> "(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water *when a through route and joint rate* have been established. If *no joint* rate over the *through route* has been established, the several carriers *in such through route* shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation." (Emphasis supplied.)

As we have already shown, the principal traffic witness of the Union Pacific unequivocally stated that the route via the Ogden Gateway and the Rio Grande is open and available to shippers who are willing to pay the higher through rates. We have also shown

that during the oral argument of the case before the Commission counsel for the Union Pacific, in answer to a question from the chairman as to whether he thought the through routes were closed in the period 1906-1915 when the joint rates were cancelled, answered:

> "Mr. Collins: No. I don't think so, if they want to pay more, if they want to route via the Rio Grande and pay the price."

At pages 16 and 17 of their Motion To Reverse appellants say that they have not solicited or otherwise tried to influence the routing of traffic via the Rio Grande through Ogden and that this is indicated by their steadfast refusal over a 50-year period to relinquish their long haul. The fact that the Union Pacific has not affirmatively solicited traffic over the routes of the Rio Grande between the "closed door" territory in Idaho, Montana, Oregon and Washington at the higher rates is of no significance. The Rio Grande as already shown participates in joint competitive rates with the Union Pacific on traffic to and from points on its line into California. It is conceded that through routes exist on the traffic moving between points on the California line of the Union Pacific and all eastern points. One would have to be *naive* indeed to assume that because the Union Pacific does participate in joint rates with the Rio Grande on that traffic it would act against its own interest in affirmatively soliciting shippers to use the Rio Grande route between Ogden and Denver rather than the Union Pacific route to Denver.

The contention that the Union Pacific and the appellants, as well as other railroads who were

defendants before the Commission, have steadfastly refused over a long period to relinquish their long hauls is refuted by the evidence of record which has been filed with the Clerk of this Court.

The appellants and other railroad defendants in the complaint before the Commission have not steadfastly refused to relinquish their long hauls in dealing with each other. They have however, refused to relinquish their long hauls in connection with the handling of the traffic involved insofar as the Rio Grande is concerned. On the other hand, the Union Pacific and the other appellants participate with each other in joint rates via routes in which each, or some of them, relinquish their long hauls. For example, a shipper at Seattle, Wash., may deliver a shipment consigned to Chicago, Kansas City or St. Louis, to the Union Pacific at that point and route the shipment at competitive rates via the Southern Pacific at Portland and thence via the Southern Pacific through southern California, Arizona, New Mexico, and other railroad connections; or the shipper may route such a shipment from Seattle via the Union Pacific to Portland, thence Southern Pacific through Ogden and thence either Union Pacific or Rio Grande from Ogden to eastern points. Under such routing the Union Pacific receives a haul of 184 miles from Seattle to Portland. It could haul the shipment from Seattle to Omaha, a distance of 1,954 miles.

The distance via the route through southern California, which is available to the shipper at Seattle, is 3,541 miles. If the joint rates sought by the Rio Grande were established through Ogden, the Union Pacific would receive a haul of 1,027 miles from Seattle to Ogden, which may be compared with the distance

of 184 miles which it voluntarily takes from Seattle to Portland.

On a shipment moving from Pendleton, Ore., to St. Louis, Mo., the long haul of the Union Pacific would be from Pendleton to Kansas City, a distance of 1,674 miles. The Union Pacific participates with the appellants and other railroads in joint competitive rates via Spokane, Wash., the Spokane International, Canadian Pacific and other railroads through Minneapolis, and thence via the Rock Island or the Wabash to St. Louis. The distance via this route is 2,317 miles, and the haul of the Union Pacific is 227 miles. If the joint rates sought via Ogden and the Rio Grande were established the distance from Pendleton to St. Louis would be 2,149 miles, and the Union Pacific would get a haul of 633 miles. Exhibit 3, introduced before the Commission by Witness Earley of the Rio Grande, contains numerous other examples in which the appellants participate with each other in joint competitive rates in which they take less than their respective long hauls. They refuse to accord like treatment to the Rio Grande.

In addition to the type of examples just referred to, the Union Pacific participates with appellants and other railroads in which some of the railroads take less than their respective long hauls on lumber which moves from points on the Union Pacific in Idaho, Washington and Oregon to points east of Denver and Pueblo, the Union Pacific relinquishes the traffic to its connections at Cheyenne and Denver. It refuses to accord like treatment to the Rio Grande on the eastbound movement of fruits, vegetables, grain and certain other commodities. The Union Pacific participates with other railroads in joint rates and

routes that apply via Denver to destinations in what is described as the Missouri River territory and Southwestern points. It is not deemed necessary or advisable to burden this brief with the numerous other examples.

The appellants attempt to justify these obvious discriminations because the rate situations referred to have the sanction of time and involve reciprocal arrangements in respect to the interchange of traffic the appellants consider satisfactory and in the interest of each. In *Pennsylvania Co.* v. *United States*, 236 U.S. 351, where the validity of an order of the Commission was assailed, the defendant there argued that the discriminatory treatment of the complaining railroad was not an unjust discrimination because of the lack of similar reciprocal interchange and traffic arrangements between defendants and the complaining railroad. In dealing with that contention, this Court said:

> "We agree with the Commission and the court below that the alleged reciprocal shipping arrangements do not remove the discriminatory character of the treatment of the Rochester road."

The decision of the Supreme Court in *Chicago, I. and L. Ry. Co.* v. *United States*, 270 U.S. 287, is to the same effect and deals with a situation substantially similar to the attempted defenses of the appellants in the instant case.

Many years ago the Commission stated that the policy of the Interstate Commerce Act is that the railroads of the country should unite themselves so that they will constitute one national system; that they must establish through routes, keep these routes open

and in operation, and furnish the necessary facilities for transportation. *Missouri & Illinois Coal Co.* v. *I. C. R. R. Co.*, 22 I.C.C. 39, 46. The policy of the Act, as amended since the decision in the *Missouri & Illinois Coal* case, was pointedly stated by the Commission in the recent decision of *Borough of Edgewater, N. J.* v. *Railroads*, 280 I.C.C. 121, at page 134. This decision was sustained in *Baltimore and Ohio* v. *United States*, 100 F. Supp. 1002. In that case, at page 134, the Commission said that it is the purpose and policy of Congress that rates be adjusted and other steps be taken to ensure adequate and efficient transportation for the country, and that the policy was not intended that it should accept as the guide, transportation service which is just barely adequate, or adequate only if needed or desirable improvements in service are lost sight of.

CONCLUSION

When all matters raised by the "Motion to Reverse" are resolved to their least common denominator, the Rio Grande had an undisputed statutory right to complain before the Commission; it had a right to predicate its compiaint primarily on the existance of *through routes;* it had a right to have the Commission decide that basic question; it suffered a legal wrong, in view of the undisputed evidence and admissions of the Union Pacific in the Commission's failure to decide that basic issue; this entitled the Rio Grande to resort to a statutory three-judge court. Whether the action of the Commission is to be treated as a complete failure to decide the basic issue, or whether it is said that because of the concurrence of Commissioner Arpaia in the general result, *even though he also found that through routes were in existence,* there was a

holding by the Commission of the non-existence of through routes—in either event, the Rio Grande was entitled to have the matter reviewed by a three-judge statutory court because the issue was an issue of law and not an administrative question. If that review was based as it was upon the proposition that the Commission incorrectly interpreted and misapplied the law, and if under the undisputed evidence and the admissions in the case the three-judge court at Denver so found, then it was proper for that court to make a conclusion of law accordingly and to remand the case to the Commission for further proceedings in conformity with that conclusion.

The "Motion to Reverse" should be denied—probable jurisdiction should be noted and the case allowed to stand for argument.

Respectfully submitted,

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September 13, 1955

Proof of Service

I, ROBERT E. QUIRK, one of counsel of record for appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13th day of September, 1955, I served, on behalf of all appellants herein, copies of the foregoing Motion on the several parties thereto and parties to the appeal in No. 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope, postage prepaid to: (and air mail to D. E. Kelley)

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

4. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

5. On Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company, Inc.; Idaho Farm Bureau; Public Service Commission of Utah; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

6. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
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Colorado Springs, Colorado

7. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

8. On the Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis and Omaha Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company, plaintiffs; and employee organization of Union Pacific Railroad Company, intervening plaintiffs; by mailing a copy in a duly addressed envelope with air-mail postage prepaid to their respective attorneys of record, as follows:

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M. P. Caveny, Esq.
Chairman, Union Pacific General Chairman's Asso.
Omaha, Nebraska

9. On the State of Nebraska and the Nebraska State Railroad Commission; Washington Public Service Commission; Public Utilities Commission of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization of Wyoming; Public Service Commission of Wyoming; Public Service Commission of Utah; National Livestock Producers Association, by mailing a copy in a duly addressed envelope with air-mail postage prepaid to their respective attorneys of record, as follows:

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Board of Railroad Commissioners of Montana
Helena, Montana

Howard B. Black, Esq.
Attorney General of Wyoming
Cheyenne, Wyoming

10. On the National Live Stock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers Association and Horse Growers Association, Intervenors as Plaintiffs.

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ROBERT E. QUIRK
Attorney for Appellee
The Denver and Rio Grande
Western Railroad Company.

APPENDIX 1

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the

transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainants according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report; and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before

April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD,
Acting Secretary.

(SEAL)

APPENDIX 2

Conclusions

"1: That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the lower peninsula of Michigan and in Oklahoma and Texas.

"2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

"4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

An appropriate order will be entered.

APPENDIX 3

Movement of Traffic Via the Rio Grande During the Periods Shown

That during the period from November 1942 to August 17, 1945, the Rio Grande handled approximately 19,000 carloads of traffic from points on its line and from eastern points destined to points in Oregon and Washington which had been routed via the Rio Grande and the Western Pacific or the Rio Grande and the Southern Pacific, but were diverted to the Union Pacific at Ogden and Salt Lake City. (Hogue—66, 67.)

During January and February 1949 when blizzards and snowstorms blocked the Union Pacific main line between Cheyenne and Ogden, 4,208 carloads of freight eastbound and westbound were diverted to the Rio Grande for movement via its line between Denver and Utah junction points

and thence via the Union Pacific. Of that number about 1,400 carloads originated or were destined to Union Pacific points in the closed door territory at which competitive joint rates were not applicable.

During that same blizzard period, the Rio Grande handled 210 carloads of express and 276 carloads of mail between Denver and Salt Lake City for the Union Pacific. In addition, it handled 44 Union Pacific passenger trains, consisting of from 10 to 16 cars each, between Denver and Salt Lake City. (69)

The carload traffic described was diverted under emergency orders of the Commission, none of which purported to establish or did establish temporary through routes as authorized in Section 15 (4) of the Act. The traffic was diverted by the Commission to the Rio Grande under Section 1(15) on the obvious assumption that through routes and the facilities for operating such routes existed.

In addition to the traffic that was diverted to the route of the Rio Grande on emergency orders, a large volume of traffic was initially routed by the shippers via the Rio Grande on bills of lading via Ogden and the Union Pacific between points in the closed door territory and eastern points. For example, there were several special trains, consisting of troops and military supplies in freight cars, handled on freight billing and which consisted of from 30 to 50 cars per train.

One train, consisting of 24 cars of military supplies and six passenger cars, moved from Ft. Sill, Okla., in December 1941 to Ft. Lewis, Wash., via eastern connections, the Rio Grande through Ogden and the Union Pacific.

Another special train, consisting of 50 cars of military supplies and some troops, moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February 1942 via different eastern railroads in connection with the Rio Grande through Ogden and the Union Pacific.

Another special train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February 1942 via different eastern

railroads, the Rio Grande through Ogden and the Union Pacific.

Still another train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., in February 1942 to Ft. Lewis, Wash., via the Rio Grande through Ogden and the Union Pacific.

In March, 1942 the Rio Grande handled 524 carloads of war material from eastern points originally consigned to Ogden and Clearfield, Utah, for the purpose of being stored. These cars were diverted on instructions of shippers to points in the northwest via the route of the Union Pacific and Ogden without ever having been unloaded at the original destinations named.

Thirty-nine carloads of freight moved eastbound in 1948 from points in the closed door territory on bills of lading issued by the Union Pacific consigned principally to Colorado common points and were routed via Ogden and the Rio Grande, some of which were probably diverted to points east. They contained canned goods, machinery, contractors equipment, paper bags, lumber, wallboard, flour, sheep, roofing, acid, newsprint and canned salmon.

The Rio Grande transported an equal number of carloads of a variety of commodities, such as tractors, canned goods, agricultural implements, furniture, soap, castings, feed, rubber, iron and steel, and other commodities from numerous eastern points, such as Springfield and Chicago, Ill., Menominee, Mich., Lewisburg, Pa., Jeffersonville, Ind., Forest City, Ark., Sedalia, Mo., Indianapolis, Ind., Wichita, Kans., and other points on bills of lading issued by eastern railroads which routed the traffic via the Rio Grande through Ogden and the Union Pacific to points in the closed door territory. The charges were assessed on the basis of the aggregate of the combination of intermediate rates. (67-70, Ex. 1)

At page 74 of the transcript of the hearing at Salt Lake City in December 1949, Vice President Hogue, of the Rio Grande, testified that he used the year 1948 because it was the last calendar year prior to the hearing and "that the same problems prevailed to about the same extent in prior years, and have continued thus far in 1949."

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Nos. 332 and 333

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 332.

WASHINGTON PUBLIC SERVICE COMMISSION, ET. AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET. AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF OF APPELLEES INTERVENING PLAINTIFFS, IN OPPOSITION TO MOTION TO REVERSE IN NOS. 332 AND 333.

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The Public Service Commission of Utah, The Public Utilities Commission of the State of Colorado, The Arnold Milling Company, The Buhler Mill & Elevator Co., The Consolidated Flour Mills Co., Dixie Portland Flour Company, The William Kelly Milling Company, Light Grain & Milling Co., The New Era Milling Company, The Wall

Rogalsky Milling Co., Walnut Creek Milling Co., Independent Lumber Company, Inc., Idaho Farm Bureau, Utah Growers Cooperative, Inc., Knudsen Builders Supply Company, Inc., Structural Steel and Forging Company, Inc., The Pueblo Chamber of Commerce, The Arkansas Valley Stock Feeders Association, Colorado State Wool Growers Association, Western Forest Industries Association, Koppers Company, Inc., J. I. Case Company, National Livestock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers' Association, Utah Cattle and Horse Growers' Association, intervening plaintiffs respectfully request this Honorable Court to deny the motion to reverse filed in Cases Nos. 332 and 333 by counsel for the defendants.

STATEMENT

This case arises by reason of a complaint filed by the Rio Grande Railroad against the Union Pacific Railroad with the Interstate Commerce Commission in August of 1949. Pursuant to said complaint the matter came on for hearing in December of 1949 at Salt Lake City, Utah and subsequent hearings were had in Boise, Idaho and Cheyenne, Wyoming, in 1950.

The matter was heard initially by Frank E. Mullen, Chief Examiner of the Interstate Commerce Commission, and as a result of the hearings had, Examiner Mullen submitted a proposed report granting to the complainant, the Rio Grande all of the relief sought by the Rio Grande for the benefit of the shippers who are dependent upon the Rio Grande for rail transportation service.

Paragraph 2 of Sheet 31 of the Proposed Report reads as follows:

"The record clearly shows that shippers and receivers of freight in localities and districts in Colorado and in Utah depending for railroad service solely upon the Rio Grande are unduly handicapped by the lack of such transportation arrangements and facilities, at joint through rates, which have become of great importance in modern merchandising. Establishment of joint through rates from and to points in the Northwest on the Union Pacific and its connections via Salt Lake City or Ogden in connection with the Rio Grande to and from Utah common points and to and from Colorado common points and points east thereof, are necessary and desirable in the public interest to permit communities located only upon the Rio Grande to be adequately served by that Railroad as part of the national transportation system."

This Proposed Report was challenged by the Union Pacific and Intervenors in support of it before the full Interstate Commerce Commission. The matter was argued on two separate occasions by all of the parties and as a result of the briefs and arguments had the Interstate Commerce Commission did render a decision on January 12, 1953, and by its decision granted a portion of the relief sought in the original complaint. (287 ICC 611). This decision then became the subject of two appeals to statutory courts, one in Nebraska and one in Colorado. The order of the Nebraska Court is now on appeal to this Court in Nos. 117-119.

The District Court for the District of Nebraska accepted the Commission's apparent findings that through routes were not in existence but modified the Commission's Order to limit the new through routes and joint rates to certain types of in-transit traffic.

The District Court for the State of Colorado ordered that "insofar as the Interstate Commerce Commission denied relief to the Rio Grande the order will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with the Court's opinion."

ARGUMENT

Since the rules of this Court do not provide for a motion to reverse and since the importance of this case to a large number of shippers and a vast geographical area of the United States is involved, we cannot believe that the Court will seriously entertain the motion to reverse.

However, in the interests of pointing out to the Court the magnitude of this case, we submit that the situation prevailing in Colorado and Utah is unique indeed.

The Union Pacific Railroad operates from Omaha to Ogden and Denver with inter-connections at Cheyenne, thence to points in California and the Pacific Northwest traversing Wyoming and Utah. The Rio Grande, on the other hand, operates from Denver via the Moffat Tunnel and Pueblo via Tennessee Pass to Dotsero, Grand Junction and on to Ogden, Utah. The fact is that the two railroads parallel each other from Denver and Pueblo to Ogden, Utah, across the Continental Divide. The Rio Grande has always been desirous of, and willing to grant to its shippers joint through rates and through routings with transit privileges, the same as any other modern railroad does for its shippers. However, this railroad which serves a large segment of the State of Colorado and Utah, is precluded and prevented from giving to its patrons the type and kind of service at the same rates as the shippers in Wyoming and

that portion of Utah served by the Union Pacific, enjoy from the Union Pacific. This deprivation of privileges and rates which is economically injurious to the flow of commerce in Colorado and Utah is brought about solely by reason of the fact that the Union Pacific refuses to join with the Rio Grande in publishing and maintaining joint through rates on traffic moving via the Rio Grande and via Ogden. It is true that certain exceptions have been made on certain categories of livestock, but these are infinitesimal compared with all of the needs of these communities.

Counsel for the defendants motion to reverse indicates a cavalier attitude towards this whole proceeding as being merely a raid upon the pocketbook of the Union Pacific.

As counsel for many shippers and persons concerned with the public interest aspect of this case, as distinguished from the railroads, we cannot refrain from pointing out that of the sixteen persons who have "decided" this case in its various phases not one has said that the Rio Grande's complaint had no basis in fact. On the other hand, the Examiner, who was the trier of the facts and heard all the witnesses, granted relief on all of the commodities sought. The Interstate Commerce Commissioners were split 5 to 5 on the through routes issue, which left that question undecided, but decided 6 to 4 that certain commodities should be permitted to move via those through routes at joint rates. Of the six district court judges who have handled this case, two judges, making the majority of the Nebraska court, did not take away from the Rio Grande that which the Commission gave them but rather limited the service which had been ordered by the Commission. The three Judges of the Colorado Court unanimously determined that through routes were in existence and ordered the Commission to

take steps to consider the classes of commodities which had not heretofore been the subject of Commission order.

This would indicate to us at least that this case is of such importance and magnitude that it should be decided on its merits by this Honorable Court. It should not be disposed of by a motion to reverse without giving the parties litigant an opportunity to present all of the record, briefs, and arguments to this court in order that a final determination of the rights and duties of the parties may be satisfactorily adjudicated.

ISSUES IN CONFLICT

The basic issues in this case are whether there are in existence today through routes via the Rio Grande Railroad through the Ogden Gateway and whether the failure on the part of the Union Pacific to establish joint rates with the Rio Grande via Ogden unjustly discriminates against the shipping public and the Rio Grande Railroad and whether the *Thompson* case (343 U.S. 549) applies to the determination of these issues.

The answer to these questions can only be obtained by full adjudication by this court of finality because the District Court of Nebraska has in effect tacidly accepted the Commission in its findings in this matter and the District Court in Colorado has expressly reversed the Commission's apparent findings on these issues. We, therefore, have two intermediate court decisions which are in seeming conflict. If this court were to grant the motion to reverse the issues and questions of law would stand in a confused and muddled state neither granting relief nor vindication to either side. The interests of justice dictate that this Court entertain the appeals on their merits and render its judgment for the

guidance of the courts and the Commission to say nothing of the interests of the shipping public and the Railroads involved. We, therefore, respectfully request this Honorable Court to deny the defendants' motion to reverse in Cases numbered 332 and 333.

Respectfully submitted,
JOHN R. BARRY,
Counsel of record for Intervening Plaintiffs in Nos. 332 and 333.

PROOF OF SERVICE

I, John R. Barry, one of counsel of record for Intervenors herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of September, 1955, I served, on behalf of the Intervenors herein, copies of the foregoing Brief of Intervening Plaintiffs in opposition to Motion to Reverse in Nos. 332 and 333 on the several parties thereto and parties to the appeals in Nos. 332, 333, and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On the Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

Frank E. Holman, Esq.
1006 Hoge Building
Seattle 4, Washington

and with first-class postage prepaid to:

Ernest Porter, Esq.
603 Rio Grande Building
Denver 2, Colorado

4. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Henry Zarlengo, Esq.
Assistant Attorney General
State of Colorado
Denver, Colorado

5. Peter M. Lowe,
Assistant Att. General of Utah
State Capitol, Salt Lake City, Utah

6. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel

The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

9. On the National Livestock Producers Association, American National Cattlemen's Association, Colorado Cattlemen's Association, Idaho Wool Growers Association and Utah Cattle and Horse Growers Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lee J. Quasi, Esq.
139 North Clark Street
Chicago 2, Illinois

10. On the Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company, and Wabash Railroad Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to their respective attorneys of record as follows:

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Chicago and North Western Railway Company
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Chicago 6, Illinois

Warren H. Ploeger, Esq.
Northern Pacific Railway Company
St. Paul 1, Minnesota.

L. E. Torinus, Esq.
Great Northern Railway Company
175 East 4th Street
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Roland J. Lehman, Esq
Atchison, Topeka and Santa Fe Railway
80 East Jackson Blvd.
Chicago 4, Illinois

Elmer S. Davis, Esq.
Wabash Railroad Company
Railway Exchange Building
St. Louis 1, Missouri

Elmer B. Collins, Esq.
Union Pacific Railroad Company
1416 Dodge Street
Omaha 2, Nebraska

11. On Brotherhood Committees of employees of Union Pacific Railroad Company by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

William E. Doyle, Esq.
Symes Building
Denver 2, Colorado

JOHN R. BARRY,
One of counsel of Record
for Intervenors Herein.

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On Appeal from the United States District Court for the District of Colorado

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BRIEF OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION IN OPPOSITION TO MOTION TO REVERSE

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Nos. 332 and 333

IN THE

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BRIEF OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION IN OPPOSITION TO MOTION TO REVERSE

STATEMENT

The American Short Line Railroad Association, hereinafter referred to as the Association, intervened in support of The Denver and Rio Grande Western Railroad, complainant before the Interstate Commerce Commission in Docket No. 30297, *Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, Et Al.*,

the administrative proceeding giving rise to this litigation. The Association also intervened in support of the Rio Grande in the judicial review proceedings in the U. S. District Court for the District of Colorado,[1] from which decision appeals have been taken by the Union Pacific and certain state commissions in Nos. 332 and 333, in the October Term, 1955 of this Court.

The Association is a voluntary, unincorporated association with a membership of 301 common carriers by railroad, of which all but three (3) are engaged in interstate and foreign commerce and therefore subject to the Interstate Commerce Act and related acts, and to the jurisdiction of the Interstate Commerce Commission. The Association, its members in general, and many of its members in particular, are vitally interested in the issues involved in these appeals with respect to the existence or establishment of through routes and rates, and fair and reasonable divisions of revenues, with particular reference to the establishment and maintenance of competitive joint through rates. The questions presented in these appeals are substantial and of public importance, and their determination will have a vital effect on the affairs of practically all of the members of this Association.

ARGUMENT

There is a serious question as to the propriety of the filing of appellants' so-called "Motion to Reverse." Certainly it cannot be said that the Revised Rules of this Court authorize the filing of such a pleading, and appellants do not so contend. They apparently seek to justify their action by reference to procedures set forth in Rule 16, providing for the filing of a Motion to Dismiss or Affirm. Such motions are available to an appellee in appeals of this type,

[1] *The Denver and Rio Grande Western Railroad Company* v. *United States, Et Al.*, Civil Action No. 4492.

to serve as a response to a Jurisdictional Statement, but the Rules do not provide for a Motion to Reverse. The Revised Rules have not been understood to permit multiple pleadings by an appellant. The fact that this Court on its own motion may summarily affirm a decision of a lower court does not suggest that an appellant may move for summary reversal.

It is conceivable that appellants' multiple pleadings will rebound to their disadvantage. Clearly it is paradoxical for the appellants in their separate Jurisdictional Statements to urge this Court to take jurisdiction and resolve the substantial questions presented in their appeals, and then suggest that the Court need not avail itself of the record nor the assistance of briefs and arguments by the parties.

Inasmuch as, as we show below, appellants' arguments failed to convince either the lower court or a majority of the Commission it is perhaps unnecessary to belabor the question of proper procedure.

1. Issues as to Through Routes

The principal interest of the Association in these appeals is centered on the proper interpretation and application of the Interstate Commerce Act and decisions of this Court as concerns the question of the existence of through routes. All of the members of this Association are participants in countless through routes and joint rates. The decisions of two District Courts on appeal to this Court in Numbers 332, 333, 117 and 118 (as well as in 334 and 119) being in conflict with each other on questions of law which the Commission in part could not, or at least did not itself decide, attest to the complexity of the questions presented. A decision resolving all appeals requires re-examination and clarifying expression of the appropriate criteria to be used

by the Commission and courts in determining the existence or non-existence of through routes.[2]

Sufficient details are available in the pleadings now filed in these cases to briefly state the elements of the key issue requiring decision by this Court.

In the initial phase of its report the Commission unequivocally states that the first question it had to decide was whether there were, as claimed by the Rio Grande, existing through routes. Its report shows that five of the ten voting Commissioners found that through routes *did* exist.

It is clear, therefore, that there was support for the lower court's conclusion that the Commission by proceeding to decide the case on the basis that there were no existing through routes "obviously prejudiced the entire proceeding." (Jur. State., No. 333, App. D, p. 11.)

Noting the equal division within the Commission, the lower court properly proceeded to determine that question, and found that "the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence."

It is significant to note at this point that the report of the Commission and the lower court's decision show that the court's decision, and that of each of the conflicting groups within the Commission, were based on conclusions reached after their respective analyses and interpretations of this Court's opinions in the *Thompson*[3] and related cases.

Although appellants contend that the lower court's decision is "vague and lacking in specificity as to the precise

---

[2] The Government in No. 334 describes the "Question Presented" as follows:

> "Whether the district court, in setting aside the Commission's order establishing new through routes (and joint rates) on the ground that the 'uncontradicted evidence' showed that through routes were already in existence, applied an erroneous standard for determining the existence of a through route." (Jur. State. No. 334, p. 4)

[3] *Thompson V. United States*, 343 U.S. 549 (1952).

reason why it holds that through routes are in existence," we suggest that a fair reading of the opinion shows why appellants' earlier similar arguments have not been persuasive to the Court or to a majority of the Commission.

To supply some of the findings not commented upon by the appellants, we observe that the district court noted that the principal traffic witness of the Union Pacific testified before the Commission "that a shipper who was willing to pay the higher combination rate had the right to specify under 15(8) of the Act a route via the Rio Grande," and that "It should be observed that this right exists only when through routes and through rates have been established." (Jur. State. No. 333, App. D, p. 12.)

Neither did appellants refer to the fact that Union Pacific counsel expressed the opinion at the hearing before the Commission, in response to interrogation by Commissioner Alldredge, that the cancellation of joint rates did not close the through routes admittedly long before established, and that shippers were free to route via the Rio Grande if they were willing to "pay the price" of higher rates.

With reference to the finding in the *Thompson* case, that there was no evidence in that case that "any *through transportation service* has ever been offered from Lenora to Omaha via the Burlington" (emphasis supplied) on any commodity, the court below found that the record here disclosed that there was a representative movement of a variety of commodities in *through transportation service* via the Rio Grande over the routes involved, despite the higher combination rates charged. The court found that admittedly *through transportation service* has been continuous on sheep and goats; and at through rates published *jointly* by the Union Pacific and the Rio Grande. It is submitted that if these facts had been established in the *Thompson* case, the Court would have held otherwise on the through routes issue.

It is clear that the lower court also refused to support the Commission's holding that a "commercially closed through route" is not a "through route." The decisions of this Court in *Thompson* and *Great Northern*[1] cases, and earlier cases therein referred to, completely refute the validity of the Commission's holding in this regard.

In summary, the Association urges that due recognition of this Court's past decisions does not sustain the view that routes are only through routes when there is a joint rate published by the carriers involved. On the contrary, in the *Great Northern* case, *supra*, at page 572, this Court said: "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates." It is again urged that the existence of published joint through rates applicable to the routes involved—consistently recognized by the Union Pacific for the transportation of sheep and goats, coupled with the issuance of through bills of lading on other commodities even though the rates were higher, clearly proves that there are existing through routes. The only real issue in the case before the Commission was whether such routes should be made commercially available to shippers of other commodities by the establishment of competitive joint through rates.

2. Scope of Judicial Review

It is believed unnecessary to comment in detail on other points mentioned in appellants' motion. Its first point, raising the technical question whether there was a Commission order susceptible of the scope of review given by the lower court, is answered by the fact that the order *in terms* refers to and incorporates the Commission's report containing its findings of fact and conclusions. (Jur. State. No. 333, App. C, p.).

Equally devoid of substance is the contention that the Rio Grande lacks standing to maintain this action. Even

[1] *United States* v. *Great Northern*, 343 U.S. 562 (1952).

in the absence of the record it is evident that the only relief the Rio Grande sought in its complaint to the Commission was the establishment of reasonable competitive joint through rates, and it must be admitted this relief can only be obtained by primary resort to the Commission. It is equally clear that the Judicial Code gave the Rio Grande the right to obtain judicial review of a decision substantially denying that relief. (28 U.S.C. 1253, 1336, 2101(b); and 2321-2325.)

CONCLUSION

It is submitted that the foregoing comments clearly disclose the lack of merit, independent of the propriety, of appellants' Motion to Reverse, and require its denial by this Court. Determination of the issues presented by the appeals are of paramount importance to the general public, the railroad industry, and members of this Association. It is suggested that the Court may wish to accept the more judicious appraisal of the substance of the issues given in the Jurisdictional Statement of the Government appellants in Number 334, that:

> "The questions presented by this appeal are substantial and of public importance. There is also a serious conflict of decisions. It is respectfully submitted that probable jurisdiction should be noted, and it is further suggested that this case should be consolidated for argument in Nos. 117-119."[5]

Respectfully submitted,

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[5] As a footnote to this conclusion Government appellants stated—
"The two cases are interdependent, since the Court will not reach the issues in Nos. 117-119 if it affirms the judgment in this case."

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Nos. 332 and 333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,
vs.
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,
vs.
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

BRIEF IN OPPOSITION TO APPELLANTS' MOTION TO REVERSE ON BEHALF OF THE NATIONAL LIVE STOCK PRODUCERS ASSOCIATION, AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, COLORADO CATTLEMEN'S ASSOCIATION, IDAHO WOOL GROWERS ASSOCIATION, UTAH CATTLE AND HORSE GROWERS ASSOCIATION.

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THE BLAKEMORE-WARREN PRINTING COMPANY, CHICAGO

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FOREWORD.

This brief is in opposition to a joint motion by appellants in Nos. 332 and 333 to reverse a final judgment of a three-Judge United States District Court for the District of Colorado without awaiting briefs, and oral argument. It is filed on behalf of the five above named livestock associations (hereinafter called appellees) more particularly described as follows:

The National Live Stock Producers Association, is a cooperative organization composed of over 500,000 live stock growers and feeders throughout the live stock producing areas of the country, and twenty-two cooperative live stock associations, with its principal offices at 139 North Clark Street, Chicago 2, Illinois.

The American National Cattlemen's Association, is a voluntary non-profit organization of live stock producers with principal membership in the seventeen States west of the Missouri River, also in the States of Florida, Louisiana, Oklahoma and elsewhere, with executive office and postoffice address 515 Cooper Building, Denver, Colorado.

The Colorado Cattlemen's Association, is a non-profit association organized under the laws of the State of Colorado, with offices at 4651 Lafayette Street, Denver, Colorado; it is composed of 48 local associations throughout the State of Colorado, comprising approximately 5,000 members, many of whom have cattle ranching operations contiguous to The Denver and Rio Grande Western Railroad.

The Idaho Wool Growers Association, is a voluntary non-profit organization in the State of Idaho, with executive office and postoffice address 17 Broadbent Building, P. O. Box 2598, Boise, Idaho.

The Utah Cattle & Horse Growers Association, is a voluntary, non-profit organization composed of twenty local associations and numerous individuals totaling approximately 2,000 members in the State of Utah with executive office and postoffice address at Heber, Utah.

These appellees have an important and pecuniary interest in the issues involved in the above entitled proceeding and they and their members are engaged in the production, buying, selling and shipping of live stock within, to, and from the area involved in this proceeding and that they pay and bear the charges for the transportation of such live stock.

The appellees herein were intervening complainants before the Interstate Commerce Commission (hereinafter referred to as the Commission) in *The Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, 287 I. C. C. 611, decided January 12, 1953.

That proceeding was brought because of the failure and refusal of the U. P. to establish just, reasonable and nondiscriminatory competitive joint through rates and charges in connection with the Rio Grande via its Colorado and Utah gateways in violation of Section 1 (4), Section 3, and Section 15 (1), (3), and (4) of the Act as amended:

> (1) between (a) points on or via the U. P. in Utah north of Ogden, Idaho, Montana, Oregon, Washington, and British Columbia, Canada, and
> (b) Colorado common points and points east thereof; and
>
> (2) between Utah common points and same northwest territory specified in (1) (a) above.

Appellees also submitted brief and participated in oral argument on appeal before the District Court for the District of Colorado in *The Denver and Rio Grande Western*

Railroad Company v. *United States of America and Interstate Commerce Commission*, Civil Action No. 4492.

The Commission granted only partial relief to live stock producers and feeders. The Commission's order, herein, provided in part that the defendants and the complainant according as they participate in the transportation, be, "* * * required to establish * * * and thereafter maintain through routes via Ogden and Salt Lake City, Utah, in connection with the line of the complainant for the interstate transportation of various named commodities, in carloads, including ordinary live stock, from origins in the territory north and west of Ogden to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming."

Thus the majority decision of the Commission denied relief to and from the important live stock market at Denver and the other Colorado common points and including the eastern part of Colorado, all of the State of Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Wisconsin, northern part of Iowa and Illinois, and the upper peninsula of Michigan.

Appellees contend that, to the extent indicated, the

order of the Commission herein referred to is unlawful, arbitrary, capricious and contrary to the evidence of record and the provisions of the Interstate Commerce Act, in that it failed to find and to prescribe in the public interest the same relief to the restricted territory above described that it accorded to the territory to which relief was granted.

The District Court held that the order of the Interstate Commerce Commission is invalid and unlawful insofar as it denied relief, prayed for by the plaintiff and the intervening plaintiffs and ordered that the same be annulled and set aside insofar as it denied relief to the plaintiff and intervening plaintiffs and remanded the matter to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of the District Court.

Appellants in No. 332 and No. 333 appealed to this Court from the final judgment and decree of the District Court below.

Subsequently appellants have filed a joint motion before this Court to reverse the judgment of the District Court without awaiting briefs and oral argument.

ARGUMENT.

Appellants' motion to reverse is without support of any rule of this Court and is repugnant to their respective statements as to jurisdiction on appeal to this Court.

Under identically worded headings appellants declare that "the questions are substantial."

The appellants in No. 332 list ten questions beginning on page three of their jurisdictional statement. Appellants in No. 333 beginning on page seven of their statement of jurisdiction list fourteen separate questions presented by their appeal, and on page twenty-seven state that the questions presented have a far-reaching future effect not only upon the railroads generally * * * and upon the public * * * but also in the field of judicial review of the Commission's orders, especially the through routes provision of Section 15(3) and (4).

The appellees herein agree that the questions presented are substantial and are of vital interest and concern to the live stock producers, their Associations and others, but contend that the number and nature of the many questions presented by appellants undeniably refute their motion to reverse the decision and judgment of the District Court without brief and oral arguments.

It should be noted that the decision of the Commission corrected only in part an unlawful rate adjustment of long standing that has discriminated against live stock producers and others. We contend that the action of the Commission should not be restricted to only a partial correction of an unlawful rate adjustment.

The Act contemplates that there should be no excluded territory with respect to any commodity or persons.

The District Court properly found that the Commission erred as a matter of law in reaching the conclusion that upon consideration of undisputed facts such through routes are not in existence.

1. Movants' first contention is that the District Court was without jurisdiction to consider the complaint, because the action complained of is not in conformity with the order. The movants contend that the Urgent Deficiencies Act confers no jurisdiction upon the courts to review "matter embodied in a (Commission) report and not followed by a formal order," *United States* v. *Atlanta B. & C. R. Co.*, 282 U. S. 522, 528; and state that that Act clearly makes the existence and presence of an "order" embodying the matter complained of pre-requisite to jurisdiction to review and that there is no such order here.

This is a wholly unwarranted contention and contrary to the view of the Supreme Court in *Mitchell* v. *United States*, 313 U. S. 80. Notwithstanding that no order was entered, the Court held that the Commission erred in refusing and in failing to find that the treatment accorded Mitchell by the railroads constituted an unjust discrimination and an undue prejudice in violation of the Interstate Commerce Act. The Supreme Court having reversed the decision of the Commission remanded it with directions, whereupon the Commission reconsidered its original decision and upon reconsideration in *Mitchell* v. *Chicago, R. I. & P. Ry. Co.*, 248 I. C. C. 149, found that Mitchell had suffered undue prejudice in violation of the Interstate Commerce Act.

Furthermore in a later decision, in *Henderson* v. *United States*, 339 U. S. 816, this Court held that the complainant was entitled to removal of the undue discrimination notwithstanding the fact that the Commission found that the modified rules did not violate the Interstate Commerce Act and that no order for the future was necessary.

We believe it is also significant to point out that the Commission in its order of January 12, 1953 said in part:

> "This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof * * *."

This clearly shows that the Commission made its report in the case below a part of the order issued thereon. Obviously, in view of the holdings of this Court and the action of the Commission, the above contention of the movants is wholly untenable.

2. In connection with second contention in support of movants' motion, we wish to point out that in addition to the interests of the Rio Grande, the interests of live stock producers and other shippers, and the public interest are entitled to careful consideration.

The decision of the Commission corrected only in part an unlawful rate adjustment that has discriminated against live stock producers and other shippers.

The District Court annulled and set aside the order of the Commission insofar as it denied relief to complainants.

We submit that the facts shown in the record in this proceeding justify the complete relief from discriminatory rates as was held by this Court in the *Mitchell* and *Henderson* cases, *supra*, on the ground that the Act contemplates that there should be no excluded territory with respect to any commodity or persons.

Therefore movants' second contention above referred to is without merit.

3. Movants' third contention that the District Court in reversing the Commission's finding that the through routes via Ogden and Salt Lake are not in existence within the meaning of the Act, misconstrued or refused to be guided by this Court's decision in *Thompson* v. *U. S.*, 343 U. S. 549.

The decision in the *Thompson* case is not applicable here. In that case, the United States Supreme Court held that the Commission's efforts to support its finding that a through route from Lenora, Kansas, to Omaha via the Burlington Line already exists are inconsistent with the meaning of the term "through route" as used in the Interstate Commerce Act. Since there was admittedly no evidence that the Missouri Pacific ever offered through transportation over the route in question the Commission's order was wholly without evidentiary support under the accepted tests for the determining of an existence of a through route. In defining a through route the Supreme Court stated "In short, the test of the existence of a through route is whether the participating carriers hold themselves out as offering through transportation service. *Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.*" (Italics supplied.)

In this case, the route is open, applicable rates are in effect, but they are unjust, unreasonable, and unduly prejudicial, and discriminatory rates, being composed of combinations or arbitraries in addition to rates based on a mileage scale. All this means that the route can be used, the evidence shows it has been used, but subject to a penalty of paying excessive rates and charges. In view of this the limitations of Section 15(4) do not apply.

However, the provisions of Section 15(3) are definitely applicable. The pertinent part thereof reads as follows:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, * * * and joint rates. * * *"

It should be noted that the Commission may prescribe joint rates and through routes if either or both are necessary or desirable in the public interest. *Stickell Case*, 255 I. C. C. 333, 338; *Cancellation of Rates and Routes*, 245 I. C. C. 183, and *Inland Waterway Case*, 151 I. C. C. 126.

We believe that the decision of the United States Supreme Court in *Virginian Railway* v. *U. S.*, 272 U. S. 658 (referred to in the *Thompson* case, *supra*), is also applicable here. In that case, it was stated that the route in question was commercially closed because the carriers had not established any joint rates and that only a combination of local rates was applicable that resulted in charges so high as to be prohibitive. The Commission there found that the combination rate was both unreasonable and discriminatory and prescribed through rates which it found were reasonable and non-discriminatory. The order was made under Section 1 and Section 3, and we contend that relief under these same sections of the Act is justified in this case without any territorial limitations.

Movants also cited *U. S.* v. *Great Northern R. Co.*, 343 U. S. 562, and quoted a single sentence from page 575 in support of their contention that the District Court misconstrued or refused to be guided by the principles in that case.

The quotation below includes the first sentence quoted by movants and the remaining part of the paragraph and all of the following paragraph as follows:

"Congress amended Sec. 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs. But the provisions

of Sec. 15(4)—the restrictions against short hauling, the financial needs prohibition and the emergency route provision—all deal with the Commission's power to establish through routes.

"Congress could well have prohibited the Commission from considering financial needs in issuing any order under Sec. 15 (3). This was proposed in one bill and expressly rejected by a congressional committee. Or, Congress could have prohibited consideration of financial needs in ordering establishment of joint through routes where through routes were in existence, as was also proposed. Instead, Congress adopted a provision prohibiting reliance on financial needs only in respect to orders establishing through routes. It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written. Where, as here, the Commission did not establish through routes, Sec. 15 (4) has no application."

Furthermore, in the course of the oral argument before the Interstate Commerce Commission on October 16, 1952, Mr. Collins, Counsel of the Union Pacific, in answer to a question by Chairman Alldredge as to whether the routes via the Rio Grande were closed, said:

"No, I don't think so, if they want to pay more, if they want to route via the Rio Grande and pay the price."

From the above it is evident that the movants and not the District Court misconstrued or refused to recognize the true significance of the above cases cited by them.

4. Now we come to movants' fourth and last contention in support of their motion to reverse (page 19 of motion to reverse). This is nothing more than an attempt to make a play on words. The phrase, referred to by movants must in all fairness to the Court be construed in the light of the entire opinion or so much of it as is necessary to give the phrase the application it is intended to have.

The more pertinent part of the opinion is as follows:

"We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding.

The undisputed evidence bearing upon the crucial question of existing through routes must be summarized. In 1897, the Union Pacific established joint through competitive rates with the Rio Grande to and from points in the northwest area through Ogden. These rates were in effect until canceled by Union Pacific in 1906 from and to some points and in 1912 from and to remaining points. But the through routes were not closed.

Counsel for Union Pacific expressed the opinion at the hearing before the Commission, in response to interrogation by Chairman Alldredge, that the cancellation of the joint rates did not close the through routes and that shippers were free to route via the Rio Grande if they wanted to pay more.

The principal traffic witness of the Union Pacific testified at the hearing that a shipper who was willing to pay the higher combination rate had the right to specify under Sec. 15(8) of the Act a route via the Rio Grande. It should be observed that this right exists only when through routes and through rates have been established. This witness further testified that some joint through rates are now published in a Union Pacific tariff for application to shipments of sheep and goats from the northwest area via Ogden and the Rio Grande to points on the Missouri River and east thereof.

A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at

through combination rates, without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small, etc."

The opinion is 29 pages long and after the part above quoted the opinion continued for about seventeen more pages ending with a last paragraph as follows:

> "The order insofar as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion."

It is therefore clearly apparent that phrase referred to by movants does not contravene the final conclusion of the District Court.

CONCLUSION.

In consideration of the above comments and in view of the importance and the far-reaching nature of the issues involved, appellees respectfully urge that the appellants' joint motion to reverse be denied and that the matter be given consideration in accordance with the regular procedure of this Court.

Respectfully submitted,

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PROOF OF SERVICE.

I, Lee J. Quasey, Counsel of record for appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of September, 1955, I served, on behalf of the appellees herein named copies of the foregoing brief, in opposition to appellants' motion to reverse on the several parties, by mailing a copy in a duly addressed envelope with airmail postage prepaid, as follows:

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IN THE

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No. 332.

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., *Appellants.*

vs.

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UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., *Appellants,*

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

CONSOLIDATED REPLY BRIEF

OF

THE NATIONAL LIVE STOCK PRODUCERS ASSOCIATION,
AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION,
COLORADO CATTLEMEN'S ASSOCIATION,
IDAHO WOOL GROWERS ASSOCIATION,
UTAH CATTLE AND HORSE GROWERS ASSOCIATION,
Intervening Appellees.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OF

THE NATIONAL LIVE STOCK PRODUCERS ASSOCIATION,
AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION,
COLORADO CATTLEMEN'S ASSOCIATION,
IDAHO WOOL GROWERS ASSOCIATION,
UTAH CATTLE AND HORSE GROWERS ASSOCIATION,

Intervening Appellees.

STATEMENT.

The intervening appellees (hereinafter called the live stock associations) are voluntary organizations of live stock producers more particularly described as follows:

The National Live Stock Producers Association, is a cooperative organization composed of over 500,000 live stock growers and feeders throughout the live stock producing areas of the country, and twenty-two cooperative live stock associations, with its principal offices at 139 North Clark Street, Chicago 2, Illinois.

The American National Cattlemen's Association, is a voluntary non-profit organization of live stock producers with principal membership in the seventeen States west of the Missouri River, also in the States of Florida, Louisiana, Oklahoma and elsewhere, with executive office and postoffice address 515 Cooper Building, Denver, Colorado.

The Colorado Cattlemen's Association, is a non-profit associafion organized under the laws of the State of Colorado, with offices at 4651 Lafayette Street, Denver, Colorado; it is composed of 48 local associations throughout the State of Colorado, comprising approximately 5,000 members, many of whom have cattle ranching operations contiguous to The Denver and Rio Grande Western Railroad.

The Idaho Wool Growers Association, is a voluntary non-profit organization in the State of Idaho, with executive office and postoffice address 17 Broadbent Building, P. O. Box 2598, Boise, Idaho.

The Utah Cattle & Horse Growers Association, is a voluntary, non-profit organization composed of twenty local associations and numerous individuals totaling approximately 2,000 members in the State of Utah with executive office and postoffice address at Heber, Utah.

These live stock associations have an important and pecuniary interest in the issues involved in the above entitled proceeding and they and their members are engaged in the production, buying, selling and shipping of live stock within, to, and from the area involved in this proceeding and that they pay and bear the charges for the transportation of such live stock.

The live stock associations intervened in support of the complaint filed by the Denver and Rio Grande Western Railroad Company (hereinafter called the Rio Grande) before the Interstate Commerce Commission reported in *Denver and Rio Grande Western R. R.* v. *Union Pacific R. R.*, 287 I. C. C. 611 (Consol. R., II, 1518-1594).

The proceeding was brought because of the failure and refusal of the Union Pacific Railroad Company (hereinafter called the Union Pacific) to establish just, reasonable and non-discriminatory competitive joint through rates and charges in connection with the Rio Grande via its Colorado and Utah gateways in violation of Section 1 (4), Section 3, and Section 15 (1), (3), and (4) of the Act as amended:

(1) between (a) points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington, and British Columbia, Canada, and (b) Colorado common points and points east thereof; and

(2) between Utah common points and same northwest territory specified in (1) (a) above.

The live stock associations actively participated in the proceedings before the Interstate Commerce Commission, including the presentation of witnesses, filing of briefs, and participation in the oral argument before the entire Commission.

The Commission's decision granted only partial relief to live stock producers and feeders from the unreasonable

and unduly discriminatory rates complained of. Accordingly the Commission's order* provided in part that the defendants and the complainant according as they participate in the transportation, be, * * * required to establish * * * and thereafter maintain through routes via Ogden and Salt Lake City, Utah, in connection with the line of the complainant for the interstate transportation of various named commodities, in carloads, including ordinary live stock, from origins in the territory north and west of Ogden to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

Thus the majority decision of the Commission denied relief to and from the important live stock market at Denver and the other Colorado common points and including the eastern part of Colorado, all of the States of Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Wisconsin, northern part of Iowa and Illinois, and the upper peninsula of Michigan.

Subsequently the live stock associations again intervened in support of an action by the Rio Grande before the United States District Court for the District of Colorado

* (Appendix A, p. 119, Consolidated opening brief of the Denver and Rio Grande Western R. R. Co.)

(hereinafter called the Colorado Court), seeking to enjoin, annul and set aside in part the order of the Commission above referred to, filed a brief and participated in the oral argument in that proceeding.

The live stock associations contended that the order of the Commission herein referred to is unlawful, arbitrary, capricious and contrary to the evidence of record and the provisions of the Interstate Commerce Act to the extent in that it failed and to prescribe in the public interest the same relief to the restricted territory above described that it accorded to the territory to which relief was granted.

In the *Denver & Rio Grande Western Railroad Company* v. *United States*, 131 F. Supp. 372, the Colorado Court held that the Interstate Commerce Commission erred:

1. In failing to hold, under the undisputed evidence that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific Railroad Company (hereinafter called the Union Pacific), and

2. In narrowly limiting itself to a consideration of the case under the restrictions of Section 15(4) of the Interstate Commerce Act, since that section does not apply

(a) where through routes are in existence, or

(b) where under the evidence of the case, and as a matter of law, relief should be granted under Sections 1(4), 3(4), 15(1) or 15(3) of the Act.

The live stock associations regard the action of the Colorado Court just and proper in remanding the entire cause for further proceedings in conformity with its opinion and judgment, because they believe that it will afford further relief, particularly to the important live stock territory to which relief was denied.

Appeals were taken to the decision of the Colorado Court by the Union Pacific in No. 333, the Washington Public Service Commission and certain other state commissions in

No. 332, and the Interstate Commerce Commission and the Secretary of Agriculture in No. 334. These appellants generally seek reversal of the judgment of the Colorado Court, except that the Secretary of Agriculture is not a party to the appeal from the Colorado Court. (Footnote 1, page 2, of the Government Brief.)

Appellants in Nos. 332, 333 and 334 urge that the decision of the Colorado Court be reversed mainly on the ground that the Court erred; as a matter of law, in holding contrary to the opinion of the Commission, that through routes exist via the Ogden gateway and the Rio Grande between the points in controversy on the Union Pacific and other railroads involved; and in its conclusion that the Commission's failure to so find was in error and so prejudiced its disposition of the entire proceeding.

Since the brief of the Washington Public Service Commission, *et al.*, is in support of and follows closely the arguments and authorities set forth in the brief of the Union Pacific, we believe that they do not require separate answers.

ARGUMENT.

PROCEDURAL QUESTIONS AGAIN REPEATED BY THE UNION PACIFIC.

In order to avoid unnecessary repetition, the intervening live stock associations adopt as their own, so far as their interests are concerned, the statements contained in the consolidated opening brief by the Rio Grande, filed pursuant to an order for consolidation of this Court on October 24, 1955, and also adopt that part of the Rio Grande's reply brief relating to procedural questions again raised by the Union Pacific, viz.:

1. That the Colorado Court had no jurisdiction to set aside the order of the Commission.

2. That the Rio Grande had no standing to bring suit to set aside the order of the Commission.

However, we submit a few supplementary comments in connection with the above points in the order shown above.

The Colorado District Court Had Jurisdiction to Set Aside the Order of the Commission.

The decision of the Commission corrected only in part the rate adjustment complained of by the live stock producers and other shippers.

The Colorado Court annulled and set aside the order of the Commission insofar as it denied full relief to complainant.

The undisputed facts shown in the record in this proceeding that through routes exist justify complete relief from discriminatory rates as was held by this Court in *Mitchell* v. *Chicago R. I. & P. Ry. Co.*, 246 I. C. C. 149, and *Henderson* v. *United States*, 339 U. S. 816, on the ground that the Act contemplates that there should be no excluded territory with respect to any commodity or persons.

The live stock producers and other shippers are entitled to just, reasonable and non-discriminatory joint through rates between points on the Union Pacific via the Rio Grande and points on all other railroads to the extent that need therefor is shown by the evidence of record in these proceedings.

This is in accord with the inherent purpose and policy of the Interstate Commerce Act as stated by the Commission in one of the early cases, *Missouri and Illinois Coal Co.* v. *Illinois Central Railroad*, 22 I. C. C. 339 (1911), where in giving special consideration to the Section 1(4) and Section 3(4) of the Act the Commission said:

> "Reading these provisions together, there can be no doubt as to the intent of Congress. Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through

routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

Congress confirmed the Commission's view of the inherent purpose and policy of the Interstate Commerce Act in its statutory declaration of transportation policy as now set forth in the preamble to the Interstate Commerce Act (United States Code, Title 49).

As to the relief denied, the Colorado Court held that the Commission erred in denying and withholding relief by mistakingly regarding the provisions of Section 1(4), 3(4), 15(1) and 15(3) of the Interstate Commerce Act, subject to the restrictions of Section 15(4), that under the unpredicted evidence as to the existence of through routes, is not applicable to the proper disposition of the matters complained of. This is clearly an error of law, and by so doing it failed to properly apply the full force of the sections above referred to, to the issues in this proceeding. The grounds on which the Commission's decision are subject to review by the Courts are pointedly summarized in *ICC v. Union Pac. Railroad Co.*, 222 U. S. 241, where at page 548 this Court stated:

"It has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

Further in *Southern Pacific Company, et al. v. Interstate Commerce Commission*, 219 U. S. 433, the court held that the Commission's order may be set aside if it has acted unreasonably; in *United States of America and Interstate Commerce Commission v. Abilene & Southern Railway Company, et al.*, 265 U. S. 274, it held to the same effect where the Commission disregards or misinterprets important testimony or bases its order upon improper or insufficient evidence. Also, in the cases of *Interstate Commerce Commission v. L. & N. Railroad Company*, 227 U. S. 88, and *Florida East Coast Railway v. United States*, 234 U. S. 167, the court laid down the very important principle that a finding without evidence is beyond the power of the Commission and that the order of the Commission must conform to the record in the case.

The Rio Grande Had Standing to Bring Suit to Set Aside the Order of the Commission.

Pursuant to provisions of Section 13 of the Interstate Commerce Act, the Rio Grande, as a common carrier by railroad, was authorized to file a complaint before the I. C. C. the same as any other party likewise authorized to do so. The applicable provisions of Section 13 of the Act states that: "* * * any common carrier complaining of anything done, or omitted to be done by any common carrier, subject to the provisions of this part, in contravention of the provisions thereof, may apply to the Commission by petition * * *."

Since the Rio Grande had a right to bring a complaint the same as any other party it logically has the right to bring suit to set aside an order of the Commission the same as any other party has a right to do. In view of this, contentions by the Union Pacific to the contrary are wholly unjustified and untenable.

SUBSTANTIVE ISSUES IN COLORADO CASE

In view of the comprehensive treatment given by the Rio Grande in its reply brief to comments made of the Union Pacific and the intervening state commissions on their side, our reply will be directed to certain specific issues or statements of particular concern to the interests of live stock producers.

Union Pacific Contentions of Impoverishment Are Fantastic Speculations.

At page 3, and at pages 11, 13 and 35 the Union Pacific claims that in the event the Rio Grande prevails in obtaining reductions in the rates complained of that it, the Union Pacific, would suffer heavy financial loss and become impoverished.

We doubt that the Union Pacific would lose any appreciable live-stock traffic to the Rio Grande as a result of the establishment of joint through rates via the Ogden gateway. The Union Pacific provides a very good service for the transportation of live stock and the mere establishment of a parity of joint through rates as here sought would not result in a divergence of traffic for that reason alone. What additional live stock would be moved by the Rio Grande would depend almost wholly on the needs of the shippers along the Rio Grande mainly in connection with feeding in transit services that live stock shippers along the Rio Grande cannot avail themselves of under the existing rates.

The establishment of a parity of joint through rates would stimulate competition in the service on the part of both lines. This obviously would redound to the benefits of the live stock shippers via both rail carriers.

In any event, the needs of the live stock shippers are en-

titled to primary consideration. The claims of the Union Pacific about impoverishment are nothing short of fantastic speculations designed to obscure the basic issues of the case.

Live Stock Producers and Other Shippers Actively Interested in Obtaining Relief Sought.

At page 12 of its brief the Union Pacific states that no complaint has ever been filed by shippers or the public or by any state public service commission demanding the longer through routes and joint rates via the Rio Grande.

The very nature and extent of the problem, its broad scope and the many interests affected affords the best answer to that contention.

The Rio Grande, as a common carrier by railroad, was the logical party to initiate the matter by filing a complaint before the Interstate Commerce Commission. It was the only single party that could bring a complaint broad enough to enable various commodity interests to intervene without involving the hazard of unduly broadening the issues. The Rio Grande had the right to bring the complaint as a matter of law.

A total of forty-two separate interests intervened in support of or testified on behalf of the complaint by the Rio Grande (pages 25 and 27, Consolidated Opening Brief of Rio Grande) including the United States Department of Agriculture, the Public Service Commission of Utah, and the five live stock associations, intervening appellees herein.

This clearly shows that the Rio Grande is only one of a large number of interested parties, that intervened in support of its complaint. Many of the supporting interveners represent large numbers of vitally interested members, located in the various areas throughout the country, who would receive the primary benefits from the relief sought

in the complaint and any benefit or pecuniary gain to the Rio Grande would be mainly incidental.

A summary of the testimony of live stock witnesses clearly shows that relief from the excessive unreasonable and discriminatory rates complained of is necessary between all points in all the important regions of the country involved in these proceedings.

Mr. I. H. Jacob of Salt Lake City, General Manager of the Producers Live Stock Marketing Association, and Manager of the Wasatch Live Stock Loan Company, who has held his present positions for over fifteen years and has had long and extensive experience in raising and marketing live stock prior to that time, stated that the marketing association of which he is Manager is composed of live stock producers, that it operates branches at Ogden and North Salt Lake, Utah, Los Angeles, Calif., Denver, Colo., and Billings, Mont.; that these organizations are members of the National Live Stock Producers Association (intervenor in support of complainant in this proceeding) which handled an equivalent of 30,000 carloads of all species of edible live stock in 1948, and that of this number about 15,000 carloads moved by rail; that in the marketing activities his organization handled shipments on consignment at the markets; rendered a sales service off the markets, at ranches and pastures and other country points, and also bought stocker and feeder animals on order; that live stock was raised, grazed and fed along the lines of the UP and the D&RGW respectively between Ogden and Denver; that a substantial volume of live stock that is grazed, pastured and fed in the D&RGW territory is brought in from points on the UP and its connections north and west of Ogden; that the live stock from the D&RGW territory then goes to Denver, Omaha and other eastern markets; that some of the animals are sold for slaughter and others move to the Kansas wheat pastures

and other areas and eventually to Kansas City and other eastern markets; that all this live stock moves and is sold in competition with live stock from points on the UP; that the pasturing of sheep on the wheat pastures of Kansas plays an important part in both the raising of wheat and production of live stock for meat; that live stock men along the D&RGW are at a disadvantage because of the relatively higher rates that they have to pay when moving to the Denver market, the Kansas wheat pastures or other eastern destinations; that freight billing is of value in obtaining a higher price for live stock at both public markets and at country points; that the reduction of the rates would benefit live stock producers by removing the penalty now imposed on traffic moving via the D&RGW; that it would promote greater competition in service between the UP and the D&RGW, stimulate more competition for live stock in the territory north of Ogden and Salt Lake, put live stock men in the D&RGW territory in better competitive position with those along the UP between Ogden and Cheyenne and encourage the movement of live stock, particularly the sheep and lambs into the wheat pastures of Kansas and the lower Mississippi River markets. (Consol. R. I. 310-319.)

Mr. W. H. Hilbert of Denver, Colo., stated that he is head of the Sheep Department of the Producers Life Stock Marketing Association, at Denver; that he had thirty-four years experience in the live stock business; that he is familiar with the Denver and other live stock markets and with the general live stock producing and feeding areas of the country; that freight billing is of value in obtaining a higher price when live stock is sold for shipment to farther points beyond the market or place where it is sold; that the reduction of the higher rates would give live stock producers the benefit of another important route without a rate disadvantage and place them on a parity in the sale

of their livestock as far as freight rates are concerned. (Consol R. I. 453.)

Mr. Elmer J. Wagner of La Mar, Colorado, President of the Arkansas Valley Stock Feeders Association, stated that the 215 members of his Association carry on live stock feeding operations in the Arkansas Valley east of Pueblo, Colo., on lines of the Santa Fe and Missouri Pacific Railroads; that they want to be able to purchase live stock in Idaho, Oregon, Washington and Montana on a competitive basis, with feeders of live stock in other localities, for instance, Northern Colorado and Nebraska; that prior to 1932 members of his Association could buy feeder lambs in large numbers in the territory north of Ogden because the freight rates via Ogden and the D&RGW and beyond to slaughter points on the Missouri River were on a competitive basis; that since 1932 when the competitive rates via the D&RGW were cancelled, the Arkansas Valley feeders have been at a disadvantage because live stock feeders along the UP can overbid them. He stated further that he and the members of his Association like the northwest lambs and would like to buy them if they had the same freight basis; that in 1928 they could compete with the Northern Colorado and Nebraska feeders, but at present their freight rates on lambs from a point like Baker, Oregon, to the Missouri River points via the Ogden gateway and the D&RGW and the Santa Fe is 49 cents higher than the rate that the Northern Colorado and Nebraska feeders have to pay and that with the tax this amounts to over $100 a car and makes it impossible for them to compete; that in 1928 their Association fed over 400,000 lambs in the Arkansas Valley and that at the present time there were only 100,000 lambs in the area. (Consol. R. I. 488-491.)

Mr. Don Clyde of Heber, Utah, stated that he is principally engaged in the production of sheep; that his opera-

tions are spread over 20,000 acres of land and that his operation consists of about 4,000 breeding ewes and about 200 head of cattle; that about 100,000 breeding ewes are handled annually in the area in which he is located; that most of his herd replacements come from points in Idaho and Montana; that a substantial percentage of every sheepman's output are sold as feeders and that these usually go to points in Mid-western States; that the arbitrary additional charge of about 19 cents per 100 lbs. that they have to pay means that the returns to the Utah grower are about that much less than the returns to the grower located on the UP. (Consol. R. I. 324.)

Mr. Charles Redd of La Sal, Utah, testified that in 1949 his company had 27,000 head of sheep and about 2,500 head of cattle; that some of the best sheep in the country, for range purposes, comes from Eastern Oregon and Western Montana and that the best fattening lambs come from Idaho; that he would like to bring in and handle the sheep in the Rio Grande territory on an equal basis of rates with those applicable via the UP. (Consol. R. I. 375-376.)

Mr. Angus McIntosh of Las Animas, Colorado, President of the Colorado Wool Growers Association, which consists of 832 members, stated that prior to 1932 a part of the members of his Association who had operations along the D&RGW bought their herd replacements in the Northwest and enjoyed through rates to Denver and the Missouri River and other eastern points via Ogden; that since 1932 they can no longer compete with the sheep men in Wyoming and in those other States on the UP, because of the lower rates via that line; that when he was able to ship via Ogden and the D&RGW he was able to do so with only two feeds in transit as against three and four feeds enroute via the UP to Denver and the Santa Fe beyond. (Consol. R. I. 494-496.)

Mr. David G. Rice, Jr. of Denver, Colo., Secretary of the Colorado Cattlemen's Association, composed of 5,000 members, stated that live stock feeders in Colorado have to go out of Colorado to an increasing degree to purchase animals for their feeding operations. He also stated in effect that his Association is very much interested in the opening of the Ogden Gateway because its members want to purchase cattle north and west of Ogden, to be shipped to Western Colorado and the Arkansas Valley areas. He agreed with Witness Benton's testimony that the reduction in forest pastures has increased the number of cattle necessary to be brought into Colorado for feeding. (Consol. R. I. 344-356.)

Mr. Herbert B. Heidel, of Pueblo, Colorado, with the Pueblo Division of The American Stores, Inc., Lincoln Packing Company, that operates a slaughterer and cold storage plant at Pueblo, Colo., stated that he received carload shipments of lambs from origins in Idaho and Oregon on the UP; that because of being able to get delivery of the shipments more quickly and because a stop for feed, water and rest enroute between Ogden and Pueblo via the D&RGW, was not necessary, he has been routing such shipments via the D&RGW at Ogden during the past year, notwithstanding that the freight charges average from $70 to $80 per car higher than if routed via the UP to Denver and via connections to Pueblo and beyond. (Consol. R. I. 412-413.)

Mr. Roger S. Smith of Denver, Colo., Supt. of live stock operations of the Holly Sugar Corporation, stated that his company has from 25,000 to 60,000 tons of beet pulp annually for feeding cattle and lambs at Delta, Colo., located southeast of Grand Junction on the D&RGW, and that there are also available several thousand tons of molasses; that he purchases live stock on the UP in Montana, but that he cannot move them to Delta for feeding in

transit at through competitive rates; that live stock produced in the Northwest, particularly in Idaho and Western Montana on the UP, is of excellent grade for use in their feeding operations; that the higher basis of rates through Ogden via the D&RGW hinders their operations and favors those of live stock feeders on the UP in Wyoming and Nebraska. It is the desire of the company, he represents to have all possible routes open and available so that it can go to producing areas where they can get the lowest price. (Consol, R. I. 270-281.)

Mr. L. C. Montgomery of Heber, Utah, is Secretary of the Heber City Cattle Company. His individual operation and those of the company embrace about 5,000 head of cattle; that his operations are substantially similar to those of Mr. Clyde, that Mr. Clyde is engaged in sheep operations while Mr. Montgomery is engaged in cattle operations. Mr. Montgomery also testified as President of the Utah Cattle & Horse Raisers' Association which markets about 75,000 head of beef cattle each year. He expressed the view that opening of the Ogden Gateway would be beneficial to the producers in the State of Utah, and that the burden of the higher freight rates which they are now forced to pay on the movement of live stock from the Northwest via Ogden and D&RGW when moving to eastern markets handicaps the growers and feeders along the Rio Grande. (Consol. R. I. 442-446.)

Mr. Roscoe C. Rich of Burley, Idaho, past President of the Idaho Wool Growers Association, the National Wood Growers Association and the American Wool Council, stated that he has ranches in three locations in Idaho and that he sheared about 8,000 sheep in 1949; that a transit arrangement for Colorado feeding and raising of lambs at competitive through rates would be a benefit to Idaho lamb growers and that he supports the testimony of other

Colorado live stock witnesses who testified in support of the complainant's side of the case. (Consol. R. I. 509.)

The testimony of live stock witnesses was not limited to any particular market or area destinations, and it did specifically include the Denver market and pasture and grazing areas immediately east thereof, to which no relief was granted.

This testimony shows very comprehensively the disadvantages and handicaps suffered by live stock producers under the rate adjustment and reasons why complete relief should be accorded.

It should be particularly noted that partial relief granted by the Commission falls far short of the relief that the live stock producers are entitled to. For instance, live stock producers along the Rio Grande have been denied relief from the exorbitant arbitraries and excessively high combination rates in shipping their live stock to their nearest public market at Denver, and to other markets and destinations in the territory north and east of Denver to which no relief was accorded.

Furthermore, much of the relief the Commission intended to give the live stock industry is defeated by the so-called three-way rule that is applicable generally on the lines of the western railroads. This rule as published in the railroad tariffs provides in substance that on live stock fed or grazed in transit the through rate to be applied shall be the rate:

(a) From original point of shipment to the final destination, or

(b) From original point of shipment to the stop-off point or points, or

(c) From stop-off point or points to the final destination, whichever is highest, in effect on date of initial

shipment from original shipping point, plus the prescribed transit charge.

Illustrating the effect of this rule, the following table shows the rates on cattle and sheep in double-deck cars originating at Blackfoot, Idaho, moving via the Ogden gateway over the Rio Grande and transited at Burlington, Colo., a point on the Rock Island near the Colorado-Kansas State Line, and the rates via the Union Pacific from Blackfoot to Omaha, Kansas City, and St. Louis.

From Blackfoot, Idaho To	Rates in Cents Per 100 Pounds
Burlington, Colo.	133
Omaha, Nebr.	112
Kansas City, Mo.	112
St. Louis, Mo.	130

The rate from Blackfoot to Burlington via the Ogden Gateway and the Rock Island of $1.33 is constructed on combination 43 cents to Ogden as named in Agent Haynes' I. C. C. No. 1514, and 90 cents beyond, Rio Grande I. C. C. No. 951. The rates from Blackfoot to Omaha, Kansas City, and St. Louis are named in Union Pacific I. C. C. No. 5323.

Because the Ogden combination must be observed as minimum rate to Omaha, Kansas City and St. Louis, on a shipment transited at Burlington, the rate would be 21 cents higher than the concurrent rate of $1.12 to Omaha and Kansas City, and by 3 cents higher than the rate to St. Louis, Missouri.

This clearly shows how the denial of relief to the intermediate area (between the Colorado common points and the Missouri River gateways) created an anomalous situation that results in violations of Section 1, Section 3, and Section 4 of the Interstate Commerce Act and should also be remedied upon further consideration by the Commission.

SUBSTANTIVE ISSUES UNDER POINTS III, IV, V AND VI OF THE UNION PACIFIC OPENING BRIEF.

The Union Pacific opening brief under points III, IV, V, and VI (pages 53 to 102) endeavors to deal various phases of substantive issues.

There is considerable overlapping. In the interest of brevity and clarity the live stock associations believe it desirable to summarize these substantive issues under basic questions as follows:

1. Was the Colorado Court correct in holding that the Commission erred, as a matter of law, in failing to hold in the face of uncontradicted evidence that through rates exist over the Rio Grande via the Ogden gateway in connection with the Union Pacific?

2. Was the Colorado Court correct in holding that the Commission erred in limiting its consideration of the case under the restrictive provisions of Section 15(4) of the Interstate Commerce Act, thereby limiting the relief granted to only part of the territory, particularly as far as live stock was concerned, that obviously prejudiced its proper consideration of the entire case?

I.

The Colorado Court Was Correct in Holding That the Commission Erred as a Matter of Law in Failing to Hold in the Face of Uncontradicted Evidence That Through Routes Exist Over the Rio Grande Via the Ogden Gateway in Connection With the Union Pacific.

In its attempt to show that the Colorado Court erred in holding that the Commission was in error as a matter of law in failing to hold in the face of uncontradicted evidence that through routes exist over the Rio Grande via the Ogden gateway in connection with the Union Pacific, the Union Pacific beginning on pages 53 to 82 of its Colo-

rado opening brief makes the general contention that the routes via the Ogden gateway are commercially closed and relies chiefly on the decisions of this Court in *Thompson* v. *United States* 343 U. S. 549, and *Beaman Elevator Co.* v. *Chicago & N. W. Ry.*, 155 I. C. C. 313.

The first and second findings of the Colorado Court refer specifically to the matter of through routes, viz:

> (1) The Commission recognized that the first question for its determination was "whether or not the present routes by way of the Ogden Gateway constitute 'through routes' as that term is used in Sec. 15 (3) and (4) of the Act." *Only five of the ten participating members of the Commission joined in the report and order of the Commission,* wherein it was first determined that through routes were not in existence over the Rio Grande in connection with the Union Pacific through the Ogden Gateway. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment of such through routes and joint rates over them must be grounded on findings as specified in Sec. 15(3) and (4). (R. I. 286-287.)
>
> (2) We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden Gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding. (R. 287-288.)

In view of the fact that only five of the ten participating commissioners joined in the report and order of the Commission, it seems appropriate to consider the views indicated by five of the commissioners on the point that through routes exist.

Commissioner Arpaia expressed the opinion that there

are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of Section 15(4) of the Interstate Commerce Act is not required. The evidence of record shows that these routes presently are open and available to shippers on combination rates. The history of the relationship between these carriers leaves no doubt as to that fact.

In his concurring opinion, Commissioner Lee made a very realistic and forthright comment wherein he stated, that the decision in this case will correct in part, a long standing unlawful rate adjustment, but expressed the opinion that the action of the Commission should not be limited to partial correction of this unlawful rate adjustment, that on the facts shown in the record the act requires that the rates on all commodities between the points in excluded territory and Colorado common points and the points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes, that the act contemplates that there shall be no excluded territory with respect to any commodity or persons, that numerous shippers testified that these routes are open and available and that they can route traffic over them, and further, that this testimony was not challenged or contradicted, but that on the contrary a responsible traffic official of the U. P. testified that the Rio Grande routes are "actually available today on traffic to and from points on the U. P. and its connections in Utah, north of Ogden, Idaho, Montana, Oregon and Washington."

Commissioner Mahaffie, in his profound dissenting opinion, that was concurred in by Commissioners Splawn and Cross, stated that a finding that the routes are open and fully available to shippers today is fully supported by the evidence, that all of this evidence clearly supports

a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for a finding that they are established through routes announced by this Court in *Thompson* v. *United States*, 343 U. S. 549, where it stated "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit and, therefore, no through routes existed between those points.

Commissioner Mahaffie stated further that the situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole in-

evitably leads to that conclusion. *To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.* (Italics supplied.)

The finding of the majority (of the Commission) that there are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden or Salt Lake on traffic under consideration, except on eastbound shipments of sheep or goats, is definitely in error. As a matter of fact, the evidence is clear and uncontradicted that as to live stock and various other commodities that the Rio Grande route is open. However, any shipper using it is put to the pains of paying a rate penalty that we believe the statute gives the Commission power to remove as to all territory, without regional restriction.

The holding of the majority is not only contrary to the uncontradicted facts in the case, that the Rio Grande route is open, but it is also contrary to law.

In the case before the Court in the *Thompson* case, there was no evidence that the Missouri Pacific ever offered through transportation over the route in question, nor was there any evidence as to any shipments having been made. The Commission's order was wholly without evidentiary support under the accepted tests for determining the existence of a through route in accordance with the doctrine laid down by this Court in that case.

In the *Beaman* case there was evidence of only one shipment that subsequently was admitted to have been made in error.

In the case before the Court the route is open and has been open for many years. There is evidence that the route has been used, but its use is subjected to penalty of paying excessive rates and charges. The evidence in this case clearly meets all the essential requirements of the existence of a through route.

The uncontradicted evidence of through route shipments warrants the holding of the Colorado Court that through routes exist to and from points on the Union Pacific in the northwest over the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways, and beyond. The Union Pacific also contends that the Ogden gateway route is closed. The decision of this Court in the *Virginian Railway* U. S. 272, U. S. 678 (also referred to in the decision of the *Thompson* case) is in point here. In that case, it was stated that the route in question was commercially closed because the carriers had not established any joint rates and that only a combination of local rates was applicable that resulted in charges so high as to be prohibitive. The Commission there found that the combination rate was both unreasonable and discriminatory and prescribed through rates which it found was reasonable and non-discriminatory. The order was made under Section 1 and Section 3, and we contend that relief under these same sections of the Act is justified in this case without any territorial limitations.

II.

The Colorado Court Correctly Held That the Commission Erred in Limiting Its Consideration of the Case Under the Restrictive Provisions of Section 15(4) of the Act Prejudiced Its Proper Consideration of the Entire Case.

The Union Pacific beginning at page 87 of its Colorado opening brief contends that even if the Commission erred in its failure to find that through rates exist over the lines of the Rio Grande via the Ogden gateway, and even if this was an error of law it manifestly did not serve as a "restriction" or a deterrent in giving the Rio Grande relief.

If the Commission's failure to find that through routes exist, did not serve as a "restriction" or deterrent, then why was the relief granted in certain areas and denied in other areas as indicated in the fore part of this brief.

This is conclusively shown by Commissioner Lee's concurring statement in which he said:

> "The decision in this case will correct in part, a long standing unlawful rate adjustment, but expressed the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment, that on the facts shown in the record the act requires that the rates on all commodities between the points in excluded territory and Colorado common points and the points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes, that the act contemplates that there shall be no excluded territory with respect to any commodity or persons, * * * ".

Furthermore on page 88 of the Union Pacific brief there appears a statement concerning the proposed report by the Chief Examiner as follows:

> "The chief examiner in his proposed report also found, as did the Commission, that the through routes claimed by the Rio Grande were not in existence, but nevertheless proceeded to recommend that the Commission order through routes and joint rates on all commodities, because he thought the evidence proved necessity for them in the public interest. Thus, the short-haul limitation in Section 15(4) operated as no restriction whatever upon the chief examiner, nor upon the Commission to the extent that it thought the evidence proved that joint rates were necessary in the public interest."

This is definitely incorrect and conveys a completely erroneous impression of the true nature of the proposed report by Mr. Frank Mullen, Chief Examiner, who conducted all the hearings for the presentation of evidence and testimony in the proceedings before the Commission.

Nowhere throughout the thirty-two mimeographed sheets of the very comprehensive proposed report is there any statement to the effect that the Examiner either found "that through routes were not in existence" or made any recommendation that the Commission so find.

On the contrary, the existence of the routes is specifically recognized in the 1st of 7 recommended findings, viz:

> "1. That the routes via Salt Lake City or Ogden in connection with the Rio Grande over which joint rates are sought in this proceeding are not unreasonably long or unduly circuitous."

The second recommended finding relates to the establishment of "joint rates" over such routes:

> "2. That the failure and refusal of the Union Pacific and the other defendants, to the extent they participate in the traffic, to join with the Rio Grande in joint rates over such routes from and to the Northwest territory, described herein, via Salt Lake City or Ogden in connection with the Rio Grande to and from Utah common points and to and from Colorado common points and points east thereof, result in undue disadvantage and undue prejudice to shippers and receivers of freight and to the localities and districts in Utah and Colorado served by the Rio Grande."

Since the question of whether or not through routes exist is the most vital issue in this proceeding we believe it appropriate to quote at least two more of the recommended findings, viz:

> "4. That it is necessary and desirable in the public interest that such joint rates over through routes over the Union Pacific and its connecting railroads, defendants herein, via Salt Lake City or Ogden in connection with the Rio Grande from and to points in Utah north of Ogden, Idaho, Montana, Oregon and Washington to and from Utah common points and to and from Colorado common points and points east thereof should be established and maintained." and

"6. That such joint rates over said routes are needed to provide adequate and more efficient and more economic transportation to the shippers and receivers of freight and localities and districts in the Northwest in order that they may ship over those routes at the joint rates, livestock, agricultural commodities, lumber and lumber products, and other commodities, to points on the Rio Grande under marketing and transit arrangements with right to reship beyond to Colorado common points and points east thereof."

It should be observed that the majority decision of the Commission did not follow the "existing route," concept indicated so clearly by the Chief Examiner in his proposed report, but adopted the "closed route" concept that inevitably brought the restrictive provisions of Section 15(4) into play with the result that the relief granted was accordingly restricted.

CONCLUSION

For the reasons stated the Colorado Court was correct in holding that the Commission erred as a matter of law in failing to hold in the face of uncontradicted evidence that through routes exist over the Rio Grande via the Ogden gateway in connection with the Union Pacific, and

Furthermore the Colorado Court correctly held that the Commission erred in limiting its consideration of the case under the restrictive provisions of Section 15(4) of the I. C. Act prejudiced its proper consideration of the entire case.

Wherefore the decree and judgment of the United States District Court of Colorado should be affirmed and the cause remanded to the Interstate Commerce Commission for proceedings in conformity with the opinion of that Court.

Respectfully submitted,

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April 12, 1956.

PROOF OF SERVICE.

I, Lee J. Quasey, Counsel of record for intervening appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of April, 1956, I served, on behalf of the intervening appellees herein named copies of the foregoing reply brief to the opening briefs of appellants in Nos. 332, 333 and 334, including the several parties, shown below, by mailing a copy in a duly addressed envelope with air mail postage prepaid as follows:

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Nos. 332, 333 and 334

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., *Appellants*,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., *Appellants*

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

Appeals From The United States District Court for The District of Colorado

---

BRIEF OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION, APPELLEE

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Appeals From The United States District Court for The District of Colorado

---

BRIEF OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION, APPELLEE

STATEMENT

The American Short Line Railroad Association, hereinafter referred to as the Association, intervened in support

of The Denver and Rio Grande Western Railroad, complainant before the Interstate Commerce Commission in Docket 30297—*Denver and Rio Grande Western Railroad Co.* v. *Union Pacific Railroad Co.*, the administrative proceeding giving rise to this litigation. The Association also intervened in support of the Rio Grande in the judicial review proceedings in the United States District Court for the District of Colorado [1] from which decision appeals have been taken by certain state commissions (No. 332), the Union Pacific Railroad Co. (No. 333), the United States, and the Interstate Commerce Commission (No. 334), in the October term 1955 of this Court.

The Association is a voluntary unincorporated association with a present membership of 289 common carriers by railroad of which all but three (3) are engaged in interstate and foreign commerce and therefore subject to the Interstate Commerce Act and related acts, and to the jurisdiction of the Interstate Commerce Commission. The Association, its members in general and many of its members in particular are vitally interested in the issues involved in these appeals with respect to the existence or establishment of through routes and rates and fair and reasonable divisions of revenues with particular reference to the establishment and maintenance of competitive joint through rates. The questions presented in these appeals are substantial and of public importance and their determination will have a vital effect on the affairs of practically all of the members of this Association.

In conformity with the spirit of the order of consolidation of this Court entered October 24, 1955, the Rio Grande, which is an appellant in No. 117 in this term and an appellee in Nos. 332, 333 and 334, filed on March 15, 1956 a consolidated opening brief covering the series of appeals from the decisions of the District Court of Colorado and the

[1] *The Denver and Rio Grande Railroad Co.* v. *United States*, 131 F. Supp. 372.

District Court of Nebraska[2] concerning the validity of the order entered by the Commission in the above-described proceeding.[3] The Rio Grande brief sets forth the appropriate recitals of jurisdiction and questions presented, and the Association adopts as its own the views expressed therein.

In Nos. 332, 333 and 334, appellants urge this Court to reverse the judgment of the Colorado court primarily on the basis that the court erred in finding as a matter of law that through routes exist between the points in dispute in connection with the Rio Grande, and the court's further conclusion that the Commission's failure to so find was erroneous and substantially prejudiced its disposition of the entire proceeding.

It is the view of the Association that the issue relating to the existence or non-existence of through routes represents the core of the controversy. Determination of this issue upon the facts of record in the light of pertinent judicial precedents will necessarily represent an important interpretation of applicable provisions of the Interstate Commerce Act and establish a substantial precedent for continued application by the Commission in its disposition of similar controversies. Inasmuch as members of this Association participate in countless through routes throughout the country and it is to be expected that a number of such railroads will be involved in future controversies concerning through routes and their establishment, it is the intention of the Association to present in this brief its views as to the merits of contentions advanced by the appellants regarding this key issue.

SUMMARY OF ARGUMENT

I

The opinion of the Colorado court sets forth substantial findings to support its conclusion as a matter of law that

[2] *Union Pacific R. R.* v. *United States*, 132 F. Supp. 72.
[3] 287 I.C.C. 611.

through routes exist between the points involved, and its further finding that Commission's failure to so find substantially prejudiced the entire proceeding.

II

Contentions advanced by the Union Pacific to show the invalidity of this conclusion by the Colorado court attempt to support the erroneous theory that cancelation of joint rates "closed" the through routes, despite admissions of record that such routes are now open and available for through service at through combination rates. In substance the untenable position of the Union Pacific appears to be that routes are not through routes if increased rates applying thereon cause a decrease in the volume of traffic moved in through service. The Union Pacific has not legally and factually closed the routes to through service although the Interstate Commerce Act (sections 6, 15(3) and 15(7)) authorizes, subject to certain safeguards, a carrier to do so. The *Thompson* and *Great Northern* cases and authorities therein cited although relied upon by the Union Pacific, clearly support a finding that through routes exist.

III

Contentions advanced by the government and other appellents reiterating contentions similar to those of the Union Pacific, and urging others of equally doubtful substance in support of the so-called "majority" report of five of the ten participating members of the Interstate Commerce Commission, disclose that the Commission's failure to find that through routes existed resulted from a confusion of its power to determine this question, separate and apart from its further authority and duty to determine under section 15(3) of the Act to what extent joint competitive through rates should be established. The Commission's procedure and conclusion are contrary to the Court's ruling in the *Great Northern* case.

ARGUMENT

The opinion of the Colorado court (R. 279) includes the following substantial findings with respect to the existence of through routes:

> (1) The Commission recognized that the first question for its determination was "whether or not the present routes by way of the Ogden Gateway constitute 'through routes' as that term is used in section 15 (3) and (4) of the Act." *Only five of the ten participating members of the Commission joined in the report and order of the Commission*, wherein it was first determined that through routes were not in existence over the Rio Grande in connection with the Union Pacific through the Ogden Gateway. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment of such through routes and joint rates over them must be grounded on findings as specified in § 15 (3) and (4). (R. 286-287)
>
> (2) We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden Gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding. (R. 287-288)

The Colorado court in summarizing the "undisputed evidence bearing upon the crucial question of existing through routes," found—

> (1) That in 1897 the Union Pacific established joint through competitive rates with the Rio Grande to and from points in the northwest area through Ogden and

that while these rates were canceled by the Union Pacific in the period between 1906 and 1912, the through routes themselves were not canceled. (R. 288)

(2) That counsel for the Union Pacific and its principal traffic witness, respectively expressed the opinion and testified that the cancelation of the joint rates did not cancel the through routes, and that shippers at the present time are free to route traffic in through service via the Rio Grande if they are willing to pay the higher rates resulting by a combination of locals. The traffic witness further testified that some *joint* through rates are now published by the Union Pacific for application over the routes involved in the transportation of sheep and goats from the northwest area involved via the Ogden Gateway and the Rio Grande to points on the Missouri River and east thereof. (R. 288)

(3) That the evidence discloses the Rio Grande route has been used in the continuous movement of traffic to and from the closed door area at through combination rates without objection of the Union Pacific or participating railroads. The Colorado court then proceeded to describe the nature and volume of the through transportation service performed over the routes involved in the year 1948, and found that such movements were substantially similar for the years prior to 1948 and subsequent thereto until the commencement of hearings before the Commission in 1949. The Colorado court further noted that in the period November 1942 to August 1945 a number of shipments were diverted from other routes between the points involved to the Rio Grande route under orders issued by the Commission. (R. 288-289)

(4) After proceeding to evaluate and discuss the decision of the Commission and its purported reliance upon the *Thompson* case[4] as well as contentions ad-

[4] *Thompson* v. *United States*, 343 U.S. 549.

> vanced by the Union Pacific and railroads intervening in its support, the Colorado court concluded that the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific and the northwest area and Rio Grande via Ogden Gateway to and from Colorado common points, the Missouri River gateways and beyond. (R. 292)

It is the position of the Association that the opinion of the Colorado court is based on substantial evidence of record adequately described therein, and is in accord with prior rulings by this Court relating to the question of through routes. It is submitted that the contentions of the appellants fail to correctly interpret and apply pertinent prior decisions by this Court and do not afford a basis for reversal of the decision of the Colorado court.

Contentions Advanced by the Union Pacific (No. 333)

The opening brief submitted on behalf of the Union Pacific contains in its pages 53 to 82 the principal grounds urged by that appellant to show that the Colorado court erred in deciding that the Commission's finding that "there are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned" was a finding not supported by substantial evidence and erroneous as a matter of law.

In substance the Union Pacific attempts to have this Court hold that a route is "closed"—consequently in *its* opinion not a through route—if there are no *joint* through rates applicable thereon and if the volume of traffic moved thereover is small as compared to movements over other existing routes as to which lower joint rates apply and over which the volume of traffic is far greater. Admittedly such a statement of its position would not be accepted by the Union Pacific, yet analysis of the contentions advanced

warrant such an appraisal.

In paragraph numbered 1 (UP Br. p. 62), being the first of a series of numbered paragraphs in which the Union Pacific *theorizes* as to the holding of the Colorado court and the significance of its conclusions, the Union Pacific advances the view that if the Colorado court was correct in its conclusion that through routes via the Rio Grande now exist because the routes did exist from 1897 to 1912 and were not canceled by the cancellation of joint rates applying thereon, it was "unnecessary and irrelevant" for the Colorado court to discuss the movement of transportation over such routes. Whereas we can agree with the Union Pacific that once it is apparent that through routes have been established and remain uncanceled it is unnecessary to show that there have been through movements thereover[*], yet this additional finding by the Colorado court based on evidence of record cannot be held to diminish the weight of the basic finding. In our opinion the additional findings by the Colorado court simply disclose its careful consideration of the *Thompson* case wherein this Court—faced with a Commission decision containing its bare conclusion, unsupported by any findings as to prior establishment of routes or movements thereon, or as to a "holding out" of through service by the carriers involved—held that the lack of evidence showing use of the route negatived its existence. In the instant record the Colorado court not only had before it the fact of prior establishment and non-cancelation of the routes, in addition to admissions by Union Pacific officials of their present existence and availability for through service, but evidence of their use by shippers, attesting to recognition—the "holding out"—

[*] *Great Northern Ry.* v. *United States*, 81 F. Supp. 921, affirmed *per curiam* 336 U.S. 933, wherein the court in finding that the Commission had in a prior proceeding ordered the establishment of through routes and rates, but which the Great Northern claimed were "commercially closed" due to the absence of joint rates permitting transit privileges, had no hesitancy in sustaining the Commission's finding that through routes existed despite the absence of through movements thereover due to the higher combination rates published by the Great Northern.

by the carriers involved. It was appropriate for the Colorado court to make complete and adequate findings on all the evidence.

At a later point in the same numbered paragraph the Union Pacific by reference to cases decided by the Commission in the period 1913-1915, undertakes to support the allegation that it is indisputable that the Commission and every one concerned regarded the action of the Union Pacific (in canceling joint rates) as "closing" the through routes and gateways in connection with the Rio Grande. The Union Pacific obviously weakens this point by its further statement that the routes were thus "closed", even though the routes then and now are available for use by shippers who are willing to pay high combination rates.

This argument of the Union Pacific, though difficult to follow, appears to suggest that a carrier simply by adjustment of the *level* of his rates can accomplish the legal and factual closing of a through route. In order for the statement to be comprehensible, it must be assumed that the Union Pacific is using the term "closed" as synonymous to "cancelation." It is true that increased rates may make a route commercially unattractive or uneconomical for a shipper, and perhaps cause a decrease in the volume of traffic over such a route. Such a result could occur if any railroad and its connections were to substantially increase joint rates over through routes between points as to which other transportation at lower cost was available. To argue that the route is being canceled or even "closed," in any significant sense obviously cannot be supported. It is equally clear that the action of the Union Pacific in canceling joint through rates with the Rio Grande and publishing higher local rates for through transportation, should be given no greater significance. The argument here advanced by the Union Pacific simply amounts to a factual statement that shippers will not ordinarily pay high rates if lower rates are available. The fact that shippers are being "commercially" deterred from fully utilizing the through routes in

connection with the Rio Grande, does not permit the conclusion that such through routes are canceled, are nonexistent, or are *in fact* closed.[6]

The cases cited at this point by the Union Pacific give no real support for the point that cancelation of joint rates here involved also canceled the through routes over which they applied.[6] An accurate appraisal of the cases cited will show that through routes or joint rates, either or both may, when justified, be canceled by a carrier through the use of *appropriate* tariff publications. We therefore agree with that part of the Union Pacific's statement (UP Br. p. 66) that tariff publications can be efficacious to cancel gateways and through routes, as we discuss in more detail at a later point, when properly descriptive of the cancelation being effected and consistently adhered to.

It is also true that the absence of competitive joint rates is what causes substantial injury to the Rio Grande and its supporting shippers. The routes are available, Union Pacific admits that, but the through rates resulting from the combination of locals published by the Union Pacific and the Rio Grande and their connections for through service are higher than the joint rates published by the Union Pacific with other connections for movements of similar traffic. The relief sought is therefore clear—the establishment of competitive joint rates, which the Commission has the authority to do without recourse to Section 15 (4) where there are existing through routes.[7]

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[6] Such a conclusion is contrary to, *Cancelation of Rates and Routes via Short Lines*, 245 I.C.C. 183, 185; *Quanah, A. & P.* v. *Atchison, T. & S. F. Ry. Co.*, 226 I.C.C. 201, 208; *Routing via Quanah, A. & P. Ry. Co.*, 229 I.C.C. 137, 139; sustained in *Thompson* v. *U. S.*, 20 F. Supp. 827; *Atchison, T. & S. F. Ry Co.* v. *United States*, 275 U.S. 768; and *Virginian Ry. Co.* v. *United States*, 272 U.S. 658.

[7] Section 15 (3) provides in substance that "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish . . . joint rates, fares, or charges, applicable to the transportation of passengers, or property by carriers subject to this part, . . . or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided. . . ."

In its paragraph 2 (UP Br. p. 69) the Union Pacific seeks to minimize the significance of its admissions of record as to its recognition and use of the involved routes for through service by misuse of the *Thompson* case, *supra*. It is clear that the Court there cannot be understood to have held that routes are not through routes when they are admitted to be open for through shipments at regularly published local rates recognized and applied by the carriers participating therein and over which a volume of representative through shipments has moved. As we discuss more fully below the further contention in this paragraph that shippers have the right to route traffic "over any series of connecting railroads wherever physical interchange is possible" cannot be accepted on face value, in consideration of the fact that there is nothing in the Act that requires a carrier to accept any traffic as to which it has no published rate (49 USC 6). It is equally true that a carrier cannot be required to participate in through transportation where local rates are restricted against shipments in through transportation. Cf. *Southern Ry.* v. *Reid*, 222 U.S. 424.

In its paragraph 3 (UP Br. p. 70) the Union Pacific seeks to have this Court hold that there are no through routes in connection with the Rio Grande despite the fact that it admits it has in conjunction with the Rio Grande published joint through rates over such routes for the transportation of sheep and goats. No help for its position is afforded by the reference to the *Adrian Grain* case which when properly analyzed is simply descriptive of the Commission's power under § 15(4) of the Act. The Court might well feel constrained to inquire at this point as to what further proof of the existence of through routes is required when it is shown that as to specific traffic there are through routes admittedly open at *joint through rates* published by the Union Pacific, the Rio Grande and other connections.

In its paragraphs numbered 4 and 5 (UP Br. pp. 70, 72), the Union Pacific attempts to underplay the significance

of the through shipments it has accepted for transportation over its routes with the Rio Grande. The views there expressed lend clear support for our earlier appraisal of its position that in reality the Union Pacific is seeking to have the Court hold that routes are not through routes even though there are applicable thereon through rates by combination which have been and are now recognized and applied by the Union Pacific in the movement of a representative number of shipments. The fact that at the same time there are other through routes enjoying a substantially greater volume of traffic due to lower joint through rates does not reveal anything more than the fact that most of the traffic will follow the lower rates. No support from the *Thompson* case is afforded the Union Pacific here, because as there stated no traffic moved over the route involved. The fact that traffic has moved over the routes involved here clearly suggests that if lower combination rates applied the volume would be more comparable to that on the other routes.

In its paragraph numbered 6 (UP Br. p. 74) the Union Pacific suggests that the cancelation of joint rates is the only lawful way it could show that the routes were "closed." This contention of the Union Pacific fails completely to reveal any understanding or knowledge of the numerous findings by this Court and the Commission that the initial power to establish rates lies with the carrier, *Georgia* v. *Penna. R. Co.*, 324 U.S. 438, 459. Section 6 of the Interstate Commerce Act requires a carrier to publish rates applicable to the type of service it undertakes or holds itself out to perform. Sections 3 (4) and 1 (4) require carriers to establish *reasonable* interchange facilities and *reasonable* through routes with other rail carriers. Clearly it is within the contemplation of the provisions of such sections that all possible interchange facilities and through routes need not be established by rail carriers, and the Commission in full recognition of this interpretation has sustained actions of carriers in failing to provide interchange facilities and

interchange traffic when the effect thereof would be to permit the performance of competitive through transportation short-hauling the establishing carrier. *Northwest Metal Products* v. *C. M. St. P. R. Co.*, 272 I.C.C. 401, 406 (1948); *Sheboygan* v. *C. & N. W. Ry. Co.*, 227 I.C.C. 472, 478 (1938).

Thus it is apparent that the Union Pacific is in error when it seeks to suggest that it is powerless to prevent or avoid the performance of through transportation service which it conceives to be unnecessary in the public interest. The Union Pacific appears equally unaware of the numerous existing tariffs whereby rail carriers have restricted through transportation over certain routes. At this point we do not intend to admit that such action by the Union Pacific would be considered reasonable in consideration of the public interest, (see sections 15 (6) and 15 (7) of the Act) but we do suggest that if the Union Pacific clearly intended to close the routes via the Rio Grande to the performance of through transportation rather than enjoy the increased revenue from the high local rates, it could have sought to publish appropriate restrictions in its local tariffs, and consistent therewith refused to accept through shipments.

Union Pacific's reference to the provisions of Section 20 (11) of the Act are equally irrelevant. This section fixing the liability of carriers in the performance of rail transportation cannot be construed to require any carrier to perform a service for which no tariff has been published. *Boston & Maine* v. *Hooker*, 233 U.S. 97; *Southern Railway* v. *Reid*, 222 U.S. 424; *Cleveland, etc. R. Co.* v. *Hays*, (Ind. 1914) 104 N.E. 581; *Hunter* v. *American Ry. Express Co.* (Mo. App. 1928) 4 S.W. 2d 847; *Cook* v. *Northern Pac. Ry. Co.*, 203 P. 512. The Commission has held that where through routes do exist, Section 20 (11) requires the issuance of through bills of lading. *Seatrain Lines, Inc.* v. *A. C. & Y. Ry. Co.*, 226 I.C.C. 7, 31 (1938). It follows therefore that Union Pacific is not required to issue through bills of lading

if its tariffs restrict the use of any route to through carriage.

Union Pacific's remaining arguments in its paragraphs numbered 7-9 (UP Br. pp. 76-82), constitute a further effort to show that the opinion of the Colorado court is in other respects contrary to the Court's ruling in the *Thompson* case. Earlier in this brief we have set forth the substantive findings of the Colorado court in support of its conclusion as a matter of law that through routes are legally and factually existent. The significance of the *Thompson* case is further disclosed by the Court's opinion in the *Great Northern*[8] case, decided the same day. In that case the Court had no difficulty in finding that "the through routes in question already exist since the carriers concerned have continuously provided through service over the same through routes at a combination of separately established rates." (pp. 563-564) Such a finding should be made in the instant case.

In the *Great Northern* case the Commission was requested to and did establish joint rates for application over the routes involved. Similar relief is requested by the Rio Grande here. There also the Court held that (pp. 572-573).

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this Court expressly has approved the Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates."

The finding by the Colorado court is consistent with this ruling.

And finally the Court held that (pp. 573-574)

> "Whatever theories may be advanced as to determining the existence of a through route *where no traffic*

[8] *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562.

passes over the route" citing the *Thompson* case "it is not questioned that through routes over the Montana Western and appellee's lines long have been in existence." (Emphasis supplied)

It is clear therefore that the Court in deciding the *Great Northern* case treated the *Thompson* case as one based on particular facts—a case involving an alleged route as to which no joint rates had ever been applicable, and over which no traffic moved. On the other hand the facts establishing a through route in the *Great Northern* case are strikingly similar to those in the instant case, but we suggest not nearly so conclusive. Here in addition to the combination rates applicable to a variety of commodities, *joint rates* now exist over the routes involved for the transportation of sheep and goats, and joint rates earlier existed with respect to other commodities. In refutation, the Union Pacific can only rely on the fact that its cancelation of the earlier joint rates—but not the routes—simply reduced the volume of transportation over the routes involved.

Contentions advanced by Government Appellants (No. 334)

The brief submitted on behalf of the United States and the Commission, contains a realistic summary of the law bearing on the question of the existence of through routes —a question which is there characterized as a ". . . vexing problem—one which has occupied the attention of the Congress, the Commission, and the courts for a good many years. . . ." (Govt. Br. p. 60.)

Although seemingly contrary to the views of the Union Pacific the government appellants recognize that the Court's opinion in the *Thompson* case involved a case ". . . concededly . . . distinguishable on its facts" (Govt. Br. pp. 49-50), yet the government seeks to urge that a similar conclusion should here be reached.

We differ also with the rationale of the conclusions reached by the government. At one point it is suggested

that the Commission's judgment on the question "largely factual in nature," of the existence of through routes, "is plainly entitled to great weight and should not be disturbed unless found to be arbitrary." Whether or not in respect to this type of question such a suggestion is usually pertinent, it should not be accepted in the instant case, where as found by the Colorado court *only five of the ten* Commissioners participating in the decision held that through routes did not exist.[9]

At pages 69-70 of their brief government appellants in stating that the Union Pacific never solicited shipments for movement over the Rio Grande, suggest that the record shows the shipments it accepted were so routed through "ignorance or inadvertance of shippers or originating carriers." In reply to this statement it is appropriate to suggest that if the course of business of the Union Pacific was thus so unascertainable, it cannot be understood as having legally and factually closed the route to through shipments. The existence of published rates unrestricted as to through transportation, clearly made the routes available to all the public. In the same vein, if the Union Pacific's "whole course of conduct . . . so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic," (Gov't. Br. p. 73)—why, it is pertinent to ask, did the Union Pacific fail to legally and factually close the through routes, and paradoxically publish rates unrestricted as to through transportation, and accept shipments over such routes?

The government further suggests that the "holding-out" by the Union Pacific to perform through transportation of sheep and goats by its publication of *joint through rates* for their transportation, does not warrant a holding-out to perform through transportation of other commodities. (Gov't. Br. pp. 73-74). We suggest that the correct answer is that the "holding-out" is clearly evident by the showing

[9] See opening brief for the Rio Grande pp. 50-52.

of acceptance of through shipments. The willingness to move sheep and goats at competitive joint through rates, and other commodities at through combination rates clearly proves the basic issue that through routes exist. The disinclination of the Union Pacific to move most commodities on rates equal to those applying over its other routes cannot be used as the sole criteria to support a conclusion that such routes are not in existence.

Much of the argument in the government brief is of course directed to supporting the theories advanced by the Commission in the report subscribed to by five of the ten participating Commissioners. These five Commissioners must be understood as supporting the theory that a finding that through routes exist, was tantamount to short hauling the Union Pacific. Such a view is clearly contrary to the holding of this Court in the *Great Northern* case, where it is said "... the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes." (343 U.S. 573) Thus the mere finding that through routes existed, as was alleged by the Rio Grande in its complaint to the Commission, would not grant the relief it or interested shippers seek. This is no more clearly shown than by the fact that routes are admitted to be open and available to shippers who are willing to pay the higher charges applicable. Obviously, therefore, it is the level of rates which is the impediment to full utilization of the routes. To what degree this impediment is to be removed is a question which remains unanswered by the Commission, and which the Colorado court's judgment requires the Commission to determine free of the limitations of section 15 (4).

Brief reference would seem appropriate to the basic criteria available for disposition of this question, as relied on by the Court in the two much discussed recent decisions in the *Thompson* and *Great Northern* cases. In *Through*

Routes and Through Rates, 12 I.C.C. 163, 167, the Commission said:

> "Therefore, it is settled that, whatever other facts or incidents of a shipment may serve to prove the existence of a through route, a through bill of lading is, as to the carriers recognizing it, *conclusive evidence* of the existence of such through route." (Emphasis supplied)

In the light of this standard, the acceptance by the Union Pacific of through shipments on through bills of lading becomes highly significant.

At page 165 of the report in the above-cited proceeding the Commission said:

> "A joint rate is simply a through rate, every part of which has been made by express agreement between the carriers making the through route. *The joint rate is a rate of a through route*, but it not the only through rate recognized by the Act and the decisions. (Emphasis supplied)

In the light of this statement the "holding-out" of the Union Pacific to accept through shipments of sheep and goats at *joint rates* is equally highly significant.

We submit these facts are critical in the determination of this question. The court in the *Great Northern* and *Thompson* cases reiterated the substance of the Commission's conclusions in its *Through Routes and Through Rates* proceeding, supra, stating—

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service."

The government appellants like other defendants find themselves in the position of contending that the *volume* of movements rather than the *fact* of such movements, rep-

resents the conclusive element in determining whether through routes exist.

This position is practically a restatement of the position which the Commission was ultimately forced to take when it concluded that the routes are *legally existent but commercially closed*. What is the legal significance of such a conclusion as affecting the determination of the issue relating to the *existence* of through routes?

To attribute it any legal significance, is to assume that the Commission believed that if it made a finding that the routes were open and available, it also believed that this alone would make such routes commercially competitive with other routes. Although this is clearly erroneous, because as the Court said in the *Great Northern* case, "the establishment of joint rates is an act separate and distinct from the establishment of through routes," and there thus remained the further question whether the Commission would establish competitive joint rates for all or any commodities, it would appear from other statements in the "majority" report of the Commission that such was its thinking. Pursuing this faulty reasoning the Commission stated that it would be error to hold that evidence of a few shipments could justify a finding of through routes because

> "Any other holding would constitute an open invitation for any shipper to set aside the provisions of section 15(3) and (4) of the Act simply by preliminarily making a shipment or two over a route sought to be opened commercially. . . ." (R. p. 65)

Whether or not the acceptance by a carrier of a few shipments over a route, clearly not the situation here, would justify a finding of the existence of a through route, it is apparent that such a finding would not as the Commission suggests "set aside the provisions of section 15 (3)" of the Act, and there would still remain, as here, the question whether the rates applicable should be modified.

The finding by the Court of existing through routes was crucial to its ultimate disposition of the *Great Northern* case, and it is equally important here. The further question as to what extent the through routes shall be made available to shippers at *competitive joint rates* is the question which when answered will determine to what degree such routes are to be competitive with other existing routes. This question the Commission did not reach because, by the above-described line of faulty reasoning it believed that the provisions of section 15 (4) precluded it from making such a finding.

Consequently the determination of the existence of through routes should have been made without consideration of the provisions of section 15 (4), but on the basis of the criteria clearly set forth in the *Thompson* and *Great Northern* cases and other authorities therein cited. The Commission obviously erroneously confused its power to find through routes with that relating to the establishment of joint rates.

Thus there was complete support for the finding by the Colorado court that the failure of the Commission to find free of the limitations of section 15 (4), that through routes existed, prejudiced the entire proceeding.

Other contentions advanced by the government and other appellants bearing on the issue of through routes, we submit are adequately answered by the foregoing comments and by the briefs submitted by the Rio Grande, and further discussion here is unnecessary.

CONCLUSION

For the reasons stated here and in the briefs submitted by the Rio Grande, The American Short Line Railroad Association respectfully submits that the decision of the United States District Court for the District of Colorado, involved in appeals Nos. 332, 333 and 334 should be affirmed,

with directions to the Interstate Commerce Commission that it proceed to a determination of the issues on the basis that through routes via the Ogden gateway are in existence, and that the Rio Grande is entitled to have the evidence considered and the case decided by the Commission free of the limitations of Section 15 (4).

Respectfully submitted,

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No. 332
Consolidated With No. 117, 118, 119, 333 and 334

Supreme Court of the United States

OCTOBER TERM, 1955

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 117, No. 118, No. 119

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

UNION PACIFIC RAILROAD COMPANY, ET AL, Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, Appellants,

vs.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 332, No. 333, No. 334

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL, Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

BRIEF OF THE PUBLIC SERVICE COMMISSION OF UTAH, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, ET AL, INTERVENING APPELLEES IN CASES No. 332, 333, and 334.

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rates and charges via the route of the Rio Grande, through its Colorado and Utah gateways, between (a.) points on the Union Pacific Railroad and its connections north and west of Ogden, and in Idaho, Montana, Oregon, Washington and British Columbia, and, (b.) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, and points east thereof, and between Utah common points, such as Salt Lake City, Ogden and Provo, Utah, and the northwest territory served by the Union Pacific Railroad and its connections.

The intervening plaintiffs herein participated in the proceedings before the Commission as intervenors, or as interested parties, and testified as to the need for joint rates as requested by the Complaint of the Rio Grande.

The hearings were had in 1949 and 1950 at Salt Lake City, Boise, Idaho, and Cheyenne, Wyoming, before an examiner of the Interstate Commerce Commission. In December, 1950, the examiner submitted his proposed report and order, and found that the Ogden gateway should be opened for all traffic, both East and West, originating or terminating in the so-called "Closed Door Territory." Among other things the examiner's report found:

> "The record clearly shows that shippers and receivers of freight in localities and districts in Colorado and in Utah depending for railroad service solely upon the Rio Grande are unduly handicapped by the lack of such transportation arrangements and facilities, at joint through rates, which have become of great importance in modern merchandising. Establishment of joint through rates from and to points in the Northwest on the Union Pacific and its connections via Salt Lake City or Ogden in connection with the Rio Grande to and from Utah common points and to and from Colorado common points and points east thereof, are necessary and desirable in the public interest to permit communities located only upon the Rio Grande

to be adequately served by that railroad as part of the national transportation system."

Subsequently the Commission set this matter for oral argument after the submission of briefs by all parties. Argument was had, and the case was then re-argued approximately a year later. On January 12, 1953, the Commission in a divided opinion handed down its order relative to the issues being adjudicated herein, both the Rio Grande and the Union Pacific and their intervenors appealed this decision of the Commission to statutory three-man courts in Nebraska and Colorado.

Intervenors, in supporting the Rio Grande, did not participate in the Nebraska case, but did appear, submit briefs and argue the matter in the Colorado case.[3]

QUESTIONS PRESENTED

1. Whether the Colorado Court erred in setting aside the order of the Interstate Commerce Commission on the grounds that the Commission erred as a matter of law in failing to find that through routes were already in existence and, therefore, applying an improper statutory standard in determining whether or not competitive joint rates should be prescribed as to all commodities moving over the Rio Grande and through the Ogden Gateway.

STATUTES INVOLVED

These appeals involve the following statutes:

The Interstate Commerce Act, Title 49 U.S.C., particularly the declaration of National Transportation Policy (preceding Section 1), and Sections 1(4), 1(5), 1(15), 3(1), 3(4), 6(1), 13(1), 15(1), 15(3), 15(4), and 15(8).

SUMMARY OF ARGUMENT

The statutory declaration of national transportation policy, (U.S. Code, Title 49) as set out by the Congress of the

United States, provides among other things that there shall be "... fair and impartial regulation of all modes of transportation, subject to the provisions of this Act (Chapters 1, 8, 12 and 13 of this Title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service, and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices; . . ."

Section 1(4)—Title 49

"It shall be the duty of every common carrier, subject to this chapter, to provide and furnish transportation upon reasonable requests therefor, and to establish reasonable through routes with such carriers, and just and reasonable rates, fares, and charges and classifications applicable thereto; . . ."

The intervening parties herein seek through this case to obtain the transportation services which they feel they are entitled to as a matter of right, which right has been enunciated and promulgated by the Congress of the United States.

ARGUMENT

(A) The Colorado Case

The Colorado case involves the question of whether the Colorado Court was correct when it found that the Interstate Commerce Commission, in its majority opinion, did not properly apply the law to the facts as demonstrated by the record. This court in *Shield v. Utah, Idaho, Central Railway Company*, 305 U.S. 177, through Justice Holmes, speaking for the Court, set out the test, which must be followed in matters appealed from the Interstate Commerce Commission. In that case, he said:

> "The condition which Congress imposed was that the Commission should make its determination after

hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. Id. That question must be determined upon the evidence produced before the Commission."

The Colorado Court concluded that the Commission's majority opinion misapplied the law as laid down in the case of *Thompson v. United States*, 343 U.S. 549, 556, 72 Supreme Court 978, or misapplied the facts as applicable to the law enunciated by the Thompson case. The Colorado Court said:

> "'We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding." *Denver and Rio Grande Western R. R. Company v. United States*, 131 Federal Supp. 372, see 379.

The Colorado Court in applying the facts as disclosed by the record, to the applicable law, found that through routes do exist between the Rio Grande and the Union Pacific at Ogden. This fact was shown by the statements of counsel and witnesses for the Union Pacific, as well as by the commodities which were shipped over the through route. The Colorado Court adopted the following test in determining this fact:

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves

out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." *Rio Grande Western R. R. Company v. United States*, 131 Federal Supp. 378.

To substantiate the application of this test by the Colorado Court, we wish to point out to this Court the direct testimony of one witness at the original hearing in dealing with the commodities shipped over the through route, which the Colorado Court found in existence.

Testimony of Herbert P. Heidel, of the Lincoln Packing Division of the American Stores:

"Q. There is a joint through rate published by the Union Pacific, and applicable by the Union Pacific, to Denver, or through Denver, and thence via any one of the three railroads that operate from Denver to Pueblo, is it not?

"A. That is right.

"Q. Then there are combination rates via Ogden, Utah, if the lambs move Union Pacific to Ogden, and then Denver and Rio Grande to Pueblo?

"A. That is right.

"Q. Which of those routes have you been using in the past years?

"A. In the past year, we used the rate from Ogden direct to Pueblo.

"Q. Does that make a higher per car charge than if you used the Union Pacific through Denver to Pueblo?

"A. It does.

"Q. Do you have any rough idea how much that would average per car?

"A. It averages about $70.00 to $80.00, I would say roughly, depending on the tonnage of the car handled.

"Q. Why do you use the Rio Grande route in view of that extra charge?

"A. Our experience in the past years indicated that we would be able to get delivery of the lambs more rapidly, and thus suffer less shrink, by using the D&RG from Ogden to Pueblo direct.

"Q. Is that because of the necessity of stopping the cars oftener when they move via Union Pacific for feed, then when they move via Ogden and the Rio Grande?

"A. If we move Ogden and the Rio Grande, we do not have to stop to feed between Ogden and Pueblo, that is right.

"Q. What happens if you move via the Union Pacific?

"A. With very few exceptions, we at least have to feed at Denver.

"Q. Do you buy these lambs on the Ogden market?

"A. A good portion of them, yes, sir." (R. 1 P. 412, 416.)

This direct testimony, we feel, is basic and certainly takes this case out from under the rule in the Thompson case, which the Interstate Commerce Commission misapplied in their order of January 12, 1953:

(B) Arbitrary Nature of Commission Order

The Commission's order is as follows:

"That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads,

from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, at Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

This order indicates a lack of comprehension of the essential issues, or a compromise as to what the record disclosed when the Commissioners voted on this issue, because the commodities which the Commission did order the Union Pacific to file joint through rates on, are of such a divergent nature that they give rise to the suspicion that an illogical approach was made to the problem.

For example, a classification of livestock could be reasonable, a classification of fresh fruits and vegetables could be reasonable, frozen foods, poultry, butter and eggs, all of which commodities are of a perishable nature, would be a reasonable classification, but when the Commission, in conjunction with these perishable commodities, included dried beans, wheat and granite and marble monuments, the order becomes arbitrary and capricious.

The Interstate Commerce Commisssion is clothed with the duty and the obligation to implement the necessary administrative machinery and to protect these rights for the good of all of the shipping public and for the public interest.

The crying inequity of the Ogden situation is simply this. The Rio Grande Railroad operates generally between Denver

and Pueblo, Colorado, on the east, and Ogden, Utah, on the west. It traverses a vast segment of the state of Colorado and nearly all of the state of Utah, and in a sense parallels transcontinentally the Union Pacific to the north and the Santa Fe Railroad to the south.

Large numbers of people and many communities, local distribution points, and agricultural marketing centers are wholly dependent upon the Rio Grande for rail service; the pity being that even though the Rio Grande is ready, willing and able to do its duty for these shippers, it is precluded and prevented and estopped from rendering the type and kind of service which is essential to modern merchandising because the defendant, Union Pacific Railroad (which does not serve this territory at all), has failed and refused and continues to fail and refuse to enter into joint through rates on traffic moving over the Ogden gateway.

(C) Classification of Shippers and Needs

The intervening complainants can be classified into three groups, and by enumeration no preference for one as to the other is intended. Group one constitutes the shippers who reside north and west of Ogden, Utah, and are served by the Union Pacific Railroad. Group two consists of the shippers residing in Rio Grande territory between Ogden, Utah, on the one hand and Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, on the other hand. The third group consists of the shippers who reside south and east of the Colorado common points and are dependent upon other railroads for service, such as the Santa Fe, the Missouri Pacific, Rock Island, Colorado and Southern, and the Burlington.

Since these three groups have separate and distinct problems, we will treat them separately.

1. The requirements of agricultural shippers in the so-called "Closed Door Territory," consisting of points and places

north and west of Ogden, Utah, are such that they need—and the record amply demonstrates that they must have—rail service at joint competitive rates via the Rio Grande and its connections at the Colorado common points, in order that they may merchandise their products throughout the United States and not be excluded from any geographical section of the country.

Potatoes, fruit, livestock, wheat, beans and other commodities need to be moved from this territory.

For some unknown reason the Commission failed and refused to afford favorable consideration to lumber. This to us seems incomprehensible because the "Closed Door Territory" comprises the largest lumber producing section of the United States and there is adequate evidence in the record to demonstrate the need for lumber to move via the Rio Grande at competitive rates. The Commission's failure to include lumber was responsible for Commissioner Patterson submitting a concurring opinion relative thereto.

2. The second group consists of those people who reside along, or are served by, the Rio Grande Railroad, between Denver and Pueblo, Colorado, and Ogden, Utah. As heretofore stated, this constitutes a large segment of the geographical portions of these two states. Furthermore, it represents a territory which is rich in natural resources, abundant with agricultural production, and is today vital to the national defense of this nation.

We take the liberty to point this up because this record was originally made in 1949 and 1950. We feel that this court can take judicial notice of the fact that western Colorado and eastern Utah are the principal producers and processors of the essential ingredients of atomic or fissionable materials. Certainly this area, which is served by the Rio Grande Railroad only, should be afforded the same type and kind of transportation which the Union Pacific to the north affords to the peoples and communities which it serves.

Basically the Public Utilities Commissions of the state of Colorado and the state of Utah recognize the need for joint through rates on any and all commodities which may have occasion to move into or out of this territory, and to that end intervened in behalf of the Rio Grande Railroad in this proceeding, because they felt that the opening of the Ogden gate way would best serve the public interest, which it is their duty to protect.

3. The last or third group comprises those people who are served by connecting railroads, that is railroads which connect with the Rio Grande at Denver, Colorado Springs, Pueblo and Trinidad. These railroads are the Santa Fe, the Missouri Pacific, the Rock Island, the Burlington and Colorado and Southern Denver and Fort Worth. These railroads serve the vast area between the Colorado common points, Missouri River points, Texas points, Mississippi River points, as well as connections from Illinois. Since all of these roads have their western terminus in Colorado (except the Santa Fe, which proceeds to southern California), it seems self evident that the transportation policy of this nation should be implemented to the extent that traffic moving via any of these roads will not be dead-ended, so to speak, on the west at the Colorado common points, or that at best be penalized by being required to carry a combination of local freight rates if such traffic moves westward beyond the Colorado common points.

CONCLUSION

This case has been before the Interstate Commerce Commission and the courts of this nation since 1949.

Exhaustive hearings have been had, briefs have been written, arguments have been made on both sides. The examiner, who was the tryer of the facts, held in favor of the Rio Grande and recommended that full relief be granted to the Rio Grande. The Commission, or at least a majority thereof, misapplied the law and granted only limited relief. The two statutory courts handed down divergent opinions.

The defendant, Union Pacific, has spread a tale of woe across this whole picture during all of this time, but the basic fact remains that the shipping public, whose interest is paramount, have not been afforded the relief which they are entitled to; relief which the national transportation policy of this country decrees they should have; relief which the Interstate Commerce Commission has the power to grant. Therefor, for the foregoing reasons the judgment of the District Court of the state of Colorado should be sustained, and the case should be remanded to the Interstate Commerce Commission to make findings in conformance with its duty under the law.

Respectfully submitted,

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333, and 334

PROOF OF SERVICE

I, John R. Barry, one of counsel of record for Intervenors herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of April, 1956, I served, on behalf of the Intervenors herein, copies of the foregoing Brief of Intervening Plaintiffs on the several parties to the appeals in Nos. 332, 333, and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
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Department of Justice
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and with first-class postage prepaid to:

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On the Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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and with first-class postage prepaid to:

Ernest Porter, Esq.
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Denver 2, Colorado

4. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Henry Zarlengo, Esq.
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Denver, Colorado

5. Peter M. Lowe,
Assistant Att. General of Utah
State Capitol, Salt Lake City, Utah

6. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Alden T. Hill, Esq.
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7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

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8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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Office Supreme Court, U.S.
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No. 333

In the Supreme Court of the United States

October Term, 1955

Union Pacific Railroad Company;
Chicago and North Western Railway Company;
Chicago, St. Paul, Minneapolis & Omaha Railway Company;
Northern Pacific Railway Company;
Great Northern Railway Company;
The Atchison, Topeka and Santa Fe Railway Company;
Wabash Railroad Company,

Appellants,

v.

The Denver and Rio Grande Western Railroad Company.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

STATEMENT AS TO JURISDICTION

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Appendix C—Order of Interstate Commerce Commission, dated January 12, 1953, in Docket No. 30297, **Denver & R. G. W. R. Co. v. Union Pac. R. Co., et al.**

Appendix D—Opinion of district court.

Appendix E—Order of district court modifying certain pages of opinion.

Appendix F—Final judgment and decree.

Appendix G—Order of district court overruling and denying motion of these appellants and others for new trial.

Appendix H—Pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 1, **et seq.**

In the Supreme Court of the United States

October Term, 1955

No.————

Union Pacific Railroad Company;
Chicago and North Western Railway Company;
Chicago, St. Paul, Minneapolis & Omaha Railway Company;
Northern Pacific Railway Company;
Great Northern Railway Company;
The Atchison, Topeka and Santa Fe Railway Company;
Wabash Railroad Company,

Appellants,

v.

The Denver and Rio Grande Western Railroad Company.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15, Revised Rules of the Supreme Court of the United States (effective July 1, 1954), appellants, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, submit herewith their statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the district court entered in this case on February 14, 1955, following which that court modified its opinion and entered an order on April

22, 1955, overruling and denying motion for new trial or reargument and reconsideration.

Opinion Below

The report of the Interstate Commerce Commission is found in 287 I. C. C. 611, and is attached hereto as Appendix B. The opinion of the three-judge district court was filed January 13, 1955, and has not been reported, but is attached hereto as Appendix D. The opinion, by the court's order entered April 22, 1955, was "modified by substituting for pages 14, 29, 31, 32 and 36 thereof" rewritten pages bearing the same numbers. Copy of that order and the rewritten pages are attached hereto as Appendix E. The court made no separate findings of fact or conclusions of law.

Jurisdiction

This action was brought in the United States District Court for the District of Colorado by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") against the United States of America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul, suspend and set aside "in part" an alleged "order" issued January 12, 1953, by the Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co. et al." These appellants and the public service commissions of Washington, Oregon, Montana, Wyoming and Nebraska intervened as defendants in the district court.

The order was issued upon complaint filed with the Commission by the Rio Grande for the admitted purpose

of improving its financial condition by diverting traffic and revenues to its line from Union Pacific routes. The Rio Grande claimed that through routes via its line had "existed" many years for the traffic concerned, and that the prohibition in Section 15(4) of the Act against short-hauling existing routes did not apply. (See App. H, p. 4.) It demanded that joint rates be established via its line "the same" as joint rates maintained over shorter through routes by the Union Pacific and other defendant railroads named in the complaint for about 172,000 carloads of traffic moved annually by those railroads for more than 75 years between points in the northwest area and points in the eastern and southern parts of the country described in the order.[1] The order issued by the Commission (copy attached hereto as Appendix C) requires, among other things, that these appellants and over 200 other railroads establish through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert over its line, short-hauling the Union Pacific at least 925 miles and subjecting it and others of these appellants to large revenue losses.[2]

But the Commission did not order through routes and joint rates on about two-thirds of the traffic, and it

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1 The lines and termini of the Union Pacific and the Rio Grande (main line) are indicated on the map attached hereto as Appendix A. Figures in the oblongs on the map show the number of additional miles shipments would move via the Rio Grande compared to mileage via existing Union Pacific routes.

2 The validity of the order issued is now before this Court in Nos. 117, 118, and 119, appeals docketed May 31, 1955, from the final decree of the United States District Court for the District of Nebraska.

is the Commission's *failure to order* through routes and joint rates on the remaining two-thirds of the traffic which the Rio Grande seeks to annul and enjoin in this case. Such failure is not embraced in the order issued or in any "order" of the Commission.

Several shipper organizations, interested in obtaining financial benefit of a reduction in rates via the Rio Grande to the level of the joint rates over the shorter Union Pacific routes, intervened before the Commission and as plaintiffs in the district court.

The case presents the novel and unique situation of an admitted attempt by the Rio Grande through judicial proceedings to further enhance its financial gains by diverting to its longer line for a "bridge" haul, traffic that originates or terminates on the railroads that have the shortest, fastest and most efficient routes and lowest rates between the points at which the traffic originates and points of its destination.

Final judgment and decree of the specially constituted three-judge district court, dated February 1, 1955, was entered February 14, 1955, annulling and setting aside the Commission's alleged order "insofar as it denied and withheld relief to the plaintiff and intervening plaintiffs". On April 22, 1955, the district court entered an order in which it overruled and denied a motion of these appellants and others for new trial or reargument and reconsideration. Copies of the final judgment and decree and the order entered April 22, 1955 denying that motion are attached hereto as Appendices F and G.

Notice of appeal was filed by these appellants in the United States District Court for the District of Colo-

rado on June 20, 1955. On that date notices of appeal were also filed by the United States, the Interstate Commerce Commission and the States of Washington, Oregon, Montana, Wyoming and Nebraska.

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479; *Moffat Tunnel League v. U. S.*, 289 U. S. 113; *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *U. S. v. Great Northern R. Co.*, 343 U. S. 562; *Thompson v. United States*, 343 U. S. 549; (see also *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538).

Statutes Involved

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out verbatim in Appendix H hereto:

National Transportation Policy (preceding Section 1), and Sections 1(4), 3(4), 15(1), 15(3) and 15(4).

Questions Presented

As stated, the Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line for the traffic it seeks, and demanded that the lower joint rates maintained over the existing Union Pacific routes be made ap-

plicable via its line. The Commission held that through routes via the Rio Grande did not exist for the involved traffic but found they were necessary in the public interest to provide adequate and more economic transportation (Section 15(4)(b), App. H, p. 4) for certain commodities named in the order, which comprise about one-third of the total volume of traffic, and required that the joint rates maintained over existing Union Pacific routes be made applicable via the Rio Grande to those commodities. The Commission concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained." The order issued does not, in terms, deny or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks to divert to its line.

For the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include that two-thirds of the traffic in the order it issued.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to the traffic it seeks to divert to its line for its financial gain, it has no standing to maintain the suit. The court held that through routes via the Rio Grande do exist for the involved traffic and that the Commission had erred as a matter of law and upon the evidence in finding that through routes via the Rio Grande did not exist. The court enjoined and annulled "the order" insofar as it denied and withheld relief from the Rio Grande, and to that extent, it "remanded" the case to the Commission for further proceedings in conformity with the court's opinion.

The following questions are presented by this appeal:

(1) Whether the court erred in refusing to dismiss the Rio Grande's complaint and intervening complaints on the ground that, as the Commission's failure to order through routes and joint rates on *all* instead of only a part of the traffic is not an "order" or a part of any order issued by the Commission, there is no jurisdictional basis for judicial review.

(2) Whether the district court erred in holding that plaintiff, the Rio Grande, admittedly lacking any legal or other right to traffic it seeks to divert to its line from other carriers, has standing to maintain this suit for the purpose of obtaining a "pecuniary profit" from that part of the traffic for which the Commission failed to order through routes and joint rates via the Rio Grande.

(3) Whether the court erred in making its own administrative finding that, "under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines", contrary to the Commission's finding that the evidence did not prove discrimination, and erred further in relying upon its own administrative finding to sustain the standing of the Rio Grande to maintain this suit.

(4) Whether the court erred in holding, in effect, that the Commission's finding that the evidence failed to prove discrimination against the Rio Grande and its failure to order through routes and joint rates on *all* instead of a part of the traffic, amounts to the denial

of a right given the Rio Grande by the [Interstate Commerce] Act adversely affecting its traffic and revenues, causing it to suffer pecuniary injury, and giving it "a right to judicial review of the order".

(5) Whether, in resting its decision that the Rio Grande has standing to maintain this suit upon several hypothetical or "if" propositions, the court erred in ignoring or giving no effect to the fact that, after full hearings and thorough consideration of the evidence, the Commission found that, except to the extent indicated in its findings, the evidence failed to prove discrimination against the Rio Grande or that through routes and joint rates by the Rio Grande are necessary in the public interest to provide adequate and more economic transportation, and concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained".

(6) Whether the court erred in failing to hold that neither the Rio Grande nor intervening plaintiffs had standing to maintain this suit.

(7) Whether the court erred in holding that the Commission's finding that "there are at present no through routes, as that term is used in the Act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law, and whether the court further erred in its own holding that the existence of such through routes is established by the evidence and the law.

(8) Whether, in holding that through routes for the "bridge" traffic here concerned were in existence via the

Rio Grande, the court erred in refusing to consider the fact that the evidence showed through movement of only one shipment of non-emergency traffic via the Rio Grande over each of only 17 of the many hundreds of thousands of through routes of which the Rio Grande claims to be a part between the 2,900 railroad stations in the northwest area and the 39,000 stations in the eastern and southern parts of the country.

(9) Whether, in holding that through routes were in existence via the Rio Grande for the traffic here concerned, the court erred in failing and refusing to indicate or specify the through routes held to be in existence via the Rio Grande or the termini of, or the railroads comprising such through routes, or the commodities for which the court holds that through routes exist via the Rio Grande.

(10) Whether, in view of the fact that the Commission overcame the short haul prohibition in Section 15(4) by ordering through routes and joint rates on all the commodities it considered upon the evidence to be necessary in the public interest, the court erred in holding that the Rio Grande and the "entire proceeding" were "prejudiced" by the Commission's finding that through routes did not already exist via the Rio Grande for the traffic it seeks.

(11) Whether, if the last preceding question is answered negatively, the court erred in annulling and setting aside "the order" *only* "insofar as it denied and withheld relief" to the Rio Grande.

(12) Whether the court erred in holding that the Rio Grande was entitled to have the Commission, in de-

terminating whether joint rates via the Rio Grande should be required "apply the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, free of any of the limitations imposed by §15(4) with respect to establishing through routes".

(13) Whether the court exceeded its powers in making its own finding that the evidence proved discrimination against the Rio Grande, and thereupon in "remanding" the case to the Commission "for further proceedings in conformity with the opinion and judgment of this Court".

(14) Whether the court erred in failing to consider and review the entire record and all the issues tendered in briefs and arguments of the parties.

Statement of the Case

The Rio Grande operates a short-line railroad with its eastern termini at Denver, Pueblo and Trinidad, Colorado, and its western terminus at Ogden, Utah, the distance between Denver and Ogden being 607 miles via its main line, and 782 miles via Pueblo. Its history has been essentially one of financial difficulty and of bankruptcy. It has been a "financial needs" railroad throughout most of its existence.[3] Its mountainous location and tortuous physical features have resulted in "operating conditions on the Rio Grande" that are "more onerous than those on the lines of the Union Pacific" or any other transcontinental railroad (App. B, p. 74), and caused the Commission in prior cases to grant the Rio Grande's demands for higher rates, based on its "financial neces-

3 *Denver & Rio Grande Investigation*, 113 I.C.C. 75; *Reconstruction Finance Corp. v. Denver & R.G.W.R.Co.*, 328 U.S. 495.

sities", than rates prescribed for other western railroads.[4]

Constructed in 1870 as a narrow-gage line and converted to standard gage in 1890, the "Rio Grande was built for the purpose of handling the local business tributary to its line"[5] but its management soon determined to enhance its financial position by diverting traffic from other lines for a "bridge"[6] haul over its line, including transcontinental Pacific Coast traffic moving over the Union Pacific-Central (now Southern) Pacific route, construction of which had been completed from Council Bluffs, Iowa, through Ogden, Utah, to Oakland, California, in 1869.

Concentrating on its purpose to enhance its financial position by diverting traffic and revenues from other railroads, the Rio Grande's revenues from "bridge" traffic increased over 326 per cent in the 15-year period ending with 1948, while traffic originated and terminated on its line increased only 155 per cent and its local traf-

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4 *Commercial Club, Salt Lake City v. A.T. & S.F. Ry. Co.*, 19 I.C.C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I.C.C. 481, 486; *Livestock-Western District Rates*, 176 I.C.C. 1, 98 and 190 I.C.C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S. F. Ry. Co.*, 218 I.C.C. 663.

5 *Commercial Club, Salt Lake City v. A.T. & S.F. Ry., supra*, P. 221.

6 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates outside of Rio Grande territory. Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

fic originating and terminating at points on its line was less annually throughout that period than during the period 1924-1929.

Further pursuing its "bridge" traffic policy, the Rio Grande filed its complaint with the Commission in this case on August 1, 1949. Although the complaint alleged violations of Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act, the Rio Grande's President testified that the complaint was filed for the purpose of improving and enhancing its financial position by diverting for a "bridge" haul over its line so much as it can of about 172,000 carloads annually of transcontinental freight traffic now and for some 75 years moved under joint transcontinental rates[7] over through routes which include lines of the Southern Pacific, Great Northern, Union Pacific, Northern Pacific and Milwaukee railroads (designated herein as "Union Pacific routes") between points in the northwestern states of Oregon, Washington, Montana, Idaho and Utah, north of Ogden (designated in this statement as "northwest area"), and points in the eastern and southern parts of the United States, generally east of the Missouri and Mississippi rivers, including points on the Atlantic and the Gulf coasts.[8]

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7 "Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions." (App. B, p. 6.)

8 The Commission found that the traffic the Rio Grande seeks to divert to its line in this case ordinarily moves over the Union Pacific through Wyming and Nebraska to and from Missouri River gateways rather than over the Rio Grande, "because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande" for that traffic. (App. B, p. 21.)

These joint rates do not apply via the Rio Grande, except in connection with routes over the Southern Pacific to Ogden and over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City, on traffic to and from that part of the northwest area lying north of the southern boundary of Oregon and west of the irregular black line shown near the left or west end of the map attached hereto as Appendix A. The joint rates over Union Pacific routes are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via the Rio Grande.

The Rio Grande demanded before the Commission that its line be included in all of the multitude of through routes of other railroads to and from the northwest area over which the joint rates are applicable, despite the fact it has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific (see figures in oblongs on map, Appendix A hereto), and would range from 33 percent to more than 50 percent longer than routes maintained by the Union Pacific with other railroads; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.

Consistent with the protection afforded by Section 15(4) of the Act against short-hauling, and having their own direct and shorter routes, the Union Pacific and other roads serving the northwest area have always insisted,

with immaterial exceptions, upon retaining their long hauls on traffic to and from that area.[9]

No complaint has ever been filed by shippers or the public or by any state public service commission demanding the longer through routes and joint rates sought by the Rio Grande.

After lengthy hearings, a proposed report of its examiner recommending the granting of the Rio Grande's full demands, exceptions to that report, two oral arguments before the full Commission, it issued the order herein assailed, January 12, 1953. Petitions for reconsideration were denied June 10, 1953.

The order (App. C, hereto) requires the Union Pacific and numerous other railroads, whose connecting lines form through routes extending from the Pacific to the Atlantic and Gulf coasts, to establish through routes with the Rio Grande and "the same" joint rates maintained on Union Pacific routes on westbound carloads of granite and marble monuments from Vermont and Georgia to points in the northwest area and on eastbound carloads of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from points in the northwest area to points in the eastern and southern parts of the country, indicated

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9 Union Pacific and some of the other railroad appellants have served the northwest for more than 75 years. Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its line.

above. These articles comprise about 57,000 carloads annually, or a third of the total volume of the traffic the Rio Grande seeks to divert to its line. Diversion of the traffic permitted by the order would result in a potential estimated revenue loss to the Union Pacific alone of more than $1,000,000 annually, and in very large losses to others of the railroad appellants.

The order does not require through routes and joint rates with the Rio Grande on the remaining two-thirds of the traffic, and the Rio Grande's purpose in this suit is to enhance its financial gains still further by having the Commission require that the joint rates over existing Union Pacific routes be made applicable via the Rio Grande on the remaining two-thirds of the traffic.

The Commission's Findings and Conclusions

The Commission made the following statement of the Rio Grande's contention concerning the existence of through routes via its line:

> "The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15(4) are not applicable and need not be considered." (8)[10].

After discussing the decision in *Thompson v. United States*, 343 U. S. 549, in which this Court nullified a Commission order based on the theory that a through route already existed over two connecting railroads because

10 Figures in parentheses refer to findings at pages of the Commission's report, as printed in Appendix B hereto.

the route was open to traffic at the combination of their local rates, the Commission carefully analyzed the contentions and the testimony concerning the alleged existence of through routes via the Rio Grande in this case, and made the following finding and statements which are material to consideration of the questions presented by this appeal:

> "We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic[3] [3 Except on east-bound shipments of sheep or goats, to which reference is made later in this report.] here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.
>
> "The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15(3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together." (14)

Other findings by the Commission[11] that are material to consideration of the questions presented are:

1. That the proposed new route via the Rio Grande could not be required "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation" (72);

2. That the Union Pacific has surplus transportation capacity, is efficiently operated, furnishes good service to shippers over its line, and its "facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseable future" (60) over routes that are shorter than Rio Grande routes;

3. A large number of shippers and representatives of communities served by the Union Pacific, traffic, commercial and civic associations, opposed the Rio Grande's complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado (64-65);

4. Shippers in opposition to the Rio Grande's complaint testified to the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. They testified that they had never experienced any difficuty in marketing their products by reason of the lack of competitive joint

11 The Commission's findings are set out here rather fully not only because of their materiality to consideration of the questions presented but also because of the apparent conflict and inconsistency between them and the district court's findings and conclusions.

through rates over the Rio Grande, and would not use that carrier in any event (65);

5. That the Rio Grande route is from 33 to 219 miles longer than the Union Pacific (25), and that routes via the Rio Grande would be from 33 to 50% longer than many of the Union Pacific routes (75);

6. That evidence as to physical characteristics of the two lines shows that the Rio Grande is less favorably situated than the line of the Union Pacific; that traffic routed over the Rio Grande as a bridge line would require at least 24 hours more time in transit than when routed over the Union Pacific and would require one or two more terminal interchange services (60), and that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (74);

7. That diversion of the traffic over the Rio Grande would deprive the Union Pacific of its long haul and would short haul it at least 925 miles in each instance (27);

8. That the traffic sought by the Rio Grande ordinarily moves over Union Pacific routes through Wyoming because those routes are shorter and they offer lower rates than the Rio Grande (21);

9. Concerning public need for the proposed Rio Grande route and damage to Union Pacific routes by diversion of traffic from them to the Rio Grande, the Commission found that it was impossible to determine or estimate accurately what volume of traffic might be diverted to the Rio Grande if all of the joint rates were made ap-

plicable over its line (67); but that whatever the volume so diverted would be the result of "active solicitation" by the Rio Grande "to persuade" shippers and receivers to use its line as an overhead or "bridge" route, the value of its service to shippers, and the extent to which the Rio Grande can "induce" shippers to route traffic via its line for the purpose of using transit facilities at points on its line and subsequent reshipment beyond at the balance of joint through rates from the point of origin (35);

10. That there are substantial dissimilarities or differences between transportation conditions, operating conditions and lengths of hauls over Union Pacific routes and over the Rio Grande but that the differences in transportation conditions become "relatively insignificant" and "substantially similar" when "spread" over the longer hauls between the northwest area and the eastern and southern parts of the country (76);

11. That the evidence failed to prove that the Union Pacific and other lines maintaining present through routes and joint rates discriminate against the Rio Grande (except at points on the Bamberger Railroad between Ogden and Salt Lake City) under Section 3(4) of the Act in refusing to include its line in present through routes and joint rates (77);

12. That (notwithstanding the dissimilarities in transportation conditions over the respective routes) the combination rates via the Rio Grande on the articles named in the order from and to the areas therein described are and for the future will be unjust and unreasonable and unduly prejudicial to shippers using, or desiring to use, the Rio Grande routes and unduly pref-

erential of shippers and receivers using the Union Pacific routes, to the extent those rates exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes (79);

13. That the Rio Grande, a railroad, could not raise in its own behalf an issue of undue prejudice and preference under Section 3(1) against another railroad, but that testimony of intervening shippers raised that issue, and also raised a question as to a need for "more" adequate and economic service than afforded by Union Pacific routes with respect to perishable food articles (72);

14. That the present complex and far-flung marketing system for perishable food articles requires that such articles move to market with expedition and care "over as many routes as possible" (73) to "as many markets and outlets as possible" (51) with "as much flexibility as possible" and without "unnecessary interruptions" (73);

15. That, while through service over Union Pacific routes in general is as satisfactory to shippers as the service which could be provided over routes including the Rio Grande, this is not true with respect to perishable food articles, and that shippers of those articles from the northwest area "are debarred from effective participation in the widespread system developed for the marketing of such commodities" (73), (apparently, only because, if routed over the longer Rio Grande route to eastern and southern markets, higher rates apply than when routed via Union Pacific routes, for the undisputed evidence shows that those shippers market their products

via Union Pacific routes in all 48 states and several foreign countries);

16. That on shipments of perishable food articles reconsigned or accorded transit privileges such as stop-off for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, *at points on the Rio Grande*, "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that "on such traffic the defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes" (74);

17. That through routes via the Rio Grande and joint rates "the same" as apply over Union Pacific routes for the commodities named in the order between points in the areas described therein are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (78).

Opinion of the District Court

The district court decided only two of the numerous issues tendered by the pleadings, briefs and oral arguments. On these two issues it held:

1. That the Rio Grande has standing to maintain suit to enjoin and annul the Commission's failure to include in its order about two-thirds of the "bridge" traffic for which the Rio Grande demanded joint rates via its line, and the court overruled a motion to dismiss the suit for lack of such standing;

2. That the Commission erred as a matter of law and upon the evidence in finding that the through routes

claimed by the Rio Grande were not already in existence, that the evidence and the law established the existence of the claimed through routes, and that the Commission should have applied the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act "free of any of the limitations imposed by §15(4) with respect to establishing through routes."

In reaching its conclusion that the Rio Grande has standing to maintain its suit, the court made and apparently relied upon the following administrative finding of fact:

> "Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines." (App. D, p. 23.)

The court held that the Rio Grande is here seeking rates "which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" (App. D, p. 25), and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande" (App. D, pp. 20-21), giving it a right to judicial review.

With respect to the Commission's finding that the claimed through routes via the Rio Grande were not in existence, the court held—

> "This erroneous self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding." (App. D, p. 11.)

Nevertheless, the court "remanded" the case to the Commission "with appropriate instructions" for fur-

ther proceedings in conformity with the opinion *only* insofar as the Commission failed to order through routes and joint rates on the traffic not included in the order.

The court's opinion is vague, ambiguous and lacking in specificity with respect to the grounds or reasons for its conclusions. For example, in holding that the Rio Grande has standing to maintain its suit the court admits that in ordering only such through routes and joint rates as it found to be in the public interest, and in failing to include all of the traffic in its order the Commission "required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had" and from these points of view "caused no pecuniary loss to the Rio Grande" (App. D, p. 19). It holds, nevertheless, that the Rio Grande suffers "pecuniary injury" because the Commission's order does not include all of the traffic, but it then holds that "we do not think such injury is essential to the right to judicial review."

The court holds that the Commission's failure to order joint rates that would result in "pecuniary profit" to the Rio Grande from traffic not included in the order prevented it from "enjoying increased traffic and increased earnings", but it does not hold that the Rio Grande has any legal or other right to divert the traffic to its line from Union Pacific routes to create or produce such additional pecuniary profit or increased earnings, nor does it hold that the Commission's failure to order joint rates on the portion of the traffic not included in its order is beyond its power or without support of evidence or adequate findings.

The court holds that "if" the Rio Grande's presentation to the Commission entitled it to an order re-

quiring joint rates on all of the traffic then the Commission's failure to issue such an order was the denial of a right granted by the Act giving the Rio Grande "a right to judicial review of the order." Such speculative or hypothetical discussions ignore the fact that the Commission had already found upon the evidence that the Rio Grande had failed to sustain the allegations of its complaint, except to the extent indicated in the order; and, as just stated, the court does not hold that the Commission acted arbitrarily or contrary to law or the evidence in limiting the required joint rates to the commodities named in the order for which the Commission found through routes and joint rates necessary in the public interest to provide adequate and more economic transportation.

Contrary to the Commission's finding, the court holds that continuance of the combination rates via the Rio Grande on traffic not included in the order results in discrimination adversely affecting the Rio Grande and shippers over its line, but it does not hold that its own finding of discrimination, or a finding of discrimination even if made by the Commission, would justify or require the Commission to order joint rates with the Rio Grande for all or any part of the traffic. In short, the court refrains from specifying or permitting its opinion to disclose any particular reason or ground for its conclusion that the Rio Grande has standing to maintain this suit.

The court's conclusion that through routes already exist via the Rio Grande for the traffic concerned is likewise shrouded in vagueness and lack of specificity concerning the reason or ground upon which the conclusion

rests. The opinion does not indicate or specify the through routes it holds are in existence via the Rio Grande, or the termini of, or the railroads comprising such through routes, or the commodities for which any of such through routes are in existence via the Rio Grande.

The opinion states that the definition of a "through route" in *Thompson v. United States*, 343 U. S. 549, compels the conclusion that the through routes claimed by the Rio Grande are already in existence, but it fails to disclose what language of that definition compels its conclusion that through routes exist here. The opinion describes a few shipments of traffic moved via the Rio Grande in 1948 at combination rates and relied upon by the Rio Grande to prove that through routes exist via its line for all of the involved traffic, but the court refused to commit itself to the proposition that evidence showing that a few shipments of a few commodities moved via the Rio Grande during one year from a few points east of Denver to the northwest area is sufficient to prove that through routes for all commodities exist via the Rio Grande or that the Rio Grande is a part of each of the many hundreds of thousands of through routes presently maintained by other carriers, for the traffic concerned between some 2,900 railroad stations in the northwest area and more than 39,000 stations in the eastern and southern parts of the country.

In holding that through routes via the Rio Grande were open and in existence through the Ogden gateway, the court not only reversed the Commission but also ignored the testimony of the Rio Grande's President that "ever since I have been with the property I have been looking forward *to the opening of the Ogden gateway*

and the publishing of through rates through there" (I. C. C. Transcript, p. 43), and ignored also the testimony of "numerous shippers in this proceeding" that Rio Grande routes through the Ogden gateway are not considered as open or through routes, "but as routes that are closed to shippers because of the higher rates applicable" (I. C. C. Report, App. B, pp. 8-9).

The court does not give any reason or indication why it disagrees with the Commission's finding that through routes claimed by the Rio Grande do not exist within the meaning of the Interstate Commerce Act.[12] Instead, the court simply asserts, without reason, that the claimed

12. In deciding that the claimed through routes via the Rio Grande do not exist, the Commission said:

"So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, 'the carriers' course of business' has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads eastbound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

"Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N.W. Ry. Co., supra*, cited with approval by the Supreme Court in

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through routes *do* exist, and undertakes to direct the Commission to proceed further upon that assumption but *only* insofar as it has previously failed to require through routes and joint rates as demanded by the Rio Grande on all commodities.

The Questions Are Substantial

The questions presented have a far-reaching future effect not only upon railroads generally that have established through routes and channels of commerce and upon the public that is dependent upon such established routes, but also in the field of judicial review of the Commission's orders and those of other Federal agencies, in the relations between those agencies and the Federal courts and in the Commission's administration of the Interstate Commerce Act, especially the through routes provisions of Section 15(3) and (4).

1. This Court has held that jurisdiction is lacking to review "matter embodied in a [Commission] report and not followed by a formal order." *United States v.*

(Continued from preceding page)

Thompson v. United States, supra. Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15 (3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15 (4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I.C.C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra*.

"We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned, and that any order requiring the establishment of such routes and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation." (App. B, pp. 12-14).

Atlanta, B. & C. R. Co., 282 U. S. 522, 528.[13] This seems necessarily to follow from the fact that the act that confers jurisdiction (Urgent Deficiencies Act, 38 Stat. L. 219; 28 U. S. C., Secs. 1336, 1398) clearly makes the existence or presence of an "order" embodying the matter complained of prerequisite to jurisdiction to review.

The order issued in the instant case (Appendix C hereto) affirmatively requires through routes and joint rates for about one-third of the traffic demanded by the Rio Grande, but the order does not embody or mention the Commission's failure to grant through routes and joint rates nor does it dismiss the complaint as to the remaining two-thirds of the traffic. While the Rio Grande's complaint asked the lower court to enjoin and annul the "order," "in part, if its arguments (except as to the existence of through routes) were directed to the Commission's failure to require through routes and joint rates on the remaining two-thirds of the traffic. But, as noted, such failure was not embodied in the order issued or in any other order.[14]

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13 In that case the Commission had made a finding of the amount representing the railroad's investment in road and equipment. It issued no order, but concluded its report with this statement:

"The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

14 The Commission's report concludes with the statement:

"That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

"An appropriate order will be entered."

The Rio Grande argued in the district court that the order must be read in the light of the report, and that by doing so here, the language just quoted becomes the "equivalent" of an order. But this cannot be sound, for the statute confers jurisdiction to review any "order"—and not an "equivalent" of an order. A much closer "equivalent" to an order was held insufficient to afford jurisdiction in the *Atlanta, B. & C.* case *supra*.

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Apparently recognizing that there is no order embodying the matter of which the Rio Grande complained, the district court sought to overcome that obstacle by saying (App. D, p. 19) that—

> "The fact that the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief"

citing *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, and *Mitchell v. United States*, 313 U. S. 80. But in both of those cases formal orders had been issued. Thus, the court construed the Commission's failure to grant the Rio Grande's full demands as a "negative portion" of the affirmative order actually issued, and in that way attempted to create the prerequsite for its jurisdiction. The court confused the abolition of the "negative order doctrine" in the *Rochester* case with the jurisdictional necessity for an actual formal order embracing the matter of which the Rio Grande complained, and it also overlooked the fact pointed out in *United States v. Atlanta, B. & C. R. Co., supra*, that—

> "No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review." (p. 528)

In *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, the Commission had issued an order requiring the carriers to establish certain specified joint rates, but it declined to comply with the demand of some of the car-

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Moreover, while this Court has held that the order may be read in the light of the report for the purpose of clarifying ambiguity or vagueness in the order issued, *Georgia Comm. v. United States*, 283 U.S. 765, 771, this Court has never held that this may be done for the purpose of creating an order, or of "importing" into an unambiguous order matters not embodied therein.

riers that it also prescribe divisions of the joint rates required. This Court noted at pages 482-483 that—

> "* * * the real complaint of appellants respecting the order now under consideration is directed not to what the order requires to be done, but to what it does not require. It granted a part of the relief for which appellants had applied to the Commission. * * * The real ground for resorting to the courts in this case is the failure to fix divisions."

The Court reviewed the affirmative order issued but refused to review the Commission's failure to fix divisions, holding that in seeking review of the Commission's failure to fix divisions, the appellants were in effect asking the Court to "exercise administrative authority where the Commission has failed or refused to exercise it."

In *Chicago Junction Case*, 264 U. S. 258, the Court cited several cases in which—

> "judicial review was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought,"

and the Court "declined to interfere" because to do so would have involved exercise by it of "the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied" (p. 264).

The district court erroneously "stretched" this Court's "negative order" ruling in the *Rochester* case to include cases in which the Commission has issued no order at all embodying its failure to grant all of the Rio Grande's affirmative demands.

Since the statute confers jurisdiction only where an "order" has been issued embodying the matter com-

plained of, and as no such order has been issued in this case, we submit that this Court should correct the lower court and refuse to permit a new ground for increasing the volume of litigation in Federal courts in attempts of litigants to override the Commission's exclusive administrative functions.

2. This Court has consistently held that standing to maintain a suit to enjoin an order of the Commission requires a showing that the order assailed subjects the complainant to legal injury, actual or threatened, *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249, 257; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486; *Moffat Tunnel League v. U. S.*, 289 U. S. 113, 119; or that the order would deprive the complainant of something it has long and lawfully possessed, or would disrupt the transportation situation causing the complainant financial or economic loss, or that the right to maintain such suit rest upon some express statutory provision, *Western Pacific v. South. Pac. Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry* v. U. S., 285 U. S. 382; *Chicago Junction Case*, 264 U. S. 258, 267; *Alton R. Co. v. United States*, 315 U. S. 15, 19.

Disregarding the settled rule of these decisions, the district court held that the Rio Grande has standing to maintain this suit despite its frank admission that its purpose in complaining to the Commission was to improve its financial position by diverting traffic from Union Pacific routes for a "bridge" haul over its line, and despite its utter lack of any legal, equitable or other right to the traffic it seeks to divert to its line, *A., T. & S. F.*

Ry. v. United States, 279 U. S. 768, 780.[15] Although the district court refrained from specifying the ground or reason for its holding that the Rio Grande has legal standing to maintain the suit, it did hold that the Rio Grande here seeks rates that "will result in pecuniary profit to the Rio Grande * * * the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" (App. D, p. 25), and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande," but that such injury is not essential to the right to judicial review (App. D, pp. 20-21).[16]

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15 On this point the Rio Grande argued as follows at page 111 of its original brief in the district court:

"Neither the Union Pacific nor any other railroad has an absolute right to the exclusive occupancy of a particular territory or to the traffic which terminates or originates in the territory. *Pennsylvania R. Co. v. United States*, 40 Fed. (2) 921; *Indian Valley R. Co. v. United States*, 52 Fed. (2) 485, and *Chesapeake and Ohio Ry. Co., Construction*, 267 I.C.C. 665, 679. In *United States v. American Railway Express Co.*, 265 U.S. 425, 437, the court held that a carrier has no absolute right to the traffic it originates or to its long haul. Such rights as a railroad may have to its long haul on interstate commerce are granted and limited by the Interstate Commerce Act. Moreover, that Act does not give the originating railroad or any railroad the unequivocal right to its long haul in connection with through routes."

16 The confused and hypothetical rationale of the district court's opinion seems to be: that the Rio Grande had a right to complain of discrimination to the Commission; that "if" the evidence proved the discrimination or that the Rio Grande was entitled to an order requiring establishment of the joint rates, then the failure of the Commission to order joint rates on all of the traffic "was the denial of a right given [the Rio Grande] by the Act," and, therefore, the Rio Grande has standing to maintain suit to enjoin such failure or denial.

But this ignores the fact that the Commission found that the evidence did not prove discrimination against the Rio Grande, or that joint rates were necessary in the public interest except as to articles named in the order, and it ignores also the Rio Grande's utter lack of any legal or other right to the traffic it seeks. Its right to complain to the Commission clearly gave it no standing to sue. *Edward Hines Trustees v. U.S.*, supra; *Sprunt & Son v. United States*, *supra*, *Pittsburgh & W. Va. Ry. v. U.S.*, *supra*.

In final analysis, the court's decision that the Rio Grande has standing to maintain the suit inescapably rests upon the proposition that, regardless of its utter lack of any legal or other right to the traffic it seeks, the Rio Grande has standing to maintain this suit because the Commission failed to grant its demands for an opportunity to reap pecuniary profit and enhance its revenue from *all*, instead of a part, of the traffic it seeks to divert to its line.

There is no precedent for the court's holding, and it is directly contrary to the decisions cited above and to the rule laid down by this Court that in order to maintain a suit the complainant must show that he is threatened with a "loss" against which he is legally or equitably entitled to protection. *Railroad Co. v. Ellerman*, 105 U. S. 166; *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118. If, as held in the cases just cited, a complainant has no standing to maintain a suit to enjoin acts of others which threaten even to destroy his business unless he shows that such acts invade some legal or equitable right of his, *a fortiori* the Rio Grande has no standing to maintain suit to enjoin the Commission's failure to grant its full demands for "pecuniary profit" to be obtained by diverting to its line traffic to which it admits that it has no semblance of legal or other right. *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76.

The decision of the district court thus opens up a new approach and avenue for a very considerable increase in the already heavy volume of litigation in the Federal district courts and in this Court involving the validity of orders of the Commission and other Federal agencies. We submit that it is of substantial public

importance that this Court prevent any such future potentiality by reviewing and reversing the holding of the district court that the Rio Grande has standing to maintain this suit.

3. In reversing the Commission's finding that through routes via the Rio Grande are not in existence within the meaning of the Act, the district court misconstrued or refused to be guided by this Court's decision in *Thompson v. United States*, 343 U. S. 549, and by the principles stated in *U. S. v. Great Northern R. Co.*, 343 U. S. 562, concerning the existence of through routes and the legislative policy against diversion of traffic from one carrier for the benefit of another.

Instead of reviewing and considering all of the evidence as required by this Court's decision in *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 488, the district court was content to "rest our decision upon a narrow ground," and upon a "brief and sketchy statement of the case" (App. D, p. 11). It purported to "summarize" the evidence bearing on the question whether through routes via the Rio Grande already existed for the traffic it seeks. It cited the fact, admitted by counsel and a traffic witness for the Union Pacific, that the traffic *could* move via the Rio Grande if shippers wanted to pay the higher combination rates.[17]

The court also cited the fact that through routes and joint rates via Rio Grande had been established by the receivership courts in 1897 and that the joint rates were cancelled by Union Pacific in 1906 and 1912, after the receiverships ended, but the court holds that this

17 This same fact was admitted in the *Thompson* case, *supra*, but was held to be no proof of the existence of a through route within the meaning of the Act (p. 558).

did not close the through routes. In so holding the court ignored the testimony of Rio Grande's President that for many years he had looked forward to the "opening" of the Ogden gateway, and the testimony of numerous shippers that the routes were considered as "closed to shippers because of the higher rates applicable" (App. B, pp. 8-9). The court further ignored the fact that, in a "pamphlet" propaganda campaign before and after filing its complaint August 1, 1949, the Rio Grande asserted that its purpose was to "restore" to the northwest the "rates and routes" established by the receivership courts in 1897. As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz", (I. C. C. Ex. 30), in which it posed 20 questions and answered them with the arguments it thought would induce shippers to aid it in its efforts. These questions clearly and indisputably show that the Rio Grande itself considered the prior through routes via its line "closed" by the cancellation of the joint rates by the Union Pacific.[18]

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18 Among the 20 questions were the following:

" 2 What Is Meant by the 'Closed' Gateway at Ogden?"
" 3 What Is the Effect of the Closed Gateway?"
" 4 How Does the Rio Grande Seek to Open the Ogden Gateway?"
" 5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"
" 6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"
" 7 Will the Open Ogden Gateway Reduce Freight Rates?"
" 8 Will the Open Gateway Provide Improved Service?"
" 9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
"11 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
"12 Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
"13 Will Opening of the Ogden Gateway Reduce Railroad Employment in the Closed-Door Territory?"
"14 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

The district court states that the definition of "through route" in the *Thompson* case "compels us to conclude that the through routes contended for by the Rio Grande were in existence", but it does not specify which of the several elements of that definition compels such conclusion. It merely states that in that case there was no evidence that a shipment had ever been made from termini to termini of the route there in question or that the carriers had ever offered through service over that route. The court then points to 18 shipments moved at combination of local rates in 1948 over the Rio Grande from 18 origins in the middlewest and southwest to destinations in the northwest area and to a few emergency shipments, and 37 shipments that moved from the northwest to destinations on the Rio Grande. Neither the latter nor the emergency shipments could be involved in this case.

But the court refused to decide whether these few isolated and sporadic shipments during the year 1948 were sufficient, under the "user" test of the *Thompson* decision, to prove the existence of through routes via the Rio Grande between the 39,000 railroad stations in the eastern area and the 2,900 stations in the northwest area, between each of which there is at least one through route, or a minimum of 113,100,000 through routes, of which the Rio Grande claims to be a part.

Every relevant or material factor recited in the opinion of the lower court in support of its conclusion that through routes exist as claimed by the Rio Grande was rejected or held insufficient by this Court in annulling the Commission's order in the *Thompson* case.

The Commission in the instant case held that the few sporadic shipments moved in 1948 did not prove the existence of through routes via the Rio Grande for the involved traffic (*ante* p. 26). Applying the principles of the *Thompson* decision, the Commission correctly concluded that the carriers in this case do not "hold themselves out as offering through transportation service" for the involved traffic, as indicated by their "course of business" and by the Union Pacific's course of conduct over many years in its steadfast refusal to relinquish its long haul.

Although the district court's decision is indefinite and lacking in specificity as to the precise reason why it holds that through routes are in existence for the involved traffic via the Rio Grande, it sanctions a new and unprecedented standard or set of circumstances for determining whether through routes exist, which not only conflicts with the principles laid down in the *Thompson* case, but is also at war with the plain purpose of the Act in conferring the through routes power on the Commission carefully limited so as to protect the long hauls of carriers except under specified circumstances. *Thompson* case *supra*, *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, *I. C. C. v. Columbus & Greenville Ry.*, 319 U. S. 551.

If the lower court is correct in holding upon the facts and circumstances in this case that through routes for the involved traffic are in existence via the Rio Grande, then through routes are established and are in existence over the lines of all railroads that physically connect and have published local rates as required by Section 6(1) of the Act. And, under that holding, the line of every railroad is a part of every through route

in the country by virtue of such physical connections and required publication of local rates over its line.

The decision would have a drastic and revolutionary effect upon the Commission's administration of its through routes powers[19] and as held in the *Thompson* case, *supra*, p. 560—

> "* * * would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage".

The decision would have a devastating effect upon appellants and railroads generally that have established through routes and channels of commerce, in reliance upon the protection afforded by Section 15(4) of their long hauls of traffic they originate or terminate.[20] Towns

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19 In a recent case, *Steinmetz v. Atchison, T. & S.F. Ry. Co.*, 293 I.C.C. 202 (decided Aug. 17, 1954), the Commission held that a through route does not exist within the meaning of Section 15 (4) of the Act over the lines of railroads that have published only the local rates for their respective lines, i.e. where the carriers have not published joint rates. At pages 203-204 the Commission said:

"Consideration has been given to the decision in *Thompson* v. *United States*, 343 U.S. 549, decided since the reparation awards were made in prior decisions. There in the Supreme Court makes plain that a route such as that used for the instant shipment may not be regarded as a through route under section 15 (4) of the Interstate Commerce Act. Thus, the route used by this shipment was a 'closed' route, and the complainant was apprised of that fact by the publication of the joint through rate from and to these points for application over routes other than that used. This does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified, but it does mean that when such routing is specified and complied with, the carriers concerned have a right to charge a combination rate. * * *"

20 See *U.S. v. Great Northern R. Co.*, 343 U.S. 562, wherein this Court held at pages 574-575:

(Continued on next page)

and communities that have grown up and are dependent upon such established routes and channels of commerce would also suffer seriously adverse economic consequences if the district court's decision is allowed to stand.[21]

4. The district court's decision and judgment present aspects of the relations between the Commission and the courts which are of fundamental public importance. The district court holds that the Commission's finding that through routes do not exist via the Rio Grande for the involved traffic "obviously prejudiced the entire proceeding", but the court "remands" the case to the Commission *only* "insofar as it denied and withheld relief" to the Rio Grande. Contrary to the Commission's finding, the court made its own administrative finding of fact that continuance of the Rio Grande's combination

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(Continued from preceding page)

"It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially but can also, at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense of other carriers and other areas. Congress amended Section 15 (4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs."

21 This is evidenced by the following statement of position in their brief in the district court by the five intervening States that have also appealed from the decision below:

"These states were moved to intervene in the proceeding before the Commission because of the overwhelming detriment the shippers and general public of such states would suffer as a result of the diversion of traffic away from the Union Pacific proposed by the Rio Grande. Any such diversion of traffic would immediately affect the service of the Union Pacific to shippers and would also inflict

(Continued on next page)

rates on the traffic not included in the Commission's order would result, in discrimination against the Rio Grande and shippers over its line.

Thus, in remanding the case to the Commission "for further proceedings in conformity with this opinion", but only insofar as the Commission denied relief to the Rio Grande, the court would not only prevent the Commission from reconsidering the portion of the "prejudiced" proceeding which is favorable to the Rio Grande, but would also tie the Commission's hands by requiring it to reverse its previous administrative judgment and finding that the evidence did not prove discrimination against the Rio Grande. In short, apart from a complete lack of power to "remand" the case to the Commission, in doing so the court virtually directs the Commission to order joint rates on the remaining two-thirds of the traffic. The court would clearly usurp the Commission's administrative authority and render its functions useless, contrary to decisions of this Court. *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470.

(Continued from preceding page)

very serious consequences upon employees of the Union Pacific that are now engaged in the handling of such traffic. Moreover, such diversion, as shown by testimony reviewed hereafter, would greatly impair the capacity of the Union Pacific to continue to provide at lowest cost the transportation service so essential in all this territory.

"It was made indisputably clear by these states that in their area there is no substantial need for the new routes and joint rates proposed by Rio Grande and that the granting of proposed relief to this local mountain railroad of Colorado and Utah would adversely affect the economy of all these intervening states."

Conclusion

It is submitted that the questions presented by this appeal are substantial and of general public importance, and that a decision of this Court correcting and reversing the decision of the lower court is essential.

Respectfully submitted,

ELMER B. COLLINS,
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F. O. STEADRY,
L. E. TORINUS,
WARREN H. PLOEGER,
ROLAND J. LEHMAN,
EUGENE S. DAVIS,
JAMES C. WILSON,
Of Counsel.

August, 1955.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 19th day of August, 1955, I served, on behalf of all appellants herein, copies of the foregoing Statement as to Jurisdiction on the several parties thereto, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

Ernest Porter, Esq.
603 Rio Grande Building
Denver 2, Colorado

4. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

5. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

6. On Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company, Inc.; Idaho Farm Bureau; Public Service Commission of Utah; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

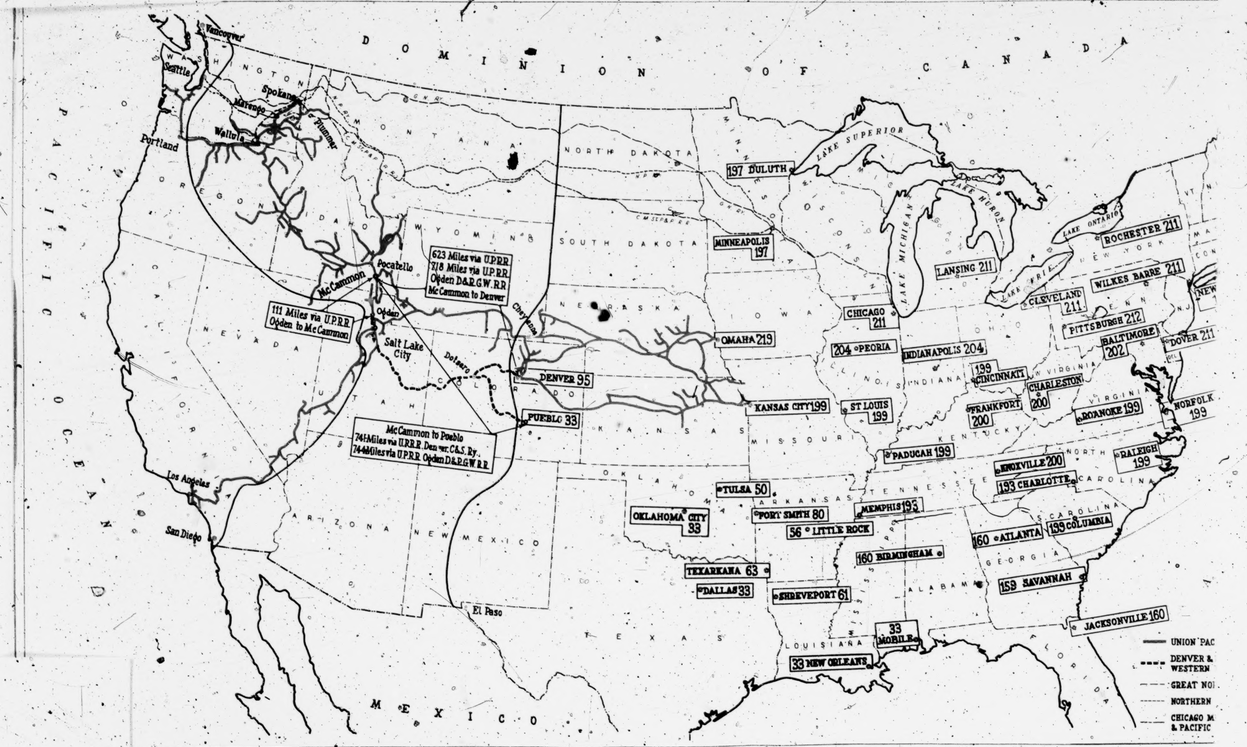
7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

ELMER B. COLLINS,
Counsel of Record for
Appellants Herein.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160 ATLANTA
135 COLUMBIA
TEXARKANA 63
DALLAS 33
SHREVEPORT 61
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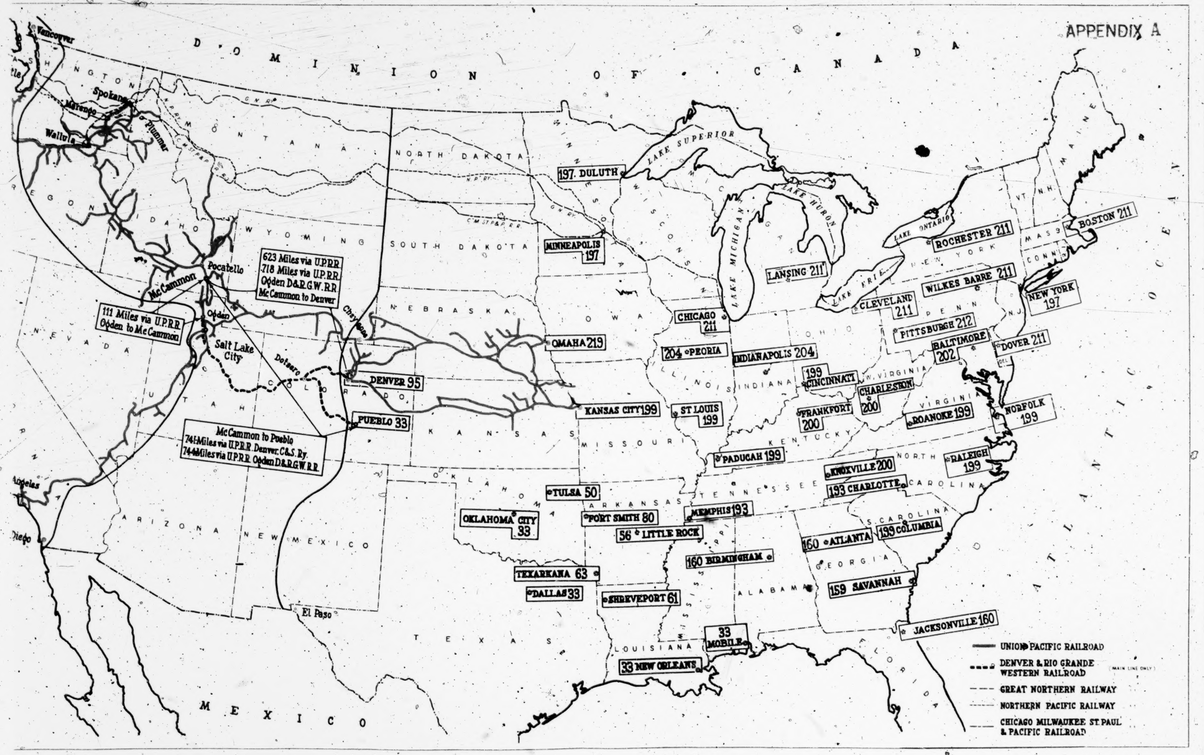
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DALLAS 33
SHREVEPORT 61
159 SAVANNAH
JACKSONVILLE 160
33 MOBILE
33 NEW ORLEANS
UNION PACIFIC RAILROAD
DENVER & RIO GRANDE WESTERN RAILROAD
GREAT NORTHERN RAILWAY
NORTHERN PACIFIC RAILWAY
CHICAGO MILWAUKEE ST PAUL & PACIFIC RAILROAD

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. 30297

DENVER & RIO GRANDE WESTERN RAILWAY COMPANY v. UNION PACIFIC RAILROAD COMPANY, ET. AL.

Submitted October 16, 1952. Decided January 12, 1953

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1. Through routes and joint rates found necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with complainant, on certain commodities from and to points in the excluded territory in the northwest area as described in the report, to and from points in official, southern, and southwestern territories, including Missouri and a portion of Iowa.

2. Rates on the same commodities from and to the same points over complainant's routes via Ogden or Salt Lake City, found unreasonable and unduly prejudicial to and preferential of shippers and receivers.

3. Maintenance by defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the line of complainant south of Ogden, found to subject complainant to unlawful discrimination.

4. Order entered requiring removal of unlawfulness found to exist and establishment of through routes and joint rates found reasonable.

Robert E. Quirk, Otis J. Gibson, and *H. L. Mulliner* for complainant.

Elmer B. Collins, L. H. Anderson, John B. Burchell, Robert H. Bierma, L. E. Clarahan, F. H. Cole, Jr., Eugene S. Davis, Lee S. Davis, P. H. Draver, F. G. Fitzpatrick, P. F. Gault, R. J. Hagman, L. W. Hobbs, Roland J. Lehman, B. P. Leverich, James E. Lyons, E. F. McGuire, F. J. Melia, Conrad Olson, W. R. Rouse, James S. Souby, Jr., Carson L. Taylor, and *L. E. Torinus, Jr.,* for defendants.

C. A. Miller for a railroad association; *Chas. B. Bowling, Carl R. Bullock, Henry A. Cockrum,* and *J. L. Pease* for Secretary of Agriculture; *Ralph C. Horton, John H. Winchell, Joseph W. Hawley, T. S. Wood,* and *Ralph Sargent, Jr.,* for Public Utilities Commission of the State of Colorado; *W. B. Joy, H. N. Beamer, B. Auger* and *L. F. Purvis* for Public Utilities Commission of Idaho; *Byron M. Gray* for State Corporation Commission of the State of Kansas; *Edwin S. Booth* and *Sidney T. Smith* for Board of Railroad Commissioners of the State of Montana; *Clarence S. Beck, Harold A. Palmer, Bert L. Overcash,* and *Harry C. King* for State of Nebraska and Nebraska State Railway Commission; *John H. Carkin* and *Thomas W. Dench* for Public Utilities Commissioner of Oregon; *Smith Troy, Phil H. Gallagher, Joseph Starin,* and *Bartlett Burns* for Washington Public Service Commission; *Norman B. Gray* and *Jefferson C. Church* for the State Board of Equalization and Public Service Commission of Wyoming; *Hal S. Bennett, Donald Hacking, W. R. McEntire,* and *Chas. A. Root* for Public Service Commission of Utah; and *George F. Guy* for the city of Cheyenne, Wyo., interveners.

Calvin L. Blaine, Chas. E. Blaine, Maurice H. Greene, Alden T. Hill, E. K. Kohlwes, Lowe P. Siddons, Reginald T. Titus, and *Lee J. Quasey* for other interveners.

Report of the Commission

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the complainants, the defendants, and cer-

tain interveners and the issues were twice argued orally. Our conclusions differ in part from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant, sometimes called the Rio Grande, a common carrier by railroad operating in interstate commerce within the States of Colorado, Utah, and New Mexico, requests us to order the Union Pacific Railroad Company, which with its leased lines is referred to as the Union Pacific system or the Union Pacific, and the other defendants to establish and maintain for the future just, reasonable, and non-discriminatory competitive joint through rates[1] and charges for the transportation of freight in connection with the complainant through Salt Lake City or Ogden, Utah, referred to as the Ogden gateway. More particularly, we are asked to require the defendants to establish such joint rates on freight traffic in connection with the complainant through its Colorado and Utah gateways, (1) between (*a*) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington,[2] and British Columbia, Canada, and (*b*) Colorado common points and the northwest territory specified in 1 (*a*).

No evidence was submitted with respect to rates from or to British Columbia, and such rates will not be considered.

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1 Rates and rate differences named herein are per 100 pounds and are those in effect at the time of the hearing herein.

2 This area is referred to in this report as the northwest area or territory.

Interveners in support of the complaint include the Secretary of Agriculture of the United States, the public utility commissions of the States of Colorado and Utah, the American National Live Stock Association, other livestock and stock-feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce, and certain groups of employees of the complainant.

Interveners in support of the defendants include the State of Nebraska, city of Cheyenne, Wyo., the public utility commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska and Kansas, various chambers of commerce and other associations, certain employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago and North Western Railway Company, and the Wabash Railroad Company.

In its exceptions to the proposed report, the State Corporation Commission of the State of Kansas took the position that the recommended finding that joint rates should be established over the existing through routes by way of Ogden and the Rio Grande is amply sustained by the evidence with respect to the rates on wheat and livestock but not otherwise, and that the recommended findings as to commodities generally are too broad in scope.

The Public Utility Commission of the State of Idaho intervened but presented no evidence. It filed a brief in which it took the position that the relief sought by the complainant should be denied, except that joint through competitive rates should be required to be established via Ogden and the Rio Grande on livestock and fruits and vegetables.

We granted a petition for leave to intervene filed by the American Short Line Railroad Association. That association appeared in support of the complaint and was represented at the hearing and the oral argument, but offered no evidence. The defendants filed a petition for reconsideration of the order permitting intervention. The request was denied at the hearing, but it is renewed on brief. It appears that 44 of the defendants named in the complaint are members of the association and that 8 defendant members are subsidiaries under common control and management with other defendants. Additional facts were developed at the hearing with respect to the relation of certain members of the association as defendants and indicating that they, as well as some others, opposed the complaint. The association filed a brief from which it appears that it has a current membership of 314 common carriers by railroad and that the association as such and many of its members are interested in the issues presented in the complaint. The intervention sought and granted was by the association as such, and not by or in behalf of the respective members thereof named herein as defendants. The petition of intervention was properly granted, and the petition for reconsideration is denied.

Immediately prior to the oral argument, counsel for the defendants submitted a memorandum of additional authorities and discussion relating to certain exceptions filed by the Union Pacific to the proposed report of the examiner. The complainant and certain interveners objected to the receipt of the document. Our rules of practice do not permit the submission of such a document so late in the proceeding. Permission to file it was not requested in time to permit opposing parties to examine it and to make reply thereto prior to the oral argument when

the proceeding was finally submitted. The objection to its receipt in the proceeding is sustained.

The complainant alleges that the defendant's failure and refusal to join with it in establishing joint rates to and from the territories described on transcontinental and other traffic through the gateways referred to result in violations of sections 1 (4) and 3 of the Interstate Commerce Act, and is contrary to the national transportation policy as declared by the Congress. We are asked to prescribe just and reasonable rates over the Rio Grande routes to remove the alleged unlawfulness.

Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions. The principal ones of importance in this proceeding are those under which the Union Pacific for the most part restricts routing on traffic to and from points in Utah north of Ogden and in Idaho, Montana, Oregon, and Washington over its lines so that it may obtain the long haul from and to the Missouri River. On transcontinental traffic that moves over its lines to and from California, Nevada, and portions of Utah, the Union Pacific participates in through routes and joint rates with other lines, including the Rio Grande. On that traffic interchange is made with the Rio Grande at Salt Lake City and Provo, Utah.

As hereinafter explained, the Rio Grande participates in joint rates on transcontinental traffic with all of its connections at its Utah junctions, except the Union Pacific, from and to the western portions of the northwest area. Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect, close the Ogden gateway in a commercial sense. We are asked to exercise our authority under section 15 (3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest.

The power to establish through routes and joint rates is limited by the provisions of section 15 (4), which declares that, except as provided in section 3 of the act, and except where one of the carriers is a water line, we may not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (*a*) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (*b*) unless we find that the through route proposed is needed in order to provide "adequate, and more efficient or more economic, transportation." The foregoing provisions are subject to the further proviso that in prescribing through routes,

we shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (*a*) and (*b*), give reasonable preference to the carrier by railroad which originates the traffic. The section further provides that no through route and joint rates applicable thereto shall be established by us for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15 (4) are not applicable and need not be considered. It further contends that the principal task here is to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such through routes are unjust, unreasonable, or discriminatory, in violation of sections 1 and 3 of the act, and contrary to the national transportation policy. The complainant argues that there is public need for joint rates via the Ogden gateway equal to the joint rates now maintained by the defendants over the competitive routes, and the public interest as well as the national transportation policy will be served by the establishment of such rates.

Through Routes

The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute "through routes" as that term is used in section 15 (3) and (4) of the act. As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or

through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.

In *Thompson v. United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the content of the term "through route" as used in the act, upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15 (1) of the act. The Court held:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such

> through route. * * * Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route.

The Court cited with approval *Beaman Elevator Co. v. Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, wherein the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, "that one shipment was not representative of the carriers' course of business." It thus becomes necessary to determine whether the carriers in this proceeding "hold themselves out as offering through transportation service" from and to the points here concerned via the Ogden gateway as indicated by their "course of business" in respect of traffic over the routes in question.

The evidence shows that 37 carload shipments were made in 1948, which may be accepted as a representative year, on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment,

paper bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

West-bound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destinations so as to avoid paying the applicable combination rates on Ogden.

In that same year, 21 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly used routes to the routes here sought to be opened commercially. For example, in February, 1949, when the main line of the Union Pacific in Wyoming was blocked by snowstorms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable and have no bearing upon the issue of whether or not those routes constitute "through routes" within the meaning of that term as used in the act.

So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by

the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads eastbound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co., supra,* cited with approval by the Supreme Court in *Thompson v. United States, supra.* Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15 (3) and (4) of the act simply by preliminarily making a shipment or two over

the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15 (4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*

We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic[3] here concerned, and that any order requiring the establishment of such routes and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15 (3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower that the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together.

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3 Except on east-bound shipments of sheep and goats, to which reference is made later in this report.

Before proceeding to a discussion of the evidence relating to the foregoing issues, we shall give consideration to a procedural contention and a motion made by the defendants. The contention is that an allegation of undue prejudice and preference under section 3 (1) of the act is not properly before us. As stated, the complaint embodies an allegation, among other things, of violation of section 3, without specifying any particular paragraph or paragraphs of that section. We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3 (1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con, was received on this issue and we think it has been fairly tendered here for decision.

The motion is that the complaint be dismissed on the ground that the request of the complainant for joint rates over the Rio Grande via the Ogden gateway is for the purpose of assisting that carrier to meet its financial needs. As stated, section 15 (4) of the act forbids us to require the establishment of any through route and joint rate applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs. Consistently throughout the proceeding, the complainant disclaimed any intent to prosecute the complaint with the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion is overruled.

Proponents' Testimony

Joint rates now apply via the Ogden gateway over the Rio Grande on traffic from and to Colorado common

points and points east thereof to and from California and certain Pacific coast points in connection with the Union Pacific, the Southern Pacific Company, The Western Pacific Railroad Company, and The Great Northern Railway Company, as more particularly described later.

The Union Pacific with its leased lines has operated since January, 1936, as a single system. It consists of the Union Pacific Railroad Company operating from Omaha, Nebr., and Kansas City, Mo., to Ogden via Julesburg, Colo., Cheyenne and Granger, Wyo., and via Limon and Denver, Colo., and Cheyenne; the Oregon Short Line Railroad Company operating in Utah north of Ogden, and in Wyoming, Idaho, Oregon, Montana, and Nevada, extending from Salt Lake City to Butte, Mont., and Huntington, Oreg., the Oregon-Washington Railroad and Navigation Company operating in Idaho, Oregon, and Washington north and west of Huntington to Spokane, Wash., Portland, Oreg., and Seattle, Wash.; the Los Angeles & Salt Lake Railroad Company from Salt Lake City to Los Angeles, Calif.; and the St. Joseph & Grand Island Railroad Company in Kansas, Nebraska, and Missouri from St. Joseph, Mo., and Grand Island, Nebr. Lease of the properties of the foregoing roads, which had been operated with the Union Pacific under common control and management, was considered and approved in *Union Pac. R. Co. Unification,* 189 I. C. C. 357 (1933) and 207 I. C. C. 543 (1935).

The railroad now operated by the complainant was originally the Denver, Rio Grande Railway organized in 1870 as a narrow-gage line. After passing through various hands and receiverships, the Denver and Rio Grande Railroad Company was organized in 1886 to operate the property. When the main line was converted to standard

gage in 1890, the railroad was opened for through traffic between Denver and Ogden by way of Pueblo, Rio Grande, and Tennessee Pass, Colo. Prior to that date, the Rio Grande could participate in transcontinental traffic only by transferring the lading to its narrow-gage cars. In 1901, it acquired the Rio Grande Western Railroad Company operating between Grand Junction, Colo., and Ogden via Provo and Salt Lake City.

Although opened for through business, the line was handicapped by the fact, among others, that traffic originated at or destined to its Colorado gateways or east thereof could not be interchanged at joint through rates at Ogden or Salt Lake City with its connections, the Oregon Short Line, to or from points on that line in Utah north of Ogden and through southern Idaho to Butte and Huntington. Also, traffic from and to Oregon over the Southern Pacific, to or from Colorado common points and east, could not be transported over the Rio Grande at joint rates equal to those over competitive routes. In 1897, however, the Union Pacific and its controlled lines, the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company operating north and west of Huntington, were in separate receiverships. In that year the two lines last named established joint through rates to and from points in the northwest area with the Rio Grande via Ogden and thus opened that gateway at rates equal to the rates then in effect over the Wyoming line of the Union Pacific through Cheyenne and Granger. Those rates applied on traffic between the Pacific coast terminals, including Portland, Tacoma, and Seattle, and Missouri and Mississippi River points and numerous points east thereof.

In the same year, the Oregon-Washington Railroad and Navigation Company established joint through rates

between its Oregon and Washington stations and points on, or reached by, the lines of the Great Northern and Northern Pacific Railway Company through Spokane and Wallula, Wash. Joint rates through those junctions from and to Union Pacific stations have been continued in effect.

Ogden remained as an open gateway through which joint rates over the Rio Grande applied until 1906, when such rates were canceled by the Union Pacific from and to Colorado common points and east, to and from points in Montana, Idaho, and Oregon on the Oregon Short Line and its connections. In 1912, transcontinental freight rates to and from points on the Oregon-Washington Railroad and Navigation Company (resulting from reorganizations in the interval) over the Rio Grande and its Utah junctions were also canceled. During this period the Southern Pacific was controlled by the Union Pacific and that circumstance greatly influenced the routing of freight and passenger traffic over the Union Pacific to and from Oregon and California. As a result of competitive stresses, as well as for other reasons, the Rio Grande financed the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast. The Western Pacific was opened in July 1911 and participates in through routes and joint rates on transcontinental traffic via Salt Lake City with the Rio Grande and the Union Pacific, its two connections at that point. In 1912, the Union Pacific was required to divest itself of control of the Southern Pacific. *United States v. Union Pac. R. Co.*, 226 U. S. 61.

Through passenger fares also were in effect over the lines of the Union Pacific and the Rio Grande via the latter's Colorado and Utah junctions from 1897 to 1915,

when they were canceled by the Union Pacific. *Ogden Gateway Case,* 35 I. C. C. 131.

In 1915, the Western Pacific and, in 1918, the Rio Grande, went into receivership. After various changes, the latter was reorganized on April 11, 1947, as the Denver and Rio Grande Western Railroad Company. *Denver & R. G. W. R. Co. Reorganization,* 267 I. C. C. 862. As a part of its reorganization on that date, the Rio Grande merged with the Denver and Salt Lake Railway Company, and thereby acquired the Moffat tunnel line of that carrier. By that line and the Dotsero cut-off, completed in 1934, from Orestod, Colo., on the Denver & Salt Lake to Dotsero, Colo., on its own line, the Rio Grande obtained a route from Denver to Ogden 175 miles shorter than its route through Pueblo.

The Rio Grande now operates between Denver and Ogden over the two routes. By way of the Moffat tunnel the distance is 607 miles, and the other route through Pueblo is 782 miles. These two are the main lines and constitute 951 miles, or 51 percent, of the Rio Grande standard-gage tracks. In addition, there are 1,452 miles of branch lines, of which 527 miles are narrow gage serving western Colorado and northwestern New Mexico in areas of small population and light traffic. In all, it operates about 2,400 miles of road.

Eastern connections of the Rio Grande are in Colorado at Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad. At Denver, it connects and interchanges traffic with the Union Pacific, the Chicago, Burlington & Quincy Railroad Company, called the Burlington, the Chicago, Rock Island and Pacific Railroad Company, called the Rock Island, The Atchison, Topeka and Santa

Fe Railway Company, called the Santa Fe, and The Colorado and Southern Railway Company, of the Burlington system. At Colorado Springs, 75 miles south of Denver, it interchanges with the Rock Island and the Santa Fe. At Pueblo, 119 miles south of Denver, it interchanges with the Missouri Pacific Railroad Company (Guy A. Thompson, trustee), the Santa Fe, and the Colorado & Southern. At Walsenburg, 51 miles farther south, it interchanges with the Colorado & Southern. At Trinidad, a short distance from the Colorado-New Mexico State line and 92 miles south of Pueblo, it interchanges with the Colorado & Southern and the Santa Fe.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City, 37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line.

Since 1890, when its standard-gage line was completed between Denver and Ogden via Pueblo, the Rio Grande, through its eastern and western connections, has been a part of several transcontinental routes. It now participates in through routes and joint rates on equal terms with other carriers on transcontinental traffic between (1) points in an area generally described as west of a line beginning at Vancouver, British Columbia, thence south, just east of Seattle and Portland, and southeasterly to a point west of Ogden and Salt Lake City, crossing the line of the Union Pacific at Lynndyl, Utah, 118 miles west of Salt Lake City, and thence southwesterly, east of the Union Pacific's Los Angeles line, to a point

south of San Diego, Calif., and (2) all points in the United States east of a line beginning at the Canadian border and extending southward along the Montana-North Dakota State line and the western border of South Dakota, thence southwesterly through the extreme southeastern portion of Wyoming, west of Cheyenne, and the eastern part of Colorado just west of Denver, Pueblo, and Trinidad, thence southwest and south through the central or western part of New Mexico to a point just west of El Paso. However, joint rates generally do not apply in connection with the Rio Grande on transcontinental traffic originating at or destined to points in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington east of the line first described. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande such traffic would move at higher combinations of rates to and from Ogden or Salt Lake City.

The area in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington, to and from which joint rates generally do not apply in connection with the Union Pacific and the Rio Grande, will be referred to as the excluded territory. Transcontinental traffic to or from such territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than over the Rio Grande route because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande route. The Rio Grande desires to participate as a bridge line on such traffic via its Colorado gateways and Ogden at the joint through rates. This also would include traffic to or from points in the excluded territory on lines which join with the Union Pacific in joint rates.

Representative origins, destinations, commodities, rates distances, average loadings per car, and revenues per car-mile are shown in an appendix to this report, for east-bound and west-bound movements, compiled from exhibits of record. The distances shown are those over existing routes over the Union Pacific and its connections by which joint through rates apply, and over the Rio Grande and its connections over which combination rates apply. Revenues per car-mile are computed for such rates and distances and, in addition, for the distances over the Rio Grande at joint rates on the same basis as those over the Union Pacific routes, as sought herein.

Traffic between the excluded territory and Colorado common-point territory (points in eastern Colorado from Denver south to Trinidad and west to Canon City) generally must move over the Union Pacific through Denver to get the lowest rate. Similarly, traffic between the excluded territory and Utah common-point territory (points in Utah from Ogden south to Provo and Payson) generally must move over the Union Pacific to get the lowest rate. There are some exceptions, however, with respect to rates between Utah common points on the Rio Grande and the northwest area on livestock, lumber, grain, and other commodities.

An analysis of distances from and to 5 representative points[4] on the Union Pacific in Utah north of Ogden, and in Idaho and Washington, to 14 destinations, Denver and east, over restricted routes of the Union Pacific for distances, computed over the short routes, ranging from 649 miles to Denver to 3,279 to Boston, Mass., shows that routes via Ogden and the Rio Grande to the same points

4 Logan, Utah; Boise, Idaho Falls, and Twin Falls, Idaho; and Spokane, Wash.

are longer by from 1 percent (from Spokane to New Orleans, La.) to 16 percent (from Idaho Falls to Kansas City). To the same destinations from nine other representative points[5] on the Union Pacific, from which through routes and joint rates are available in connection with the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, referred to as the Milwaukee, the Great Northern, the Northern Pacific, or the Southern Pacific, the routes via Ogden and the Rio Grande would be longer than the short workable and service routes by from 1 percent (from Seattle to Fort Worth, Tex., and Oklahoma City, Okla.) to 37.5 percent (from Yakima to Minneapolis, Minn.). To Minneapolis from seven of the nine origin points, the routes via the Great Northern form the short workable and service routes.

The Ogden-gateway routes of the Union Pacific consist of two lines. The Los Angeles line runs southwesterly through Salt Lake City, Provo, and Delta, Utah, Caliente and Las Vegas, Nev., and Barstow, Calif., to Los Angeles. Through routes with joint rates are maintained over that route in connection with the Rio Grande, as hereinbefore described. The other line of the Union Pacific runs north from Ogden, 111 miles to McCammon in southeastern Idaho. At that point it meets the Wyoming line of the Union Pacific leading west 186 miles from Granger, the junction point with the main line through Cheyenne to Ogden from the east. From McCammon the line extends north to Pocatello, Idaho, 22 miles, and from that point the main line runs in a northwesterly direction across Idaho into Oregon and Washington. From Pocatello another line extends northerly to Butte. From

5 Hood River, Milton, Pendleton, Portland, Elgin, and Redmond, Oreg., and Yakima, Kent, and Seattle, Wash.

Cheyenne, the main line extends east across Nebraska to Omaha, 507 miles, and south to Denver, 109 miles. From Ogden through Granger to Cheyenne the distance is 483 miles.

All shipments to or from points in Idaho, Montana, Oregon, and Washington north or west of McCammon over present Union Pacific routes, or over routes through Ogden and the Rio Grande, must pass through McCammon. That point therefore, is used as the point of divergence in computing distances over the Union Pacific routes and the routes over the Rio Grande by way of Ogden. A shipment from McCammon over the Union Pacific to Cheyenne would move 529 miles; and to the Denver gateway, also over the Union Pacific, 623 miles. But over the Union Pacific to Ogden, thence the Rio Grande to the Denver gateway, the shipment would move 718 miles, or 198 miles farther than over the Union Pacific route to Cheyenne and 95 miles farther than over its route to Denver. On shipments carried through to the Missouri River and points east, the Union Pacific route through Cheyenne also has the advantage in distance.

From Cheyenne to Kansas City a shipment would move 624 miles, as compared with 636 miles for a movement off the Rio Grande from Denver to Kansas City over the Rock Island, its short-line connection. A through shipment, therefore, from McCammon to Kansas City over the direct line of the Union Pacific through Granger and Cheyenne would move 1,153 miles, as compared with 1,352 miles, 199 miles longer, via Ogden and the Rio Grande to Denver, thence the Rock Island. The latter route on such a shipment would be 17.2 percent circuitous. To points east of Kansas City the maximum excess mileage from McCammon over the Rio Grande route is on a

haul to Pittsburgh, Pa. Over the Union Pacific to Omaha, thence the Chicago & North Western to Chicago, Ill., and The Pennsylvania Railroad Company beyond, the haul would be 1,991 miles, and over the Union Pacific to Ogden, the Rio Grande to Denver, the Burlington to Chicago, thence the Pennsylvania, the haul would be 2,203 miles, 212 miles longer, or a circuity of 10.7 percent.

In the following table are shown representative destinations and the distances from McCammon over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming. Joint through rates apply over the latter routes. Over routes that include the Rio Grande higher combination rates apply. The table does not contain complete routing, except over the Union Pacific direct to Omaha and Kansas City. The last column of the table shows the percentages by which the Rio Grande routes are longer, or the circuity, from the point of divergence, McCammon, to the points shown.

From McCammon, Idaho, to—	Via Union Pacific	Distance	Via Rio Grande	Distance	Difference	Circuity via Rio Grande
		Miles		Miles	Miles	Percent
Omaha, Nebr.	(1)	1,036	(2)	1,255	219	21.1
Kansas City, Mo.	(3)	1,153	(2)	1,352	199	17.2
Minneapolis, Minn.	(3)	1,396	(2)	1,593	197	14.1
St. Louis, Mo.	(3)	1,428	(2)	1,627	199	13.9
Chicago, Ill.	(1)	1,524	(2)	1,735	211	13.8
Pittsburgh, Pa.	(1)	1,991	(2)	2,203	212	10.7
Charleston, W. Va.	(3)	2,018	(2)	2,218	200	10.0
Columbia, S. C.	(3)	2,274	(2)	2,473	199	8.8
Baltimore, Md.	(1)	2,319	(2)	2,521	202	8.7
Norfolk, Va.	(3)	2,438	(2)	2,637	199	8.2
New York, N. Y.	(1)	2,477	(2)	2,674	197	8.0
Tulsa, Okla.	(4)	1,377	(5)	1,427	50	3.6
Dallas, Tex.	(6)	1,456	(5)	1,489	33	2.3
Fort Smith, Ark.	(4)	1,458	(5)	1,538	80	5.5
Memphis, Tenn.	(3)	1,593	(5)	1,786	193	12.1
New Orleans, La.	(6)	1,970	(5)	2,003	33	1.7
Atlanta, Ga.	(3)	2,044	(5)	2,204	160	7.8
Savannah, Ga.	(3)	2,327	(5)	2,486	159	6.8

1 Union Pacific through Wyoming to Omaha.
2 Union Pacific to Ogden, Rio Grande to Denver.
3 Union Pacific through Wyoming to Kansas City.
4 Union Pacific to Pacific Junction, Kans.
5 Union Pacific to Ogden, Rio Grande to Pueblo.
6 Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

The differences in the distances to destinations in the Southwest over routes including the Rio Grande from points in the excluded territory, as compared with the Union Pacific routes through Wyoming, are much less than they are to Missouri River crossings and points east and southeast. About 90 per cent of the traffic upon which joint through rates are sought via Ogden and the Rio Grande moves to the latter areas, and about 10 percent to the Southwest.

Over its routes through Wyoming, the Union Pacific gets its long haul from McCammon to Omaha, 1,036 miles, and to Kansas City, 1,153 miles. If joint rates were prescribed over the Union Pacific to Ogden and the Rio Grande to Denver, the Union Pacific's haul from McCammon to Ogden on traffic to Omaha or Kansas City and beyond would be 111 miles. However, if such traffic were routed beyond Denver over the Union Pacific, the latter would get a further haul of 560 miles to Omaha via Julesburg, or 640 miles to Kansas City via Salina, Kans., a total haul from McCammon of 671 miles to Omaha or 751 miles to Kansas City. Joint through rates are in effect over that route on sheep from Union Pacific origins in southern Idaho and eastern Oregon, but are 19 cents higher to the Missouri River and east (20 cents to Chicago) than rates over more direct routes of the Union Pacific. That railroad would establish a similar basis on cattle if requested. Over the route in connection with the Rio Grande, it would lose its haul of 529 miles from McCammon to Cheyenne, or 623 miles to Denver. On traffic routed via Ogden, the Rio Grande, and Pueblo to destinations east thereof, the Union Pacific would not be in a position to get any additional haul.

All of the foregoing distances, as stated, are computed from McCammon as the point of divergence. The great bulk of the traffic, however, from the excluded territory in Idaho, Montana, Oregon, and Washington originates or terminates on the Union Pacific or its connections west and north of that junction. On such traffic the Union Pacific would have a substantial haul in addition to that of 111 miles from McCammon to Ogden.

The hauls to Ogden would be, for example, from Lewiston, Idaho, 847 miles; from Centralia, Wash., 937 miles; and from Seattle, 1,029 miles. Over the Union Pacific direct from those respective origins to Omaha, the hauls would be 1,772, 1,862, and 1,954 miles. Those figures show the extent to which the Union Pacific would lose its long haul, the loss in mileage being 925 miles in each instance.

From and to points in the excluded territory in Oregon and Washington, and on the Burke and Headquarters branches of the Union Pacific in northern Idaho, the Union Pacific and certain other defendants have arrangements for the interchange of traffic in various commodities at junctions or gateways in Oregon, Washington, and Idaho, under joint rates. On traffic through such gateways moving under the joint rates, the Union Pacific in many instances foregoes its long haul. The gateways through which the rates are in effect, with certain limitations upon their application specified in the tariffs, are: Portland, in connection with the Southern Pacific; Marengo, Wash., and Plummer, Idaho, in connection with the Milwaukee; Spokane, in connection with the Great Northern; Wallula, Wash., and Spokane, in connection with the Northern Pacific; and Spokane, in connection with the Spokane International Railroad Company con-

necting with the Canadian Pacific Railway Company at Eastport, Idaho, at the Canadian border.

Illustrative of the hauls over the Union Pacific on traffic routed through these gateways are the following: From Lewiston, 132 miles via Marengo or 193 miles via Spokane; from Centralia, 393 miles on a route through Marengo; from Seattle, 184 miles through Portland; and from Pendleton, Oreg., 165 miles via Marengo, 227 miles via Spokane, or 70 miles via Wallula, Wash., on traffic routed over its connections at such points. If joint rates were established from the same origin points to Omaha and beyond via Ogden and the Rio Grande, the hauls of the Union Pacific to Ogden would be substantially greater than many of its hauls via other junctions with its connections, as illustrated.

For example, from Pendleton, a representative point, on traffic to Chicago the Union Pacific has a haul of 1,560 miles on its route through Omaha, but only 70 miles over an established through route via Wallula and the Northern Pacific and connections. The rates are the same over both routes. Over a route via Ogden and the Rio Grande to Denver, thence the Burlington, the distance is 2,257 miles, or 6.4 percent longer than the route via Wallula and 10.4 per cent longer than the Union Pacific route through Omaha. The Union Pacific's haul over the Rio Grande route would be 633 miles. From Pendleton to St. Louis, the Rio Grande route sought would be shorter by 168 miles than a through route now available via Spokane and the Spokane International and its connections, and would be 201 miles, or 10.3 percent, longer than the Union Pacific route through Kansas City. To Oklahoma City, Okla., the haul of the Union Pacific would be increased from 227 miles, over the present route via Wal-

lula and the Northern Pacific and connections, to 633 miles via Ogden and the Rio Grande to Pueblo and the Santa Fe beyond. The distance over the latter route is 1,910 miles, or only 34 miles, 1.3 percent, longer than the route which gives the Union Pacific its long haul; and 692 miles, or 36.2 percent, shorter than the foregoing route through Wallula.

The foregoing are illustrative of numerous established through routes in which the Union Pacific participates from points in the excluded territory which short haul that carrier. Many of such routes are longer than those here sought via Ogden and the Rio Grande, and this is true to all sections of the country east of the Rocky Mountains, except western trunk-line territory. To the latter territory the short-hauling routes are generally shorter than the routes by which the Union Pacific retains its long haul, and considerably shorter, for example, by 37.5 percent from Yakima to Minneapolis, than the routes sought via Ogden and the Rio Grande. As indicated, the portion of the excluded territory from and to which this short hauling of the Union Pacific occurs does not include points in Utah nor points in Idaho, except on the Burke and Headquarters branches of the Union Pacific in the northern portion of that State.

These short-hauling routes have been in effect for many years. Most of them were established prior to the dates when the Union Pacific assumed control of the portions of its line west of Huntington and south of Salt Lake City. Joint rates with the Southern Pacific through Portland have been in effect since about 1910, with the Milwaukee through Marengo and Plummer since about 1902, with the Great Northern through Spokane since about 1894, with the Northern Pacific through Wallula

since about 1883, and with the Spokane International through Spokane since about 1907.

On some of the traffic interchanged at these gateways the Union Pacific obtains a short haul, as compared with its connections, and on other traffic a long haul. East-bound traffic through the specified Washington and Idaho gateways consists of apples, pears, lumber and other forest products, some steel products, and miscellaneous commodities. A large portion of the traffic, particularly lumber, moves to North and South Dakota, Minnesota, and Wisconsin over the northern routes. Traffic over such routes moves also to Midwestern States and to States east of the Mississippi River. West-bound traffic through the same gateways consists of manufactured products and miscellaneous commodities from the Middle West and from eastern and southern territories.

These interchange arrangements are warranted and in the public interest, according to the defendants, because each carrier shares in long hauls on some traffic as well as short hauls on other traffic, and because the arrangements make it possible for the carriers to handle traffic over shorter routes in many instances. This latter statement, however, applies only, except to an insignificant extent, to such routes to and from points in western trunk-line territory.

As indicated, through routes and joint rates apply in connection with the Rio Grande through Provo on traffic to or from points on the Los Angeles line of the Union Pacific. Such routes generally are shorter than routes over the Union Pacific direct to or from Omaha, Kansas City, or Denver. The following is illustrative:

From Los Angeles, Calif., to—	Via Union Pacific	Distance	Via Rio Grande	Distance
		Miles		Miles
Omaha, Nebr.	(1)	1,808	(2)	1,813
Minneapolis, Minn.	(1)	2,168	(2)	2,152
Kansas City, Mo.	(3)	1,925	(2)	1,911
St. Louis, Mo.	(3)	2,200	(2)	2,185
Denver, Colo.	(4)	1,395	(2)	1,276
Chicago, Ill.	(1)	2,296	(2)	2,293
Atlanta, Ga.	(3)	2,816	(5)	2,762
Little Rock, Ark.	(3)	2,430	(5)	2,272
Dallas, Tex.	(4)	2,226	(5)	2,045

1 Union Pacific to Omaha.
2 Union Pacific to Provo and Rio Grande to Denver.
3 Union Pacific to Kansas City.
4 Union Pacific to Denver.
5 Union Pacific to Provo and Rio Grande to Pueblo.

Other defendants also participate in through routes with joint rates on traffic moving to or from points on the Union Pacific in the excluded territory from and to eastern points and voluntarily forego their long hauls. For example, the Burlington, the Rock Island, the Santa Fe, and the Missouri Pacific participate in joint rates with the Union Pacific through Kansas City and Omaha. The railroads named could haul the traffic for longer distances over their own rails to Pueblo, Denver, or Cheyenne, instead of permitting shippers to route through Kansas City and Omaha in connection with the Union Pacific.

The total amount of traffic moving between the four Northwestern States and points east of the Colorado common points is substantial. According to figures computed by the Union Pacific, transcontinental carload traffic from the East in the year 1948 over the Union Pacific through Wyoming to those Northwestern States totaled 55,631 cars. Of these, (1) 81.7 percent originated in eastern

Colorado, Kansas, Missouri, Kentucky, Virginia and all States north thereof, (2) 10.8 percent in Texas, Oklahoma, Arkansas, and Louisiana, and (3) 7.5 percent in Tennessee, Mississippi, Alabama, Georgia, Florida, North Carolina, and South Carolina. About 62 percent of the total consisted of manufactures and miscellaneous traffic, most of which originated in group (1). East-bound traffic from the four States to the same three groups in the same year totaled 116,278 carloads, of which 84.1 percent went to group (1), 10.5 percent to group (2), and 5.4 percent to group (3). About 75 percent of that total consisted of agricultural and forest products.

Of the total carloads, 171,909 in both directions, 121,909 originated or terminated in the excluded territory and the remainder, 50,000, originated or terminated at points in Oregon and Washington west of that territory. The Rio Grande is in a position to solicit movements of the latter traffic over its line at competitive joint through rates in connection with longer routes over the Southern Pacific from Portland to Ogden or over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City. These joint rates are the same as the rates which apply over the direct routes of the Union Pacific from origins on that road in the same area west of the excluded territory. For example, from Seattle to Denver the distance is 1,588 miles over the Union Pacific direct and 1,894 miles over the Union Pacific to Portland, the Southern Pacific to Ogden, and the Rio Grande beyond. In addition to the joint rates sought via the Ogden gateway from the excluded territory, the complainant is also seeking joint rates from the northwest area west of the excluded territory, the same as those in effect over the Union Pacific, Southern Pacific, and Great Northern-

Western Pacific routes, for application in connection with the Union Pacific via the Ogden gateway.

A substantial volume of traffic is handled by the Rio Grande in connection with the described routes over which it participates in competitive joint through rates to and from Oregon, Washington, and British Columbia. For example, in 1948 the Rio Grande handled 30,486 carloads in connection with the Southern Pacific and 7,152 carloads in connection with the Western Pacific-Great Northern. In 1947, the volume was 22,722 and 8,909 carloads over the respective routes. Most of this consisted of lumber from Southern Pacific origins south of Portland.[6]

The complainant's estimate of the traffic in carloads that would be potentially available to and from the excluded territory for solicitation by the Rio Grande, in the event competitive joint rates were established over its line via Ogden, from Idaho, Montana, Oregon, and Washington is about 29 percent greater than the volume of traffic, according to the Union Pacific, that moved in 1948 over its Wyoming lines. The estimate was based upon the total carload traffic originated and terminated by the Union Pacific in the years 1944 to 1948, inclusive. It included commodities within the description of products of agriculture, animals and animal products, products of mines, products of forests, and manufactures and miscellaneous commodities. The total carloads estimated as ori-

6 Prior to February 1, 1949, joint rates applied over the Bieber route in connection with the Rio Grande to competitive territory in Colorado and east thereof on lumber from certain origins in Oregon and Washington on the Oregon Trunk Railway and the Spokane, Portland and Seattle Railway Company (subsidiaries of the Great Northern and Northern Pacific). Those rates were canceled on February 1, 1949, in connection with the Rio Grande; there is no indication that the cancellation was protested.

ginated by the Union Pacific annually in the area specified was 101,476 and the number terminated 56,286, a total "potential" of 157,762 carloads.

This estimate did not include any shipments that might originate or terminate off the line of the Union Pacific and moved over that carrier as a part of a longer haul. Although stated to be a conservative estimate of potential traffic, it was computed from a substantial number of reliable sources, and represents the complainant's best analysis of the traffic considered available for solicitation. No attempt was made to estimate the amount of traffic that the Rio Grande might actually obtain from these potential sources other than a statement that there was no probability that it would get more than 10 percent and that the amount probably would be less than 10 percent because of the vigorous competition of the Union Pacific. This figure of 10 percent as a maximum was derived from the experience of the Rio Grande in obtaining other transcontinental traffic now moving at joint rates in competition with the Santa Fe, Southern Pacific, Union Pacific, Great Northern, Northern Pacific, and Milwaukee. If the Ogden gateway were opened to traffic to and from the four States named, there would be active competition with the Union Pacific, the Wabash, the Chicago & North Western, and the Missouri River connections that favor Union Pacific routing. At the present time the Rio Grande gets less than 5 percent of the traffic to and from California over the available through routes, with joint rates in connection with its line, because of competition with other routes.

A transportation specialist of the United States Department of Agriculture testified that the Rio Grande would be doing well if it obtained 1,000 cars additional

annually from this traffic, an amount that is less than 1 percent of the estimated potential total traffic.

Whatever the amount, it would be the result mainly of (*a*) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (*b*) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it.

Since 1934, when the Dotsero cut-off was constructed, affording a shorter route by the Rio Grande between Denver and the Utah gateways, there has been a marked increase in the traffic carried over that railroad. For the 2 years prior thereto, the total tons carried were less than 6,000,000 although the tons carried exceeded that figure in each year before that, back to 1924. Beginning in 1934, the traffic gradually increased and reached a maximum of 18,517,000 tons in the war year of 1944. In 1945 it dropped to 14,213,000 tons, but increased in 1947 to 18,331,000 tons and in 1948 to 18,473,000 tons. This tonnage has shown a considerable increase percentagewise in traffic received from connecting lines and a decrease in traffic originated. In 1924, 23.2 percent was received from connections and 76.8 percent originated. In 1934, the respective percent-

ages were 39.3 and 60.7. In 1947, they were 49.8 and 50.2, and in 1948 they were 52.3 and 47.7 percent. This traffic in 1948 did not differ markedly from the traffic handled in the four war years 1942-45, when the percentages of traffic received from connections ranged from 52.6 percent in 1942 to 58.2 percent in 1945.

Of the traffic received from connections in the 15-year period 1934 to 1948, inclusive, the percentage terminated on the line of the Rio Grande has ranged from 16.4 percent in 1941 to 20.7 percent in 1948. In the war years the percentages were 16.7 to 19.9 percent. In the same 15-year period, of the traffic received from connections, the amount delivered to connections, that is, bridge traffic ranged from 20.7 percent in 1935 to 39.6 percent in the war year of 1945. Excluding the war years, the percentage of traffic received from connections that was delivered to connections was 30.1 percent in 1947 and 31.6 percent in 1948. In 1934, the corresponding percentage was 21.7 percent and in 1924 it was 9 percent. These percentages show the increasing importance of the Rio Grande as a bridge line. In tons of freight carried in 1947, such traffic accounted for 5,519,239 tons out of a total of 18,331,176 tons, and in 1948 accounted for 5,846,793 tons of a total of 18,473,356 tons carried. In revenue, the Rio Grande received in 1947 from its bridge traffic $22,894,412, which was 43.3 percent of its total revenue of $52,883,339; and in 1948, $27,654,086 or 44.2 percent of its total revenue of $62,505,951.

Although the percentage relation of the traffic originated on the Rio Grande to the total traffic of that carrier has decreased, such traffic both in tonnage and revenue has increased in the same 15-year period. In 1934, the tons originated were 3,826,049 and the revenue received therefrom was $8,311,254; in 1947, the tons originated were 9,202,867 and the revenue therefrom $20,190,318; and in

1948, the corresponding figures were 8,804,334 tons and $22,018,519. The 1947 and 1948 figures exceeded those of the war years. The volume of strictly local traffic; that is, traffic both originated and terminated on the line, also increased; this traffic in 1934, for example, accounted for 2,048,544 tons and $4,351,807 in revenue, and in 1948, for 3,307,374 tons and $7,630,587. Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

The reasons given for the decline or lack of proportionate growth in traffic originated are (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many sawmills; and (4) loss of local traffic to other forms of transportation.

The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from connecting lines and terminated. Such traffic affords a measure of the increasing importance of the Rio Grande to the shippers and receivers of freight in the localities and areas in the States of Colorado and Utah served by it. Although percentagewise, bridge traffic in relation to the total was greater in 1948 than in 1934, and increased by over 326 percent in the 15-year period, traffic originated or terminated also increased by substantial amounts, or over 155 percent. In terms of revenue, however, less was received from bridge traffic than from the other traffic. In 1934, for example, the Rio Grande received from bridge traffic $5,648,891, and

in 1948 it received $27,654,086; from the other traffic, it received $11,519,335 in 1934 and $34,851,865 in 1948.

The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled "20 Questions" as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimulated in any questionable manner.

Transit.—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. West-bound traffic to that territory is made up for the most part of manufactures and partially manufactured articles, some of which are stopped for storage, partial unloading at a number of points, and fabrication in transit.

On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the stoppage-in-transit arrangements offered by that railroad at such Rio Grande points. Pueblo has a population of about 75,000; Colorado Springs, 50,000; Grand Junction, 17,500; and Price, 5,000. All of these are distributing points for surrounding areas. A shipper at Chicago, for example, may have a carload containing shipments for consignees at Pueblo and Boise, Idaho. If the car is partially unloaded at Pueblo it cannot be reshipped over the Rio Grande to Boise at a joint through rate; but the car can be moved to Boise via Pueblo and Denver, thence the Union Pacific at a joint through rate. If stops are desired on the Rio Grande at Grand Junction, Price, or Provo, for example, joint through rates would not be available.

A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows:

Building Materials.—A dealer in and distributor of general building materials in Salt Lake City, who handles from 400 to 500 carloads annually, obtains from 150 to 200 cars from points east of Colorado common points, including cellotex from Marrero, La., roofing from Cincinnati, Ohio, doors from Louisville, Ky., hardwoods and plywoods from Algoma, Wis., and Orangeburg, N. C., asbestos products from St. Louis, and asphalt siding from Minneapolis. Distribution is made in carloads, from pool cars, and from warehouses to customers located on the Rio Grande on the western slope of Colorado, such as Glenwood Springs and Grand Junction Colo., and in Utah, such as Price, Helper, Ephraim, and Manti; and also on the Union Pacific in northern Utah; in Wyoming, Rock Springs and west; and in southern Idaho northward to and including Ashton on the West Yellowstone branch and westward to and including Magic, Shoshone, and Buhl. This dealer cannot now serve these customers from shipments made in through cars at joint rates over the Rio Grande when such cars also carry shipments for points on the Union Pacific beyond Ogden. Ephraim and Manti are on a branch line about 52 and 59 miles, respectively, south of Thistle, Utah.

In some instances this shipper has had to forego business east of Salt Lake City at points as far as Glenwood Springs because of the rate situation. If joint through rates were established, this distributor could give customers at a number of intermediate points on the Rio Grande, who generally are small dealers and can take only less-

than-carload quantities, better service through partial unloading in transit and more efficient service by frequent deliveries under more flexible schedules, instead of being limited, as at present to furnishing service in connection with pool cars consigned to Salt Lake City as the ultimate destination. Pool cars with partial loads for that point or Ogden and points on the Union Pacific beyond do not now move over the Rio Grande, but are routed over the Union Pacific to get the benefit of joint rates.

Of the 150 or more cars annually from the east, this distributor estimated that he would have stopped for partial unloading about 25 percent. Witness made no mention of commercial competition, but indicated that his chief concern was better service to his customers and a saving in cost to his company if such carloads could be stopped for partial unloading at intermediate points on the Rio Grande while moving at the through rates to Union Pacific destinations in the area served by him.

Farm machinery.—A distributor of farm machinery and equipment at Salt Lake City receives carloads of these commodities from eastern origins, including farm tractors from Detroit, Mich., and distributes them by his own motor vehicles to points in Utah and Idaho. This business was established in 1947, at which time the production of these commodities was insufficient to meet all demands, and a system of allocations based on prior needs was introduced. While the system of allocations was in effect, it was found to be more convenient and efficient to bring all shipments to Salt Lake City and distribute them by truck. This distributor is located on the Rio Grande at Salt Lake City and all shipments move over that line. He expressed a desire for joint through rates from eastern origins to points in

Utah and Idaho in connection with the Rio Grande, but admitted that no attempt was being made to partially unload shipments at points on the Rio Grande south of Salt Lake City when carloads are consigned to the latter point, or to ship over the Union Pacific to Salt Lake City where carloads could be partially unloaded or stored and later shipped to Union Pacific destinations in Utah and Idaho at joint through rates. The witness for this distributor stated that he preferred to slfip in-bound over the Rio Grande and forego the stopping-in-transit provisions that are now in effect at Salt Lake City and other points on the Union Pacific when traffic is routed over that line.

A factory branch of a large manufacturer of farm machinery and equipment which distributes in the intermountain area is located on the Rio Grande at Salt Lake City. In 1949 it received 369 carloads from its eastern manufacturing points. Of these, 70 percent were sold at points north of Salt Lake City, mostly at points served by the Union Pacific as far as Ontario, Oreg., and the remainder in Utah and western Colorado. About one-half of the shipments to Salt Lake City moved over the Rio Grande route and one-half over the Union Pacific. Shipments which move in over the Union Pacific may be stopped at Salt Lake City for partial unloading or storage in transit at the joint through rates when the ultimate destinations are on the lines of that carrier, but combinations of rates to and from Salt Lake City apply when such shipments move into that point over the Rio Grande. The manager of this branch testified that it would be desirable to establish joint through rates over the Rio Grande so that shipments moving over that line could be stored in transit at Salt Lake City and later reshipped, or partially unloaded thereat and the remainder forwarded to points on the Union Pacific at charges no greater than apply on similar

shipments moving over the Union Pacific. However he did not know what effect this would have on the parent company as some shipments have been routed over the Rio Grande when Union Pacific routing was requested. To indicate a need for joint through rates reference was made to a shipment of tractors which were routed over the Rio Grande to Salt Lake City. At that time a customer at Ontario needed two tractors and it cost about $50 each to ship them from Salt Lake City by motor carrier. If joint through rates had been in effect the car could have been partially unloaded at Salt Lake City and the two tractors could have been forwarded to Ontario at the joint rate from origin to Ontario. The record fails to show the difference in the joint rates to Salt Lake City and to Ontario. On a 34,000-pound shipment of tractors from Chicago, the joint through rate is $2.68 to Ogden and $2.98 to Boise, which is southeast of Ontario, representing a difference of $102 in charges.

Monuments.—A fabricator and wholesaler of granite and marble monuments at Brigham City, Utah, on the Union Pacific 21 miles north of Ogden, obtains his stone from Vermont, Georgia, Wisconsin, and Minnesota and sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington. This dealer has keen competition with dealers in like articles in Salt Lake City. Its business is such that straight carloads rarely can be shipped to retailers. If joint through rates were established over the Rio Grande through Ogden, cars could be stopped in transit at Colorado points, such as Grand Junction. A retailer at the latter point testified that he finds it impracticable, except in unusual instances, to purchase the various kinds of monuments needed in the trade in carloads, and that the keen competition cannot be met when

shipments are made in less than carloads. There is thus an urgent need for the establishment of joint through rates on this traffic to destinations in the excluded territory with stop-off privilege at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

Livestock.—Large volumes of traffic are involved in connection with the livestock industry and with the processing and marketing of agricultural products. With respect to livestock, evidence was submitted by producers, feeders, and marketers. A number of producers in the northwest area, particularly in Idaho at such points as Pocatello, Burley, Soda Springs, and Blackfoot, desire joint rates via Ogden and the Rio Grande to markets in Denver, Pueblo, and east thereof on the same basis that applies on shipments moved over the Union Pacific through Cheyenne. Much of the evidence dealt with the advantages from such joint rates when applied on livestock shipped to grazing and feeding areas in Utah and Colorado on the Rio Grande for reshipment beyond under transit arrangements. In the areas in Utah and Colorado served by the Rio Grande are good pasture lands for grazing livestock. In addition to livestock produced locally in those areas, substantial quantities are shipped in the summer season from other sections of Colorado, Utah, and surrounding States, both for feeding in feed lots and pastures and for grazing on the livestock ranges. Movements of livestock, both sheep and cattle, into and out of Colorado are substantial in volume.

Evidence as to the needs of raisers of livestock and operators engaged in fattening livestock for markets was

submitted by persons engaged in those pursuits, individually and as representatives of livestock and feeder associations. These came from several representative points or districts served by the Rio Grande, such as Heber City and La Sal, Utah, and Burns, Lamar, and Las Animas, Colo. Those served only by the Rio Grande generally buy from areas from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit on feeder stock when the fattened animals are shipped to Denver or markets east thereof. The evidence shows that such operators have to absorb the difference in transportation costs and are not able to purchase cattle or sheep economically in the northwest area in competition with buyers from Iowa, Wyoming, Nebraska, Colorado, and Kansas that have the benefit of competitive joint rates from the excluded territory over Union Pacific routes with grazing or feeding in transit arrangements.

Due to the curtailment of the use of grazing lands in national forests in Colorado, as part of a general policy for all such forest lands, livestock raisers in Colorado have curtailed their operations in raising livestock, and have engaged more in fattening stock by grazing in private pastures or feeding in feed lots. They purchase most of their feeder stock in Colorado and surrounding areas, but for supply, quality and price reasons they have been seeking some feeder stock from more distant origins, and the need for doing so, particularly by reason of the curtailment of the pasture area, has been increasing. Livestock produced in the northwest area, particularly in Idaho, Montana, and Oregon, is of excellent grade, does well on the range, and is considered very desirable for feeding and breeding purposes. About 90 percent of the

sheep produced in Colorado are produced in the area served by the Rio Grande, and the operators in this territory purchase replacement or breeding ewes in the excluded territory for summer grazing and the production of white-faced or mutton-type lambs. One witness indicated that in-bound billing on breeding ewes is used under the feeding-in-transit arrangements, when available, at points on the Rio Grande when the new-born, fattened lambs are shipped to markets, but the feeding-in-transit arrangements apparently do not apply for breeding in transit.

Operators on the Rio Grande in western Colorado and those in the eastern Arkansas Valley sections (in southeastern Colorado east of Pueblo and in southwestern Kansas) feel that they cannot now profitably purchase stock in the excluded territory for feeding in transit in competition with similar operators on the Union Pacific in Wyoming, Colorado, Nebraska, and Kansas, due to the rate situation. For example, from Dillon, Mont., to Kansas City the rate on sheep or goats in double-deck cars is $1.21 over the Union Pacific direct and $1.40 over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond, a difference of 19 cents. The 19-cent differential over the latter route applies generally on sheep and goats from Union Pacific origins in the excluded territory to Missouri River markets and points east thereof. These rates are published as joint rates over through routes via Ogden and the Rio Grande. On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to all of the territory Colorado common points and east thereof, via Ogden and the Rio Grande, the rates are on a combination basis. Cattle and sheep may be shipped from the excluded territory over the Union Pacific to Denver and con-

necting lines beyond to points in the Arkansas Valley, such as Lamar, for feeding in transit and subsequent reshipment to Missouri River markets, or markets east thereof, at the rates applicable over the Union Pacific direct to the Missouri River markets, plus an arbitrary of 8.5 cents per 100 pounds. Feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are now able to overbid the Arkansas Valley feeders on northwest stock when destined to the Missouri River and east thereof, and the latter are thus unable to compete successfully because of their unfavorable rate situation. The northern Colorado-Nebraska operators feed a majority of the lambs fattened for market in the United States.

A packing plant at Pueblo purchases lambs at the Ogden market, some of which originate at points on the Union Pacific in Idaho and Oregon. These shipments are routed over the Rio Grande from Ogden even though it costs from $70 to $80 per car more than the total charges would be if the shipments were routed over the Union Pacific to Denver t the transit balance of the through rate. The Rio Grande is used from Ogden because shipments do not have to be stopped for feed and water en route to Pueblo, whereas shipments routed from Ogden over the Union Pacific usually require feed and water at Denver. There is less shrinkage on shipments moved over the Rio Grande, but not enough to offset the additional freight charges.

The rates on livestock in western territory were prescribed in *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535. Generally, the rates are predicated on the shortest routes over which carload traffic can be moved without transfer

of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the act. The rates on stocker or feeder livestock were prescribed on a basis not in excess of 85 percent of the rates prescribed on the same kind of stock when fit for slaughter, and the carriers were authorized to establish tariff provisions which allow stock moving toward a market to be fed in transit at intermediate points on the basis of the through rates plus a reasonable charge for such privilege. On December 6, 1932, the Rio Grande was authorized (196 I. C. C. 175) to add certain arbitraries to the rates prescribed for mountain-Pacific territory for hauls over its standard-gage lines between Pueblo and Walsenburg on the east, and Provo on the west, including branch lines connecting with the main lines between those points. For hauls of 500 miles or more, the arbitrary authorized at that time was 6 cents on cattle and on hogs and sheep, double deck. Later, these same arbitraries were authorized for application between Denver and Provo over the Dotsero cut-off (200 I. C. C. 535).

In establishing the prescribed rates on livestock, the carriers appear to have limited their application over routes which do not result in short hauling, and over other and longer routes to have provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. As indicated, operators in the Arkansas Valley may now obtain cattle and sheep in the excluded territory for feeding in transit at an arbitrary of 8.5 cents, and this same arbitrary applies when the stock originates on the Burlington in Montana and Wyoming. On the other hand, such operators may at

tain feeder stock in other areas, such as Texas and New Mexico, for feeding in transit and reshipment to the Missouri River markets or markets east thereof, at lower rates than would apply if the same stock were fed in transit by operators on the Union Pacific in Colorado, Nebraska, or Kansas. For example, the rate on cattle from Las Vegas, N. Mex., to Chicago is $1.13 when stopped for feeding at Lamar, but if the same cattle were fed at Barton, Nebr., just east of Julesburg on the Union Pacific, the rate would be $1.26, or 13 cents higher. On cattle from Raton, N. Mex., fed in transit at Lamar, the rates are $1.07 to Chicago and 76 cents to Kansas City, but if the same cattle were fed in transit at Barton the rates would be $1.21 and 89 cents, respectively. Many other examples of a similar nature are shown.

The arbitrary of 19 cents, originally 13 cents, applicable on lambs from the northwest area and moving over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond was established prior to the opening of the Dotsero cut-off, and was based in part on the mileage over the Rio Grande via Pueblo. The evidence indicates that this arbitrary was based on the difference between the prescribed scale rates for the average distance from 12 representative origins, on the line of the Union Pacific from Pocatello north to Butte and west to Pendleton, to the several Missouri River markets over the Union Pacific direct and over that road to Ogden, the Rio Grande to Denver via Pueblo, and the Union Pacific beyond. Using the same formula, but giving consideration to the shorter distance over the Rio Grande's Dotsero cut-off, the Union Pacific states that the arbitraries on traffic routed over the Rio Grande should be 5 cents to Denver and Pueblo and 15 cents to the Mis-

souri River markets, and it is willing to establish these arbitraries and make them applicable to cattle as well as sheep. The arbitrary of 8.5 cents on cattle and sheep from origins on the Union Pacific and the Burlington when fed in transit at points in the Arkansas Valley and reshipped to the Missouri River and beyond apparently is based on a similar formula. Reasonable groupings were authorized in *Livestock Western District Rates, supra.*

In seeking to have the rates on livestock which apply over the Union Pacific made applicable over its lines from Ogden, the Rio Grande indicates a desire to waive the arbitraries which were authorized over its line from Provo to Denver and Pueblo and, in addition, to have established over its routes lower rates than would result from the application of the prescribed scales for the distances over its routes. On shipments moving over the Union Pacific-Ogden-Rio Grande route, this would result in short hauling the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City, which are the differences in the Union Pacific distances from McCammon to Ogden and from McCammon to Denver and Kansas City.

Reference is made to *Crouch v. Nevada N. Ry. Co.*, 208 I. C. C. 586, which concerned the rates on feeder cattle moved from East Ely, Nev., to Davis, Calif., over the lines of the Nevada Northern Railway Company to Shafter, Nev., thence the Western Pacific to Sacramento, Calif., and the Southern Pacific beyond, 760.4 miles. A rate of 47.5 cents was applicable over the Nevada Northern to Shafter and the Southern Pacific beyond, 705 miles. This rate was collected, but the defendants later sought to collect a rate of 58 cents, which was the combination rate based on Sacramento. Division 4 found that the combination rate was applicable but unreasonable to the ex-

tent that it exceeded 49.5 cents, which was the prescribed scale rate for distances of 775 miles and over 750 miles. See also *Routing Livestock to and from Oregon Points*, 209 I. C. C. 349. We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden gateway.

Agricultural commodities.—Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.

In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.

The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the Central, Southwestern, and Southeastern States. Carloads

moved over the Union Pacific to the Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect: Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

Wichita and Liberal, Kans., are described as pocket markets on potatoes and other vegetables originating in Idaho because they cannot be diverted or reconsigned therefrom to points east of the Missouri River at joint through rates. However, the record indicates that shipments refused at these two points may be diverted or reconsigned to destinations in the Southwest at the joint through rates. Wichita is not located on the direct line of any carrier operating between the Colorado common points and the Missouri River gateways, and Liberal is located in the southwestern part of Kansas near the Oklahoma border. Shipments to Kansas City and east thereof would require an out of line haul via Wichita and a substantial back haul via Liberal.

Storage facilities are available at Pueblo for the storage of perishables, including potatoes, onions, apples, pears, frozen poultry, frozen foods, butter and eggs. Joint through rates are applicable from the excluded territory via Pueblo on shipments routed over the

Union Pacific to Denver and connecting lines beyond to destinations in the Southwest and to points west of the Missouri River. The route of the Rio Grande from Ogden would be used if joint through rates were available over that route to additional destinations with storage in transit at Pueblo. Storage operators at Pueblo are now handicapped, in relation to two competitors at Denver, because the through rates do not apply via Pueblo to Denver and other northern destinations where a back haul would be required on shipments routed to Pueblo via Denver, whereas the competitors can ship at the through rate in all directions, except westward. The application of the through rates via Ogden and the Rio Grande is sought so that these shippers may have available the same distribution markets as their competitors.

A shipper who deals in dried beans from Idaho and other Western States is located at Colorado Springs. His principal markets are in southeastern territory. Beans which originate in California, Colorado, and Wyoming may be stopped at Colorado Springs for cleaning and packaging and reshipped at the balance of the joint through rates. Beans which originate in Idaho may be shipped over the Union Pacific to Denver and the Rio Grande or other connections to Pueblo and reshipped therefrom at the balance of the through rates, except to points east of the Missouri River. The route of the Rio Grande from Ogden would be used on Idaho beans if it would result in the application of joint through rates to points east of the Missouri River on the same competitive basis as is now applicable when such beans are transited at points on the Union Pacific. Another bean dealer at Fruita, Colo., on the Rio Grande about 10 miles west of Grand Junction, would like to transit Idaho beans

on the same competitive basis as is applicable at Union Pacific points. This dealer is now engaged primarily in buying pinto beans from growers in the vicinity of Fruita and shipping them in carload lots to others, including the shipper at Colorado Springs. These dealers in dried beans are in competition with like dealers at points on the Union Pacific who have the benefit of transit at the through rates to destinations, among others, east of the Missouri River.

A company which is engaged in the purchase and sale of dried beans and peas maintains plants in Nebraska at Morrill on the Burlington and at Gering on the Union Pacific. Carloads of dried beans and peas originating in California, Utah, Oregon, Washington, Idaho, Colorado, Wyoming, Montana, and Nebraska are shipped to Morrill and Gering where they are cleaned, sorted, and packaged, and reshipped generally eastward and to Oklahoma and Texas. This company can obtain Idaho beans and reship them from Gering to eastern and southern destinations at the joint through rates. It was stated, however, that a substantial amount of pinto beans (about 6,000,000 pounds per year) are obtained from Colorado, mostly on the Rio Grande, on which an out-of-line charge of 7 cents per 100 pounds is applicable in addition to the joint through rates over direct routes when such beans are processed at Gering and reshipped to the Missouri River and points east thereof; also that when such beans are processed at Gering and reshipped to destinations west of the Missouri River, combinations of rates to and from Gering are applicable.

The Utah Growers' Cooperative operates throughout Utah in the production and shipment of vegetables,

including potatoes and onions. It has two branches on the Union Pacific and three on the Rio Grande in Utah, the latter at Midvale, American Fork, and Springville, all south of Salt Lake City. These three points are served by the Union Pacific and the Rio Grande, but track connections exist only at Midvale. Shipments of box shooks and of seed potatoes from Idaho and of fertilizer from Montana may move into American Fork and Springville over the Union Pacific at lower rates than when they are interchanged with the Rio Grande at Ogden or Salt Lake City, but when they are received over the Union Pacific they must be trucked to the plants on the Rio Grande. The differences in the rates are not shown.

Various flour mills at southern Kansas points, such as Moundridge and Wichita, support the complaint because they cannot at present purchase wheat at points on the Union Pacific in Idaho, Oregon, and Washington, mill it in transit, and reship to the Missouri River and points east thereof at the same rates that are applicable when similar wheat is milled at points on the Union Pacific. A specific instance was shown where nine carloads of wheat moved from Ogden to Moundridge on which the Ogden shipper applied in-bound transit billing on wheat originating at Idaho Falls. The shipments moved from Ogden over the Union Pacific to Denver, the Rio Grande to Pueblo, and the Missouri Pacific beyond. Moundridge is a local point on a branch line of the latter carrier north of Eldorado, Kans. After the wheat was milled at Moundridge the in-bound billing thereon was applied against an out-bound movement of flour to New Cumberland, Pa. The rate on flour from Idaho Falls to New Cumberland over the route of movement through Denver and Moundridge was $1.335, or 12.5 cents higher than the

rate would have been if the same wheat had been milled at a point on the Union Pacific. The distances over the route of movement through Denver and Moundridge and the more direct route of the Union Pacific are not shown.

The rate restrictions complained of by shippers of and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from the excluded territory to Colorado common points and east thereof have placed these shippers and dealers at a serious disadvantage in marketing their products, as compared with competing shippers and dealers located on the Union Pacific and having the benefit of the lower joint through rates from and to the same points. Some of these restrictions complained of, such as those by operators of flour mills in southern Kansas, could be remedied by the establishment of additional joint through rates from the excluded territory over routes of the Union Pacific to Denver and connecting lines beyond. From McCammon and points north thereof such routes would in all instances be shorter than the routes over the Union Pacific to Ogden, the Rio Grande to Denver or Pueblo, and connecting lines beyond. The Union Pacific states that it has not been requested to establish additional joint through rates via Denver. Its position with respect thereto is that the rates on agricultural commodities are on a low basis and, therefore, the carriers should be permitted to limit their application to more direct routes, thereby maintaining their long hauls and preventing undue circuity. For example, it believes that if competitive joint through rates were established on grain for milling at Wichita and other southern Kansas points and reshipment beyond to the Missouri River and east, other and longer routes probably would be demanded on the

same basis at points in Oklahoma and Texas where competing mills are located.

The establishment of additional routes and rates by way of the Union Pacific, however, would not remedy the disadvantage complained of by the shippers of and dealers in these products in the excluded territory who are compelled to pay combination rates on shipments diverted or reconsigned at intermediate points on the Rio Grande, including those stored at Pueblo or Colorado Springs on that road, and reshipped to Colorado common points and east thereof. The only effective remedy in those instances would appear to be the establishment of through rates, the same as those over the Union Pacific routes, over Rio Grande routes via Ogden or Salt Lake City.

Lumber.—A number of lumber dealers and lumber mills are located at Grand Junction and other points, and a wood-treatment or preserving plant is located at Salida, Colo., all on the Rio Grande. Generally, the complaints of these parties relate to their inability to ship lumber and millwork from the excluded territory on competitive joint rates via Ogden and the Rio Grande with stoppage in transit for partial unloading, storage, milling, or treatment and reshipment beyond to Colorado common points and east thereof at the balance of the joint rates. Mention also was made of a handicap in diverting or reconsigning at the joint rates to such points carloads originally shipped to local stations on the Rio Grande via Ogden. As previously indicated, joint through rates apply on lumber and mill work from points in California and in Oregon and Washington west of the excluded territory, including areas around Seattle, Tacoma, and Portland, over the Southern Pacific or the Western Pacific and the Rio Grande through the Utah gateways to points

on the Rio Grande and east thereof, with storage, milling, and treatment under transit arrangements. Lumber may be shipped at joint through rates from the excluded territory when the final destinations are local points on the Rio Grande, but such rates are not applicable from that territory over the Union Pacific to Ogden and the Rio Grande when the final destinations are Colorado common points or points east thereof, whether the shipments move direct or are stopped for milling or other transit purposes.

A lumber company with a wholesale yard, a box factory, a mill, and a storage and drying yard is located at Grand Junction. This company buys most of its lumber, both rough and dressed, and plywood and doors at points west of the excluded territory and sells in Colorado and points east and south thereof. This company also has a financial interest in a wholesale lumber company at Colorado Springs. It has purchased some lumber at points in the excluded territory, such as Cascade and Winchester, Idaho, Burns, Oreg., and Metaline Falls, Wash. Lumber shipped from Cascade, Winchester, and other points in the excluded territory over the Union Pacific to Ogden and the Rio Grande to Grand Junction could not be stored in transit at the latter point and later reshipped to Colorado common points or points east thereof at the joint through rates as those rates apply only over the Union Pacific routes.

Another lumber company on the Rio Grande at Military Junction, Colo., about 10 miles south of Denver, purchases lumber in California and Oregon; also a small amount in Washington, for milling in transit and reshipment beyond. Lumber from the excluded territory can now be milled in transit at Military Junction and re-

shipped to Colorado points south thereof and to points in the Southwest at the joint through rates to final destination, but this is not true to other destinations east of the Rocky Mountains. Military Junction is about 1 mile outside of the Rio Grande's switching limits at Denver.

The wood-treatment plant at Salida purchases some lumber, poles, piling, and cross ties in Colorado, Utah, and New Mexico but most is obtained from points in Oregon and Washington west of the excluded territory. This plant has a contract for treating cross ties for the Rio Grande, but about 60 percent of the forest products which it treats are reshipped to points outside of Colorado. It has not purchased products in the excluded territory, but probably would do so if the joint through rates to eastern and southern destinations were made applicable over the Union Pacific to Ogden and the Rio Grande through Salida. The company which owns the plant at Salida has a similar plant at Denver and 22 others scattered throughout the country. The plant at Denver can perform treatment in transit at the joint through rates from the excluded territory to final destinations in the East, South, and Southwest, and apparently joint through rates apply on about 40 percent of the business at Salida which does not move outside of Colorado.

Opposition Testimony

The Union Pacific operates about 9,724 miles of railroad serving over 1,000 points in 13 States.[7] It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte,

7 Iowa, Nebraska, Wyoming, Idaho, Oregon, Washington, Missouri, Kansas, Colorado, Montana, Utah, New Mexico, and California.

Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 percent and west-bound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grande is 66.3 percent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services.

The Union Pacific objects to the establishment of joint through rates to points beyond Denver or Pueblo via Salt Lake City or Ogden over the Rio Grande upon the principal grounds that such routes would short haul the Union Pacific and that the diversion of traffic over such route from the Union Pacific routes now available would curtail the service and growth of the Union Pacific in the teritories it alone serves and in which it pioneered in railroad construction. Such diversion, it fears, would adversely affect the operation of its numerous branch lines in Idaho, Montana, Oregon, and Washington, which are feeders for its main line and are not self-sustaining. In those States the Union Pacific operates a fotal of 5,606 miles of railroad, with 2,913 miles of branch lines upon which about 46 percent of the total traffic in that territory originates or terminates. It contends that unless it has a substantial main-line haul on branch-line traffic, the operation of many, if not most, of such branches would not long be justified.

Another objection is that yard facilities of the Ogden Union Railway and Depot Company, referred to as the Depot Company, jointly owned by the Southern Pacific and the Union Pacific, at Ogden terminal are inadequate to interchange any additional volume of traffic with the Rio Grande that may be routed to or from the northwest area through Ogden, and that expansion of facilities there is not possible. Several instances of delays to trains, particularly in the fall when traffic is heavy, are shown. The record describes in detail the yard and track lay-out at this terminal and interchange point. At present the Union Pacific finds it necessary to bypass the Ogden terminal as much as possible by taking its trains for Pocatello, Salt Lake City, or Green River over an outside wye

track which avoids the terminal proper. In addition to these deficiencies, icing facilities now maintained at Ogden for east-bound and west-bound traffic are not considered adequate for icing perishable commodities from Idaho and the Pacific Northwest for delivery to the Rio Grande. The Depot Company estimated that the cost of interchanging cars between the Rio Grande and the Union Pacific and Southern Pacific is at least twice the average cost of cars in the terminal because of the additional handling required.

The largest volume of traffic was moved through the Ogden terminal in the war year 1945, when a total of 2,847,277 cars were handled. In July, the peak month in that year, the total was 284,711 cars in 2,966 trains, an average of 96 trains daily, which required an average of 70 switching shifts a day. Of that number in July, 894 were solid trains that moved through the terminal without switching. The handling of such a large volume caused considerable congestion and delays to trains. In 1949 the total number of cars handled was 1,955,219. In the peak month of that year, 2,359 trains were handled, an average of 76 trains per day, requiring about 59 switching shifts daily. These figures show that 892,058 fewer cars were handled in 1949 than in the peak year of 1945.

To show that the Union Pacific cannot afford to lose any part of its haul on traffic, attention is directed to the large deficits which the Union Pacific incurred in its passenger service. In 1948, that deficit amounted to $28,462,000, equivalent to $4,291 per mile of road operated, as compared with a passenger deficit incurred by the Rio Grande of $4,954,000, equivalent to $3,127 per mile of road. In the last 20 years the Union Pacific in only 6 years, principally in the war years, has had railway

operating income sufficient to pay fixed charges plus declared dividends, and in 1949 it had a net railway operating income of $21,707,437, which was not sufficient by $10,269,865 to pay declared dividends and interest on funded debt. That is contrasted with the results on the Rio Grande, which in 1948 had a net railway operating income of $12,156,284, out of which it provided for all fixed charges, paid a declared dividend, provided for sinking-fund requirements, and had left for its surplus account $5,167,148.

The Wabash and the Chicago & North Western, important eastern connections of the Union Pacific, furnished estimates of the possible loss of traffic to those roads, and its effect upon train service and employment on their lines in the event that the volume of traffic embraced in the Rio Grande estimate of potential traffic were diverted over the Rio Grande route.

The Wabash in 1948 participated in 9.07 percent of the total traffic handled by the Union Pacific from the Northwest and about one-half of that on west-bound traffic to that area. It estimates the value to it of the potential traffic which it might lose at $1,602,000.

The revenue derived by the Chicago & North Western from the traffic to and from the northwest territory handled in connection with the Union Pacific in 1948 was about $4,000,000. Based on the loss of the potential traffic as estimated by the Rio Grande, it urges that it will lose that amount of revenue if the joint through rates sought in this proceeding are established.

The Great Northern, Northern Pacific, Santa Fe, and Milwaukee oppose granting the Rio Grande's re-

quest for the establishment of competitive joint through rates via Ogden. Neither of these defendants, except the Santa Fe, connects with the Rio Grande. They participate, however, in joint rates with the Union Pacific on traffic between the northwest area and eastern points, but there are numerous exceptions. For example, from origins on the Great Northern joint rates are not applicable via Spokane and the Union Pacific on wool, livestock, ores, concentrates, or smelter products, and the joint rates east-bound on fruits and vegetables over that route are limited to destinations reached by the Union Pacific. These restrictions became effective on September 15, 1932, although they were protested by various shipping interests. On lumber from origins on the Great Northern, joint rates apply over that line to Spokane and the Union Pacific only when the traffic is destined to points on and west of the Missouri River, Council Bluffs to Kansas City, thence the line of The Kansas City Southern Railway Company to the Gulf of Mexico. Reference is made also to *Transcontinental Traffic Routed via Bieber, Calif.*, 213 I. C. C. '87, wherein the Great Northern was permitted to cancel joint rates via Bieber and Salt Lake City on transcontinental traffic originating at or destined to various points on the Great Northern in Idaho and Washington.

The Milwaukee, the Santa Fe, and the Wabash, in a joint brief, contend, as does the Great Northern, that upon the evidence submitted the establishment of joint rates which would short haul the defendants is not warranted.

A large number of shippers and representatives of communities served by the Union Pacific, and traffic asso-

ciations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock.

It is not practicable to deal with all of this evidence in detail, but the testimony and position of the parties have been considered. Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four Northwestern States, a total of 157,762, that number was used as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to $49,880,000 yearly.

Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (*a*) the discontinuance of four trains daily east-bound and four trains daily west-bound between Pocatello and North Platte; (*b*) three trains east-bound and three west-bound daily between North Platte and Council Bluffs; and (*c*) one train east-bound and one west-bound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of $5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300. Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed as 5,144, with a total loss of wages of $21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real-estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect such employees from loss, as conditions upon the establishment of the joint rates and through routes.

There is no specific provision in section 15 (3) or (4) requiring that such conditions be imposed, but it is argued that in finding joint rates and through routes necessary and desirable in the public interest, as required by section 15 (3), the interests of employees must be considered as they are in proceedings involving consolidations, mergers, and abandonments. Reference is made to the decision in *Cancelation of Rates and Routes via Short Lines*, 245 I. C. C. 183. In that proceeding certain carriers sought to cancel their joint rates over through routes with specified short lines. It was found that cancellation of the rates and routes would result in abandonment of the short lines with resulting inconvenience and loss to shippers and to carrier employees. Permission to cancel certain of the routes was denied.

Upon the record before us it is impossible to find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made.

Shippers have a right to route their own traffic, and where traffic is not routed by the shipper, the originating carrier has the right to control the routing within certain limitations.

General Discussion and Ultimate Fact Findings

In support of its contention that the assailed rates over its line are unreasonable, the Rio Grande submitted a large number of comparisons showing the differences in such rates and the competitive joint through rates on various commodities, together with the car-mile and ton-mile revenue under the respective rates and what the revenue would be if the lower joint rates were made applicable over its line. Neither factor of the combination rates is assailed, but the aggregates of such factors are alleged to be unreasonable to the extent that they exceed the competitive joint rates.

Many of the present joint rates on the transcontinental traffic here affected are commodity rates which were established originally on particular commodities to meet water competition. Others, such as those applicable on agricultural commodities, were established from producing areas in the excluded territory to enable growers and shippers to market such commodities in eastern and midwestern territories. For these reasons, and others, the defendants contend that it would be unreasonable to require the application of the joint rates over the Rio Grande, as it would result in depleting their revenues and in wasteful transportation over circuitous routes, as well as in short hauling the defendants, especially the Union Pacific. For example the rates on potatoes to Chicago are 96 cents from Monte Vista and Greeley, Colo., and $1.14 from Idaho Falls, Idaho, a difference of 18

cents, although the distance from Idaho Falls to Chicago, 1,597 miles, is 315 miles greater than from Monte Vista and 590 miles greater than from Greeley. Computations were submitted which indicate that on a carload of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of $1.14 would yield a net profit of $1.97 per car when moved over the Union Pacific to Omaha and the Chicago & North Western beyond, and a net loss of $62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington beyond, 1,809 miles. The computed costs were based on general cost scales compiled by our Bureau of Accounts and Cost Finding and were not based on studies of particular movements of traffic over the respective routes. Many other examples of this nature were submitted.

With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates.

With respect to the issue under section 15, the facts before us here are in some respects similar to those con-

sidered in *United States v. Union Pac. R. Co.*, 28 I. C. C. 518, and *Western Pac. R. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127, in both of which the complaints were dismissed. In the first, the complainant sought through routes and joint rates over the Rio Grande, among others, in connection with the Santa Fe at Pueblo or Denver on the east and the Oregon Short Line at Salt Lake City or Ogden on the west, on traffic moving between Chicago and certain Mississippi and Missouri River points, on the one hand, and stations on the Oregon Short Line, on the other. The joint rates sought were the same as those then in effect over generally shorter routes of the Union Pacific and other defendants. The short-hauling provision of the statute was held to be a bar to the establishment of the routes and rates sought.

In the second proceeding, the Western Pacific alleged that the failure of the defendants to join with it in the establishment and maintenance of joint rates between points in California on the Northwestern Pacific Railroad Company, controlled by the Southern Pacific, on the one hand, and eastern defined groups, on the other hand, over routes in which the Western Pacific would be an intermediate participating carrier, was discriminatory and prejudicial, and that the combination rates between such points over such routes were unreasonable. Therein, division 2 said, at pages 136 and 137:

> In requesting the application of the joint rates over its line complainant is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic which, under the act, belongs, in the absence of emergency, to the Northwestern Pacific and Southern Pacific.

The instant complainant likewise is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul. In that proceeding, the distance over the Southern Pacific route to Ogden was about 200 miles shorter than the route sought, which is substantially the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves. Again, the short hauling provision was held to be a bar to the relief sought.

Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co. v. United States*, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons, Inc. v. Alton R. Co., supra*, the Supreme Court said that the expressions "more efficient or more economic" transportation, as used in section 15 (4), "may well embrace both shippers' and carriers' interests," * * that both interests should be considered and a fair balance found."

These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.

In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

There is no contention here by complainant that the present routes of the defendants are not adequate for the traffic hauled, and no finding is sought by complainant to that effect. The absence of such a request may well be due to complainant's contention, not sustained herein except as to sheep and goats to points on the Missouri River and east thereof, that through routes via Ogden and the Rio Grande already exist within the meaning of section 15 (3) of the act. Testimony on behalf of shippers, however, does raise a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities.

In order properly to evaluate the testimony of shippers it is necessary to consider the nature, extent, and functioning of our intricate and far-flung commodity marketing system. The growth of our population and the development of the country have required a constantly expanding flow of diverse commodities. Great consuming areas in many instances are far distant from the points of production of the necessities of every-day life, particularly articles of food. Movements of transcontinental proportions are involved in important instances. That is true here. A complex but efficient marketing system has been evolved to provide as orderly a distribu-

tion of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and over as many routes as possible. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities. *Southeastern Vegetable Case*, 200 I. C. C. 273, and *Routing Lumber and Fruits, South to C. F. A. Territory*, 256 I. C. C. 223.

While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing,

or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes.

In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established.

The situation as to the commodities above named, as to which the defendants' routes are inadequate, is largely similar to that considered in *D. A. Stickell & Sons, Inc. v. Alton R. Co., supra.* There is one point of difference. There, the operating conditions, mile for mile, on the respective routes were substantially similar. Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recognized by the Commission in prior proceedings. See *Livestock, Western District Rates, supra*; and *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486. There is before us no data from which the exact differences in costs over the Union Pacific routes and the Rio Grande routes can be determined. Several estimates were made by witnesses for both the Rio Grande and the defendants, but the estimates vary so widely and are so obviously incomplete as to be practically useless. The record is sufficiently complete, however, to enable us to make a rough approximation of the differences in the operating con-

ditions and to appraise the weight which should be given to those differences, as well as to the differences in the distances over the respective routes, in determining the issues before us.

The differences in the distances between the Union Pacific routes through Wyoming, on the one hand, and the Rio Grande routes sought, on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately, from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles, or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls

between the excluded territory, on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments westbound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs eastbound, who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3 (1) of the act.

As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates the same as those in effect over the routes of

the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. No such a showing has here been made.

The situation is different with respect to traffic between Utah common points, on the one hand, and the northwest area, on the other. On such traffic the Union Pacific interchanges with the Bamberger Railroad Company at Ogden at joint through rates to and from points on that line, including Salt Lake City. There is no apparent reason why similar arrangements should not apply on like traffic interchanged with the Rio Grande. The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande.

The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points, embraced within the findings of unlawfulness herein made.

The testimony dealing with the terminal facilities at Ogden has been carefully considered. We are persuaded that the additional traffic over the Rio Grande routes which will result under the findings herein made can be interchanged at that point or at Salt Lake City by the use of the present facilities and without serious detriment to the operating efficiency of the railroads concerned.

Conclusions

We conclude:

1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans.,

to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

An appropriate order will be entered.

LEE, *Commissioner*, concurring in part:

I concur in the conclusions of the majority that joint rates the same as apply over the Union Pacific and its

connecting lines should be established via Ogden or Salt Lake City, in connection with the Rio Grande, on the commodities and from and to the origins and destinations specified by the majority; that the rates assailed on such commodities from and to such origins and destinations are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes; and that the maintenance by the Union Pacific and other defendants of joint rates from and to points on the Bamberger Railroad south of Ogden, while refusing to participate in like rates from and to the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section (3) (4) of the act. The decision in this case will correct in part, a long-standing, unlawful rate adjustment, an adjustment which has discriminated against the industries and people of Washington, Oregon, Idaho, Montana, and Utah, the area from and to which such unlawful adjustment applies being referred to in the report as the "excluded territory." However, I am of the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment. On the facts shown in the record, the act requires that the rates on all commodities, between points in the excluded territory and Colorado common points and points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes. The act contemplates that there shall be no excluded territory with respect to any commodity or persons.

Transcontinental joint rates on freight traffic were established in 1897, from and to the territory here considered, applicable over the Rio Grande routes via Ogden. These joint rates were in effect for many years, until 1906 from and to some points and until 1912 from and to other points, when they were canceled by the Union Pacific and higher combination rates became effective. However, the through routes were not closed. Numerous shippers testified that these routes are open and available and that they can route traffic over them. This testimony was not challenged or contradicted. On the contrary, a responsible traffic official of the Union Pacific testified that the Rio Grande routes are "actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon, and Washington." That these routes are open and used is proved by evidence in the record (1) of east-bound shipments of various commodities made in 1948 from points on the Union Pacific in the excluded territory to Colorado common points, and which moved over the Rio Grande routes, including the entire length of the Rio Grande line, on through bills of lading issued by the Union Pacific, (2) of west-bound shipments of various commodities made in the same year from various eastern points to points in the so-called excluded territory, and which moved on through bills of lading over carriers east of Colorado junctions to the Rio Grande at such junctions and thence over the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond, and (3) of numerous shipments moved over the Rio Grande routes between eastern points and the excluded territory during World War II and in 1949 when the Union Pacific main line in Wyoming was blocked by snow. The year 1948, the calendar year immediately preceding the hearing, was selected as typical of the sit-

nation which prevailed in the prior years and which continued up to the time of the hearing.

"I am unable to agree with the majority that the shipments referred to above must be regarded as of an isolated nature and as falling in the same category as the single shipment considered in the *Beaman Elevator case*, 155 I. C. C. 313, referred to in a footnote to the opinion of the United States Supreme Court in *Thompson v. United States*, 343 U. S. 549. In the *Beaman* case single carload shipment of grain moved over the lines of two connecting railroads from Beaman, Iowa, via Clinton, Iowa, to St. Louis, Mo. The evidence plainly showed that the bill of lading covering this shipment was issued and recognized by these railroads through error. There was no evidence "of any like movement before or since." Adequate service was available over nine other routes. A wholly different situation is before us in this proceeding. Numerous shipments of a variety of commodities have been transported in both directions over the Rio Grande routes on through bills of lading deliberately issued and recognized by the Union Pacific and the other participating carriers. The situation here before us is similar to that considered by the Supreme Court in *Virginia Ry. v. United States*, 272 U. S. 658, also referred to in a footnote to the decision in *Thompson v. United States, supra*, in which, in referring to the route over which the Commission there prescribed reasonable and nondiscriminatory rates, the Court stated that "that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive."

The Court held however, that even though the route was closed commercially, open through routes to the West were in existence.

In the *Thompson* case the court pointed out that "there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line" or that the carriers have ever offered through service over the Missouri Pacific-Burlington route. Thus, the facts before the Court in that case likewise were wholly different from those before us in this proceeding. I think that the Court's opinion in that case supports the conclusion that through routes on freight traffic over the Rio Grande routes have existed for many years and now exist and that the short-hauling provision of section 15 (4) is not applicable.

If, however, the Rio Grande routes were actually closed, the short-hauling provision of section 15 (4) of the act would not be a bar to the correction in full of the present discriminatory rate adjustment. The discrimination in violation of section 3 of the act, shown by the evidence, makes that provision of section 15 (4) inapplicable. In any event, the Rio Grande routes are shown to be needed in order to provide adequate, and more efficient and more economic transportation, and, if they were not already open through routes, we could and should require that they be opened.

As stated in the report of the majority, the evide shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments, livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, who reconsign shipments or take advantage of transit arrangements at intermediate points

on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific. The evidence is equally impressive with respect to the disadvantage or handicap to shippers or receivers of lumber, building materials, farm machinery, and other commodities. For instance, the lumber company at Military Junction, Colo., referred to in the majority report, is handicapped in its efforts to compete with mills at Denver and Kansas City because it cannot obtain lumber from the excluded territory for milling in transit on the same basis as these competing mills. A representative of that company testified that it would purchase several million feet of lumber annually from points in the excluded territory if it had available reasonable and nonprejudicial joint rates over the Rio Grande routes. By reason of the rate situation complained of, the lumber dealer at Grand Junction, Colo., who is also referred to in the majority report, has lost business to competitors who have the benefit of transit at the joint rates applicable over the Union Pacific routes. This evidence is only typical; it was presented as representative of the prevailing situation.

Shippers and receivers of freight at points in eastern Oregon and southern Idaho, on the line of the Union Pacific, have been, and are, excluded from additional markets that would be available to them if reasonable and nonprejudicial joint rates were in effect over the Rio Grande routes. Some of these shippers express the belief that the establishment of such joint rates would provide them with a better car supply, in that the Rio Grande would furnish additional cars to move out shipments routed over its line. It is common knowledge that better supply of cars is available to shippers who have com-

petitive routes to the consuming markets. The record clearly establishes that the present rate adjustment results in a substantial disadvantage to the industries, shippers, and receivers located in the considered territory, and in undue prejudice to them.

Likewise, the evidence establishes that the defendant railroads discriminate against the Rio Grande, in that from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections, its long haul, while refusing to establish the same joint rates over the Rio Grande routes. The routes by which defendants short haul themselves are generally as long as, and in many instances substantially longer than, the Rio Grande routes, and the hauls of the Union Pacific and of other defendants are shorter over such established routes than over the Rio Grande. The evidence does not establish that transportation conditions are more favorable over these routes than over the Rio Grande routes which are discriminated against by defendants. On the contrary, the record, in my opinion, warrants finding that the transportation conditions over such routes are, in general, no more favorable than over the Rio Grande routes. The Union Pacific and the other defendants are, and for the future will be, violating section 3 (4) of the act by failing and refusing to participate in joint rates with the Rio Grande, from and to points in the excluded territory, to and from points in official, southern, and southwestern territories, while participating with each other in joint rates from

and to the same points, over routes over which the Union Pacific and other defendants short haul themselves.

The Union Pacific is a strong and progressive railroad. It is ably managed and efficiently and economically operated. Being the only railroad in southern Idaho, every shipper in that area is dependent on it for rail service. I am persuaded that, instead of being allowed to continue to maintain an "excluded territory," it should be required to provide these shippers with joint rates which will enable them to buy and sell in all markets on an equality with other shippers, and that such joint rates will not result in any substantial diversion of the traffic now moved over its lines.

The joint rates now in effect on freight traffic over the Union Pacific routes are shown by the record to be reasonable for application over the Rio Grande routes. We should require that these rates be maintained over the latter routes.

PATTERSON, *Commissioner*, concurring in part:

I concur in the relief granted to the Rio Grande and transit operators thereon who are handicapped by the lack of through routes and joint rates the same as those over the Union Pacific routes. It seems to me, however, that the findings of unlawfulness are inconsistent in that they fail to include lumber and articles taking lumber rates in the relief granted.

The showing made of a need for such through routes and joint rates, in my opinion, is more persuasive as to lumber and articles taking lumber rates than as to any of the commodities included in the foregoing findings, with the possible exception of livestock. The record shows,

that at least one lumber dealer at Grand Junction, another at Military Junction, near Denver, and a wood-treatment plant at Salida, all on the Rio Grande, are handicapped in their efforts to compete with like dealers on the Union Pacific routes, and that at least the dealer at Grand Junction has lost business, by reason of the rate situation complained of, to competitors who have the benefit of transit at the joint rates over the Union Pacific routes. I believe this evidence is adequate support for the inclusion of this commodity group in the findings of unlawfulness made.

The order entered in connection with this report requires the establishment on particular commodities in connection with the Rio Grande, of through routes and joint rates the same as those now in effect over the Union Pacific routes. The formation of those through routes is appropriately left, in large measure, to the carriers. I want to make it clear that in my view, on traffic to or from the area east of the Colorado common points, where the provisions of the order so permit, these new routes should be formed in such a manner as to short haul the Union Pacific only to the extent necessary to afford the Rio Grande its line haul and avoid unduly circuitous routes.

ARPAIA, *Commissioner*, concurring:

In my opinion there are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of section 15 (4) of the Interstate Commerce Act is not required.

The evidence of record shows that these routes presently are open and available to shippers on combination

rates. The history of the relationship between these carriers leaves no doubt as to that fact.

When joint rates over these routes, which were in effect from 1897 to 1906 and 1912, were canceled by the Union Pacific, no specific cancellation was made of the through routes over which the joint rates applied. To my mind it would be necessary for the Union Pacific to have shown affirmatively that it refused traffic on through billing over the Ogden Gateway in order to negative the existence of such through routes. Instead, the record shows information elicited from an official of the Union Pacific to the effect that routes via Ogden were available subject to the application of combinations of local rates.

The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.

We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires.

MAHAFFIE, *Commissioner*, dissenting in part:

I dissent from the majority report insofar as it fails to find that the existing routes to and from the northwest territory, described in the report, via the Rio Grande through the Ogden gateway are effective through routes and that the failure of the Union Pacific and other defendant railroads to establish joint rates with the Rio Grande via Ogden unjustly discriminates against that carrier. I disagree also because the report does not find that

it is necessary and desirable in the public interest that joint rates on commodities generally, in addition to those specified, should be established over such through routes.

We are not called upon in this proceeding to exercise our authority, under section 15 (4) of the Interstate Commerce Act, to establish new through routes via that gateway. Therefore, the conditions in that paragraph are not applicable. We are free to exercise our power under section 15 (3) to establish joint rates unhampered by those restrictions.

A finding that these routes are open and freely available to shippers today is fully supported by the evidence. It was acknowledged by a freight traffic official of the Union Pacific that a shipper has the right under the act (section 15 (8)), to specify such routes for the carriage of his shipments. That right, it should be noted, can be availed of only when two or more through routes and through rates are actually established and in existence.

The record shows that some joint through rates, as distinguished from combination rates, are in fact now published in a Union Pacific tariff for application through Ogden over the entire length of the Rio Grande to Denver and the Union Pacific beyond. These apply on shipments of sheep or goats originating on the Union Pacific in southern Idaho and eastern Oregon, billed to destinations on the Missouri and Mississippi Rivers and to Chicago and other points. The joint rates are higher than rates on like livestock moved over the direct route of the Union Pacific and, therefore, retard use of the Rio Grande route. But the publication of such joint rates in connection with transportation over the whole length of the Rio Grande is proof of the consent of the Union Pacific for

the use of that rail line as part of a through route at joint rates. And it was further stated by the same witness that the Union Pacific has no objection to publishing the same joint rate arrangement on shipments of cattle.

In 1941-42 mixed military trains with troops in passenger cars and military supplies in freight service were transported over this route on through billing. Four examples of such trains are described in the record. These moved from Fort Sill, Okla., and Camp Claiborne, La., to Fort Lewis, Wash., in December 1941 and February 1942. The trains were routed and moved to Colorado junctions of the Rio Grande, thence over that railroad to Ogden and the Union Pacific beyond. Unlike certain other movements to and from the northwest area via Ogden in the war period in connection with these two lines, the military trains were not routed under service orders issued by us or the Office of Defense Transportation. Arrangements for the through movements were made with the railroads and the rates charged were settled on the basis of the joint rates applicable in connection with the Union Pacific routes through Wyoming.

The existence of the route as an established through route was undoubtedly an important consideration for its use in February 1949, when the line of the Union Pacific was blocked by snow. In that emergency, freight cars, passenger cars, express and mail were promptly diverted by the Union Pacific through Denver over the Rio Grande to Salt Lake City and to Ogden for movement beyond. Of the freight cars diverted, 1,493 were for destinations in Idaho on the Union Pacific and in the northwest area.

Actual and continuous use of the Rio Grande route at through rates made by combinations of separate rate factors via Ogden to and from the Northwest without op-

position or objection by the Union Pacific or other participating railroads is amply shown by the evidence of typical movements of numerous commodities. The calendar year 1948 was used by the Rio Grande as a representative year. In that year 16 carloads of various commodities were shipped from the northwest territory over the Union Pacific to Ogden and the Rio Grande beyond to Denver, Louviers, Pueblo and Trinidad, Colo., over the entire length of the Rio Grande. They originated on the Union Pacific and moved on through bills of lading. Some of the cars were partly unloaded at Rio Grande points and then continued through to their destinations. Seventeen carloads of various commodities moved, from late in December 1947, and in the year 1948, from various eastern points on through bills of lading at through combinations of rates over rail lines east of the Colorado junctions to the Rio Grande at such junctions thence over that line to Salt Lake City or Ogden and the Union Pacific beyond. Some of the cars were stopped for partial unloading at stations on the Rio Grande or the Union Pacific.

The same kinds of movements as those exhibited in 1948 prevailed to about the same extent in years prior to 1948 and continued into 1949 at the time of the hearings.

All of this evidence clearly supports a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for a finding that they are established through routes announced by the United States Supreme Court in

Thompson v. United States, 343 U. S. 549. In that case, the Court said "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the Court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit and, therefore, no through routes existed between those points.

The situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole inevitably leads to that conclusion. To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.

Even if a finding that no through routes exist over this line be sustained there is substantial evidence that the rate situation results in undue prejudice and undue

disadvantage to shippers and to districts and localities in Utah and Colorado dependent upon the Rio Grande for rail service, in violation of section 3 (1) of the act. Such violation removes the restrictions imposed in section 15 (4) upon our authority to establish through routes. That undue prejudice and undue disadvantage exist is fully supported by the testimony of numerous witnesses. Briefly, the testimony shows that livestock producers in Utah and Colorado, in areas served by the Rio Grande, are not able, due to the combination through rates via Ogden, to buy on a reasonably competitive basis, cattle and sheep in Idaho, Montana, Oregon and Washington for grazing and feeding in transit on the ranges in Utah and Colorado, in competition with buyers and stock feeders in northern Colorado, Nebraska, and northern Kansas. The same undue prejudice and undue disadvantage is experienced by buyers and feeders in southeastern Colorado east of Pueblo, Colo., and in southwestern Kansas served by the Santa Fe and the Missouri Pacific railroads. Their failure to obtain joint through rates from the producing areas in the Northwest over the Union Pacific to Ogden, Rio Grande to Pueblo and its connections beyond places them at an undue disadvantage.

The record contains convincing evidence by representatives of large groups of shippers that there is undue prejudice and undue disadvantage to wool producers, as well as to livestock operators in Colorado served by the Rio Grande; also to lumber dealers and processors, dealers in farm machinery and other commodities, and to a cold storage warehouse operator in Pueblo. There is substantial evidence from producers and shippers of agricultural commodities in the Northwest, particularly in Idaho, to support findings that the refusal of the defendant railroads to join in joint through rates via Ogden,

and the Rio Grande to and from points beyond the Colorado gateways of that carrier exclude them from additional markets needed for their products. All of that evidence sustains and fully supports the finding that there is a violation of section 3 (1) of the act and justifies a general finding that joint through rates via the Ogden gateway should be established on commodities generally. The findings should not be limited, as are the findings of the majority, to particular commodities as to which evidence was offered but should be broadened to include all commodities.

We are fully warranted in dealing with this situation broadly, in considering what is necessary and desirable in the public interest, with respect to joint rates over these established through routes. We are not limited to consideration of proof as to every rate on every commodity from every origin to every destination. Such a view of our authority is too narrow and is not justified by the law or the evidence.

In other types of proceedings where we found it necessary to deal generally with a comprehensive rate situation, the Supreme Court has held that we may properly make general findings upon typical evidence representative of the situation as a whole.

In exercising authority under section 13 (4) as to the lawfulness of rail rates on intrastate traffic in a State and under section 15 (6) as to divisions of joint rates of rail carriers we may make general findings when the evidence is shown in numerous and representative instances that are typical of the rate situation as a whole. Similarly we need not attempt the impracticable, if not impossible, task of examining every rate on every commodity

and class of commodities, from every origin to every destination in the large areas and territories under scrutiny here. We can adjust the remedy to the evil and make our order as broad as the discrimination and undue prejudice. See *Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493, 507. In *Wisconsin Railroad Comm. v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579, a proceeding dealing with intrastate rates on a State-wide basis, the Court stated that "any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute." In *Georgia Public Service Comm. v. United States*, 283 U. S. 765, 774, the Court said that "when an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings." That case also arose under section 13 (4) of the act with respect to intrastate rates. There the order related to a few commodities but the rates prescribed were State-wide in operation and applied to shipments between hundreds of points of origin and destination. Under those circumstances the Court held that "To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief."

To the same effect is the holding of the Court in *New England Divisions Case*, 261 U. S. 184, 197. There the Court had under consideration contentions with respect to the nature of the evidence in support of our order as to divisions of joint rates between groups of rail carriers. The Court pointed out that our order was based on evidence which we assumed was "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." That method of proof was found to be our common practice in

adjudicating comprehensively upon substantially all rates in a large territory, and that the actual necessities of procedure and administration had led to the adoption of that method also in passing upon the reasonableness of proposed rate increases. That method was found equally appropriate in passing upon multitudes of divisions of joint rates. That it has similar application in a comprehensive case such as we have here where we are called upon to establish joint rates via a gateway through which substantially all joint rates have been refused, is equally clear. In the case cited, the Court said that there was no constitutional obstacle to the adoption of the method pursued and that only in the way could the task be performed.

The same rule should be applied in the instant case, in order to carry out effectively our authority to prescribe, in the public interest, joint rates by way of the Ogden gateway. The report of the majority finds it necessary in the public interest that joint rates via that gateway be established on particular commodities as specified in the report. The same evidence is, and should be concluded to be typical of the rate situation as a whole. In accordance with our practice in other types of comprehensive proceedings which has been found lawful and necessary under principles announced in the Supreme Court cases cited, that evidence should be found adequate to support an order that joint rates be established via that gateway on commodities generally.

I am authorized to state that COMMISSIONERS SPLAWN and CROSS join in this expression.

COMMISSIONER KNUDSON did not participate in the disposition of this proceeding.

From—	To—	Commodity	Rates [1]		Distances [2]		Revenues per car-mile			Average carload weight
			Via Union Pacific routes	Via D&RGW routes	Via Union Pacific routes	Via D&RGW routes	Via Union Pacific joint rates	Via D&RGW combination rates	Via D&RGW joint rates [3]	
			Cents	*Cents*	*Miles*	*Miles*	*Cents*	*Cents*	*Cents*	*Pounds*
Pendleton, Oreg	North Salt Lake, Utah	Cattle	58	90	342	342	37.99	58.95	37.99	22,400
Logan, Utah	Denver, Colo	do	83	111	649	679	28.65	36.62	27.38	22,400
Huntington, Oreg	Chicago, Ill	do	168	213	1,872	2,083	20.10	22.91	18.07	22,400
Idaho Falls, Idaho	Oklahoma City, Okla	Potatoes	90	128	1,428	1,462	28.44	39.50	27.78	45,120
Redmond, Oreg	Atlanta, Ga	do	163	203	2,808	3,008	26.19	30.45	24.45	45,120
Armstead, Mont	Oklahoma City, Okla	Dry beans and peas	93	203	1,550	1,584	50.89	108.70	49.80	84,820
Twin Falls, Idaho	Atlanta, Ga	do	148	187	2,172	2,372	57.80	66.87	52.92	84,820
Nampa, Idaho	Detroit, Mich	Lettuce	175	217	2,074	2,286	29.96	23.58	19.02	24,840
Hood River, Oreg	Pittsburgh, Pa	Apples	192	252	2,666	2,877	29.99	36.47	27.79	41,640
Spokane, Wash	Kansas City, Mo	Wheat	86.5	132	1,901	2,101	47.40	65.45	42.89	104,180
Pocatello, Idaho	Wichita, Kans	do	68.5	96	1,206	1,240	59.17	80.66	57.55	104,180
Spokane, Wash	Omaha, Nebr	Lumber	92	143.5	1,784	2,003	35.76	49.68	31.85	69,340
Kellogg-Wardner, Idaho	Fort Worth, Tex	do	104	143.5	2,237	2,271	32.24	43.81	31.75	69,340
Portland, Oreg	Provo, Utah	Canned goods	84	116	943	930	53.82	75.36	54.57	60,420
Do	New Orleans, La	do	143	209	2,762	2,728	31.28	46.29	31.67	60,420
St. Louis, Mo	Logan, Utah	Roofing	153	196	1,453	1,588	64.76	75.91	59.25	61,500
Chicago, Ill	Spokane, Wash	do	161	250	2,272	2,483	43.58	61.92	39.88	61,500
Geneva, Utah	Boise, Idaho	Iron and steel articles	63	78.55	447	440	109.76	136.03	111.51	77,880
Do	Portland, Oreg	do	63	78.55	928	921	52.87	66.42	53.27	77,880
Pittsburgh, Pa	do	do	167	205	2,729	2,941	47.50	54.10	44.08	77,880
Salt Lake City, Utah	Butte, Mont	Agricultural implements	141	173	433	434	98.67	120.78	98.44	30,300
Detroit, Mich	Malad, Idaho	do	295	333	1,836	1,982	49.17	51.41	45.54	30,300
Denver, Colo	Spokane, Wash	Vehicle parts	251	370	1,371	1,466	79.16	109.13	74.03	43,240
Fort Worth, Tex	Seattle, Wash	Animal and poultry feed	119	278	2,356	2,372	31.48	72.48	31.02	61,840
Denver, Colo	Butte, Mont	Tires and tubes	179	294	908	1,004	73.41	109.05	66.39	37,240
Atlanta, Ga	do	Furniture	396	596	2,318	2,518	28.63	39.67	26.36	16,760
Kansas City, Mo	Seattle, Wash	Paper	154	373	2,069	2,269	31.72	70.06	28.93	42,630
Oklahoma City, Okla	Boise, Idaho	Petroleum and petroleum products.	141	188	1,612	1,645	48.09	62.83	47.13	54,980
Kanssa City, Mo	Portland, Oreg	Paint and paint material	170	364	1,891	2,091	52.84	102.32	47.79	58,780

[1] In cents per 100 pounds; in effect September 1, 1949.
[2] Over existing routes of Union Pacific and connections; and over Denver & Rio Grande Western routes.
[3] At joint rates applicable over competitive routes of Union Pacific and connections.

APPENDIX C

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

Denver & Rio Grande Western Railroad Company

v.

Union Pacific Railroad Company, et al.

This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination;

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of

the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD,
Acting Secretary.

(Seal)

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

No. 4492 Civil

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Messrs. Dennis McCarthy and Robert E. Quirk (Herbert M. Boyle was with them on the brief) for plaintiff.

Mr. E. Riggs McConnell (Messrs. Stanley N. Barnes, James E. Kilday, and Donald E. Kelley, were with him on the brief) for the United States of America, defendant.

Mr. Samuel R. Howell (Mr. Edward M. Reidy was with him on the brief) for the Interstate Commerce Commission, defendant.

Messrs. Elmer B. Collins, F. O. Steadry, A. E. Torpus, Jr., and Eugene S. Davis (Messrs. F. J. Melia, Warren H. Ploeger, Roland J. Lehman, Carson L. Taylor, E. G. Knowles, W. R. Rouse, Nye F. Morehouse, M. L. Countryman, Jr., Edwin C. Matthias, J. C. Gibson, and Joseph H. Miller were with them on the briefs) for intervening railroad defendants.

Messrs. W. J. Hickey, John R. Barry, and Lee J. Quasey (Messrs. Duke W. Dunbar, Frank W. Wachob, William T. Secor, E. R. Callister, Jr., Peter M. Lowe, Paul M. Hupp, Lowe P. Sicklons, Dennis O'Rourke, and Alden T. Hill were with them on the briefs) for intervening plaintiffs.

Messrs. William E. Doyle, Robert L. Simpson, Howard B. Black and Bert L. Overcash (Messrs. Don Eastvold, C. W. Ferguson, James B. Patten, Clarence S. Beck, and Richard H. Shaw were with them on the briefs) for intervening defendants.

Before PHILLIPS, Chief Circuit Judge, and KNOCH, Chief District Judge, and SAVAGE, District Judge.

Per Curiam.

This action was brought by the Denver and Rio Grande Western Railroad Company against the United States of America and the Interstate Commerce Commission under the Urgent Deficiencies Act to set aside and permanently enjoin, in part, an order of the Interstate Commerce Commission.

In August, 1949, the Rio Grande filed a complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroad defendants. In such complaint the Rio Grande alleged that the defendants have failed and refused to establish and maintain competitive joint rates on freight traffic with the Rio Grande: (a) via its Colorado and Utah gateways between places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and (b) between Utah common points and places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that through routes now exist and have for many years existed for the interchange of traffic by the Rio

Grande with the Union Pacific at Provo, Ogden and Salt Lake City, Utah, and with the Union Pacific and certain other defendants at Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, Colorado, as to freight traffic

(a) between points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and

(b) as to freight traffic between Utah common points and points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that the rates and charges applicable to such traffic between the points described via such through routes, with minor exceptions, are based upon the combination of the intermediate local or other rates, which rates and charges, in the aggregate, are substantially higher than the joint rates maintained by the defendants on similar competitive traffic between the same origin and destination places and territories which moves via the Union Pacific or via the Union Pacific and the other defendants, and that such combination rates are unjust, unreasonable and discriminatory, as compared with the competitive joint rates maintained by the Union Pacific or via the Union Pacific and the other defendants on like freight traffic via other competitive routes;

And that the failure and refusal of the Union Pacific and other railroad defendants to establish joint competitive through rates and charges applicable to the freight traffic between the points above described re-

sults in combination through rates which are excessive, unjust, unreasonable and constitute violations of §§1, 3 and 15 of the Interstate Commerce Act[1] and was and is contrary to the national transportation policy, since it deprives the public, shippers and the Rio Grande of the use of reasonable and available through routes and rail facilities at just, reasonable and non-discriminatory through joint rates, which were and are necessary and desirable in the public interest.

The Rio Grande prayed that the Commission enter an order requiring the Union Pacific Railroad and the other defendant railroads to establish and maintain for the future, just, reasonable, and non-discriminatory competitive joint rates on the freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific and its connections in Utah, north of Ogden, Utah, and in Idaho, Montana, Oregon, Washington, and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, and points east thereof; and between (c) the points designated in (a); and (d) Utah common points.

By the challenged order entered on January 12, 1953, the Commission granted some but not all of the relief sought by the Rio Grande. 287 I. C. C. 611. In this action the Rio Grande seeks to have the court enjoin, set aside, annul and remand, with appropriate directions, that part of the order which denied relief sought by the Rio Grande. Union Pacific and other railroads and other persons have intervened with permission of the Court.

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1 Hereinafter called the Act.

Section 1, Par. (4) of the Interstate Commerce Act in part provides:

"It shall be the duty of every common carrier * * * to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3, Par. (4) of such Act in part provides:

"All carriers * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper * * *."

Section 13(1) of such Act in part provides:

"That * * * any common carrier, complaining of *anything done or omitted to be done* by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to

satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." (Italics ours.)

Section 15(1) of such Act provides:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall

cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

At the threshhold we are confronted with a motion of the defendants to dismiss on the ground that the Rio Grande is without standing to maintain this suit. We hold that the Rio Grande has such standing. Since we so hold, by reason of our conclusion with respect to the existence of the through routes, the erroneous finding of the Commission on that issue, the erroneous application to the facts by the Commission of certain provisions of the Act, and the rights of the Rio Grande under the provisions of the Act, we shall state in detail our reasons for denying such motion, after a full consideration of the merits.

I.

The Merits

The Rio Grande operates approximately 2400 miles of railroad in Colorado, New Mexico and Utah. From its northern terminus at Ogden, Utah, it runs south to Salt Lake City and Provo, Utah, thence generally east to Dotsero, Colorado, where it divides, one branch going east to Denver, the other southeast to Pueblo. From Denver the line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serving territories in southern Utah, northwest New Mexico and southern Colorado are not of importance in this action.

The Rio Grande has interchange track connections and interchanges traffic with the Union Pacific at Denver,

Colorado, and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and the Western Pacific at Salt Lake City. It has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, Santa Fe and the Colorado & Southern; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo with the Santa Fe, the Colorado & Southern and the Missouri Pacific; at Walsenburg with the Colorado & Southern, and at Trinidad with the Santa Fe and the Colorado & Southern.

The Union Pacific, with its leased lines, operates as a single system. From Ogden, Utah, one line of the Union Pacific extends in a southwesterly direction through Salt Lake City and Provo and thence to Los Angeles. Another line extends northwest through Utah, Idaho, Oregon, Washington and Montana, serving what is referred to as the northwest territory, or the closed door territory. From Ogden, the Union Pacific runs generally easterly through Cheyenne and Denver, with eastern termini on the Missouri River at Omaha and Kansas City. At various points on its line it connects and interchanges traffic with the other intervening railroads.

The Union Pacific and other intervening railroads and the Rio Grande participate in through routes and joint rates with each other and with other carriers on transcontinental and other traffic, with certain exceptions. Joint rates generally do not apply in connection with the Rio Grande on traffic originating at or destined to points in Utah, north of Ogden, and in Idaho, Montana, Oregon and part of Washington. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande to and from Ogden,

the higher combination rate, consisting of the aggregate of local rates, applies.

The transcontinental traffic to and from this northwest territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather *[than over the Rio Grande route. This is due in part, to the refusal of Union Pacific to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates is limited by §15(4) of the Act, which declares that, except as provided in §3 of the Act, a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide "adequate, and more efficient or more economic], transportation." It is further provided that in prescribing through routes the Commission shall, so far as is consistent with the public interest and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier which originates the traffic. The section further provides that no through routes and joint rates applicable thereto shall be established for the purpose of assisting any carrier to meet its financial needs. This section was designed

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 2 of Appendix E.

to restrict the power of the Commission to establish through routes which would short haul a carrier without its consent.

Rio Grande contended at the hearing before the Commission, and contends here, that the routes over which joint rates are sought were in existence and open to traffic at combination rates, and that the Commission was not called upon to establish through routes and, therefore, limitations on its power to do so, imposed by §15(4), are not applicable and need not be considered. It urged that the principal task of the Commission was to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such existing through routes are unjust, unreasonable or discriminatory, in violation of §§1 and 3 of the Act, and contrary to the national transportation policy.

The Commission recognized that the first question for its determination "is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15(3) and (4) of the Act." Only five of the ten participating members of the Commission joined in the report and order of the Commission, wherein it was first determined that through routes were not in existence over the Rio Grande in connection with the Union Pacific through the Ogden gateway. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment of such through routes and joint rates over them must be grounded on findings, as specified in §15(3) and (4). Thus limited in its further consideration of the case, the Commission entered its order:

"That it is necessary and desirable in the public interest, in order to provide adequate and more eco-

nomic transportation, that through routes and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

In all other material respects the relief requested by the Rio Grande was denied.

This very brief and sketchy statement of the case will suffice, since we rest our decision upon a narrow ground. We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding.

The undisputed evidence bearing upon the crucial question of existing through routes must be summarized. In 1897, the Union Pacific established joint through competitive rates with the Rio Grande to and from points in the northwest area through Ogden. These rates were in effect until canceled by Union Pacific in 1906 from and to some points and in 1912 from and to remaining points. But the through routes were not closed.

Counsel for Union Pacific expressed the opinion at the hearing before the Commission, in response to interrogation by Chairman Alldredge, that the cancellation of the joint rates did not close the through routes and that shippers were free to route via the Rio Grande if they wanted to pay more.

The principal traffic witness of the Union Pacific testified at the hearing that a shipper who was willing to pay the higher combination rate had the right to specify under §15(8) of the Act a route via the Rio Grande. It should be observed that this right exists only when through routes and through rates have been established. This witness further testified that some joint through rates are now published in a Union Pacific tariff for application to shipments of sheep and goats from the northwest area via Ogden and the Rio Grande to points on the Missouri River and east thereof.

A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at through combination rates, without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small. In 1948, which was selected as a

representative year, 37 carload shipments were made on through bills of lading from the northwest area to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific or its connections, but none moved to any destination east of Colorado common points. In the same year, 18 carload shipments were made west bound on through bills of lading from points east and southwest over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific to destinations in the northwest area. In addition, 21 carload shipments moved on through bills of lading from various eastern points to destinations in the northwest area, which were routed over the Rio Grande and Union Pacific, were held by Rio Grande at Denver or Pueblo for change of the routing because the joint through rates were not applicable. The traffic movement to and from the northwest area over the Rio Grande through the Ogden gateway on through bills of lading and at through rates was substantially the same in years prior to 1948 and continued into 1949, until the date of the Commission hearings.

From November, 1942, to August, 1945, a number of shipments were diverted under service orders issued by the Commission from the regularly used routes to the Rio Grande route. During World War II mixed trains of troops in passenger cars and of military supplies in freight cars moved from eastern and southern points on through billing over the Rio Grande via Ogden and Union Pacific to the closed door area. These trains were not routed under service orders issued by the Commission. In 1949, when the main line of the Union Pacific in Wyoming was blocked by snow, the traffic was diverted

over the Rio Grande between Denver and junctions with the Union Pacific in Utah. These latter movements were made under emergency conditions and admittedly do not tend to establish an ordinary course of business between the carriers involved, but the Commission did not invoke its authority under § 15(4) of the Act to establish temporary through routes which indicates that the Commission assumed that through routes were already in existence.

It is well settled that a joint rate is not essential to the existence of a through route. The rate which applies over a through route may be the aggregate of separate rates fixed independently by the several carriers participating in the through route. *St. Louis-Southwestern R. Co. v. United States*, 245 U. S. 136, 139; *Thompson v. United States*, 343 U. S. 549, 556. In *Thompson v. United States, supra*, the court defines a through route as follows:

> "* * * The statutory term 'through route,' used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> "'A through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. Through Routes and Through Rates, 12 I. C. C. 163, 166.'
>
> * * * * *

"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

While the foregoing definition of "through route" compels us to conclude that the through routes contended for by Rio Grande were in existence, the Commission relied on the *Thompson* case in reaching its decision that through routes were not in existence. But the facts in the *Thompson* case are in striking contract with the facts in this case. There, the question was whether a route from Lenora, Kansas, via Missouri-Pacific to Concordia, Kansas, and thence via Burlington to Omaha was a through route. No evidence was presented that any shipment had ever been made from Lenora to Omaha via the Burlington or that the carriers had ever offered through service over that route.

In our case, through routes and joint rates were established in 1897 and the joint rates remained in effect for some fifteen years. While the joint rates were canceled by Union Pacific, nothing was ever done to close the routes and diminished traffic continued to move over the same through routes at the higher through combination rates. Moreover, joint rates were continued in effect as well as through routes in respect to the shipment of sheep and goats from the closed door area through Ogden over the Rio Grande to the Missouri River and beyond. The Union Pacific and other participating railroads have issued through bills of lading, thereby recognizing the through route status. Shipments were diverted from the Union Pacific over the Rio Grande under emergency con-

ditions without having the Commission authorize temporary through routes, which suggest that both the Union Pacific and the Commission assumed the existence of through routes.

The Commission stated in its report and order that "The Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable." Then follows a statement that the establishment of joint competitive rates would result in such routes becoming "effective through routes, a character which they do not now possess." Thus, it appears that the Commission reasoned that the closing of the routes in a commercial sense by applying the higher combination rates terminated the through routes. But, it was held to the contrary in *Virginian Railway Co. v. United States*, 272 U. S. 658. There, of 99 coal mines located on the line of the Virginian, 45 enjoyed through routes and joint rates to the West because of certain trackage arrangements entered into between the Virginian and the Chesapeake & Ohio. As to other complaining mines, the court said, at page 661:

> "* * * But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive. * * *"

In discussing the attack made on the order of the Commission fixing joint non-discriminatory rates, the court stated, at page 666:

> "* * * The Virginian contends that the order is void because the Commission directed the establish-

ment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under § 15(3). But the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination. (Citing cases.) The fact that the combination rates were excessive constituted the only obstacle to the movement."

The intervening railroads argue that Rio Grande had the burden of proving, in order to show the existence of the through routes contended for, an actual movement of traffic between every point in the northwest area and every point in the United States on every railroad east of a north and south line drawn roughly along the eastern boundary of Colorado. They point out that there are some 2,900 railroad stations in the northwest area and some 30,000 stations in the area east of Colorado and that there are undoubtedly hundreds of thousands of through routes available in the published tariffs between the thousands of stations in the involved area of which Rio Grande claims to be a part. This question was not considered by the Commission, and we do not reach it here. In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond. Since the case must be remanded to the Commission for a new hearing, we believe that the Commission should initially pass on the question of whether the burden is on the Rio Grande to show some actual movement of traffic on through billing over each of the possible routes

between the thousands of stations in the involved areas. It might be mentioned in passing that the court in the *Virginian Railway Company* case concluded that "through routes to the west are already in existence," without apparent direct proof of transportation of freight from all points on the Virginian to all points in the west via the Chesapeake & Ohio.

The contention of the intervening railroads that we are not authorized to enter an order remanding the case to the Commission with appropriate instructions is refuted by the recent order entered by the Supreme Court in *Secretary of Agriculture v. United States*, 347 U. S. 645.

II.

The Motion to Dismiss

*[We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We have further concluded that the Commission, in determining whether the Union Pacific Railroad and the other defendant railroads should be required to establish and maintain for the future just, reasonable, and nondiscriminatory competitive joint rates, as prayed for by the Rio Grande, erred as a matter of law in failing to apply the provisions of § 1(4) and § 3(4), rather than the provisions of § 15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in § 1(4) and § 3(4) of the Act. The right of

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 3 of Appendix E.

the Rio Grande to file its complaint with the Commission and seek the relief therein prayed for is clearly given by § 13 of the Act. Under the Act, a carrier is as fully entitled to non-discriminatory treatment as a shipper. See *Chicago Junction* case, 264 U. S. 258, 267, which cites with approval *Pennsylvania Co. v. United States,* 236 U. S. 351, where the complainant sought relief under § 3 of the Act.

The fact that the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief. See *Rochester Telephone Corp. v. United States,* 307 U. S. 125, 135-143; *Mitchell v. United States,* 313 U. S. 80, 92, 93.

The negative portion of the order required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had, and, if considered solely from those points of view, the order caused no pecuniary loss to the Rio Grande.

If the Rio Grande, in the proceeding before the Commission, established its right to the relief prayed for, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and *[equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defend-

*APPELLANTS' NOTE: The language included in brackets is modified by substituted pages 4 and 5 of Appendix E.

ants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of § 1(4) and § 3(4) of the Act.

If the Rio Grande, on its showing before the Commission and an application of the provisions of § 1(4) and § 3(4), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated, if the Rio Grande, under the facts established by the evidence before the Commission, and the application of the provisions of § 1(4) and § 3(4) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]]

While it is our view that the denial of the relief here challenged will result in pecuniary injury to the

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2 The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

3 The Chicago Junction Case, 264 U. S. 258, 266, 267.

Rio Grande, we do not think such injury is essential to the right of judicial review. In *Mitchell v. United States*, 313 U. S. 80, Mitchell brought a proceeding before the Commission in which he alleged that the Chicago, Rock Island and Pacific Railway Company, in its purported compliance with an Arkansas statute requiring segregation of the races during transportation did not provide as desirable accommodations for colored as for white passengers traveling in Arkansas over its line, which resulted in unreasonable charges and unjust discrimination against and undue prejudice to colored passengers in violation of §§ 1, 2, 3, and 13 of the Act and the Fourteenth Amendment. The only relief sought was the removal and avoidance in the future of the alleged discrimination and prejudice in the furnishing of accommodations. The Commission, while holding that the matters complained of were prohibited by § 3(1) of the Act, denied the relief prayed for. Mitchell then brought an action in the District Court of the United States for the Northern District of Illinois to set aside the Commission's order. In passing on whether Mitchell had standing to maintain the action, the Supreme Court said, at pages 92 and 93:

> "*First.* The Commission challenges the standing of appellant to bring this suit. We find the objection untenable. This question does not touch the merits of the suit, but merely the authority of the District Court to entertain it. The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not controlling. Rochester Telephone Corp. v. United States, 307 U. S. 125, 143.
>
> "Nor is it determinative that it does not appear that appellant intends to make a similar rail-

road journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids. He presents the question whether the Act does forbid the conduct of which he complains.

"The question of appellant's right to seek review of the Commission's order thus involves the primary question of administrative authority, that is, whether appellant took an appropriate course in seeking a ruling of the Commission. The established function of the Commission gives the answer. The determination whether a discrimination by an interstate carrier is unjust and unlawful necessitates an inquiry into particular facts and the practice of the carrier in a particular relation, and this underlying inquiry is precisely that which the Commission is authorized to make. As to the duty to seek a determination by the Commission in such a case, we do not see that a passenger would be in any better situation than a shipper. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Robinson v. Baltimore & Ohio R. Co., 222 U. S. 506; Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247; Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304; General American Tank Car Corp. v. El Dorado Terminal Co, 308 U. S. 422.

"The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law."

*[There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission,

*APPELLANTS' NOTE: The language included in brackets is modified by substituted page 6 of Appendix E.

that he was an aggrieved party, and that he was entitled to judicial review. See, also, *Henderson v. United States*, 339 U. S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform the duty of establishing just and reasonable joint rates, fares, and charges over through routes, and it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

Edward Hines Trustees v. United States, 263 U. S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the] continuation of a so-called penalty charge of $10 per car per day on lumber held at reconsignment points. The court said that the plaintiffs had no absolute right to require carriers to impose penalty charges and that plaintiffs' right was "limited to protection against unjust discrimination." Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines. In the *Chicago Junction* case, *supra*, the court distinguished between an incident of more effective competition and injury inflicted by denying equality of treatment. Just, reasonable, and non-discriminatory joint rates is the equality of treatment which the Rio Grande here seeks.

In *Alexander Sprunt & Son, Inc. v. United States*, 281 U. S. 249, the Interstate Commerce Commission entered an order directed to the railroads operating in Oklahoma, Arkansas, Texas, and Louisiana, which required them to remove in a prescribed manner, undue prejudice and preference caused by their rates on cotton shipped from interior points to Houston and other ports on the Gulf of Mexico. Two actions were brought, one by Sprunt & Son and one by the Texas & New Orleans Railroad Company and other carriers, to enjoin the enforcement of the order. Upon final hearing, the District Court sustained the validity of the order and entered a decree dismissing the bills. None of the carriers appealed from the decree. Sprunt & Son appealed. The court held that the issue of undue prejudice and unjust preference which had been passed upon by the Commission had become moot, because most of the carriers never sought to annul the order and that the carriers who joined in the suit to set it aside had voluntarily severed themselves from the shipper, who objected to it. With respect to the right of Sprunt & Son to maintain the action, the court at pages 254, 255, said:

> "* * * We are of the opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under § 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. * * * But that interest alone did not give

them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where *a right of his own is alleged to have been violated by the order.* * * * In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. *They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled.* The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so." (Italics ours.)

Here, again, the court recognized that mere deprivation of a competitive advantage was not enough and that they were only entitled to reasonable service at reasonable rates and without unjust discrimination. Here, the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings.

In *Pittsburgh & West Virginia Railway Co. v. United States*, 281 U. S. 479, the Commission entered an order authorizing the New York Central Railroad and other rail carriers to join in establishing a union passenger station at Cleveland, through a subsidiary, Cleveland Union Terminals Company. The Wheeling & Lake Erie Rail-

way Company had for some years owned and maintained an independent passenger station at Ontario Street, in Cleveland, in the line of the easterly approach to the proposed union terminal. It was apparent that either ownership of or an easement in the Wheeling's site would be indispensable in order to provide the necessary easterly approach to the terminal. Wheeling consented to sell its site and become a tenant in the new terminal. Contracts were made embodying this plan, subject to approval of the Interstate Commerce Commission. Thereupon, Wheeling filed before the Commission two applications for certificates of public convenience and necessity, one permitting it to abandon its Ontario Street station, and the other authorizing it to use the facilities of the union terminal, and pending its completion to use the facilities of the station of the Erie Railroad and the tracks of the Big Four.[4] Pittsburgh & West Virginia Railway, a minority stockholder and connecting carrier of the Wheeling, intervened in opposition to the applications. It opposed them on the ground that the Ontario Street station was ample for both the present and future needs of the Wheeling and that the contracts were disadvantageous to the Wheeling in certain particulars. The Commission found the public convenience and necessity would be served by the granting of both applications and accordingly issued its certificates as prayed for. Pittsburgh & West Virginia Railway then brought an action in the District Court of the United States for the Northern District of Ohio to set aside and annul the order of the Commission. The Supreme Court held that the order did not affect Pittsburgh & West Virginia as a carrier and that the claim that the order threatened Wheeling's

4 Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

financial stability and Pittsburgh & West Virginia's financial interest as a minority stockholder was not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. The court, at page 487, said: "* * * The injury feared is the indirect harm which may result to every stockholder from harm to the corporation," and that the interest of Pittsburgh & West Virginia was insufficient to give it standing to bring the action.

In *Moffat Tunnel League v. United States*, 289 U. S. 113, the Commission had entered an order authorizing the Denver and Rio Grande Western Railroad Company by stock purchase to acquire control of the Denver and Salt Lake Railway Company, called the Moffat Road. In the proceeding before the Commission the Moffat Tunnel Improvement District and the Public Utilities Commission of Colorado had intervened and they brought an action in the District Court of the United States for the District of Delaware to set aside the Commission's order. In holding that the plaintiffs did not have standing to maintain the suit, the Supreme Court said, at page 119:

> "* * * the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. Edward Hines Trustees v. United States, 263 U. S. 143, 148. Sprunt & Son v. United States, 281 U. S. 249, 254. Pittsburgh & W. Va. Ry. v. United States, 281 U. S. 479, 486. Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment, such as may be entertained by members of the public in the territory west of Craig, that the improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points."

The *Pittsburgh & West Virginia Railway* case and the *Moffat Tunnel League* case are obviously distinguishable from the instant case.

With respect to cases relied on by the defendants, the statement by the court in *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476, is apposite. "* * * The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were *unreasonable or discriminated against them.*" (Italics ours.) Here, the existing rates are attacked by the Rio Grande on the ground that they are unjust, unreasonable, and discriminatory as against the Rio Grande and shippers on its line, deny them equality of treatment, and cause injury to them.

It is urged that to maintain the action, equitable grounds for relief must be alleged. But, it should be remembered that in the *Rochester Telephone* case, the court, at page 142, said:

> "* * * An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise.

considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. * * *"

Moreover, in overruling *Proctor & Gamble v. United States*, 225 U. S. 282, the court, at page 136, in the *Rochester Telephone* case, *supra*, observed that the shipper in that case "was within the express language of Congress authorizing suits 'to enjoin, set aside, annul, * * * any order of the Interstate Commerce Commission.'"

In the instant case, the Rio Grande, in its complaint, alleges that it was without adequate remedy at law. Clearly, the Rio Grande can maintain no other action which will give it adequate relief or prevent injury to it.

Accordingly, we conclude that the Rio Grande had standing to maintain the action.

The order in so far as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion.

APPENDIX E

In the United States District Court
For the District of Colorado

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Filed Apr 22 1955

Order

It is ordered by the court that the opinion heretofore filed herein be modified by substituting for pages 14, 29, 31, 32 and 36 thereof the following pages numbered 14, 29, 31, 32 and 36 and by the changes reflected in such last-mentioned pages:

[Substituted Page]

than over the Rio Grande route. This is due, in part to the refusal of Union Pacific to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates under §15(3) is limited by §15(4) of the Act, which declares that, except as provided in §3 of the Act, a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through rate unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide "adequate, and more efficient or more economic

Appendix E

[Substituted Page]

II.

The Motion to Dismiss

We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We further conclude that the Commission erred as a matter of law in applying the limitations of §15(4) with respect to the establishment of through routes, in determining whether the Union Pacific and the other defendant railroads should be required to establish and maintain for the future just, reasonable and non-discriminatory competitive joint rates under the provisions of §14(4), §3(4), §15(1) and §15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in §1(4), §3(4), §15(1) and §15(3) of the Act. The right of the Rio Grande to file its complaint with the Commission and seek the relief therein prayed for is clearly given by

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equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of §1(4), §3(4), §15(1), and §15(3) of the Act, free of any of the limitations imposed by §15(4) with respect to establishing through routes.

If the Rio Grande, on its showing before the Commission and an application of the provisions of §1(4), §3(4), §15(1) and §15(3), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the

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Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated, if the Rio Grande, under the Facts established by the evidence before th Commission, and the application of the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]

2 The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

3 The Chicago Junction Case, 264 U. S. 258, 266, 267.

[Substituted Page]

There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission, that he was an aggrieved party, and that he was entitled to judicial review. See, also, *Henderson v. United States*, 339 U. S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform their statutory duty to establish just and reasonable joint rates, fares, and charges over through routes, and if it was entitled to such an order, then it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

Edward Hines Trustees v. United States, 263 U. S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the

(Signed) Royce H. Savage
District Judge

(Signed) William Lee Knous
District Judge

(Signed) Orie L. Phillips
Circuit Judge

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

v.

United States of America and Interstate Commerce Commission,
Defendants,

Union Pacific Railroad Company, et al.,
Intervening Defendants.

Filed Feb. 14, 1955

Final Judgment and Decree

The hearing in the above-entitled cause having been held on June 8 and 9, 1953, before Circuit Judge Orie L. Phillips and District Judges Royce H. Savage and William Lee Knous, constituting a District Court of three judges, convened pursuant to Title 28, U. S. C., Sections 2284 and 2325, and all parties being represented by counsel, and the Court having received the evidence offered and heard the arguments of counsel, and the Court being fully advised in the premises and having filed its opinion herein on January 13, 1955, and the Court being of the opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297 is invalid and unlawful insofar as it denied relief to the plaintiff above named;

NOW, THEREFORE, upon the basis of said opinion of this Court dated January 13, 1955, and for the reasons therein set forth, IT IS ORDERED, ADJUDGED AND DECREED that the injunction and other relief prayed for by plaintiff and intervening plaintiffs in the complaint be and the same is hereby granted, and the order of the Interstate Commerce Commission dated January 12, 1953, be and the same is hereby annulled and set aside insofar as it denied and withheld relief to the plaintiff and intervening plaintiffs,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause, insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief to plaintiff and intervening plaintiffs, be and the same is hereby remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of this Court.

DATED this 1st day of February, 1955.

/s/ ORIE L. PHILLIPS
Orie L. Phillips, Chief Judge
United States Court of Appeals

/s/ ROYCE H. SAVAGE
Royce H. Savage, Judge
United States District Court

/s/ WILLIAM LEE KNOUS
William Lee Knous, Judge
United States District Court

APPENDIX G

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

The Denver and Rio Grande Western Railroad Company,
Plaintiff,

vs.

United States of America and Interstate Commerce Commission,
Defendants.

Filed Apr 22 1955

Order Denying Motion for New Trial or Reargument and Reconsideration

---

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company; and Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, intervening defendants herein, having seasonably filed their motion for new trial or reargument and reconsideration and this Court having entertained and duly considered said motion and brief of plaintiff in opposition thereto,

IT IS ORDERED:

1. That said motion be and it is hereby overruled and denied;

2. That the Clerk of this Court transmit forthwith copies of this Order to counsel in this case.

DATED at Denver, Colorado, this 22 day of April, 1955.

By the Court:

/s/ ORIE L. PHILLIPS
Orie L. Phillips, Chief Judge
United States Court of Appeals
for the Tenth Circuit

/s/ ROYCE H. SAVAGE
Royce H. Savage,
United States District Judge for the
Northern District of Oklahoma

/s/ WILLIAM LEE KNOUS
William Lee Knous,
United States District Judge.

APPENDIX H

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49) Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1 (4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to

part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3 (4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15 (1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers sub-

ject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mini-

ma, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

Section 15 (4)--

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

LIBRARY
SUPREME COURT, U.S.

No. 333
Consolidated with Nos. 117, 118, 119, 332 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNION PACIFIC RAILROAD COMPANY;
CHICAGO AND NORTH WESTERN RAILWAY COMPANY;
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY;
NORTHERN PACIFIC RAILWAY COMPANY;
GREAT NORTHERN RAILWAY COMPANY;
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY;
WABASH RAILROAD COMPANY,

Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR ABOVE NAMED APPELLANTS

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No. 333
Consolidated with Nos. 117, 118, 119, 332 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNION PACIFIC RAILROAD COMPANY;
CHICAGO AND NORTH WESTERN RAILWAY COMPANY;
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY;
NORTHERN PACIFIC RAILWAY COMPANY;
GREAT NORTHERN RAILWAY COMPANY;
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY;
WABASH RAILROAD COMPANY,

Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR ABOVE NAMED APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado is reported in 131 F. Supp. 372 (R. 279). The report of the Interstate Commerce Commission is found in 287 I. C. C. 601 (R. 57).

JURISDICTION

This action was brought in the United States District Court for the District of Colorado by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") against the United States of

America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul, suspend and set aside "in part" an alleged "order" of January 12, 1953, by the Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co. et al." These appellants intervened as defendants in the district court.

The final judgment and decree of the district court, dated February 1, 1955, was entered February 14, 1955. On April 22, 1955, the district court entered an order overruling and denying a motion of these appellants and others for new trial or reargument and reconsideration (R. 361-362).

Notice of appeal was filed by these appellants in the United States District Court for the District of Colorado on June 20, 1955 (R. 365).

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). Probable jurisdiction was noted by this Court on October 24, 1955.

STATUTES INVOLVED

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out in Appendix B hereto:

National Transportation Policy (preceding Section 1), and Sections 1(4), 3(4), 15(1), 15(3), 15(4), 15(8) and 20(11).

QUESTIONS PRESENTED

The Commission's alleged "order" results from a complaint filed by appellee, The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande"), a chronically bankrupt and "financial needs" short line railroad, for the admitted purpose of improving its financial condition by diverting for a "bridge" haul over its line about 172,000 carloads annually of traffic originated and terminated on through routes of the Union Pacific Railroad Company and other railroads and hauled under joint rates maintained over those routes through Wyoming and Nebraska for 75 years, between points in the northwest area, embracing the States of Oregon, Washington, Montana, Idaho and Utah north of Ogden, and points in the eastern and southern parts of the United States.[1]

The joint rates do not apply via the Rio Grande and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved over that line.

The only order issued by the Commission (R. 20-22) requires that these appellants and over 200 other railroads establish through routes and joint rates demanded by the Rio Grande "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert over its line, short-hauling the Union Pacific and other

1 The lines and termini of the Union Pacific and the Rio Grande (main lines) are indicated on the map attached hereto as Appendix A.

lines at least 925 miles on traffic from which the Union Pacific alone earns about $11,000,000.00 annually.[2]

But the Commission did not order through routes and joint rates on about two-thirds of the traffic, and it is the Commission's *failure to order* through routes and joint rates on the remaining two-thirds of the traffic which the Rio Grande assailed and the lower court annulled and enjoined in this case. Such *failure* is not embraced in the order issued or in any order of the Commission.

The Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line for the traffic it seeks and demanded that the lower joint rates maintained over existing Union Pacific routes be made applicable via its line and that its line be included at equal joint rates in the many hundreds of thousands of existing through routes between some 39,000 railroad stations in the east and south and some 2,900 stations in the northwest area.

The Commission held that the through routes claimed by the Rio Grande did not exist for the involved traffic within the meaning of Section 15(3) and (4) of the Act, and that if through routes and joint rates were ordered via the Rio Grande they would have to be grounded on findings required by Section 15(4)(b), which permits the Commission to short haul existing routes only if it finds that "the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation". The Commission found that through routes via the Rio Grande were "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for

2. The validity of the order issued is now before this Court in Nos. 117, 118 and 119, appeals from the final decree of the United States District Court for the District of Nebraska.

certain commodities which comprise about one-third of the total volume of the traffic the Rio Grande seeks to divert to its line. The Commission concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained."

The order does not in terms deny, dismiss or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks to divert to its line. For the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include that two-thirds of the traffic in its order.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to improve its financial position by diverting traffic from other railroads, it has no standing to maintain the suit. The court further held that through routes via the Rio Grande are already in existence for the involved traffic, that the Commission erred as a matter of law and upon the evidence in finding that the claimed routes are not in existence, and that this finding by the Commission "obviously prejudiced the entire proceeding". The court enjoined and annulled the alleged "order" insofar as it "denied and withheld" relief from the Rio Grande, and "remanded" the case to the Commission for further proceedings in conformity with the court's opinion "insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief" to the Rio Grande.

The following questions are presented by this appeal:

(1) Whether the court erred in refusing to dismiss the Rio Grande's complaint and intervening complaints on the ground that, as the Commission's failure to order through routes and joint rates on *all* instead of only a part of the traffic is not an "order" or a part of any order issued by the Commission, there is no jurisdictional basis for judicial review.

(2) Whether the district court erred in holding that plaintiff, the Rio Grande, admittedly lacking any legal or other right to traffic it seeks to divert to its line from other carriers, has standing to maintain this suit, for the purpose of obtaining a "pecuniary profit" from that part of the traffic for which the Commission failed to order through routes and joint rates via the Rio Grande.

(3) Whether the court erred in making its own administrative finding that, "under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines", contrary to the Commission's finding that the evidence did not prove discrimination, and erred further in relying upon its own administrative finding to sustain the standing of the Rio Grande to maintain this suit.

(4) Whether the court erred in holding, in effect, that the Commission's finding that the evidence failed to prove discrimination against the Rio Grande and its failure to order through routes and joint rates on *all* instead of a part of the traffic, amounts to the denial of a right given the Rio Grande by the [Interstate Commerce] Act adversely affecting its traffic and revenues, causing it to suffer pecuniary injury, and giving it "a right to judicial review of the order".

(5) Whether, in resting its decision that the Rio Grande has standing to maintain this suit upon several hypothetical or "if" propositions, the court erred in ignoring or giving no effect to the fact that, after full hearings and thorough consideration of the evidence, the Commission found that, except to the extent indicated in its findings, the evidence failed to prove discrimination against the Rio Grande or that through routes and joint rates by the Rio Grande are necessary in the public interest to provide adequate and more economic transportation, and concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained".

(6) Whether the court erred in failing to hold that neither the Rio Grande nor intervening plaintiffs had standing to maintain this suit.

(7) Whether the court erred in holding that the Commission's finding that "there are at present no through routes, as that term is used in the Act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law, and whether the court further erred in its own holding that the existence of such through routes is established by the evidence and the law.

(8) Whether, in holding that through routes for the "bridge" traffic here concerned were in existence via the Rio Grande, the court erred in refusing to consider the fact that the evidence showed through movement of only one shipment of non-emergency traffic via the Rio Grande over each of only 17 of the many hundreds of thousands of through routes of which the Rio Grande claims to be a

part between the 2,90 railroad stations in the northwest area and the 39,000 stations in the eastern and southern parts of the country.

(9) Whether, in holding that through routes were in existence via the Rio Grande for the traffic here concerned, the court erred in failing and refusing to indicate or specify the through routes held to be in existence via the Rio Grande or the termini of, or the railroads comprising such through routes, or the commodities for which the court holds that through routes exist via the Rio Grande.

(10) Whether, in view of the fact that the Commission overcame the short haul prohibition in Section 15(4) by ordering through routes and joint rates on all the commodities it considered upon the evidence to be necessary in the public interest, the court erred in holding that the Rio Grande and the "entire proceeding" were "prejudiced" by the Commission's finding that through routes did not already exist via the Rio Grande for the traffic it seeks.

(11) Whether, if the last preceding question is answered negatively, the court erred in annulling and setting aside "the order" *only* "insofar as it denied and withheld relief" to the Rio Grande.

(12) Whether the court erred in holding that the Rio Grande was entitled to have the Commission, in determining whether joint rates via the Rio Grande should be required "apply the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, free of any of the limitations imposed by §15(4) with respect to establishing through routes".

(13) Whether the court exceeded its powers in making its own finding that the evidence proved discrimination against the Rio Grande, and thereupon in "remanding" the case to the Commission "for further proceedings in conformity with the opinion and judgment of this Court".

(14) Whether the court erred in failing to consider and review the entire record and all the issues tendered in briefs and arguments of the parties.

STATEMENT

The Rio Grande operates a short-line railroad with its eastern termini at Denver, Pueblo and Trinidad, Colorado, and its western terminus at Ogden, Utah, the distance between Denver and Ogden being 607 miles via its main line, and 782 miles via Pueblo. Its history has been essentially one of financial difficulty and of bankruptcy. It has been a "financial needs" railroad throughout most of its existence.[3] Its mountainous location and tortuous physical features have resulted in "operating conditions on the Rio Grande" that are "more onerous than those on the lines of the Union Pacific" or any other transcontinental railroad, and caused the Commission in prior cases to grant the Rio Grande's demands for higher rates, based on its "financial necessities", than rates prescribed for other western railroads.[4]

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3 *Denver & Rio Grande Investigation*, 113 I. C. C. 75; *Reconstruction Finance Corp. v. Denver & R. G. W. R. Co.*, 328 U. S. 495.

4 *Commercial Club, Salt Lake City v. A., T. & S. F. Ry. Co.*, 19 I. C. C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486; *Livestock-Western District Rates*, 176 I. C. C. 1, 98 and 190 I. C. C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S. F. Ry. Co.*, 218 I. C. C. 663.

The "Rio Grande was built for the purpose of handling the local business tributary to its line"[5] but its management soon determined to enhance its financial position by diverting traffic from other railroads for a "bridge"[6] haul over its line, including transcontinental Pacific Coast traffic moving over the Union Pacific-Central (now Southern) Pacific route, construction of which had been completed from Council Bluffs, Iowa, through Ogden, Utah, to Oakland, California, in 1869.

Pursuing its purpose to enhance its financial position by diverting traffic and revenues from other railroads, the Rio Grande's revenues from "bridge" traffic increased over 326 per cent in the 15-year period ending with 1948, while traffic originated and terminated on its line increased only 155 per cent and its local traffic originating and terminating at points on its line was less annually throughout that period than during the period 1924-1929.

Further pursuing its "bridge" traffic policy, the Rio Grande filed its complaint with the Commission in this

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5 *Commercial Club, Salt Lake City v. A., T. & S. F. Ry., supra.*, P. 221.

6 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance betweeen its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates outside of Rio Grande territory. Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

case on August 1, 1949. Although the complaint alleged violations of Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act, the Rio Grande's President testified that the complaint was filed for the purpose of improving and enhancing its financial position by diverting for a "bridge" haul over its line so much as it can of about 172,000 carloads annually of transcontinental freight traffic now and for some 75 years moved under joint transcontinental rates over through routes which include lines of the Southern Pacific, Great Northern, Union Pacific, Northern Pacific and Milwaukee railroads (designated herein as "Union Pacific routes") between points in the northwestern states of Oregon, Washington, Montana, Idaho and Utah, north of Ogden (designated herein as "northwest area"), and points in the eastern and southern parts of the United States, generally east of the Missouri and Mississippi rivers, including points on the Atlantic and the Gulf coasts. As noted, these joint rates do not apply via the Rio Grande, except in instances not here involved, and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via the Rio Grande.

The Rio Grande demanded before the Commission that its line be included in all of the multitude of through routes of other railroads to and from the northwest area over which the joint rates are applicable, despite the fact it has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific, and would range from 33 per cent to more than 50 per cent longer than routes maintained by the Union Pacific with other railroads; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time

and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.

Consistent with the protection afforded by Section 15(4) of the Act against short-hauling, and having their own direct and shorter routes, the Union Pacific and other roads serving the northwest area have always insisted, with immaterial exceptions, upon retaining their long hauls on traffic to and from that area.[7]

No complaint has ever been filed by shippers or the public or by any state public service commission demanding the longer through routes and joint rates sought by the Rio Grande.

The order (R. 20) requires the Union Pacific and numerous other railroads, whose connecting lines form through routes extending from the Pacific to the Atlantic and Gulf coasts, to establish through routes with the Rio Grande and "the same" joint rates maintained on Union Pacific routes on westbound carloads of granite and marble monuments from Vermont and Georgia to points in the northwest area and on eastbound carloads of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from points in the northwest area to points in the eastern and southern parts of the country, indicated above. These articles

7. Union Pacific and some of the other railroad appellants have served the northwest for more than 75 years. Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its lines.

comprise about 57,000 carloads annually, or a third of the total volume of the traffic the Rio Grande seeks to divert to its line. Diversion of the traffic permitted by the order would result in a potential estimated revenue loss to the Union Pacific alone of more than $11,000,000 annually, and in very large losses to others of the railroad appellants.

The order does not require through routes and joint rates with the Rio Grande on the remaining two-thirds of the traffic, and the Rio Grande's purpose in this suit is to enhance its financial gains still further by forcing the Commission to require that the joint rates over existing Union Pacific routes be made applicable via the Rio Grande on the remaining two-thirds of the traffic.

The Commission's Findings and Conclusions

The Commission made the following statement of the Rio Grande's contention concerning the existence of through routes via its line:

> "The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15(4) are not applicable and need not be considered." (R. 61)

After discussing the decision in *Thompson v. United States*, 343 U. S. 549, in which this Court nullified a Commission order based on the theory that a through route already existed over two connecting railroads because the route was open to traffic at the combination of their local rates, the Commission carefully analyzed the contentions and the testimony concerning the alleged existence of through routes via the Rio Grande in this case, and made the following finding and statements:

"We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic[3] [3 Except on east-bound shipments of sheep or goats, to which reference is made later in this report.] here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

"The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15(3) and (4)." (R. 65)

Other findings by the Commission are:

1. That the proposed new route via the Rio Grande could not be required "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation" (R. 101);

2. That the Union Pacific has surplus transportation capacity, is efficiently operated, furnishes good service to shippers over its line, and its "facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" over routes that are shorter than Rio Grande routes (R. 94);

3. A large number of shippers and representatives of communities served by the Union Pacific, traffic, commercial and civic associations, opposed the Rio Grande's

complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado (R. 97);

4. Shippers in opposition to the Rio Grande's complaint testified to the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. They testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event (R. 97);

5. That the Rio Grande route is from 33 to 219 miles longer than the Union Pacific, and that routes via the Rio Grande would be from 33 to 50% longer than many of the Union Pacific routes (R. 72, 103).

6. That evidence as to physical characteristics of the two lines shows that the Rio Grande is less favorably situated than the line of the Union Pacific; that traffic routed over the Rio Grande as a bridge line would require at least 24 hours more time in transit than when routed over the Union Pacific and would require one or two more terminal interchange services, and that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (R. 94, 102);

7. That diversion of the traffic over the Rio Grande would deprive the Union Pacific of its long haul and would short haul it at least 925 miles in each instance (R. 73);

8. That the traffic sought by the Rio Grande ordinarily moves over Union Pacific routes through Wyoming because those routes are shorter and they offer lower rates than the Rio Grande (R. 69);

9. Concerning public need for the proposed Rio Grande route and damage to Union Pacific routes by diversion of traffic from them to the Rio Grande, the Commission found that it was impossible to determine or estimate accurately what volume of traffic might be diverted to the Rio Grande if all of the joint rates were made applicable over its line; but that whatever the volume so diverted would be the result of "active solicitation" by the Rio Grande "to persuade" shippers and receivers to use its line as an overhead or "bridge" route, the value of its service to shippers, and the extent to which the Rio Grande can "induce" shippers to route traffic via its line for the purpose of using transit facilities at points on its line and subsequent reshipment beyond at the balance of joint through rates from the point of origin (R. 78);

10. That there are substantial dissimilarities or differences between transportation conditions, operating conditions and lengths of hauls over Union Pacific routes and over the Rio Grande but that the differences in transportation conditions become "relatively insignificant" and "substantially similar" when "spread" over the longer hauls between the northwest area and the eastern and southern parts of the country (R. 103-104);

11. That the evidence failed to prove that the Union Pacific and other lines maintaining present through routes and joint rates discriminate against the Rio Grande (ex-

cept at points on the Bamberger Railroad between Ogden and Salt Lake City) under Section 3(4) of the Act in refusing to include its line in present through routes and joint rates (R. 104);

12. That (notwithstanding the dissimilarities in transportation conditions over the respective routes) the combination rates via the Rio Grande on the articles named in the order from and to the areas therein described are and for the future will be unjust and unreasonable and unduly prejudicial to shippers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, to the extent those rates exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes (R. 105-106);

13. That the Rio Grande, a railroad, could not raise in its own behalf an issue of undue prejudice and preference under Section 3(1) against another railroad, but that testimony of intervening shippers raised that issue, and also raised a question as to a need for "more" adequate and economic service than afforded by Union Pacific routes with respect to perishable food articles (R. 65; 101);

14. That the present complex and far-flung marketing system for perishable food articles requires that such articles move to market with expedition and care "over as many routes as possible" to "as many markets and outlets as possible" with "as much flexibility as possible" and without "unnecessary interruptions" (R. 102; 88);

15. That, while through service over Union Pacific routes in general is as satisfactory to shippers as the service which could be provided over routes including

the Rio Grande, this is not true with respect to perishable food articles, and that shippers of those articles from the northwest area "are debarred from effective participation in the widespread system developed for the marketing of such commodities" (apparently, only because, if routed over the longer Rio Grande route to eastern and southern markets, higher rates apply than when routed via Union Pacific routes, for the undisputed evidence shows that those shippers market their products via Union Pacific routes in all 48 states and several foreign countries) (R. 102);

16. That on shipments of perishable food articles reconsigned or accorded transit privileges such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, *at points on the Rio Grande*, "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that "on such traffic the defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes" (R. 102);

17. That through routes via the Rio Grande and joint rates "the same" as apply over Union Pacific routes for the commodities named in the order between points in the areas described therein are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (R. 105).

Opinion of the District Court

The district court held:

1. That the Rio Grande has standing to maintain suit to enjoin and annul the Commission's *failure* to include in its order about two-thirds of the "bridge" traf-

fic for which the Rio Grande demanded joint rates via its line (and the court overruled a motion to dismiss the suit for lack of such standing);

2. That the Commission erred as a matter of law and upon the evidence in finding that the through routes claimed by the Rio Grande were not already in existence, that the evidence and law established the existence of the claimed through routes, and that the Commission should have applied the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act "free of any of the limitations imposed by §15(4) with respect to establishing through routes" (R. 294).

In reaching its conclusion that the Rio Grande has standing to maintain its suit, the court made and apparently relied upon the following administrative finding of fact:

> "Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines." (R. 297)

The court held that the Rio Grande is here seeking rates "which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" (R. 299) and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande", giving it a right to judicial review, but that "we do not think such injury is essential to the right to judicial review" (R. 295).

With respect to the Commission's finding that the claimed through routes via the Rio Grande were not in existence, the court held—

"This erroneous self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding." (R. 288)

Nevertheless, the court "remanded" the case to the Commission "with appropriate instructions" for further proceedings in conformity with the opinion *only* insofar as the Commission *failed* to order through routes and joint rates on the traffic not included in the order.

SUMMARY OF ARGUMENT

I. As the Rio Grande's complaint assails only the Commission's failure to compel through routes and joint rates for commodities not named in the order, there is no jurisdictional basis for its suit because such "failure" is neither an "order" nor a part of the order issued. The conclusion in the Commission's report "that except as indicated in the preceding findings, the allegations made in the complaint are not sustained" is not embodied in the order issued and is not subject to judicial review.

The district court erred in treating the Commission's failure to require through routes and joint rates for commodities not named in the order as a "negative" portion of the order issued. That order is entirely affirmative and completely favorable to the Rio Grande, and there is no order or any part of any order which "denied and withheld relief to the Rio Grande". Hence, the court below was without jurisdiction; *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522.

The affirmative order issued granting the Rio Grande's demands for through routes and joint rates on a third of the traffic it seeks may not be used as the jurisdictional basis for its attack upon the Commission's

failure to include more commodities than it did in the order issued, for a plaintiff "may not adopt the [order] as the basis of his suit and then attack it", *Baltimore and Ohio R. Co. v. Brady*, 288 U. S. 448, 458; nor may the Rio Grande misuse the order issued as a jurisdictional basis for obtaining through court proceedings "the same relief it failed to secure from the Commission", *Standard Oil Co. v. United States*, 283 U. S. 235, 241. Any other view "would propel the court into the domain which Congress has set aside exclusively for the administrative agency", *Securities Comm'n v. Chenery Corp.*, 332 U. S. 194, 196.

II. The district court plainly erred in denying the motion to dismiss the complaint on the ground that the Rio Grande has no legal right or standing to maintain the suit, since it admittedly has no semblance of a legal, equitable, statutory or other right to the traffic it seeks to divert to its line for the purpose of enhancing its financial position; nor does the Commission's failure to require through routes and joint rates on commodities not named in its order deprive the Rio Grande of anything it has previously possessed; or disrupt or threaten to disrupt or change the transportation situation of the Rio Grande or cause it any financial or economic loss.

The district court was correct in holding that the Commission's failure to grant the Rio Grande's full demands "required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had" and "caused no pecuniary loss to the Rio Grande", but the court erred in holding that as the Commission's failure to order through routes and joint rates on all commodities would prevent the Rio Grande "from enjoying increased traffic and increased earnings", it

"will result in pecuniary injury to the Rio Grande", giving it a right to maintain its suit.

There is no precedent for the lower court's decision and it is directly contrary to consistent and repeated holdings of this Court that to maintain a suit to enjoin an order of the Commission the complainant must show that the order subjects him to legal injury actual or threatened. *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 148. The Rio Grande's complaint in the lower court fails to allege any ground upon which standing to maintain its suit could be sustained.

The Commission's failure to grant the Rio Grande's full demands was not, as held by the lower court, a denial of a right given the Rio Grande by the Interstate Commerce Act, but was the result of an adjudication and findings by the Commission upon adequate evidence that the Rio Grande had not sustained its case except to the extent indicated in the order. Neither its right to complain to the Commission nor the fact that it was a party to the proceeding gives the Rio Grande a right to maintain a suit to enjoin and set aside the order or the Commission's failure to grant the Rio Grande's full demands. *Sprunt & Son v. United States*, 281 U. S. 249, 255; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486; *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 147.

III. In finding that there are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden on the traffic concerned, the Commission correctly applied the test of the existence of a through route, namely "whether the participating carriers hold themselves out as offering through transportation," and the "carriers' course of business" test

laid down by this Court in *Thompson v. United States*, 343 U. S. 549.

Refusing to be guided by those tests, the district court erroneously reversed the Commission's finding and made its own finding that the same evidence considered by the Commission proved that the through routes contended for by the Rio Grande were in existence. Nor did the court specify or indicate what railroads composed what routes, between what points or termini, or on what commodities it thought through routes were in existence via the Rio Grande for the traffic concerned. The court inconsistently and erroneously refused to decide whether the meager evidence was sufficient to prove the existence of through routes via the Rio Grande between each of the 39,000 stations in the eastern and southern parts of the country and the 2,900 stations in the northwest area but remanded that problem to the Commission.

The facts summarized and presumably relied upon by the court were not even a scintilla of proof that the millions of through routes between all the stations in the east and south and all the stations in the northwest area were in existence via the Rio Grande within the meaning of the Act. The evidence showed that through routes and joint rates had existed via the Rio Grande during court receivership of the Union Pacific but were cancelled in 1906 and 1912; that only one shipment from each of 18 origins in the middlewest and east that moved at combination rates via the Rio Grande in 1948 to 9 destinations in the northwest area; that a few shipments moved from the northwest area *to destinations on the Rio Grande*, and that shipments were detoured over the Rio Grande under emergency conditions during World War II and blizzards that blocked the Union Pacific route a few days

in 1949. The Commission correctly held that these few isolated shipments did not prove the existence of through routes via the Rio Grande, and that:

> "Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*"

The Commission further and correctly found that "the carriers' course of business" has been and is to use Union Pacific routes, except where called upon to use the Rio Grande routes "by force of shippers' or connecting carriers' routing", that the whole "course of conduct" of Union Pacific "has been for many years and is now to guard jealously its long haul and not to open commercially the Rio Grande routes on this traffic", and that the movement of the few shipments via the Rio Grande in 1948 proved—*not* "the carriers' course of business" but only exceptions to it.

Every relevant or material factor recited in the opinion of the lower court was rejected or held insufficient by this Court in annulling the Commission's order in *Thompson v. United States*, 343 U. S. 549, because the order had the effect of reducing the short-haul prohibition of Section 15(4) to "unnecessary surplusage", and "was without evidentiary support under the accepted tests for determining the existence of a through route".

IV. The lower court erred in holding that the Commission's finding that no through routes existed via the Rio

Grande for the involved traffic "obviously prejudiced the entire proceeding". The Commission, after making that finding, proceeded to require establishment of through routes and joint rates via the Rio Grande for all commodities which the evidence showed to be necessary in the public interest. It was insufficiency of the evidence to prove public interest and not its finding that there were no through routes via the Rio Grande for the involved traffic that caused the Commission to require through routes and joint rates only for the commodities listed in its order.

But if the court were right in holding that the Commission's finding "prejudiced the entire proceeding", then the court clearly erred in annulling and remanding to the Commission only that "part" of the case in which the Commission had failed to require through routes and joint rates on commodities not named in its order, for, if "the entire proceeding" was "prejudiced", the court was powerless to save that part of the administrative action which was favorable to the Rio Grande by refusing to remand that "part" as well as the unfavorable "part" to the Commission, and in attempting to do so the court clearly exceeded its power and usurped administrative authority.

V. The district court erred in confusing and commingling separate and independent provisions of the Act and in treating the case hypothetically, as if the Commission had not already heard and adjudicated the contentions and issues raised by the Rio Grande's complaint. It is clearly illogical and erroneous to hold, as the lower court did, that the Rio Grande was entitled to an order requiring joint rates if the evidence showed that the combination rates via its line were unreasonable, dis-

criminatory or unduly prejudicial, for such findings do *not* involve public interest, whereas, the Commission can order joint rates only after finding them to be necessary "in the public interest". The power to order through routes and joint rates may not be used to remedy rates found unreasonable, discriminatory or unduly prejudicial *Thompson v. United States*, 343 U. S. 549.

VI. The district court usurped administrative authority and exceeded its power by making findings of fact favorable to the Rio Grande and thereupon remanding that "part" of the case "with appropriate instructions" to the Commission for further proceedings "in conformity with this opinion". In making its own finding that the evidence proved discrimination against the Rio Grande and, thereupon, remanding the case for further proceedings in conformity with such findings, the court ties the Commission's hands and destroys its administrative discretion. This error of the court derives from its first error in exceeding its power to review the Commission's failure to grant the Rio Grande's full demands and amounts to a "substitution of judicial for administrative discretion", *Communications Comm'n v. WOKO*, 329 U. S. 223, 229. The statutory power to enjoin, annul, suspend or set aside an order in part "does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it", *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 483.

In exercising the power to review an administrative order—"* * * the court must act within the bounds of the statute and without intruding upon the administrative province", *Ford Motor Co. v. Labor Board*, 305 U. S. 364, 373.

ARGUMENT

I.

The District Court Erred in Failing to Dismiss the Complaint on the Ground That, as the Commission's *Failure* to Compel Through Routes and Joint Rates for Commodities not Named in the Order is Neither an "Order" nor a Part of the Order Issued, There is no Jurisdictional Basis for Court Review.

The district court said (R. 281-282):

> "By the challenged order entered on January 12, 1953, the Commission granted some but not all of the relief sought by the Rio Grande. 287 I. C. C. 611. In this action the Rio Grande seeks to have the court enjoin, set aside, annul and remand, with appropriate directions, *that part of the order which denied relief sought by the Rio Grande.*" (Italics added.)

In other words, the matter of which the Rio Grande complained to the court was the Commission's *failure* to order through routes and joint rates on *all* commodities instead of the limited number named in the order.

The final judgment and decree states that the Commission's order dated January 12, 1953, is annulled and set aside "insofar as it denied and withheld relief."

Urgent Deficiencies Act (28 U. S. C. §§ 1336, 1398) confers upon the courts power and jurisdiction to enjoin, set aside, annul or suspend in whole or in part any "order" of the Commission. There is nothing to which a court's jurisdiction can attach unless and until the matter complained of has been followed by and embraced in a formal "order", *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522.

The only order issued by the Commission in this case is the order of January 12, 1953, affirmatively requiring through routes and joint rates for a third of the traffic the Rio Grande seeks to divert to its line. That order directs the railroads to establish through routes and joint rates with the Rio Grande for the articles therein named, prohibits them from charging rates in excess of those prescribed, and requires them to cease and desist from practicing undue prejudice and preference and unlawful discrimination referred to in the first paragraph of the order.

But there is no "part" of that order, nor is there any order or "part" of any order which "denied and withheld relief" to the Rio Grande, or refused to require through routes and joint rates on articles other than those named in the order issued. As that order is silent as to articles not named therein, the matter complained of by the Rio Grande is not embraced or touched upon in the order issued or in any other order.

Upon finding that through routes and joint rates were necessary for the articles specified in its findings, the Commission stated in conclusion "4" (R. 106)—

> "That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

But that conclusion is not embraced in the order issued or embodied in any order or part of any order. The decree below, therefore, attempts to annul and set aside the Commission's mere *failure to issue an order* with respect to articles not named in the order it did issue.

This Court has expressly held that "matter", conclusions or findings contained in a Commission report,

but not followed by and embraced in a formal "order", are not subject to judicial review. In *United States v. Atlanta, B. & C. R. Co., supra,* the Commission had issued a report at the end of which it stated its final conclusion and said that the carrier "will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report" (p. 524). But the Commission issued no "order". Rejecting the railroad's contention that the language just quoted was "equivalent" to, or "amounts to an order", this Court held, pages 527-528:

> "The action here complained of is not in form an order. It is a part of a report—an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons.
>
> * * * * *
>
> "No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

The Rio Grande has sought to escape the decision in the *Atlanta* case, *supra,* by arguing that the order issued must be read in the light of the Commission's report which is made a part of the order, citing *Georgia Comm. v. United States,* 283 U. S. 765, 771, and *American Express Co. v. Caldwell,* 244 U. S. 617, 627, and that the Commission's "conclusion" number 4, when so imported into the order, becomes "the equivalent of a dismissal", and, therefore, is an "order".

Those decisions hold that the report may be read in connection with the order for the purpose of clarifying any vagueness, indefiniteness or ambiguity in an order

actually issued. But neither those decisions nor any others hold that the Commission's report must or may be read for the purpose of creating an order or "the equivalent" thereof where conclusions and findings in the report have not actually been embraced in a formal order. No stronger case of "the equivalent" of an order could be imagined than the *Atlanta* case, *supra*, but this Court held that jurisdiction to review was lacking because the action complained of was "not in form an order."

If, in the instant case, the Commission had concluded that *none* of the allegations of the complaint had been sustained and had issued no order, the situation would have been identical to that in the *Atlanta* case. The fact that the Commission issued the affirmative order requiring through routes and joint rates on some articles does not alter the fact that it issued no order embracing its *failure* to include other commodities in its order.

The order issued, being completely favorable to the Rio Grande (and now being defended by it in this Court, No. 117, *The Denver and Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al.*), may not serve as a jurisdictional basis for its attack upon the Commission's failure to include more commodities than it did in the affirmative order issued, for a plaintiff "may not adopt the [order] as the basis of his suit and then attack it", *Baltimore and Ohio R. Co. v. Brady*, 288 U. S. 448, 458, citing *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247, holding at page 258 that a "plaintiff can not claim under the act and against it".

The favorable order issued may not be misused by the Rio Grande as a jurisdictional basis for obtaining

through court proceedings "the same relief it failed to secure from the Commission", *Standard Oil Co. v. United States*, 283 U. S. 235, 241. Any other view "would propel the court into the domain which Congress has set aside exclusively for the administrative agency", *Securities Comm'n v. Chenery Corp.*, 332 U. S. 194, 196.

The position of the Rio Grande in this case is identical to that of the complainant in *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, affirmed Per Curiam, 283 U. S. 804. In that case Brady asked the Commission for an order awarding him damages exceeding $57,000 because of alleged discrimination against him by failure of two railroads to furnish him coal cars. The Commission did not order the full damages sought. Instead, it issued an order awarding Brady $12,838.31. Brady brought suit under Urgent Deficiencies Act, asking that "certain parts" of the order "be set aside and annulled" (p. 848). The district court held that the suit clearly should be dismissed "for the reason that it seeks not to set aside the order of the Commission, but to correct alleged errors in the findings of the Commission upon which that order is based" (p. 850). Holding that it was without jurisdiction over the matter of which Brady complained, the court said, p. 850:

> "What complainant is asking is not that we set aside the order of the Commission, which directs the payment to him of $12,838.31, but that we set aside the findings upon which his damages were reduced and direct the Commission to reopen the proceeding and make 'corrected findings and a supplemental order.' In other words, he seeks to have us review the findings of the Commission and correct its errors as upon a writ of error or appeal; but this we have no power to do. Western N. Y. & P. R. R. Co. v. Penn. Refining Co. (C. C. A. 3rd), 137 F. 343, 354.

And see I. C. C. v. Waste Merchants' Ass'n, 260 U. S. 32, 43 S. Ct. 6, 67 L. Ed. 112; Bartlesville Zinc Co. v. Interstate Commerce Commission, 58 App. D. C. 316, 30 F. (2d) 479, and Northern Pac. Ry. Co. v. I. C. C., 57 App. D. C. 318, 23 F. (2d) 221, holding that errors of the Commission cannot be corrected by mandamus or certiorari."

Attempting to overcome the absence of an order or any part of an order embracing the matter of which the Rio Grande complained, the court below said that the fact that "the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief", citing *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, and *Mitchell v. United States*, 313 U. S. 80. But clearly the court either confused the abolition of the "negative order doctrine" by the *Rochester* case with the jurisdictional necessity for an actual formal order embracing the matter of which the Rio Grande complained, or attempted to stretch the ruling in that case to include a case in which the Commission has issued no order at all embodying its failure to grant the remaining two-thirds of the Rio Grande's affirmative demands.[8]

8 The order reviewed in *U. S. v. Great Northern R. Co.*, 343 U. S. 562 (No. 151, Oct. Term 1951, Transcript of Record, pages 24-25), "denied" an application to abandon the Montana Western, ordered joint rates in lieu of combination rates and prescribed divisions of the joint rates.

And compare orders granting "in part" and denying "in part", applications for motor carrier operating rights. In such proceedings the Commission's report generally recites the extent to which the evidence justifies the application, and an order is entered, as follows:

"*It is ordered*, That said application, except to the extent granted in said report, be, and it is hereby, denied." (No. MC-61396 (Sub—No. 32) Herman Bros. Inc., Extension—Kansas and Other States, June 30, 1955, unreported.)

Our contention that the jurisdictional basis for review is lacking here is not based on the "negative" character of the Commission's failure to require through routes and joint rates on commodities not included in its order, but upon the fundamental fact that here, as in the *Atlanta* case, there is no order at all, or any part of an order embodying the failure of the Commission to require through routes and joint rates on more articles than those named in the order. To make our position clearer, if possible, we point to the fact that in all of the cases in which judicial review was denied because the Commission's orders were "negative", there were in fact actual "orders", in form, dismissing complaints that had been filed with the Commission. (See cases reviewed and discussed in *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125.) Such "order" dismissing the complaint had actually been issued in *Mitchell v. United States*, 313 U. S. 80, and, adhering to its decision in the *Rochester* case, this Court, upon holding that Mitchell had standing to maintain the suit because the order deprived him of his Constitutional rights, proceeded to review the order, regardless of its negative character. But *there was an order in form and in reality* and not, as here, a complete absence of an order embodying the non-action of the Commission of which the Rio Grande complained to the court.

In *Shannahan v. United States*, 303 U. S. 596, the Commission had issued a report in which it concluded that a certain electric railway was subject to the Interstate Commerce Act, but issued no order. In affirming the district court's dismissal, for want of jurisdiction, of a suit to enjoin and annul the Commission's decision, this Court held at page 599:

> "Its decision is not even in form an order. It had no characteristic of an order, affirmative or negative." (citing cases)

The Court further held that:

> "* * * The determination * * * is clearly not an order enforceable within the meaning of the cases construing and applying the Urgent Deficiencies Act. It is a decision on a controverted matter, comparable to that considered in *United States v. Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299, in *Great Northern Ry. Co. v. United States*, 277 U. S. 172, in *United States v. Atlanta B. & C. R. Co.*, 282 U. S. 522, and in *United States v. Griffin, ante*, p. 226, which were held not to be subject to review under the Urgent Deficiencies Act."

This Court has explained that where the Commission has failed to grant a part of the "relief" demanded, the courts will not interfere through judicial review because to do so would be to exercise or usurp administrative authority. In *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, the Commission had issued an order requiring certain carriers to establish joint rates, but it declined to comply with the demand of some of the carriers that it also prescribe divisions of the joint rates. This Court reviewed the affirmative order issued but refused to review the Commission's *failure* to fix divisions, holding that in seeking review of the Commission's failure to fix divisions, the appellants were in effect asking the Court to "exercise administrative authority where the Commission has failed or refused to exercise it." In *Chicago Junction Case*, 264 U. S. 258, the Court cited a number of cases at page 264, in which, the Court said, judicial review was refused "not because the order * * * was negative in character," but that this Court declined to interfere "because to do so would have involved exercise by it of the administrative function of granting the relief" which the Commission had failed to grant.

There being no "order" embodying or carrying into effect the Commission's *failure* to include all commodities in the order it issued, the lower court erred in failing to dismiss the Rio Grande's complaint on the ground that there is no order or part of an order giving the court jurisdiction to review the matters of which the Rio Grande complained.

II.

The District Court Erred in Denying the Motion to Dismiss on the Ground That the Rio Grande has no Legal Right or Standing to Maintain This Suit.

The Rio Grande's complaint to the Commission demanded joint rates that would afford it the opportunity to improve its financial position by short-hauling the appellant railroads 925 miles and diverting for a "bridge" haul over its line through traffic from which the Union Pacific alone earns over $49,000,000 annually. The order issued by the Commission grants the demand to the extent of about one-third of the traffic from which the Union Pacific earns over $11,000,000 annually. The Rio Grande filed this suit in the district court for the purpose of obtaining equal joint rates which it "failed to secure from the Commission" on the remaining two-thirds of the traffic (see *Standard Oil Co. v. United States*, 283 U. S. 235, 241).

These appellants filed a motion in the district court to dismiss the suit on the ground that as the Rio Grande has no legal or other right to the traffic it seeks to divert to its line, it has no standing to maintain the suit.

The decisions of this Court hold that a plaintiff has no standing to maintain a suit to enjoin an order of the Commission unless his complaint shows that the order

subjects him to legal injury, actual or threatened, *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249, 257; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486; *Moffat Tunnel League v. U. S.*, 289 U. S. 113, 119; or that the order would deprive him of something he has long and lawfully possessed, or would disrupt or materially change the transportation situation causing him financial or economic *loss*, or that the right to maintain such suit rests upon some express statutory provision, *Western Pacific v. South. Pac. Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry v. U. S.*, 285 U. S. 382; *Chicago Junction Case*, 264 U. S. 258, 267; *Alton R. Co. v. United States*, 315 U. S. 15, 19.

This Court held in *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 780, that:

> "There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originated."

The district court, though denying the motion to dismiss, conceded that the Commission's failure to grant the full demands "required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had", and from that standpoint "caused no pecuniary loss to the Rio Grande" (R. 293-294), but would, nevertheless, prevent the Rio Grande "from enjoying increased traffic and increased earnings" and, therefore, "will result in pecuniary injury to the Rio Grande", giving it a right to judicial review (R. 299, 295).

Keeping in mind the consistent rulings of this Court, the fact that the "order" does not deprive the Rio Grande of anything it already had and does not disrupt the transportation situation or subject the Rio

Grande to any penalty or adverse economic burden, the fact that the Rio Grande's only purpose in prosecuting this suit is to reap financial gain beyond the extent permitted by the Commission's order, and the fact that the Rio Grande admittedly has no legal or other right to enhance its financial position by diverting "bridge" traffic to its line from other railroads, it is clear beyond doubt that the district court erred in holding that the Rio Grande has standing to maintain this suit.

The purpose of the short-hauling prohibition in Section 15(4) of the Act is "to protect the long haul routes of carriers", *United States v. Mo. Pac. R. Co*, 278 U. S. 269, 277, and it is a distortion of that purpose to contend or suggest that there is any hint of a legislative sanction of a right in the Rio Grande to short haul the railroad appellants 925 miles so that it may improve its financial condition by diverting for a "bridge" haul over its line traffic originated and terminated on the lines of the railroad appellants. Indeed, Section 15(4) requires that in prescribing through routes the Commission shall "give reasonable preference to the carrier by railroad which originates the traffic." And that section contains the further mandate that:

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

All of this, we submit, conclusively demonstrates that the Rio Grande has no semblance of a legal or other right to take from Union Pacific routes the traffic it seeks for a "bridge" haul over its line, and, hence, no standing to maintain this suit.

Although the district court refrained from specifying the precise ground or reason for its holding that the Rio Grande has standing to maintain the suit, it did hold that the Rio Grande here seeks rates that "will result in pecuniary profit to the Rio Grande * * * the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande", but that, nevertheless, such injury is not essential to the right to judicial review (R. 299, 295).

The opinion states (R. 284):

> "At the threshhold we are confronted with a motion of the defendants to dismiss on the ground that the Rio Grande is without standing to maintain this suit. We hold that the Rio Grande has such standing. Since we so hold, by reason of our conclusion with respect to the existence of the through routes, the erroneous finding of the Commission on that issue, the erroneous application of the facts by the Commission of certain provisions of the Act, and the rights of the Rio Grande under the provisions of the Act, we shall state in detail our reasons for denying such motion, after a full consideration of the merits."

But nowhere does the opinion assert, nor has the Rio Grande alleged or claimed that it has any legal, equitable or other right to the additional "pecuniary gain" it seeks in this suit from the diversion of traffic to its line from these appellant railroads.[9] Nevertheless, in final

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9 To the contrary, the Rio Grande argued as follows at page 111 of its original brief in the district court:

"Neither the Union Pacific nor any other railroad has an absolute right to the exclusive occupancy of a particular territory or

(Continued on next page)

analysis, and though lacking in specificity, the court's decision that the Rio Grande has standing to maintain the suit necessarily rests upon the proposition that, regardless of its utter lack of any legal or other right to the traffic it seeks, the Rio Grande has standing to maintain this suit because the Commission failed to grant its demands for an opportunity to reap "pecuniary profit" and enhance its revenues from *all*, instead of a part, of the traffic it seeks to divert for a "bridge" haul over its line.

There is no precedent for the court's holding, and it is directly contrary to the decisions cited above and to the rule laid down by this Court that in order to maintain a suit to enjoin acts of others the complainant must show that he is threatened not only with a "loss" but also a loss against which he is legally or equitably entitled to protection, *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118. In the *Alabama* case, the Power Company sued to enjoin the Federal Administrator of Public Works from making loans and grants under a federal statute to certain municipalities for construction of electricity distribution systems, the competition of which the Company alleged would result in great and destructive loss and

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(Continued from preceding page)

to the traffic which terminates or originates in the territory. *Pennsylvania R. Co. v. United States*, 40 Fed. (2) 921; *Indian Valley R. Co. v. United States*, 52 Fed. (2) 485, and *Chesapeake and Ohio Ry. Co., Construction*, 267 I. C. C. 665, 679. In *United States v. American Railway Express Co.*, 265 U. S. 425, 437, the court held that a carrier has no absolute right to the traffic it originates or to its long haul. Such rights as a railroad may have to its long haul on interstate commerce are granted and limited by the Interstate Commerce Act. Moreover, that Act does not give the originating railroad or any railroad the unequivocal right to its long haul in connection with through routes."

injury to its business of producing, distributing and selling electricity. The Court held that the Power Company had no standing to maintain its suit, saying, at page 478:

> "Unless a different conclusion is required from the mere fact that petitioner will sustain financial loss by reason of the lawful competition which will result from the use by the municipalities of the proposed loans and grants, it is clear that petitioner has no such interest and will sustain no such legal injury as enables it to maintain the present suits."

After making it clear that to maintain a suit for an injunction, a party must show that the thing complained of threatens or causes him "direct injury" in a legal sense, meaning "a wrong which directly results in the violation of a legal right", the Court undertook to define or describe, at page 479, the injury essential to the maintenance of a suit for injunctional protection, as follows:

> "'An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim that a damage to one, without an injury in this sense, (*damnum absque injuria,*) does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. . . . want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action.' *Parker v. Griswold,* 17 Conn. 288, 302-303. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained."

Holding that, since the Power Company had no legal or equitable right to be free of competition of other electric power plants, it had no standing to maintain

its suit to prevent such competition even "if its business be curtailed or destroyed" by such competition. Later on, the Court held that a "legal interest" which qualifies a complainant to sue—

> "* * * is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty."

and that—

> "The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right."

Since the Rio Grande admits, as it must, that it has no legal right to the traffic it seeks to divert to its line for a "pecuniary gain", and, indeed, that no carrier has an absolute right even "to the traffic which terminates or originates" on its line, it clearly has no standing to maintain suit to enjoin the Commission's failure to grant its full demands even if, as erroneously held by the lower court, its desire for a "pecuniary gain" be treated as a "pecuniary injury", for, as held in the *Alabama* case, such "pecuniary injury", would not be the result of an "invasion of some legal or equitable right" of the Rio Grande.

If, as held in the cases cited, a complainant has no standing to maintain a suit to enjoin acts of others *which threaten even to destroy his business* unless he shows that such acts invade some legal or equitable right of his own, *a fortiori* the Rio Grande having no prior claim to the traffic and no express statutory right to sue, is without standing to maintain suit to enjoin the Commission's failure to grant a part of its demands for "pecuniary profit" to be obtained by diverting to its line traffic to

which it admits that it has no semblance of legal or other right.

Being unable to point to any legal, equitable or other right of the Rio Grande to a "pecuniary profit" by diverting traffic to its line from other railroads, the district court seemed to think it could sustain standing to maintain this suit because the Act gives the Rio Grande a right to complain to the Commission of discrimination against it by other railroads. The opinion states (R. 295):

> "Where an order of the Commission denies a right given to a carrier by the Act and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order."

Continuing to theorize, hypothesize and speculate concerning the Rio Grande's rights under the Act, the opinion says that *if*, before the Commission, the Rio Grande established its right to the relief prayed, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and that "denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established"; and, *if* on the Rio Grande's showing before the Commission and application of Sections 1(4), 3(4), 15(1) and 15(3), the Rio Grande was entitled to an order establishing such joint rates, then the denial of such order "deprived the Rio Grande of a pecuniary gain to which it was entitled" because the granting of the joint rates would have resulted in a large increase in the Rio Grande's traffic and income; and again, *if*, under the facts established by the evidence and the application of Sections 1(4), 3(4), 15(1) and 15(3), of the Act, the Rio Grande was entitled to an order requiring such joint rates, then

the denial of that right resulted in pecuniary injury to the Rio Grande (R. 294).

But all of this theorizing in the opinion completely ignores and gives no effect whatever to the fact that the Commission has heard and adjudicated the Rio Grande's complaint and has found that the evidence failed to prove discrimination against it, and failed to prove that joint rates were necessary in the public interest except upon the commodities named in the order. This part of the opinion below goes extremely far toward holding that, upon the mere exercise of its right to complain to the Commission of discrimination and to submit such evidence as it had in support of its complaint, the Rio Grande had a right under the Act to equal joint rates on all of the traffic it sought, and that the Commission had no alternative but to find that the alleged discrimination was being practiced and to issue an order granting *in toto* the full "relief" demanded by the Rio Grande. Such a view of the Commission's power is not only contrary to the statutory pattern, but is also foreclosed by decisions of this Court, such as *United States v. Merchants &c. Ass'n*, 242 U. S. 178, wherein it was said at pages 186-187:

> "In other words, the Commisson granted a part of the relief asked. The District Court says it had no power to do so. But there is nothing in the act to justify limiting the power of the Commission to either a grant or a denial *in toto* of the precise relief applied for. Such a construction * * * is at variance with the broad discretion vested in the Commission and the prevailing practice of administrative bodies."

In any event, this Court has repeatedly held that neither the right of a party to complain to the Commis-

sion nor the fact that a party participated in the proceeding in which an order was issued affords any standing to maintain a suit to enjoin the order. *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 147; *Sprunt & Son v. United States*, 281 U. S. 249, 255; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486.

If the bare right to complain and present evidence to the Commission affords the Rio Grande standing to maintain this suit, then every litigant before the Commission has standing to maintain suit to enjoin the Commission's failure to grant every bit of administrative "relief" demanded of the Commission, with the result that a right to judicial review is opened up to every disappointed litigant before the Commission.

The opinion below cites the *Chicago Junction Case*, 264 U. S. 258, but the legal right and standing of the complaining railroads to maintain the suit in that case was sustained by this Court—not because the order failed to grant them "pecuniary gain", but, as stated at page 266, because the order resulted in a *loss* to them of $10,000,000 annually by diversion from their lines traffic they had previously enjoyed. Standing to maintain that suit was sustained also because the order denied plaintiffs "equality of treatment" in the joint use the terminal properties, control of which the order transferred to the New York Central, and because the Transportation Act, 1920, had made provision for "securing joint use of terminals", and prohibited acquisition of a railroad by another unless authorized by the Commission. The Court held at page 267:

> "By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company."

Although the court below held that the Commission's failure to grant all of the "pecuniary gain" demanded by the Rio Grande results in "pecuniary injury" it said "we do not think such injury is essential to the right to judicial review", citing *Mitchell v. United States*, 313 U. S. 80. But the court failed to recognize the real ground upon which this Court held that Mitchell was entitled to judicial review of the order in his case. At page 94 the opinion points out that Mitchell had bought a first-class fare for the entire journey from Chicago to Hot Springs, Arkansas, and had offered to pay the proper charge for a seat which was available in the Pullman car from Memphis to Hot Springs, but he was—

> "* * * compelled, in accordance with custom, to leave that car and to ride in a second class car and was thus denied the standard conveniences and privileges afforded to first-class passengers. This was manifestly a discrimination against him in the course of his interstate journey and admittedly that discrimination was based solely upon the fact that he was a Negro."

After saying that whether this was a discrimination forbidden by the Act was not a question of giving effect to state "segregation" laws but one of "equality of treatment", the Court held at page 94 that the denial of equal accommodations to Mitchell because of his race was "an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment" to the Constitution of the United States and that such discrimination was "essentially unjust" and could not be deemed "to lie outside the purview of the sweeping prohibitions" of the Act. At page 97, the Court held:

> "On the facts here presented, there is no room * * * for administrative or expert judgment with

respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act."

Thus, Mitchell was entitled to judicial review of the order in that case, because the discriminatory conduct of which he complained violated his Constitutional rights, and he was therefore entitled to the Court's determination of the question whether the Commission committed error of law in holding that Section 3 of the Act did not forbid conduct which the Court found to be so clearly discriminatory as to violate his Constitutional rights.

But the decision in that case is clearly inapposite here because the Rio Grande has no Constitutional, legal, equitable or other semblance of a right to wrest additional "pecuniary gain" from these appellant railroads by diverting traffic they originate and terminate to its line for a "bridge" haul.

The district court also cites *Youngstown Co. v. U. S.*, 295 U. S. 476, in which this Court distinguished other cases, saying that judicial review was refused in those cases because the parties had no legal interest or capacity to sue, "or failed to allege that the rates under attack were unreasonable or discriminated against them". The Rio Grande's amended complaint in this case contains such an allegation, but if it is entitled to judicial review of the order merely because it makes that allegation in its complaint to the court, then, as there is nothing to prevent anyone from making such allegation, everyone has standing to maintain a suit to enjoin the Commission's failure to find rates unreasonable.

The order in the *Youngstown* case was not sustained by any finding of this Court that the rates prescribed by

the Commission's order were in fact just and reasonable, but upon the ground that the prescription of the rates was within the Commission's authority and that its order was adequately supported by its findings and the evidence of record.

And, more important, such allegation attempts to present to courts an administrative question of fact which they are powerless to determine, for every decision of this Court on the point since it decided *Texas and Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, has held without exception that the courts have no power or jurisdiction to determine whether an interstate rate is unreasonable, discriminatory or otherwise in violation of the Act.[10]

Furthermore, the district court ignored the fact that the order in the *Youngstown* case increased the rates of the Youngstown Company as much as 18¢ per net ton, or $9.00 per 50-ton car, and apparently this Court felt that the shipper was entitled to have the court determine whether

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10 See *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 481-483; *Assigned Car Cases*, 274 U. S. 564, 581; *Swayne & Hoyt, Ltd. v. U. S.*, 300 U. S. 297, 303-304; and *Montana-Dakota Co. v. Pub. Serv. Co.*, 341 U. S. 246, in which this Court held at pages 251-252:

"Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one."

the Commission committed any error of law in issuing an order imposing such a tremendous additional financial burden.

In the instant case the district court sustains the Rio Grande's standing to maintain the suit—not because the "order" subjects it to any additional financial or other burden—but because the Commission failed to grant the additional "pecuniary gain" the Rio Grande seeks in this suit, to which neither the court nor the Rio Grande can claim it has any legal or other right.

The district court also cites *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, but the standing of the Rochester Company to maintain its suit in that case was clear and unquestioned, as the order "necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority." Moreover, Mr. Justice Frankfurter, who wrote the opinion in that case, later pointed out (in his dissent in *Columbia System v. U. S.*, 316 U. S. 407, at page 436) that failure or refusal by Rochester to comply with the order would subject it to statutory penalties of $500.00 for each offense and $25.00 for each day of its continuance. The Rochester Company had a right to judicial review because it had a right not to be regulated if it was not within the class of telephone companies embraced within the Commission's authority, and it clearly had a right not to be subjected to the statutory penalties for refusal to obey the order if in making it the Commission had committed error of law in holding it subject to the regulatory provisions of the Act.

In striking contrast, the Commission here has merely held that the Rio Grande's evidence fails to prove that its rights under the Act are being violated, or that

all of the joint rates demanded by it are necessary "in the public interest". Judicial review is sought here because the Commission, without subjecting the Rio Grande to any loss, burden, regulatory process or statutory penalty, merely failed to order joint rates enabling it to reap all of the "pecuniary gain" it seeks by diverting to its line traffic to which the Rio Grande admits it has no legal right whatever.

The Rio Grande's lack of standing to maintain this suit is far clearer than that of the plaintiff railroads in *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76, affirmed Per Curiam, 76 S. Ct. 152. There the Commission's order authorized a merger of two large motor carriers. Fearing loss of traffic and revenues through stronger competition than they previously had from the motor carriers individually, the railroads sued to enjoin the order. In sustaining motions to dismiss the suit for lack of standing, the district court stated, page 78:

> "In this case the Complaint fails to allege that the plaintiffs have suffered or been threatened with any damage or financial injury. It does not allege that any definite legal right of the plaintiffs has been violated, nor that the order of the Commission has created any additional motor carrier service, or increased competition for the plaintiffs. The plaintiffs merely allege that they are in competition with the motor carriers, and that they have a direct interest in the enforcement of the Interstate Commerce Act and the National Transportation Policy."

Distinguishing *Western Pacific v. South. Pac. Co.*, 284 U. S. 47; *Chicago Junction Case*, 264 U. S. 258; and *Alton R. Co. v. United States*, 315 U. S. 15, in which the orders affected legal rights or threatened material changes and disruptions in the transportation situation to the detri-

ment and loss of the plaintiffs, and citing *Singer & Sons v. Union Pacific R. Co.*, 311 U. S. 295; *Alabama Power Co. v. Ickes*, 302 U. S. 464, and *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118, the district court held, page 79:

> "Though the motor carriers in the instant case may, as a combination under joint control with adequate financial backing, offer stronger competition to the railroads than they did previously, we conclude that the railroads have no 'definite legal right' to be immune from this competition and, therefore, are not 'parties in interest' who may maintain this suit."

The Rio Grande contended in the district court that it has standing to maintain this suit as a party "adversely affected or aggrieved" within the meaning of Section 1009(a) of the Administrative Procedure Act, 5 U. S. Code § 1009. The court did not discuss the contention. The same contention was made in *Atchison, Topeka and Santa Fe Ry. Co. v. United States, supra,* but the court rejected it, saying at page 78:

> "Plaintiffs also refer to Section 10 of the Administrative Procedure Act, 5 U. S. C. A. § 1009, but it is clear that that Act merely was a declaration of existing law where judicial review is provided. See Transamerica Corp. v. McCabe, D. C., 80 F. Supp. 704.
>
> "Thus the decisions under the Interstate Commerce Act must control the determination of whether the plaintiffs are 'parties in interest' within that Act."

Extensive search discloses no case holding that a party may maintain a suit under that Act or any other when, as in this case, the agency action grants a large part but fails to grant all of the demands for "pecuniary gain", and neither takes nor threatens to take anything from, or to change the position of the complainant.

The word "aggrieved" has been in legal use so long that its meaning could not innocently be misunderstood. Webster's New International Dictionary (1954) carries the following definition:

> "Aggrieved—Troubled or distressed; having a grievance; specif. *Law*, adversely affected in respect of legal rights; suffering from an infringement or denial of legal rights."

The Attorney General's Manual, which is treated as authoritative on the purposes of the Administrative Procedure Act, clearly shows that no new rights to maintain suits to enjoin agency orders, and no enlargement of power of reviewing courts were conferred by that Act. Under the heading "Fundamental Concepts," the Manual states:

> "a. *Basic Purposes of the Administrative Procedure Act*
>
> "The Administrative Procedure Act may be said to have four basic purposes:
>
> "1. To require agencies to keep the public currently informed of their organization, procedures and rules (sec. 3).
>
> "2. To provide for public participation in the rule making process (sec. 4).
>
> "3. To prescribe uniform standards for the conduct of formal rule making (sec. 4(b)) and adjudicatory proceedings (sec. 5), i. e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing (secs. 7 and 8).
>
> "4. To restate the law of judicial review (sec. 10)."[11]

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11 The Manual further states, under the heading "Section 10(a)—Right of Review":

"Section 10(a) provides that 'Any person suffering legal wrong

(Continued on next page)

The opinion of the district court completely fails to demonstrate that the Rio Grande has any standing to maintain suit in this case, and its judgment clearly should be reversed with direction to dismiss the suit.

(Continued from preceding page)

Because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.' This statement of the persons entitled to judicial review has occasioned considerable comment because of the use of the phrase 'any person suffering legal wrong.' This phrase was used as one of limitation and not for the purpose of making judicial review available to anyone adversely affected by governmental action. The delicate problem of the draftsmen was to identify in general terms the persons who are entitled to judicial review. As so used, 'legal wrong' means such wrong as particular statutes and the courts have recognized as constituting ground for judicial review. 'Adversely affected or aggrieved' has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action. The determination of who is 'adversely affected or aggrieved * * * within the meaning of any relevant statute' has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' Final Report, p. 83; see also pp. 84-85. The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. More specifically he indicated his understanding that section 10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *The Chicago Junction Case*, 264 U. S. 258 (1924); *Sprunt & Son v. U. S.*, 281 U. S. 249 (1930); *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940); and *Federal Communications Commission v. Sandgrs Brs. Radio Station*, 309 U. S. 470 (1940). Sen. Rep. p. 44 (Sec. Doc. p. 230). This construction of section 10(a) was not questioned or contradicted in the legislative history. Also implied is the continuing role of the courts in determining, in the context of constitutional requirements and the particular statutory pattern, who is entitled to judicial review."

III.

The Court Erred in Holding That the Commission's Finding That "there are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned" is not Supported by Substantial Evidence and is Erroneous as a Matter of law, and the Court Further Erred in its own Holding That the Evidence Establishes the Existence of Such Through Routes.

The Rio Grande demanded an order from the Commission that would require joint rates via its line equal to the joint rates maintained over Union Pacific through routes between some 2,900 railroad stations in the northwest area and some 39,000 stations in that part of the United States lying generally east of a north and south line drawn along the eastern boundary of Colorado (R. 58-61). There are, of course, from one route to thousands of routes between each of the stations in the respective areas, but if there were only one through route between each of the stations, this would make a minimum total of 113,100,000 through routes between the stations in the respective areas.

As its demands would divert the traffic from Union Pacific routes and short haul them at least 925 miles, the Rio Grande sought to avoid the short-haul prohibition of Section 15(4) of the Act by claiming that through routes had existed for many years via its line for the traffic moving between stations in those areas, and contending before the Commission and the lower court either, (1) that its line is physically a part of all of the myriad of through routes now maintained via the Union Pacific between all stations in the respective areas, or, (2) that its line is a part of all routes formed by carriers whose lines connect

between all stations in the respective areas, and which carriers have published local rates between points on their respective lines.[12] So contending, the Rio Grande argued that the short-haul prohibition of Section 15(4) was not applicable and that the Commission should disregard the restrictions of that prohibition.

The Rio Grande undertook to prove its allegation that its line is a part of all these through routes by pointing to the fact that (1) it was a party to through routes and joint rates for traffic to and from the northwest between 1897 and 1912; (2) contending that cancellation of the joint rates did not cancel the through routes since interchange of the traffic with its line is physically

12 The colossal and fantastic extent and scope of the Rio Grande's claim that it is already a part of all through routes for the involved traffic, between the 2900 stations in the northwest and the 39,000 stations in the east is shown in an official Federal document entitled "Through Routes", being a transcript of hearings before the Interstate and Foreign Commerce Committee of the House of Representatives on Senate Bill 1261, December 1937 and April 1938, concerning a proposal of short line railroads and the Interstate Commerce Commission to repeal the short-haul prohibition of Section 15(4) of the Act. It is shown in that document (p. 164) that there were then 12,291 different through routes for movement of traffic under specific tariff publication from Chicago, Ill. to Jacksonville, Fla., and (p. 142) that there were more than 10,000 through routes for so-called merchandise traffic alone between New York, N. Y. and Dallas, Texas, and (p. 141) that there were 2,300 through routes from New York to St. Louis and 2,628 through routes from Boston to St. Louis, and from such smaller places as Butler, Pa. to Burlington, Ia., there were as many as 130 through routes, and from New York to Chicago 445 through routes. While that testimony concerned through routes east of the Missouri River, it illustrates the point we make, particularly since much of the transcontinental traffic here involved moves through such points as St. Louis, Kansas City, Omaha, Chicago, Pittsburgh, and other cities that are served by numerous railroads, nearly all of which doubtless are parties to the existing through routes of which the Rio Grande claims its line is a part, and it is indisputable that the number of such routes would run into many millions.

possible, and that counsel and a witness for Union Pacific "admitted" that the traffic could move via the Rio Grande if shippers wanted to pay the higher combination rates; (3) that 18 shipments of through traffic from 15 of the 39,000 stations in the east moved westbound via its line in 1948 at combination rates to 9 of the 2900 stations in the northwest area (I. C. C. Ex. 1, p. 5); that 37 carloads moved in 1948 from points on the Union Pacific in the northwest to *destinations on the Rio Grande's line;* (4) that through traffic was diverted to and moved over its line under emergency conditions of World War II and the blizzards which blocked the Union Pacific Railroad a few days in 1949.

After carefully analyzing the facts and circumstances upon which the Rio Grande relied to support its contention, and comparing them with those upon which this Court annulled the order in *Thompson v. United States*, 343 U. S. 549, and applying "the accepted tests for determining the existence of a through route" laid down in that decision[13] the Commission rejected the Rio

13 In the *Thompson* case this Court held at pages 557-558 that:
"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
"In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under Section 15(3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines."

Grande's contention that the claimed through routes were already established via its line, and its answer to the contention is so clear and logical, and, we submit, so impeccably correct, we adopt it and here quote at some length from it (R. 61-65):

> "As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.
>
> "In *Thompson v. United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the content of the term "through route" as used in the act, upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15 (1) of the act. The Court held:
>
> > "'In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.

"'In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. * * *Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route.'

"The Court cited with approval *Beaman Elevator Co. v. Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, wherein the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, 'that one shipment was not representative of the carriers' course of business.' It thus becomes necessary to determine whether the carriers in this proceeding 'hold themselves out as offering through transportation service' from and to points here concerned via the Ogden gateway as indicated by their 'course of business' in respect to traffic over the routes in question.

"The evidence shows that 37 carload shipments were made in 1948, which may be accepted as a representative year, on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned

goods, canned salmon, machinery, contractors' equipment, paper bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

"West-bound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull brand, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destination so as to avoid paying the applicable combination rates on Ogden.

"In that same year, 21 carload shipments moving on through bills of lading from various origins east

of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly used routes to the routes here sought to be opened commercially. For example, in February 1949, when the main line of the Union Pacific in Wyoming was blocked by snowstorms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute 'through routes' within the meaning of that term as used in the act.

"So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior con-

necting carrier. *In other words, so far as this record shows, 'the carriers' course of business' has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic.* That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads east-bound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

"Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co., supra,* cited with approval by the Supreme Court in *Thompson v. United States, supra. Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940* (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.,* 255 I. C. C. 333, 339), *and a result clearly not in accord with the decision in Thompson v. United States, supra.* (Italics added.)

"We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic.[3]

> [except on east-bound shipments of sheep or goats, to which reference is made later in this report.] here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation."

Refusing to adopt or apply the tests laid down in the *Thompson* case, but upon the same facts and circumstances analyzed by the Commission, the district court adopted the opposite conclusion, reversed the Commission's finding that there are no through routes, within the meaning of the Act, over the Rio Grande for the traffic here concerned, and held (R. 292):

> "In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond."

The court's opinion does not indicate what through routes, or between what points or termini, or the commodities for which, or the railroads that comprise the through routes it holds to be in "existence". This lack of specificity would render it impossible to give any practical effect to the court's decision, for no one can determine from the opinion what routes are in "existence" or on what commodities.

Although the court readily assumed authority to reverse the Commission and to hold that the "uncontradicted evidence" showing that one through or "bridge" shipment moved via the Rio Grande from each of 15 eastern points in 1948 to 9 points in the northwest "clearly

established the existence of through routes" via the Rio Grande, the court is inconsistent, if not self-contradictory, in refusing to decide, but instead, remanding the case for the Commission to decide whether the "uncontradicted evidence" on which it unhesitatingly reversed the Commission is sufficient to prove the existence of through routes via the Rio Grande between each of the 2900 points in the Northwest and the 39,000 points in the east (R. 292). If, upon such remand, the Commission is bound by the court's holding that through routes via the Rio Grande are already in "existence", it will be unable to determine from the opinion what through routes are embraced in the court's holding, and yet will be under the court's direction to decide whether the "uncontradicted evidence" establishes the existence of through routes via the Rio Grande between all of the 2900 points in the northwest and all of the 39,000 points in the east. And this in the face of the Commission's finding already made upon the same "uncontradicted evidence" that there are no through routes via the Rio Grande for the traffic concerned.

As the opinion below merely "summarized" the evidence and arguments on which the Rio Grande relied, but refrained from disclosing the rationale, if any, by which the court reached the conclusion that through routes claimed by the Rio Grande already exist, we are left to guess or speculate upon the facts or circumstances on which it may be assumed that the court relied.

1. If the court believed through routes via the Rio Grande now exist because some of the routes did exist from 1897 to 1912, and because, when the joint rates were cancelled "the through routes were not closed", then its discussion concerning movement of traffic over the Rio Grande at combination rates is unnecessary and ir-

relevant. But, unless the court intended to hold that, in order to close through routes, railroads must erect some physical roadblock or take other measures to prevent physical interchange of traffic, then those old through routes were "closed" with the cancellation of the joint rates. Indeed, the district court itself held (R. 285) that:

> "The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic."

Although most of the through routes and joint rates established in connection with the Rio Grande during the court receiverships had been cancelled by 1912 without protest or proceedings before the Commission, some of them were not cancelled until 1914. In several cases the Commission suspended tariffs filed by the Union Pacific proposing to "close" certain through routes and cancel joint rates over them. Protests against the proposals resulted in hearings and formal reports by the Commission, in which it stated that the Union Pacific's purpose in cancelling the joint rates and closing the routes was to obtain a "longer haul" on the traffic.

In *Lumber Rates, Oregon and Washington to Eastern Points*, 29 I. C. C. 609, the Union Pacific filed tariffs proposing "to close established routes for certain traffic." The Commission permitted the cancellation of the Wallula, Washington, gateway and "the closing" of routes with the Northern Pacific through that gateway (p. 612), but it held that "closing of the Spokane, Silver Bow and Butte gateways" on lumber and that "cancellation of through routes and joint rates by way of the Colorado gateway" upon general traffic was not justified. With respect to the latter the Commission stated at page 614

that the proposed tariffs would result in "cancelling through routes and joint rates by way of the Colorado Gateways" on all traffic both eastbound and westbound originating and terminating at points on the Oregon-Washington Railroad and Navigation Company (a part of the Union Pacific system) in the State of Washington. However, in a supplemental report in the same proceeding, upon Union Pacific agreement to retain through routes and joint rates on fruit and lumber, the Commission permitted the Union Pacific "to close the Colorado gateways for general traffic between exclusive points of that system in the States of Oregon and Washington and points on and east of the Missouri River" (31 I. C. C. 191).

In *The Ogden Gateway Case*, 35 I. C. C. 131, the Commission permitted the "cancellation by the Union Pacific of through routes and joint fares in connection with The Denver and Rio Grande through the Ogden gateway", although in doing so it stated that passengers could, of course, still use the Rio Grande route for through service by paying "the higher charges resulting from application of the intermediate fares". The Commission said (page 132) that publication of the tariffs brought "vigorous protests" from the Rio Grande, the railroad commissions of Idaho and Montana, and communities located on the Rio Grande in Colorado and Utah.

In *United States v. U. P. R. R. Co.*, 28 I. C. C. 518 (decided December 1, 1913, after most of the through routes and joint rates in connection with the Rio Grande had been cancelled in 1906 and 1912), the Commission refused the request of the United States Government to order "establishment of through routes and joint rates" in connection with the Rio Grande at Pueblo or Denver

and at Salt Lake City or Ogden, Utah, on traffic between the same northwest area and points east of Denver that is involved in the instant case. Pointing out that Union Pacific routes were materially shorter than routes demanded by the Government via the Rio Grande, the Commission said at page 524, "we are unable to find on this record any set of facts which would over-shadow the clearly expressed purpose of the Act" to prohibit short-hauling Union Pacific routes by "the establishment of the desired routes" via the Rio Grande.

From the foregoing, it is indisputable that the Commission and everyone concerned regarded the action of the Union Pacific as "closing" the through routes and gateways in connection with the Rio Grande as well as the cancellation of the joint rates even though interchange of traffic between the two railroads was still physically possible and shippers could use the Rio Grande route by paying higher combination of local rates. Contrary to the view of the district court that "the through routes were not closed" by cancellation of the joint rates, the proceedings before the Commission clearly demonstrate that the court now attempts to reverse Commission decisions made nearly 50 years ago on the question whether its approval of tariffs proposing to cancel "through routes and joint rates" effected the closing of the through routes as well as the cancellation of the joint rates.

The filing of the tariffs constituted notice to the public that carriers participating in Union Pacific routes no longer "hold themselves out" as offering through service in connection with the Rio Grande and that their "course of business" thereafter would be to refuse to relinquish their long hauls on the traffic from and to the northwest area, *Thompson* case, *supra*, page 557.

This Court has long since recognized the efficacy of tariff publication in cancelling or closing gateways and through routes. *Atlantic Coast Line R. Co. v. U. S.*, 284 U. S. 288; *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 775; *Kansas City So. Ry. v. Albers Comm. Co.*, 223 U. S. 573, 596. The Commission also gives appropriate effect to the publication of tariff changes as a means of closing a through route. In *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202, a shipper had routed a shipment of cattle from Montana to Kansas via a route over which there were no joint rates. In dismissing a complaint for reparation, the Commission cited this Court's decision in the *Thompson* case, *supra*, and held:

> "Therein the Supreme Court makes plain that a route such as that used for the instant shipment may not be regarded as a through route under section 15(4) of the Interstate Commerce Act. Thus, the route used by this shipment was a 'closed' route, and the complainant was apprised of that fact by the publication of the joint through rate from and to these points for application over routes other than that used. This does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified, but it does mean that when such routing is specified and complied with, the carriers concerned have a right to charge a combination rate, provided that each of the factors in such combination does not exceed a maximum reasonable rate for a shipment having origin and destination at the points from and to which such rate applies." (pages 203-204)

As alleged in its complaint to the Commission, cancellation of the joint rates so effectively closed the through route via the Rio Grande "as to prevent the movement of freight traffic" over its line; and to deprive the Rio

Grande of "through freight traffic which it might obtain if equal rates applied in connection with it" (V. I, 7, 8).*

So effective was the cancellation of the joint rates in closing the through routes via the Rio Grande that its brief (p. 5) to the Commission argued that refusal of carriers participating in the Union Pacific routes to short haul themselves by including the Rio Grande in the through routes at equal joint rates "actually prevents the movement of traffic from eastern points" via the Rio Grande to Salt Lake City and Ogden; and (p. 98) that the higher combination of local rates, after cancellation of the joint rates, via its line "prevent any regular or substantial movement of the traffic via" the Rio Grande; and again at page 101 of its brief that, "unless the same level of rates is prescribed on the traffic involved via the Ogden Gateway and the Rio Grande no practical or useful purpose will be served"; and (p. 116) that livestock shippers testified that any rates via the Rio Grande higher than livestock rates via Union Pacific routes "would be of no use to them and would not move the livestock" via the Rio Grande.

Admittedly, cancellation of the joint rates was effective to close the through route via the Rio Grande sufficiently to preserve the right guaranteed by Section 15(4) of carriers participating in Union Pacific routes not to be short hauled by the Rio Grande. Indeed, if cancellation of the joint rates had not effectively closed the route via its line, then the Rio Grande would have had no motive in complaining to the Commission or to the court. The Rio Grande clearly stultifies its position in contend-

* Because of duplication in page numbering the printed records in these cases, this abbreviation will be used to refer to pages of Volumes I and II, proceedings before the Interstate Commerce Commission.

ing that cancellation of the joint rates had no effect on the existence of through routes via its line and, in the same breath, contending that cancellation of the joint rates so effectively closed its route "as to prevent the movement of freight traffic" over its line, and the lower court's opinion is likewise inconsistent and erroneous.

That the cancellation nearly 50 years ago of the joint rates established in connection with the Rio Grande by the receivership courts in 1897 fully accomplished the "closing" of the through routes in question, is and has been the understanding of all railroads and shippers generally concerned during that 50-year period. It was the understanding of 137 shipper and public witnesses who opposed the Rio Grande and of some 50 witnesses who supported its complaint before the Commission, and it was the understanding of the Rio Grande's President, who testified that, ever since he became affiliated with the Rio Grande he had looked forward "to the opening of the Ogden Gateway." It was the tacitly admitted position of Rio Grande until after this Court handed down its decision in the *Thompson* case (June 2, 1952). In its publicity campaign, conducted before and after the filing of its complaint, August 1, 1949, the Rio Grande publicly asserted that its purpose was to "restore" to the northwest the "rates and routes" established by the receivership courts in 1897. As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz", (I. C. C. Ex. 30), in which it posed 20 questions and answered them with the arguments it thought would convince shippers to aid it in its efforts to "open" through routes via its line in connection with the Union Pacific to and from the northwest area. Those questions clearly and indisputably show that the Rio Grande itself con-

sidered the prior through routes via its line "closed" by the cancellation of the joint rates by the Union Pacific."[14]

2. If the lower court relied on the statements of the counsel and witness for the Union Pacific (R. 288), that shippers may route such of the involved traffic over the Rio Grande as they desire if they are willing to pay the higher combination rates, the court is clearly erroneous in holding that this obvious fact tends to prove the existence of through routes via the Rio Grande unless the court intends to rest its decision on a theory that this Court flatly rejected in the *Thompson* case, because such a theory would mean that "through routes exist between all points throughout the country wherever physical rail connections are available" (p. 559). The court further errs in holding that a shipper's right under Section 15(8) of the Act to route his traffic "exists only when through routes and through rates have been established"; for there is no provision in the Act preventing a shipper from routing his traffic over any series of connecting railroads

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14 Among the 20 questions were the following:
" 2 What is Meant by the 'Closed' Gateway at Ogden?"
" 3 What is the Effect of the Closed Gateway?"
" 4 How does the Rio Grande Seek to Open the Ogden Gateway?"
" 5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"
" 6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"
" 7 Will the Open Ogden Gateway Reduce Freight Rates?"
" 8 Will the Open Gateway Provide Improved Service?"
" 9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
"11 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
"12 Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
"13 Will Opening of the Ogden Gateway Reduce Railroad Employment in the Closed-Door Territory?"
"14 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

wherever physical interchange is possible and the carriers have performed their duty of publishing local rates on their respective lines. The right of a shipper under Section 15(8) is to choose between two or more "competing lines of railroad" and he may exercise that right by paying the rates published over the route or routes he chooses, regardless of whether the rates are combinations of local rates or joint rates.

3. If the court relied on the fact that joint rates are published for shipments of sheep and goats via the Rio Grande, the court clearly errs because there is no statutory, judicial or administrative precedent or authority for the proposition that where carriers publish a through route with joint rates for one commodity, then such route becomes a through route within the meaning of Section 15(3) and (4) for every commodity. Such proposition is contrary to the Commission's settled administrative practice and treatment of through routes and carriers' rights under Section 15(4) not to be short hauled. See *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331.

4. If the lower court intended to hold that the existence of through routes can be established by proof of "a continuous use of the Rio Grande in the movement of traffic to and from the closed door area at through combination rates", then its ultimate conclusion is wholly erroneous and unsupported because the evidence here is limited to 18 westbound through shipments that moved in 1948; to 37 eastbound shipments that moved *to local destinations on the Rio Grande* in 1948, none of which moved beyond its eastern termini; and to traffic that was diverted to the Rio Grande under war and blizzard emergency conditions, which is clearly within the right of carriers to do by voluntary agreement or, which, in the absence of such agreement, the Commission may require under Section 15(4) of the Act. The court further errs in

saying that movements of the traffic via the Rio Grande "was substantially the same in years prior to 1948 and continued into 1949" for that statement is squarely contrary to the Rio Grande's own assertion at page 98 of its brief to the Commission that the combination rates are so high as to "prevent any regular or substantial movement of the traffic" via its line; and there is no evidence whatever in the record concerning the movement of such traffic via the Rio Grande during any year other than 1948. The Rio Grande's witness who submitted the movement for 1948 did not say that 1948 was a representative year; but that he selected that year because "it was the last full calendar year prior to this proceeding" and, after testifying concerning problems of re-routing arising because shippers had sometimes mis-routed their traffic via the Rio Grande, in ignorance of the fact that the joint rates did not apply via that line, the witness said "the same problems prevailed to about the same extent in prior years, and have continued thus far in 1949" (V. I, 76).

The *Thompson* decision, page 557, footnote 13, makes it plain enough that even if the Rio Grande had proved that one or more isolated or sporadic shipments moved via its lines over each of the innumerable routes of which it claims to be a part, it still would have failed to prove "the carriers' course of business". *A fortiori*, its showing here of 18 shipments routed via its line by shippers over 18 of the millions of existing through routes between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area is not even a *scintilla* of proof that the "course of business" of the carriers comprising the myriad of Union Pacific routes is to offer through transportation service in connection

with the Rio Grande between the northwest and the eastern and southern parts of the country.[15]

The "continuous use" theory advanced by the lower court not only lacks any factual basis, but is directly contrary to the testimony of the Rio Grande's own President, who said (V. I, 42):

> "The Dotsero Cutoff had just been completed when I began my tenure as co-trustee of the Rio Grande. While this 'cutoff' provided a *potential* means for the Rio Grande to participate in transcontinental traffic, the physical condition of our company at that time was such that *we were in no position to effectively compete for this extremely competitive business from either a service or cost standpoint.* Because of long depressed earnings, the Rio Grande's trackage and rolling stock were in very poor condition. At that time *faster schedules were neither feasible nor possible.* (Italics added.)
>
> "Therefore, a planned program was immediately progressed with a view towards contributing to a sounder national transportation system by making the Rio Grande a vital link in transcontinental traffic. This embraced strengthening of the personnel, a revamping of the financial structure, and complete modernization of the physical plant."

5. The lower court's statement that shipments diverted from the Union Pacific via the Rio Grande under emergency conditions without the Union Pacific having

15 At page 559, the *Thompson* decision holds:
"Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, *a right guaranteed by Section* 15(4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern." (Italics added.)

asked the Commission to authorize temporary through routes via the Rio Grande and without the Commission invoking its authority under Section 15(4) to establish temporary through routes though "admittedly do not tend to establish an ordinary course of business", but do indicate "that both the Union Pacific and the Commission assumed the existence of through routes" (R. 289) via the Rio Grande, is untenable and illogical, and rests upon a misconception or a distortion of the statutory pattern. Section 1(15) of the Act authorizes the Commission to issue "service orders" whenever it is "of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country" and Section 15(4) authorizes the Commission, under the same type of emergency conditions, to "establish temporarily such through routes as in its opinion are necessary or desirable in the public interest". But no provision of the Act prohibits carriers from acting voluntarily among themselves in such emergencies without invoking the authority of the Commission under either of these statutory provisions and it is wholly illogical and erroneous to hold that, because the Union Pacific and the Rio Grande acted voluntarily in these emergencies, instead of invoking or waiting for an exercise of the Commission's emergency powers on its own initiative, indicates or suggests that the Union Pacific and the Commission assumed that through routes via the Rio Grande were already in existence, within the meaning of Section 15(3) and (4), for the traffic involved in this suit. It was testified by an experienced railroad witness in this case (V. I, 583) that:

> "There is nothing unusual about such diversion of traffic among railroads under emergency conditions. It is the rule and not the exception.

"Detour movements of trains and traffic via other lines in the event of interruptions is an accepted principle in American railroading, and hundreds of agreements are on file today stipulating the terms and conditions governing such movements. It is the device under which traffic of the Nation is kept fluid regardless of the temporary stoppage or incapacity of one line to function."

As well stated by the Commission in holding that these few isolated shipments do not prove the "carriers' course of business", but rather the exception to it, and are clearly insufficient to show the existence of a through route:

"Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*" (R. 65)

And, as to the emergency movements:

"These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute 'through routes' within the meaning of that term as used in the act." (R. 64)

6. The district court said the Union Pacific and other participating railroads "have issued through bills of lading, thereby recognizing the through route status" of the Rio Grande. Although the court did not indicate

what more, in addition to cancellation of the joint rates, the Union Pacific could or should have done to "close" the through routes via the Rio Grande, the latter asserted in the district court that through routes can be closed "legally and factually by simply publishing in their tariffs that particular railroads will not thereafter issue a bill of lading or accept shipments which are routed by shippers via such routes". This is but to say that, in order to close an existing through route, a carrier must go so far as to commit a direct violation of Section 20(11) of the Act; which provides:

> "That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof * * *."

Thus, the lower court would leave the Union Pacific or any other railroad in the perilous, illogical and untenable position of either losing its "right guaranteed by Section 15(4)" to its long haul, *Thompson* case, *supra*, page 559, or violating its plain statutory duty to accept property tendered for shipment and issue a "bill of lading therefor". The court's view that the Union Pacific could protect itself against being short hauled by the simple expedient of refusing to accept and issue a bill of lading for property tendered for shipment is directly contrary to the holding of this Court in *Southern Ry. Co. v. Reid*, 222 U. S. 424, 435, that "it is undoubtedly the duty of a railway company to receive freight when tendered for transportation". In *N. Y. Central R. Co. v. The Talisman*, 288 U. S. 239, this Court rejected the contention that a railroad could "by its own act relieve itself of any duty imposed upon it by law or arising out of the nature of its undertaking" as a public servant, and held that a railroad is "powerless by mere announcement to fix the terms

on which it would participate" in effecting interchange of traffic with other carriers (p. 242). Citing numerous cases, the Court said at page 241:

> "Petitioner and respondent were connecting carriers. As such, each, in the discharge of its duties to the public, owed to shippers of freight in its possession destined to points on or routed over the railway of the other the duty to deliver to the connecting line for further transportation; and each was correspondingly bound to receive and carry."

The assertion that a carrier must violate its plain duty under one provsion of the Act in order to retain the benefit of its rights under another provision of the same Act is wholly untenable. See *Atchison & Topeka Ry. v. Harold*, 241 U. S. 371, 378; *Norfolk & W. Ry. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 595.

7. The lower court's opinion states that "a joint rate is not essential to the existence of a through route" and that "the rate which applies over a through route may be the aggregate of separate rates fixed independently by the several carriers participating in the through route." The opinion then cites *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136, 139, which defines the term "through route", and *Thompson v. United States, supra*, quoting from the latter decision the definition of a "through route" as there given at page 556.

The opinion refrains from indicating what there is in the definitions of a through route in the *St. Louis* case and the *Thompson* case that "compels us to conclude that the through routes contended for by Rio Grande were in existence", so we are again left to guess what the Court means in this part of its opinion. The decision in the *St. Louis* case clearly is against the lower court's conclu-

sion and the Rio Grande's position here, as shown at page 143:

> "The order entered does not require any complaining carriers to substitute the route via Memphis for that via Cairo; nor does it require any to establish an additional route via Memphis. Carriers are left free to furnish the through transportation either via Cairo or via Memphis. The order merely compels a through route and a joint rate of 16 cents to Paducah. If they elect to continue the existing through route via Cairo, the order operates merely to introduce reduced joint rates. If they elect to discontinue the through routes via Cairo, the order operate to establish through routes and joint rates via Memphis, which the findings of the Commission fully justify."

In the instant case the Rio Grande's sole purpose is to "substitute" its line for lines of the Union Pacific and other roads so it can haul the traffic part way as a "bridge" line.

If the lower court means that the part of the definition in the *Thompson* case that "compels" the conclusion that through routes exist via the Rio Grande is that part which says that a through route may exist where a "through rate" has been published and that such rate "may be merely an aggregate of separate rates fixed independently by the several carriers forming the 'through route'", then the court's conclusion that the definition compels it to hold that through routes exist via the Rio Grande is clearly erroneous because it flies in the face of the fact that this very theory was urged by the Commission but flatly rejected by this Court in the *Thompson* case in the following language (p. 558):

> "The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route since

the power to establish through routes under Sections 15(3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines."

And, at pages 559-560, the Court further explained that:

"The Commission continues to support its order, but the logical conclusion of the theory advanced by the Commission is that through routes exist between all points throughout the country wherever physical rail connections are available. If there is no through carriage over any combination of connecting carriers, the Commission under its present theory would never have to establish through routes under Section 15(3) and (4) but could divert traffic to any route between two points by ordering reduction of the sum of the local rates over that route. Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order. The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4), before the Court in *United States v. Great Northern R. Co.*, 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."

If the lower court's view is that through routes claimed by the Rio Grande exist on the theory that by

publishing their own independent local rates the connecting carriers "hold themselves out as offering through transportation service" via the Rio Grande, then again, its conclusion is clearly erroneous and foreclosed by the language just quoted from the *Thompson case*.

8. If the lower court rests its decision that through routes are in existence as claimed by the Rio Grande, upon that part of the definition in the *Thompson* case which says that "through carriage implies the existence of a through route whatever the form of the rates charged for the through service", then there is no basis whatever for the court's conclusion here, because there is no evidence whatever in this case, and indeed the Rio Grande made no effort to prove, and does not contend that there has been "through carriage" via its line between the termini of the millions of transcontinental routes, of which it claims to be a part. The complete absence of any such evidence becomes more fatal to the lower court's conclusion in view of its apparent reliance upon the fact that in the *Thompson* case there was no evidence showing that any shipment had ever moved from Lenora to Omaha via the Burlington, and in view of this Court's holding that the evidence upon which the Commission relied of shipments moving from Lenora to points on the Burlington short of Omaha:

> "* * * cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15(4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern." (p. 559)

9. If, as the lower court erroneously seems to hold, that under the *Thompson* decision the existence of a through route can be proved by evidence showing actual movement of traffic over the entire lines of the connecting carriers "between the termini" (Section 15(4)) of the claimed through route, then the court is clearly wrong in holding that the meager token of evidence offered by the Rio Grande and summarized in the opinion, establishes the Rio Grande's claim that its line is a part of the millions of Union Pacific routes published in the tariffs for the transcontinental traffic involved in this case.

The lower court is further inconsistent and erroneous in attempting to throw back to the Commission for decision the question whether the "burden is on the Rio Grande to show some actual movement of traffic on through billing over each of the possible routes between the thousands of stations in the involved areas", for the court readily assumed authority to make its own decision and to reverse the Commission upon the very facts and circumstances on which the Commission held that through routes via the Rio Grande did not exist. If the court correctly construed the *Thompson* decision as holding that proof of actual movement "between the termini" of a claimed through route is essential to establish the existence of the route, then the court was bound by that decision to hold that the burden is on the Rio Grande to make such proof of the "carriers' course of business" by showing actual movement over each of the millions of routes of which it claims to be a part, and having failed to do so it had not proved the existence of the claimed through routes.

The lower court's citation of *Virginian Ry. v. United States*, 272 U. S. 658, lends no support to its views for no

question of actual movement of traffic was raised in that case, and the dictum of that decision that there were "through routes by combination" rates, has necessarily been overruled by the very pointed decision in the *Thompson* case, page 558.

The opinion below says it appears that the Commission "reasoned" that cancellation of the joint rates in 1906 and 1912 closed the through routes in a "commercial sense" by applying the higher combination rates and that this "terminated the through routes", but that "it was held to the contrary" in the *Virginian* case. But it was not there "held to the contrary" for that case could not have involved cancellation of previous joint rates because this Court said "these two carriers have not established any joint rates to the west" (p. 661).

Moreover, in footnote 18 at page 560 of the *Thompson* case, this Court says that the *Virginian* case "is inapposite", and it is clearly inapposite here, for the opinion in that case states at page 666 that "the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates". Instead, as stated at page 662, the Commission ordered the carriers to "cease and desist" from collecting rates from the 54 complaining mines to western destinations in excess of the rates enjoyed by the 45 mines and others in the district having the lower rates. Thus, neither the Commission nor the Court in the *Virginian* case faced any problem of establishing joint rates under Section 15(3) or any new through route with joint rates. In that case, there was no railroad claiming that its line was a part of millions of existing through routes, nor any demand, such as the Rio Grande makes here, that the Commission require that the joint rates via existing Union Pacific routes be made applicable via the Rio

Grande for the purpose of its "pecuniary gain" from a "bridge" haul over its line of traffic diverted from existing routes. Furthermore, there was no question of short-hauling the Virginian in that case for the traffic involved was originated at the 54 mines located on its line and it hauled the coal from the mines to its junction with the Chesapeake and Ohio.[16] And, as the Virginian's line did not extend farther west, it had obtained its long haul on the westbound traffic there involved.

If the lower court had accepted and applied, as did the Commission, the "test of the existence" of a through route, namely, whether the participating carriers "hold themselves out as offering through transportation service" and "the carriers' course of business", as laid down in the *Thompson* case, page 557, it could have reached no other conclusion than that through routes and joint rates via the Rio Grande do not presently exist for the traffic concerned and it clearly erred in failing to do so.

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16 That haul averaged only 64.7 miles, as shown in Commissioner Cox's dissenting opinion, 98 I. C. C. 498, and included all of the Virginian's line "which lies between the termini" of the route over which the coal moved from the 54 mines to the western destinations and, since it obtained its longest possible haul on such coal to the west, there was no short-hauling within the meaning of Section 15(4). As shown in the decisions of the Commission and this Court, the western terminus of the Virginian was at Deepwater, W. Va., and from there it "extends only eastward to tidewater", meaning Norfolk, Va., and other ports along the Atlantic Coast. The Virginian's purpose in refusing to reduce its local rates from the 54 mines to junctions with the Chesapeake and Ohio was to discourage shipments from those mines to the west and thereby retain or increase the volume of coal traffic over its line to the east which gave it the benefit of a maximum haul of 450 miles (98 I. C. C. 498).

The Fallaciousness of the Lower Court's Decision That Through Routes are Already in Existence via the Rio Grande for the Traffic Concerned is Sharply Illustrated and Emphasized by the Situation With Respect to the Great Northern, Northern Pacific and Milwaukee Railroads.

The Rio Grande's complaint to the Commission demanded that it order "joint through rates" equal to those maintained by the defendants therein named on traffic "between points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof". (V. 1, 9). It further alleged that through routes now exist and have for many years existed for the interchange of traffic between those points with the Union Pacific at Ogden and certain other carriers at Denver and other Colorado points. In other words it claimed that through routes were already in existence between all points as to which it demanded prescription of joint rates, or as stated by the lower court, "that the routes over which joint rates are sought were in existence and open to traffic at combination rates" (R. 286). This, of course, included all points located on the Union Pacific and all points located on other railroads with which the Union Pacific has joint rates in Idaho, Montana, Oregon, Washington and British Columbia and all points on the hundreds of railroads with which the Union Pacific has joint rates to the thousands of points east of Colorado common points and the Missouri River.

The principal lines with which the Union Pacific has joint rates for interchange of traffic at junctions in Idaho, Montana, Oregon and Washington are the Great Northern, Northern Pacific and the Milwaukee Railroads. Neither of these lines connects with the Rio Grande and,

indeed, their lines are located and traverse territory several hundred miles distant from Ogden, the northernmost point reached by the Rio Grande. For example, Spokane, Washington, where the Great Northern interchanges traffic with the Union Pacific, is 859 miles from the Rio Grande's nearest trackage at Ogden.

At one place in its opinion the lower court concludes that "under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law", thus, apparently, agreeing with and adopting the Rio Grande's contention that through routes via its line were in existence between points in the northwest area located not only on the Union Pacific but also points located on the Great Northern, Northern Pacific and Milwaukee with which the Union Pacific has joint rates for interchange of part of the traffic the Rio Grande seeks. But at another place in its opinion the lower court refuses to say whether it intends to hold that through routes via the Rio Grande exist between each of the 39,000 stations in the area east of Colorado and the 2,900 stations in the northwest area and, though refusing to indicate or specify what through routes over the lines of what carriers, between what points or termini or on what commodities, are in existence via the Rio Grande. However, in the following statement (R. 292) the court seems to narrow its decision as to through routes to and from points on the Union Pacific in the northwest area:

> "In our view the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond."

Aside from the fact that no one can ascertain from the court's decision just what through routes, between what points or termini, or for what commodities, the court holds to be in existence via the Rio Grande, its loose and untenable treatment of this question is illustrated by the situation of the Great Northern, Northern Pacific and Milwaukee. Among the factors recited in the court's opinion and upon which it presumably relied are:

(1) That through routes and joint rates had been established via the Rio Grande during court receivership of the Union Pacific, Oregon Short Line and Oregon Washington Railroad and Navigation Company in 1897, and the joint rates but not the through routes were cancelled in 1906 and 1912. But, there is no showing on this record that the Great Northern, Northern Pacific or Milwaukee were parties to those old joint rates, and the Commission's report makes it clear that those old joint rates were established in connection with the Rio Grande by the Oregon Short Line and the Oregon Washington Railroad and Navigation Company—not by the Great Northern, Northern Pacific or Milwaukee (R. 67).

(2) That a few shipments moved west via the Rio Grande and the Union Pacific in 1948. But there is not a shred of evidence that a single one of those shipments moved to or from a point on either the Great Northern, the Northern Pacific or Milwaukee (original I. C. C. Ex. 1, pp. 4 and 5). That evidence shows that all of the westbound "bridge" shipments cited moved to points on the Union Pacific in Idaho, Washington, Utah and Montana and it further shows that the eastbound shipments, which were not "bridge traffic" involved here but local traffic for delivery at points on the Rio Grande, originated at points on the Union Pacific except one shipment from St.

Helens, Oregon, on the Spokane, Portland and Seattle railroad, one shipment from Trentwood, Washington, on the Spokane International Railroad, and one shipment from Port Angeles, Washington, on the Milwaukee Railroad. But, as stated, these were not shipments of "bridge" traffic and they have no bearing upon the question whether the Rio Grande had been used as a part of a route for such traffic.

(3) That eastbound joint rates on sheep and goats apply via the Rio Grande. But the Commission's report shows that these rates are from "Union Pacific origins in the excluded territory to Missouri River markets and points east thereof" (R. 85), and not from points on the Great Northern, Northern Pacific or Milwaukee.

Thus, at least three of the factors which the lower court apparently considered important in reaching its conclusion as to the existence of through routes via the Rio Grande are absent with respect to the Great Northern, Northern Pacific and Milwaukee. The court, nevertheless, makes no distinction or differentiation as to those lines, or any other of the numerous lines concerning which the record is completely devoid of evidential facts or elements of the sort recited by the court as justifying its conclusion that through routes via the Rio Grande were already in existence.

IV.

Upon its holding that the Commission "erred as a matter of law" in Finding That There are at Present no Through Routes via the Rio Grande as Claimed by it, and That This Finding "obviously prejudiced the entire proceeding", the District Court Erred in Concluding That the Commission's Order Should be Annulled and set Aside Only "in so far as it denied relief to the Rio Grande", and in Failing to Hold That the Order Requiring Through Routes and Joint Rates for the Articles Therein Named, as Well as the Commission's Failure to Require Joint Rates for all Commodities Should be Annulled and set Aside.

The district court held:

> "We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates *obviously prejudiced the entire proceeding.*" (Italics added; R. 287-288.)

After reversing the Commission and making its own finding that through routes via the Rio Grande had been established, the court said the Rio Grande was entitled, as a matter of law, "to have the Commission apply the provisions of §§ 1(4), 3(4), 15(1), and 15(3) of the Act, free of any of the limitations imposed by § 15(4) with respect to establishing through routes" (R. 294).

The court refers to the Commission's finding that through routes via the Rio Grande do not exist as a "self imposed restriction upon its authority to establish

joint rates". The court seemed to think that but for its finding that through routes were not in existence via the Rio Grande the Commission would have made an order more favorable or entirely favorable to the Rio Grande by including all, instead of a part, of the traffic in its order. Such a view is clearly illogical and erroneous, for the Commission's finding of the non-existence of through routes via the Rio Grande manifestly did not serve as a "restriction" or a deterrent to its giving the Rio Grande the benefit of through routes and joint rates on a third of the traffic.

A finding of "public interest" is essential to the prescription of joint rates, regardless of whether through routes already exist, and since the Commission unhesitatingly ordered through routes on all of the traffic for which it thought the evidence sufficient to prove that joint rates were necessary in the public interest, it results that it was not the "limitations imposed by § 15(4) with respect to establishing through routes", but an insufficiency of evidence of public interest in joint rates on traffic not included in the order that prevented the Commission from making an order more favorable to the Rio Grande.

The chief examiner in his proposed report also found, as did the Commission, that the through routes claimed by the Rio Grande were not in existence, but nevertheless proceeded to recommend that the Commission order through routes and joint rates on all commodities, because he thought the evidence proved necessity for them in the public interest. Thus, the short-haul limitation in Section 15(4) operated as no restriction whatever upon the chief examiner, nor upon the Commission to the extent that it thought the evidence proved that joint rates were necessary in the public interest.

While we submit that as shown above the Commission correctly found that no through routes presently exist as claimed by the Rio Grande, but even if it committed error of law in so finding, the error is irrelevant to the validity of the order and is of no consequence unless it is a "distinct and dominant proposition of law * * * the exact influence of which, in its [the Commission's] decision, could be estimated", *Illinois Cent. &c. R. R. v. Inter. Com. Comm.*, 206 U. S. 441, 457. The lower court does not, and no one can demonstrate that the Commission's finding that through routes via the Rio Grande do not presently exist "prejudiced" or had any effect or influence upon its ultimate conclusions or its failure to grant the Rio Grande's full demands. That neither the proceeding before the Commission nor the Rio Grande was "prejudiced" by that finding is clearly demonstrated by the fact that the Rio Grande made no objection, exception or claim that the same finding made by the chief examiner influenced or prejudiced his conclusions and recommendation that the Commission require through routes and joint rates on all commodities.

However, if we are wrong, and if the court was correct in its view that the Commission's finding of the non-existence of through routes via the Rio Grande was an error of law which "prejudiced the entire proceeding", it is inescapable, we submit, that the *whole proceeding* before the Commission, including its order requiring through routes and joint rates for the articles therein named as well as its failure to require joint rates on still more or all commodities, was by that finding vitiated and completely nullified, and that the court patently errs in decreeing that the order will be annulled, set aside and remanded to the Commission *only* "in so far as it denied relief to the Rio Grande".

An error of law so fundamental and having such pervading consequential effect that it "obviously prejudiced the entire proceeding" necessarily nullifies *all* action flowing from such error of law, and the court plainly exceeds its power in attempting to save that part of the "prejudiced" proceeding which confers benefits upon the Rio Grande, while condemning the part of the same "prejudiced" proceeding which failed to benefit the Rio Grande. In other words, though holding that the *entire* proceeding was prejudiced, the court nullifies and would permit the Commission to reconsider only that part which fails to benefit the Rio Grande, while withholding from the Commission's reconsideration that part of the prejudiced proceeding which resulted in substantial financial gain to the Rio Grande.

The inevitable and unavoidable effect of the court's holding that the Commission's finding that through routes do not presently exist as claimed by the Rio Grande is an error of law which "obviously prejudiced the entire proceeding", like a blight which kills a tree and all of its roots and branches, is completely destructive and nullifying of all and not merely a part of the action flowing from the error. There can be no "unprejudiced" or lawful part of the action flowing from an error which "obviously prejudiced the entire proceeding". No case can be found in which such incongruous action has been undertaken by a court under such circumstances. Instead, the courts have invariably completely, and not partly, annulled and set aside orders held to have resulted from fundamental errors of law, or from the Commission's misinterpretation of its authority or from its arbitrary action. For example, in *Ann Arbor R. Co. v. United States*, 281 U. S. 658, this Court held that the Commission had committed error of law by misconstruing a Joint

Resolution of Congress in issuing the order there considered, but the Court did not undertake to save any part of the order. Instead, at page 669, it held:

> "Our conclusion is that the order of the Commission was based upon an erroneous construction of the Joint Resolution, and therefore should have been set aside by the Court below".

In *Atchison, etc. Ry. Co. v. U. S.*, 284 U. S. 248, the Commission had issued an order prescribing rates on grain and grain products throughout most of the United States. After the order was issued, several western railroads petitioned the Commission to reopen the proceedings and receive further evidence which would disclose drastically changed conditions resulting from the early effect of the great "Depression", and the consequent inability of the railroads to withstand the rate reductions required by the order. The Commission denied the petition. This Court held that the Commission's refusal of further hearings and reconsideration in the light of the facts which the petition offered to prove was an arbitrary denial of right. The court did not attempt to save any part of the order or to remand the case to the Commission. Instead, at page 263, the opinion concludes:

> "The order of the District Court refusing an interlocutory injunction is reversed, and the cause is remanded with direction to grant the injunction as prayed".

Even in cases where the courts have found that the Commission acted lawfully in granting *a part* of motor carrier operating rights but acted upon an error of law or misinterpretation of the Act in denying other parts of the rights sought by the applicant, the courts, upon holding that the Commission's denial of a part of the rights sought resulted from its error of law, have not

tried to save the rights lawfully granted but have annulled and set aside the entire order. Such a case is *Carolina Freight Carriers Corp. v. United States*, 38 F. Supp. 549, in which the district court, though "remanding" the case to the Commission, said at page 556:

> "For the reasons stated the order of the Commission will be set aside."

The decree of the district court was affirmed by this Court without suggesting that the order be annulled and set aside only insofar as it refused operating rights as a result of its error of law. *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 490.

In *E. Brooke Matlack, Inc. v. United States*, 119 F. Supp. 617, the Commission issued an order granting a part and denying a part of the operating rights sought by the motor carrier's application. The court held that the denial of part of the rights was the result of erroneous and unlawful action by the Commission, but it decreed that the Commission's whole order be set aside, without suggesting that the rights lawfully granted by the order be withheld from reconsideration by the Commission.

For the foregoing reasons, the lower court, upon its holding that the "entire proceeding" was prejudiced by the Commission's finding that no through routes presently exist as claimed by the Rio Grande, could only decree that the entire order be annulled and set aside, for it has no power to save that part of the Commission's "prejudiced" action which is beneficial to the Rio Grande while annulling and setting aside the part of the same "prejudiced" action which is unfavorable to the Rio Grande.

V.

The District Court Erred in Commingling and Confusing the Provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act and in Ignoring the Fact That the Commission had Already Heard and Adjudicated the Rio Grande's Case.

The district court so wrote its opinion as to make it impossible to follow its reasoning, but it is clear that the court thought the Rio Grande was entitled to a more favorable order than had been given it by the Commission, and sought to remand the case to the Commission in such way as to accomplish that result. In doing so the court has confused and commingled separate and independent provisions of the Act and refused to review the Commission's action upon the record made before the Commission and introduced in the court.

The opinion says:

> "If the Rio Grande, in the proceeding before the Commission, established its right to the relief prayed for, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates * * *." (R. 294)

The opinion then states that the Rio Grande was entitled "as a matter of law, to have the Commission find that such through routes had been established" and in passing on the allegations of its complaint "to have the Commission apply the provisions of §§ 1(4), 3(4), 15(1) and 15(3) of the Act, free of any of the limitations imposed by § 15(4) with respect to establishing through routes" (R. 294). The opinion then says:

> "If the Rio Grande, on its showing before the Commission and an application of the provisions of §§ 1(4), 3(4), 15(1) and 15(3), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of a pecuniary gain to which it was entitled." (R. 294)

The first difficulty with the court's theorizing with respect to what the Rio Grande might have been entitled to receive under various "if" propositions is that it ignores the fact that the Commission fully heard and thoroughly adjudicated the Rio Grande's complaint and its allegations of violations of each of the provisions mentioned by the court. The second difficulty with the court's treatment of the case is its apparent assumption that the Commission necessarily would have given the Rio Grande a more favorable order if it had dealt with the case "free of any of the limitations imposed by § 15(4) with respect to establishing through routes", the error of which assumption we have already demonstrated.

The admitted and undeniable purpose of the Rio Grande's complaint to the Commission was to short haul Union Pacific routes and divert their traffic to its line in the hope of improving its own financial position. The crux of its complaint was that, although the traffic could move over its line at present combination rates, those rates were so much higher than rates via Union Pacific routes, it could not persuade shippers to short haul Union Pacific routes by diverting the traffic to its line. To accomplish the short-hauling purpose it demanded joint rates exactly equal to those maintained by Union Pacific

routes. In other words, it was solely because of the higher rates via its line that the Rio Grande could not succeed in its purpose to divert traffic from Union Pacific routes. This was clearly recognized by the Commission in its statement that "[t]he higher rates and charges act as deterrents to shippers and, in effect, close the Ogden gateway in a commercial sense", and that it was asked by the Rio Grande "to exercise our authority under Section 15(3) of the Act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest": (R. 60-61).

Obviously, since the traffic could move via that route if shippers were willing to pay the higher combination rates, the "establishment" of through routes without equal rates via the Rio Grande was a futility. In short, through routes via the Rio Grande with rates any higher than those maintained over Union Pacific routes were useless because only with equal rates could the Rio Grande succeed in its purpose to divert the traffic to its line. Clearly, the obstacle in the Rio Grande's path to its realization of additional pecuniary profit by diverting traffic from Union Pacific routes was its higher rates and not that the traffic could not physically move over its line.

The language quoted above from the court's opinion indicates the view that if the Commission had found that through routes already existed via the Rio Grande it would have made findings under Sections 1(4), 3(4), 15(1) and 15(3) more favorable to the Rio Grande than the findings it made. But the Commission found the combination rates unreasonable and unduly prejudicial to the extent they exceeded the joint rates of Union Pacific routes; found that upon the evidence no discrimination

was being practiced by other carriers against the Rio Grande; and ordered establishment of joint rates which it found necessary in the public interest for the specified commodities via the Rio Grande "the same" as rates over Union Pacific routes.

Thus, the court falsely assumed that but for its holding that through routes did not exist via the Rio Grande the Commission would have made findings more favorable or that would necessarily have given the Rio Grande equal joint rates it demanded on all of the traffic, for, it was not a failure or refusal by the Commission to make the findings demanded by the Rio Grande or the nature of the findings made, but the insufficiency of the evidence, which was the Commission's exclusive duty to evaluate, to prove that public interest required through routes and joint rates on more commodities that limited the Rio Grande's benefits to those named in the order. There is no room for assuming that the Commission would have ordered rates on additional commodities if it had felt free of the limitations of Section 15(4), for it still was limited by the "public interest" standard of Section 15(3), and, applying that standard, it has given the Rio Grande all it thought the evidence justified.

The district court apparently did not understand that short-hauling Union Pacific routes by establishment of equal rates with the Rio Grande is clearly forbidden unless that is "necessary or desirable in the public interest", regardless of whether through routes physically exist via that line over which the traffic can be moved at higher rates, *Thompson* case, *supra*.

It is the equalization of rates and not the existence of through routes that would enable the Rio Grande to

divert the traffic and short haul Union Pacific routes. Therefore, since the purpose of the Act is to forbid short-hauling existing routes, it necessarily results that the very root of the short-haul prohibition is equalization of rates that divert traffic from existing routes, and not the mere establishment of a "through route". Indeed, if this were not true the Rio Grande would not have complained, for obviously it would have no motive or purpose in complaining if it had been able to divert to its line all the traffic it wanted at the higher combination rates which, of course, would give it more revenue than a division of the lower joint rates.

Realistically, and from a practical standpoint, what the short-haul prohibition actually forbids is the ordering of joint rates that would enable the Rio Grande to divert traffic to its line from Union Pacific routes, for, as illustrated by this case, it is unequal rates that prevent short-hauling and equal rates that permit it.

The district court's inept lumping of Sections 1(4), 3(4), 15(1) and 15(3), and its statement that the Commission should have applied those provisions without reference to the limitations in Section 15(4) leaves its opinion confusing and incomprehensible as usually is the case when separate and independent provisions of an act are commingled and their separate and different purposes are disregarded. If, as indicated by its opinion, the court thought that the Rio Grande would have been entitled to the joint rates it demanded if the Commission had applied Sections 1(4), 3(4) and 15(1) "free of the limitations" in Section 15(4), then the court clearly erred, first, in assuming that, so applying the provisions of those three sections, the Commission had power to order joint rates and, second, in ignoring the fact that the Commission plainly did not apply those provisions subject to

the short-haul limitations in Section 15(4), but as clearly shown in its report (R. 65), it proceeded upon the correct view that an order requiring the joint rates demanded by the Rio Grande must be grounded upon findings in Section 15(3) as limited by Section 15(4).

The power to deal with reasonableness of rates and discrimination under Sections 1(4) and 3(4) is separate and distinct from the power to require joint rates, which can be exercised only upon a finding of public interest. That finding is not a prerequisite to exercise of the power under Section 15(1) to prescribe reasonable and nondiscriminatory rates. While the power to require joint rates in lieu of combination rates may, upon a valid finding that joint rates are necessary "in the public interest", be exercised separately from the power to require through routes where through routes already exist, and requiring the same joint rates over the same through route would not divert traffic from other routes, but the joint rate power clearly may not be exercised separately from the limitations upon it where, as here, the very purpose is to divert traffic to the Rio Grande from Union Pacific routes, or for the purpose of curing violations of Section 1(4) or Section 3(4), *U. S. v. Great Northern R. Co.*, 343 U. S. 562.

VI.

The District Court Exceeded its Power by Usurping Administrative Authority to Make Findings of Fact Favorable to the Rio Grande and Thereupon "remanding" That Part of the Case "with appropriate instructions" to the Commission "for further proceedings in conformity with this opinion".

The court's opinion reflects a strong tendency to control the exercise of the Commission's exclusive adminis-

trative power in its "further proceedings" pursuant to the court's "remand" of *only* that part of the case which is unfavorable to the Rio Grande. The court even goes so far as to make its own administrative findings of fact. For example, the opinion finds:

> "Here, the Rio Grande sought an order compelling the defendant railroads to perform their statutory duty to establish just and reasonable joint rates, fares, and charges over through routes, and if it was entitled to such an order, then it was immediately and directly affected and *suffered discrimination* by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate." (R. 297)
>
> * * * * *
>
> "Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines." (R. 297)
>
> * * * * *
>
> "Here, the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings." (R. 299)

These are plain findings of fact and in making them the court ignores the settled rule laid down in this Court's decisions that in reviewing orders of the Commission the courts may not "usurp merely administrative functions", *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470. Having usurped administrative authority to make these findings, the lower court then would further exceed its powers and make its findings binding

upon the Commission by "remanding" the case to the Commission "for further proceedings in conformity with this opinion". If the "remand" were within the court's power, which we think it is not, the Commission in such "further proceedings" would be bound to adopt the administrative findings of fact which the court has made even though they would compel a decision completely favorable to the Rio Grande and are contrary to the Commission's own findings already made in its report.

Fortunately, the Commission's exclusive administrative discretion may not be so easily pre-empted or controlled, for the court has no authority to make administrative findings of fact and it has no power to "remand" a case to the Commission with direction to proceed further in conformity with the court's unauthorized administrative findings of fact.

The statute (28 U. S. Code, Sec. 1336) authorizing review of the Commission's orders gives the courts no power to "remand" a case to the Commission. Under the specific language of the statute, the courts are given power only to "enjoin, set aside, annul or suspend in whole or in part, any order" of the Commission. In view of the exact statutory specification and limitation of what the courts may do upon reviewing an order of the Commission, and the failure of Congress to empower the courts to "remand" cases to that legislative and administrative agency, there is no express power in the courts to "remand" cases to the Commission.

An appropriate federal court has power to compel the Commission *to act* only in a mandamus suit, but this is not such a suit, and no court in any type of proceeding has power to compel the Commission to decide a case as a court might think it should be decided.

The district court said that this Court's decision in *Sec'y of Agriculture v. United States*, 347 U. S. 645, is its authority "to enter an order remanding the case to the Commission with appropriate instructions" (R. 293). But, regardless of whether the courts have power to remand cases to the Commission in the sense that it remands them to lower courts, this Court did not remand the *Agriculture* case "with appropriate instructions" nor upon findings of fact made by this Court, but merely "for further proceedings not inconsistent with this opinion", and the opinion at pages 653-655 clearly shows that the purpose of the "remand" was not for the Commission to conform its own decision to findings of fact or other suggestions made by the Court but to give the Commission a chance to make its decision understandable to the Court by explaining "its departure from prior norms" and spelling out "the legal basis of its decision", and to "make more explicit findings as to the differences and similarities in the treatment accorded other commodities unloaded at these same points." Certainly there is no manifestation in such a "remand" to control the Commission's administrative judgment as there clearly is in the instant case.

In *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, this Court held at page 483 that jurisdiction to review orders of the Commission "does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it". And in *Standard Oil Co. v. United States*, 283 U. S. 235, at page 241, it is held that the courts are without jurisdiction to aid a plaintiff to obtain indirectly through a court decision "the same relief it failed to secure from the Commission". This Court said in *Ford Motor Co. v. Labor*

Board, 305 U. S. 364, at page 373, that in exercising the power to review an administrative order—

> "* * * the court must act within the bounds of the statute and without intruding upon the administrative province."

Contrary to this Court's principles, the decision below would effect a "substitution of judicial for administrative discretion", *Communications Comm'n v. WOKO*, 329 U. S. 223, 229, and destroy the "wide discretion" and "wide latitude" which Congress has delegated to the Commission, *Siegel Co. v. Trade Comm'n*, 327 U. S. 608, 611-613. The decision below is at war with the holding of this Court in *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 276, that it is not within the province of a court "to revise the Commission's decision and to enter such judgment as the court may think just."

The usurpation by the lower court of administrative authority to make important and controlling findings of fact and remanding the case for further proceedings in conformity with those findings and the views expressed in the court's opinion not only nullifies the Commission's independent administrative functions but also contravenes the fundamental division of authority between administrative commissions and the courts. The court's action must be rejected because it runs afoul this Court's pronouncement in *Humphrey's Executor v. U. S.*, 295 U. S. 602, 629, that:

> "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question".

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded to it with direction to dismiss the complaint.

Respectfully submitted,

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PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 15th day of March, 1956, I served, on behalf of all Appellants herein, copies of the foregoing brief on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

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Washington 25, D. C.

Stanley N. Barnes, Esq.
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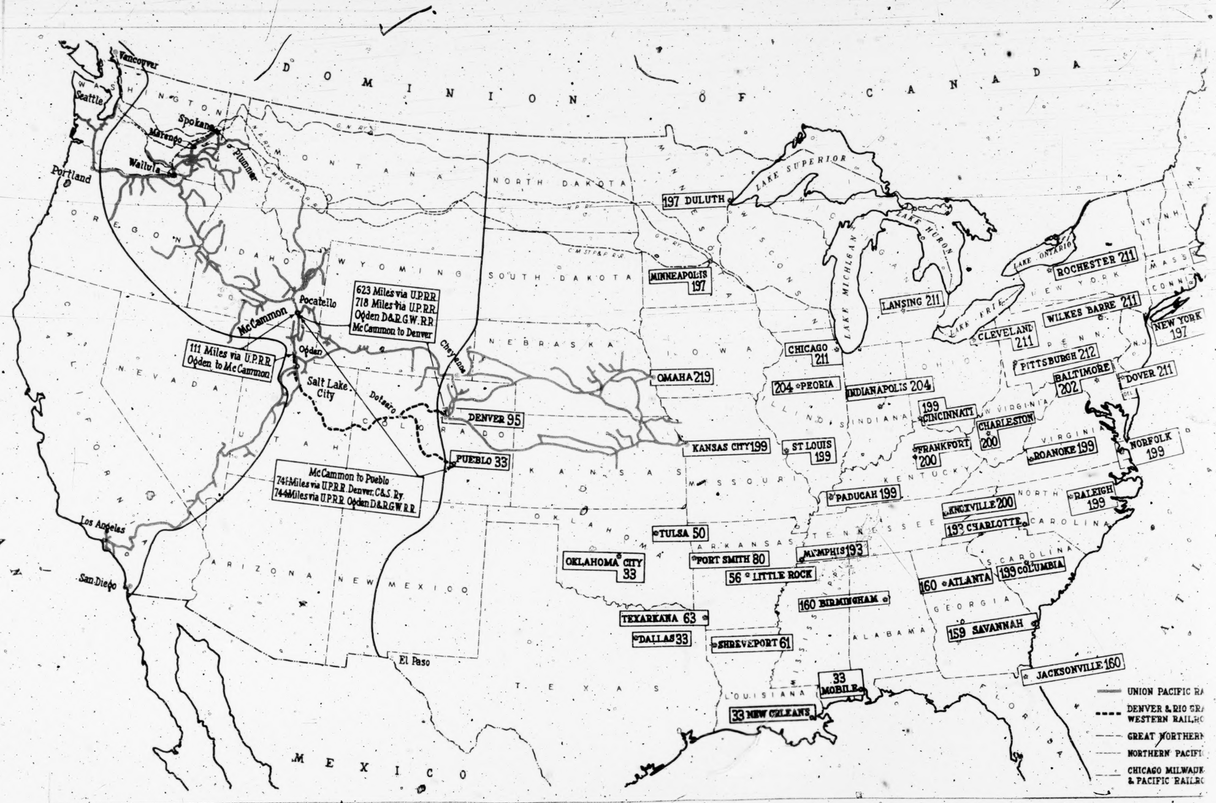
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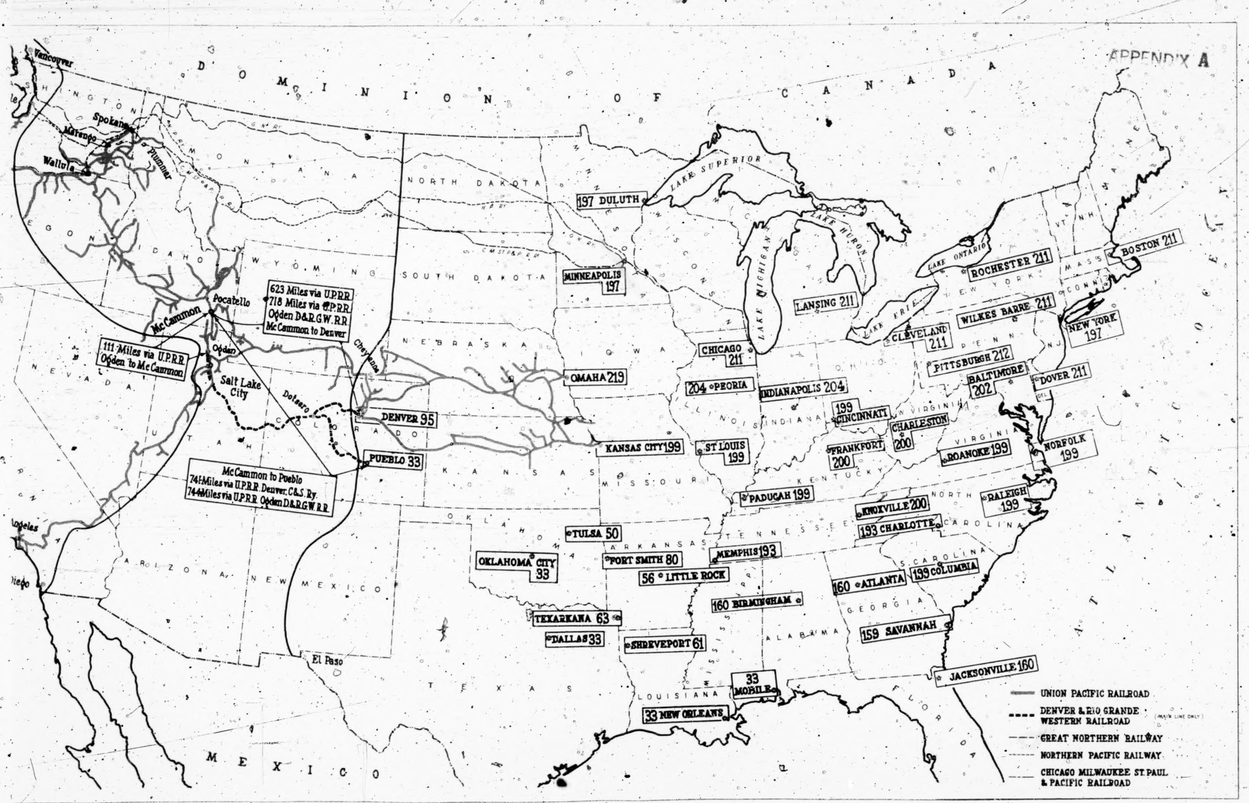
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UNION PACIFIC RAILROAD
DENVER & RIO GRANDE WESTERN RAILROAD
GREAT NORTHERN RAILWAY
NORTHERN PACIFIC RAILWAY
CHICAGO MILWAUKEE ST PAUL & PACIFIC RAILROAD

APPENDIX B

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to

part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3(4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15(1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers sub-

ject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportaton other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mini-

ma, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

Section 15(4)—

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and point rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15(8)—

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

Section 20(11)—(in part)

"That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, Dis-

trict of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; * * *".

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No. 334

In the Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. —

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Colorado is reported in 131 F. Supp. 372. The report of the Interstate Commerce Commission is reported in 287 I. C. C. 611. The court's opinion, final judgment and decree, and order denying motion for new trial or reargument and reconsideration, are set forth in the Appendix, *infra*, pp. 11-48.

JURISDICTION

The suit was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce Commission. The judgment of the district court (dated February 1, 1955) was entered on February 14, 1955, and a timely motion for new trial or reargument and reconsideration was denied on April 22, 1955. The notice of appeal was filed in that court by appellants on June 20, 1955. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612; *United States* v. *Capital Transit Co.*, 325 U. S. 357; *United States* v. *Great Northern R. Co.*, 343 U. S. 562.

STATUTE INVOLVED

Sections 15(3) and 15(4) of the Interstate Commerce Act, 24 Stat 379, as amended, 49 U. S. C. 15(3) and 15(4), provide in pertinent part:

> § 15. * * * (3) *Establishment of through routes, joint classifications, joint rates, fares, etc.*
>
> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chap-

ter * * * or the maxima or minima, or maxima and minima, to be charged, and divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *

(4) *Through routes to embrace entire length of railroad; temporary through routes.*

In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation; *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph,

give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

QUESTION PRESENTED

Whether the district court, in setting aside the Commission's order establishing new through routes (and joint rates) on the ground that the "uncontradicted evidence" showed that through routes were already in existence, applied an erroneous standard for determining the existence of a through route.

STATEMENT

This appeal involves the same order of the Interstate Commerce Commission which is before this Court in Nos. 117-119, this Term. The facts relat-

ing to the Commission's proceedings are set forth fully in our Jurisdictional Statement in No. 119, and we shall not repeat them here. Briefly, they are that the Denver and Rio Grande Western Railroad Company ("Rio Grande") petitioned the Commission to prescribe joint rates covering all commodities moving via the Ogden, Utah, gateway over through routes which allegedly already existed with The Union Pacific Railroad Company ("Union Pacific"). The Commission held that such through routes were not in existence but, acting under Sections 15(3) and 15(4) of the Interstate Commerce Act, ordered the Union Pacific to establish new through routes (and joint rates) on certain of the commodities involved. *Denver & Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company*, 287 I. C. C. 611.

The carriers filed separate complaints attacking the Commission's order. In the proceeding instituted by the Union Pacific, the District Court for the District of Nebraska upheld the Commission's finding that through routes were not in existence, but modified the Commission's order to limit the new through routes and joint rates to certain categories of traffic.[1] In the instant case, involving the proceeding instituted by the Rio Grande, the District Court for the District of Colorado set aside the order in its entirety on the ground that the "uncontradicted evidence" established that

[1] The order of the Nebraska Court is the subject of the appeals in Nos. 117-119.

through routes were already in existence, and remanded the case to the Commission for further proceedings.

In holding that through routes were not in existence, the Commission applied the rule of *Thompson* v. *United States*, 343 U. S. 549, 557, that "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." The Commission stated (287 I. C. C. at 618) that there was no evidence that the Union Pacific ever had solicited any traffic for routing over the Rio Grande, or ever had routed traffic over that line except when called upon to do so by a shipper or a connecting carrier. It pointed out (*ibid.*) that for many years the Union Pacific's "whole course of conduct" had been "to guard jealously its long haul" and that "numerous shippers" had testified that the Ogden gateway routes are not considered as "open or through routes commercially, but as routes that are closed to shippers" (*ibid.* p. 616). The Commission noted (p. 617) that in 1948 (a typical year) there were 37 east-bound and 18 west-bound carload shipments made on through bills of lading at combination rates over the routes in question,[2] but it held (pp. 618-619) that these shipments —representing approximately 1/20th of 1% of the Union Pacific's more than 100,000 carloads annu-

[2] The Commission further noted (pp. 617, 618) that in the same year an additional 21 west-bound carload shipments routed on through bills over the Rio Grande were held by the latter for correction of routing because joint rates were not applicable via the Ogden gateway.

ally to and from the area (pp. 630-631)—were of "an isolated nature" and insufficient to show the existence of through routes.[3]

THE QUESTIONS ARE SUBSTANTIAL

1. In *Thompson* v. *United States*, 343 U. S. 549, 557, this Court stated that "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." We submit that the Commission correctly applied that test in concluding that through routes were not in existence, and that the district court misapplied the test in reaching the opposite conclusion.

In the *Thompson* case, this Court held that the Commission had erred in concluding that there was a through route between Lenora, Kansas and Omaha, Nebraska. The Court held that, absent a showing that any traffic had moved over the routes, evidence that the carriers' tracks were interconnected and that they had offered through service to points short of Omaha was insufficient to show that they had offered "any through transportation service" between Lenora and Omaha (343 U. S. at 557). But the fact that through routes do not exist where *no* traffic has moved over the routes does not establish the converse proposi-

[3] The Commission further stated (p. 618) that the fact that traffic had been diverted to the Rio Grande when the main line of the Union Pacific was blocked by a snowstorm in 1949 showed only that the Rio Grande routes were physically practical, and had no bearing upon whether through routes exist.

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CITATIONS

Cases:

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Statutes:

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tion that through routes do exist whenever there is some slight movement of traffic.

Whether a through route exists is a question of fact. As we have noted (*supra*, pp. 6-7), the Commission found that the Union Pacific had never solicited traffic for routing over the Rio Grande or routed traffic over that line except upon instructions of a shipper or connecting carrier; that the Union Pacific had "guard[ed] jealously" its long haul via its own routes; and that the small number of shipments which actually moved over the route (at the higher combination rates)—constituting only 1/20 of 1% of the Union Pacific's total annual carload shipments to and from the area—were of an "isolated nature." We submit that, in the light of these facts, it was reasonable for the Commission to conclude that the carriers do not "hold themselves out as offering through transportation service," and that through routes therefore were not in existence.

In Section 15(4) of the Interstate Commerce Act, Congress has given the Commission "only a carefully restricted power to establish through routes" (*Thompson* case, p. 560) which result in short-hauling a carrier,[4] namely, if it finds that the existing route is unreasonably long, or that the proposed route is needed to provide adequate, and more efficient or more economic, transportation.

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[4] A carrier is short-hauled when it is required "without its consent, to embrace in such [through] route substantially less than the entire length of its railroad * * * which lies between the termini of such proposed through route * * *." Section 15(4).

Since the existence of a through route permits the Commission to require short-hauling without making those findings by establishing joint rates,[5] a through route should be found to exist only upon a strong evidentiary showing. Otherwise, the Congressional policy of "protecting carriers from being required to short haul themselves" (*Id.*, p. 559) might be thwarted.

The standard for determining the existence of a through route is an important question in the administration of the Interstate Commerce Act. The *Thompson* case held only that through routes do not exist if no traffic moves over the routes. It did not hold—as the district court apparently read it—that movement of a slight volume of traffic under the circumstances of this case necessarily establishes that through routes do exist. The Commission's expert factual judgment on whether through routes exist is entitled to great weight. In overturning the exercise of that judgment in this case, the district court departed from the principle of the *Thompson* case that a through route exists only if "the participating carriers hold themselves out as offering through transportation service."

2. There is an additional reason why this Court should hear this appeal (as well as the appeals in Nos. 117-119). As we have pointed out in our jurisdictional Statement in No. 119 (pp. 12-13), two

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[5] The Commission can establish joint rates over an *existing* through route whenever it deems such action "necessary or desirable in the public interest." Cf. *United States v. Great Northern Railway Co.*, 343 U.S. 562, 569, 573.

district courts are in direct conflict as to the proper scope of the Commission's order. Although the Nebraska court upheld the Commission's finding that through routes do not exist, and then modified the order on other grounds, the court below concluded that through routes do exist and set aside the order in its entirety. Only this Court can dissipate the confusion which has resulted from those conflicting holdings.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. There is also a serious conflict of decisions. It is respectfully submitted that probable jurisdiction should be noted, and it is further suggested that this case should be consolidated for argument with Nos. 117-119.[6]

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
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SAMUEL R. HOWELL,
Acting General Counsel,
Interstate Commerce Commission.

AUGUST, 1955.

[6] The two cases are interdependent, since the Court will not reach the issues in Nos. 117-119 if it affirms the judgment in this case.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

No. 4492 Civil

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before PHILLIPS, Chief Circuit Judge, and KNOUS, Chief District Judge, and SAVAGE, District Judge

Per CURIAM:

This action was brought by the Denver and Rio Grande Western Railroad Company against the United States of America and the Interstate Commerce Commission under the Urgent Deficiencies Act to set aside and permanently enjoin, in part, an order of the Interstate Commerce Commission.

In August, 1949, the Rio Grande filed a complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroad defendants. In such complaint the Rio Grande alleged that the defendants have failed and re-

fused to establish and maintain *competitive joint rates* on freight traffic with the Rio Grande: (a) via its *Colorado* and *Utah gateways* between places on or via the *Union Pacific in Utah*, north of *Ogden, Idaho, Montana, Oregon, Washington and British Columbia* and Colorado common points and points east thereof; and (b) between Utah common points and places on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that *through routes now exist* and have *for many years* existed for the interchange of traffic by the Rio Grande with the Union Pacific at *Provo, Ogden* and *Salt Lake City, Utah*, and with the *Union Pacific* and certain other defendants at *Denver, Colorado Springs, Pueblo, Walsenburg* and *Trinidad*, Colorado, as to freight traffic:

(a) between points on or via the *Union Pacific* in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof; and

(b) as to freight traffic between Utah common points and points on or via the Union Pacific in Utah, north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia;

And that the rates and charges applicable to such traffic between the points described via such through routes, with minor exceptions, are based upon the combination of the intermediate local or other rates, which rates and charges, in the aggregate, are substantially higher than the joint rates main-

tained by the defendants on similar competitive traffic between the same origin and destination places and territories which moves via the Union Pacific or via the Union Pacific and the other defendants, and that such combination rates are unjust, unreasonable and discriminatory, as compared with the competitive joint rates maintained by the Union Pacific or via the Union Pacific and the other defendants on like freight traffic via other competitive routes;

And that the failure and refusal of the Union Pacific and other railroad defendants to establish joint competitive through rates and charges applicable to the freight traffic between the points above described results in combination through rates which are excessive, unjust, unreasonable and constitute violations of §§ 1, 3 and 15 of the Interstate Commerce Act [1] and was and is contrary to the national transportation policy, since it deprives the public, shippers and the Rio Grande of the use of reasonable and available through routes and rail facilities at just, reasonable and non-discriminatory through joint rates, which were and are necessary and desirable in the public interest.

The Rio Grande prayed that the Commission enter an order requiring the Union Pacific Railroad and the other defendant railroads to establish and maintain for the future, just, reasonable, and non-discriminatory competitive joint rates on the freight traffic via the route of the Rio Grande

[1] Hereinafter called the Act.

through its Colorado and Utah gateways between (a) points on the *Union Pacific* and its *connections in Utah, north of Ogden, Utah, and in Idaho, Montana, Oregon, Washington, and British Columbia,* and (b) *Colorado common points,* such as Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, and points east thereof; and between (c) the points designated in (a); and (d) Utah common points.

By the challenged order entered on January 12, 1953, the Commission granted some but not all of the relief sought by the Rio Grande. 287 I. C. C. 611. In this action the Rio Grande seeks to have the court enjoin, set aside, annul and remand, with appropriate directions, that part of the order *which denied relief* sought by the Rio Grande. Union Pacific and other railroads and other persons have intervened with permission of the Court.

Section 1, Par. (4) of the Interstate Commerce Act in part provides:

> "It shall be the duty of every common carrier * * * to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled

thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3, Par. (4) of such Act in part provides:

"All carriers * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the *interchange* of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and *shall not discriminate* in their rates, fares, and charges *between connecting lines*, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. * * *."

Section 13(1) of such Act in part provides:

"That * * * any common carrier, complaining of *anything done or omitted to be done* by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reason-

able time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." (Italics ours.)

Section 15(1) of such Act provides:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby author-

ized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

At the threshhold we are confronted with a motion of the defendants to dismiss on the ground that the Rio Grande is without standing to maintain this suit. We hold that the Rio Grande has such standing. Since we so hold, by reason of our conclusion with respect to the existence of the through routes, the erroneous finding of the Commission on that issue, the erroneous application to the facts by the Commission of certain provisions of the Act, and the rights of the Rio Grande under the provisions

of the Act, we shall state in detail our reasons for denying such motion, after a full consideration of the merits.

I.

The Merits

The Rio Grande operates approximately 2400 miles of railroad in *Colorado, New Mexico* and *Utah.* From its northern terminus at *Ogden, Utah,* it runs south to *Salt Lake City* and *Provo,* Utah, thence generally east to *Dotsero, Colorado,* where it divides, *one branch going east to Denver,* the other southeast to *Pueblo.* From Denver the line *runs south through Colorado Springs to Pueblo* and *Trinidad.* Other lines serving territories in *southern Utah, northwest New Mexico* and southern Colorado are not of *importance in this action.*

The Rio Grande has *interchange track connections and interchanges traffic with the Union Pacific at Denver,* Colorado, and at *Ogden, Salt Lake City* and *Provo,* Utah; with the *Southern Pacific* at *Ogden,* and the *Western Pacific* at *Salt Lake City.* It has interchange track connections and interchanges traffic at *Denver* with the *Rock Island,* the *Burlington, Santa Fe* and the *Colorado & Southern;* at *Colorado Springs with the Santa Fe and the Rock Island;* at Pueblo with the Santa Fe, the Colorado & Southern and the Missouri Pacific; at Walsenburg with the Colorado & Southern and at Trinidad with the Santa Fe and the Colorado & Southern.

The Union Pacific, with its leased lines, operates as a single system. From Ogden, Utah, one line of the Union Pacific extends in a southwesterly direction through *Salt Lake City* and *Provo* and thence to *Los Angeles*. Another line extends *northwest through Utah, Idaho, Oregon, Washington and Montana,* serving what is referred to as the *northwest territory,* or the *closed door territory.* From Ogden, the *Union Pacific runs generally easterly through Cheyenne and Denver,* with eastern *termini on the Missouri River at Omaha and Kansas City.* At various points on its line it connects and interchanges traffic with the other intervening railroads.

The Union Pacific and other intervening railroads and the Rio Grande participate in *through routes* and *joint rates* with each other and with *other carriers* on transcontinental and other traffic, with certain exceptions. Joint rates generally do not apply in connection with the Rio Grande on traffic originating at or destined to points in *Utah,* north of *Ogden,* and in *Idaho, Montana, Oregon* and part of *Washington.* Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande to and from Ogden, the higher combination rate, consisting of the aggregate of local rates, applies.

The transcontinental traffic to and from this northwest territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than over the Rio Grande route. This is due, in part to the refusal of Union Pacific

to join with Rio Grande in establishing joint rates with respect to such traffic. The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic.

The power of the Commission to establish through routes and joint rates under §15(3) is limited by § 15(4) of the Act, which declares that, except as provided in §3 of the Act, a railroad may not be required without its consent to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through rate unreasonably long, as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed is needed in order to provide "adequate, and more efficient or more economic *transportation.*" It is further provided that in prescribing through routes the Commission shall, so far as is *consistent with the public interest* and subject to the foregoing limitations in clauses (a) and (b), give *reasonable preference to the carrier which originates the traffic.* The section further provides that *no through routes and joint rates applicable thereto shall be established for the purpose of assisting any carrier to meet its financial needs.* This section was designed to restrict the power of the Commission to establish *through routes* which would short haul a carrier without its consent.

Rio Grande contended at the hearing before the Commission, and contends here, that the routes over which joint rates are sought *were in existence and open to traffic at combination rates*, and that *the Commission was not called upon to establish through routes* and, therefore, *limitations on its power to do so*, imposed by §15(4), are *not applicable and need not be considered*. It urged that the principal task of the Commission was to determine whether the *through rates* resulting from the combination or aggregate of intermediate rates over such existing through routes are unjust, unreasonable or discriminatory, in violation of §§ 1 and 3 of the Act, and contrary to the national transportation policy.

The Commission recognized that the first question for its determination "is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15(3) and (4) of the Act." Only five of the ten participating members of the Commission joined in the report and order of the Commission, wherein it was first determined that *through routes were not in existence over the Rio Grande in connection with the Union Pacific through the Ogden gateway*. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment of such through routes and joint rates over them must be grounded on findings, as specified in §15(3) and (4). Thus limited in its further consideration of the case, the Commission entered its order:

"That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established *via Ogden or Salt Lake City, in connection with the Rio Grande,* on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary *livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs,* in carloads, from *origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary* of Kansas thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

In all other material respects the relief requested by the Rio Grande was denied.

This very brief and sketchy statement of the case will suffice, since we rest our decision upon a *narrow ground.* We are of the opinion that the finding of the Commission that *there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence.* It is our view that the Commission erred *as a matter of law* in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority *to establish joint rates obviously prejudiced the entire proceeding.*

The undisputed evidence bearing upon the crucial question of existing *through routes must be summarized.* In 1897, the Union Pacific established *joint through competitive rates with the Rio Grande* to and from points in the northwest area through Ogden. These rates were in effect *until canceled by Union Pacific in 1906* from and to some points and in *1912 from and to remaining points.* But the through routes were not closed.

Counsel for Union Pacific expressed the opinion at the hearing before the Commission, in response to interrogation by Chairman Alldredge, that *the cancellation of the joint rates* did not close the *through routes* and that shippers *were free to route via the Rio Grande if they wanted to pay more.*

The principal traffic witness of the Union Pacific testified at the hearing that a shipper who was

willing *to pay the higher combination rate had the right to specify under § 15(8) of the Act a route via the Rio Grande.* It should be observed that this right exists only when through routes and through rates have been established. This witness further testified that some joint through rates are now published in a Union Pacific tariff for application to shipments of *sheep and goats* from the northwest area via Ogden and the Rio Grande to points on the Missouri River and east thereof.

A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area *at through combination rates,* without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small. In 1948, which was selected as a representative year, 37 carload shipments were made *on through bills of lading from the northwest area to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City.* All of these shipments originated on the Union Pacific or its connections, but none moved to any destination east of Colorado common points. In the same year, *18 carload shipments* were made west bound on through bills of lading from points east and southwest over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific to destinations in the northwest area. In addition, *21 carload shipments moved on through bills of lading* from various eastern points to destinations in the

northwest area, which were routed over the Rio Grande and Union Pacific, were held by Rio Grande at Denver or Pueblo for change of the routing *because the joint through rates* were not applicable. The traffic movement to and from the northwest area over the Rio Grande through the Ogden gateway on through bills of lading and at through rates was substantially the same in years prior to 1948 and continued into 1949, until the date of the Commission hearings.

From November, 1942, to August, 1945, a number of shipments were diverted under service orders issued by the Commission from the regularly used routes to the Rio Grande route. During World War II mixed trains of troops in passenger cars and of military supplies in freight cars moved from eastern and southern points on through billing over the Rio Grande via Ogden and Union Pacific to the closed door area. These trains were not routed under service orders issued by the Commission. In 1949, when the main line of the Union Pacific in Wyoming was blocked by snow, the traffic was diverted over the Rio Grande between Denver and junctions with the Union Pacific in Utah. These latter movements were made under emergency conditions and admittedly do not tend to establish an ordinary course of business between the carriers involved, but the Commission did not invoke its authority under § 15(4) of the Act to establish temporary through routes which indicates that the Commission assumed that through routes were already in existence.

It is well settled that a joint rate is not essential to the existence of a through route. The rate which applies over a through route may be the aggregate of separate rates fixed independently by the several carriers participating in the through route. St. Louis-Southwestern R. Co. v. United States, 245 U. S. 136, 139; Thompson v. United States, 343 U. S. 549, 556. In Thompson v. United States, supra, the court defines a through route as follows:

> "* * * The statutory term 'through route,' used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> "'A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. Through Routes and Through Rates, 12 I. C. C. 163, 166.'
>
> * * * * *
>
> "In short, the test of the existence of a 'through route' is whether the participating

carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

While the foregoing definition of "through route" compels us to conclude that the through routes contended for by Rio Grande were in existence, the Commission relied on the Thompson Case in reaching its decision that through routes were not in existence. But the facts in the Thompson Case are in striking contrast with the facts in this case. There, the question was whether a route from Lenora, Kansas, via Missouri-Pacific to Concordia, Kansas, and thence via Burlington to Omaha was a through route. No evidence was presented that any shipment had ever been made from Lenora to Omaha via the Burlington or that the carriers had ever offered through service over that route.

In our case, through routes and joint rates were established in 1897 and the joint rates remained in effect for some fifteen years. While the joint rates were canceled by Union Pacific, nothing was ever done to close the routes and diminished traffic continued to move over the same through routes at the higher through combination rates. Moreover, joint rates were continued in effect as well as through routes in respect to the shipment of sheep and goats from the closed door area through Ogden over the Rio Grande to the Missouri River and beyond. The Union Pacific and other participat-

ing railroads have issued through bills of lading, thereby recognizing the through route status. Shipments were diverted from the Union Pacific over the Rio Grande under emergency conditions without having the Commission authorize temporary through routes, which suggest that both the Union Pacific and the Commission assumed the existence of through routes.

The Commission stated in its report and order that "The Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable." Then follows a statement that the establishment of joint competitive rates would result in such routes becoming "effective through routes, a character which they do not now possess." Thus, it appears that the Commission reasoned that the closing of the routes in a commercial sense by applying the higher combination rates terminated the through routes. But, it was held to the contrary in Virginian Railway Co. v. United States, 272 U. S. 658. There, of 99 coal mines located on the line of the Virginian, 45 enjoyed through routes and joint rates to the West because of certain trackage arrangements entered into between the Virginian and the Chesapeake & Ohio. As to other complaining mines, the court said, at page 661:

> "* * * But that route is closed commercially, because these two carriers have not established any joint rates to the West from

> any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive. * * *"

In discussing the attack made on the order of the Commission fixing joint non-discriminatory rates, the court stated, at page 666:

> "* * * The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under § 15(3). But the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination. (citing cases.) The fact that the combination rates were excessive constituted the only obstacle to the movement."

The intervening railroads argue that Rio Grande had the burden of proving, in order to show the existence of the through routes contended for, an actual movement of traffic between every point in the northwest area and every point in the United States on every railroad east of a north and south line drawn roughly along the eastern

boundary of Colorado. They point out that there are some 2900 railroad stations in the northwest area and some 30,000 stations in the area east of Colorado and that there are undoubtedly hundreds of thousands of through routes available in the published tariffs between the thousands of stations in the involved area of which Rio Grande claims to be a part. This question was not considered by the Commission, and we do no reach it here. In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond. Since the case must be remanded to the Commission for a new hearing, we believe that the Commission should initially pass on the question of whether the burden is on the Rio Grande to show some actual movement of traffic on through billing over each of the possible routes between the thousands of stations in the involved areas. It might be mentioned in passing that the court in the Virginian Railway Company Case concluded that "through routes to the west are already in existence," without apparent direct proof of transportation of freight from all points on the Virginian to all points in the west via the Chesapeake & Ohio.

The contention of the intervening railroads that we are not authorized to enter an order remanding the case to the Commission with appropriate instructions is refuted by the recent order entered

by the Supreme Court in Secertary of Agriculture v. United States, 347 U. S. 645.

II

The Motion to Dismiss

We have concluded that under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law, and that the Commission erred, as a matter of law, in not finding the existence of such through routes.

We further conclude that the Commission erred as a matter of law in applying the limitations of § 15(4) with respect to the establishment of through routes, in determining whether the Union Pacific and the other defendant railroads should be required to establish and maintain for the future just, reasonable and non-discriminatory competitive joint rates under the provisions of § 14(4), § 3(4), § 15(1) and § 15(3).

The duties and powers of the Commission, with respect to the relief sought by the Rio Grande, are clearly provided in § 1(4), § 3(4), § 15(1) and § 15(3) of the Act. The right of the Rio Grande to file its complaint with the Commission and seek the relief therein prayed for is clearly given by § 13 of the Act. Under the Act, a carrier is as fully entitled to non-discriminatory treatment as a shipper. See Chicago Junction Case, 264 U. S. 258, 267, which cites with approval Pennsylvania Co. v. United States, 236 U. S. 351, where the complainant sought relief under § 3 of the Act.

The fact that the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief. See Rochester Telephone Corp. v. United States, 307 U. S. 125, 135-143; Mitchell v. United States, 313 U. S. 80, 92, 93.

The negative portion of the order required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had, and, if considered solely from those points of view, the order caused no pecuniary loss to the Rio Grande.

If the Rio Grande, in the proceeding before the Commission, established its right to the relief prayed for, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates, and the denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established.

The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of § 1(4), § 3(4), § 15(1) and § 15(3) of the Act, free of any of the limitations imposed by § 15(4) with respect to establishing through routes.

If the Rio Grande, on its showing before the Commission and an application of the provisions of § 1(4), § 3(4), § 15(1) and § 15(3), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its operating income, and, no doubt, in its net earnings.[2] More succinctly stated; if the Rio Grande under the Facts established by the evidence before the Commission, and the application of the provisions of § 1(4), § 3(4), § 15(1) and § 15(3) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande.

Where an order of the Commission denies a right given to a carrier by the Act, and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order.[3]

While it is our view that the denial of the relief here challenged will result in pecuniary injury to the Rio Grande, we do not think such injury is

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[2] The Union Pacific asserts that the granting of the relief prayed for would result in a large loss of traffic and a large reduction of earnings by the Union Pacific.

[3] The Chicago Junction Case, 264 U.S. 258, 266, 267.

essential to the right to judicial review. In Mitchell v. United States, 313 U. S. 80, Mitchell brought a proceeding before the Commission in which he alleged that the Chicago, Rock Island and Pacific Railway Company, in its purported compliance with an Arkansas statute requiring segregation of the races during transportation did not provide as desirable accommodations for colored as for white passengers traveling in Arkansas over its line, which resulted in unreasonable charges and unjust discrimination against and undue prejudice to colored passengers in violation of §§ 1, 2, 3, and 13 of the Act and the Fourteenth Amendment. The only relief sought was the removal and avoidance in the future of the alleged discrimination and prejudice in the furnishing of accommodations. The Commission, while holding that the matters complained of were prohibited by § 3(1) of the Act, denied the relief prayed for. Mitchell then brought an action in the District Court of the United States for the Northern District of Illinois to set aside the Commission's order. In passing on whether Mitchell had standing to maintain the action, the Supreme Court said, at pages 92 and 93:

> "*First.* The Commission challenges the standing of appellant to bring this suit. We find the objection untenable. This question does not touch the merits of the suit, but merely the authority of the District Court to entertain it. The fact that the Commission's order was one of dismissal of appellant's complaint did

not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not controlling. Rochester Telephone Corp. v. United States, 307 U. S. 125, 143.

"Nor is it determinative that it does not appear that appellant intends to make a similar railroad journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids. He presents the question whether the Act does forbid the conduct of which he complains.

"The question of appellant's right to seek review of the Commission's order thus involves the primary question of administrative authority, that is, whether appellant took an appropriate course in seeking a ruling of the Commission. The established function of the Commission gives the answer. The determination whether a discrimination by an interstate carrier is unjust and unlawful necessitates an inquiry into particular facts and the practice of the carrier in a particular relation, and this underlying inquiry is precisely that which the Commission is authorized to make. As to the duty to seek a determination by the Commission in such a case, we do not see that a

passenger would be in any better situation than a shipper. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Robinson v. Baltimore & Ohio R. Co., 222 U. S. 506; Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247; Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304; General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422.

"The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law."

There, Mitchell suffered no pecuniary injury, but the court had no difficulty in concluding that he had a right to maintain the proceeding before the Commission, that he was an aggrieved party, and that he was entitled to judicial review. See, also, Henderson v. United States, 339 U. S. 816, 823.

Here, the Rio Grande sought an order compelling the defendant railroads to perform their statutory duty to establish just and reasonable joint rates, fares, and charges over through routes, and if it was entitled to such an order, then it was immediately and directly affected and suffered discrimination by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate.

We think the cases relied on by the defendants are distinguishable.

Edward Hines Trustees v. United States, 263 U.S. 143, did hold that in order for the plaintiffs to maintain that action it was necessary for them to show that the order subjected them "to legal injury, actual or threatened," but the complainants there sought the continuation of a so-called penalty charge of $10 per car per day on lumber held at reconsignment points. The court said that the plaintiffs had no absolute right to require carriers to impose penalty charges and that plaintiffs' right was "limited to protection against unjust discrimination." Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines. In the Chicago Junction Case, supra, the court distinguished between an incident of more effective competition and injury inflicted by denying equality of treatment. Just, reasonable, and non-discriminatory joint rates is the equality of treatment which the Rio Grande here seeks.

In Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249, the Interstate Commerce Commission entered an order directed to the railroads operating in Oklahoma, Arkansas, Texas, and Louisiana, which required them to remove in a prescribed manner, undue prejudice and preference caused by their rates on cotton shipped from interior points to Houston and other ports on the Gulf of Mexico. Two actions were brought, one by Sprunt & Son and one by the Texas & New Orleans

Railroad Company and other carriers, to enjoin the enforcement of the order. Upon final hearing, the District Court sustained the validity of the order and entered a decree dismissing the bills. None of the carriers appealed from the decree. Sprunt & Son appealed. The court held that the issue of undue prejudice and unjust preference which had been passed upon by the Commission had become moot, because most of the carriers never sought to annul the order and that the carriers who joined in the suit to set it aside had voluntarily severed themselves from the shipper, who objected to it. With respect to the right of Sprunt & Son to maintain the action, the court at pages 254, 255 said:

> "* * * We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under § 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. * * * But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where *a right of*

his own is alleged to have been violated by the order. * * In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled.* The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so." (Italics ours.).

Here, again, the court recognized that mere deprivation of a competitive advantage was not enough and that they were only entitled to reasonable service at reasonable rates and without unjust discrimination. Here, the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings.

In Pittsburgh & West Virginia Railway Co. v. United States, 281 U.S. 479, the Commission entered an order authorizing the New York Central

Railroad and other rail carriers to join in establishing a union passenger station at Cleveland, through a subsidiary, Cleveland Union Terminals Company. The Wheeling & Lake Erie Railway Company had for some years owned and maintained an independent passenger station at Ontario Street, in Cleveland, in the line of the easterly approach to the proposed union terminal. It was apparent that either ownership of or an easement in the Wheeling's site would be indispensable in order to provide the necessary easterly approach to the terminal. Wheeling consented to sell its site and become a tenant in the new terminal. Contracts were made embodying this plan, subject to approval of the Interstate Commerce Commission. Thereupon, Wheeling filed before the Commission two applications for certificates of public convenience and necessity, one permitting it to abandon its Ontario Street station, and the other authorizing it to use the facilities of the union terminal, and pending its completion to use the facilities of the station of the Erie Railroad and the tracks of the Big Four.[4] Pittsburgh & West Virginia Railway, a minority stockholder and connecting carrier of the Wheeling, intervened in opposition to the applications. It opposed them on the ground that the Ontario Street station was ample for both the present and future needs of the Wheeling and that the contracts were disadvantageous to the Wheeling in certain particulars. The Commission found the public convenience and necessity would be served by the

[4] Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

granting of both applications and accordingly issued its certificates as prayed for. Pittsburgh & West Virginia Railway then brought an action in the District Court of the United States for the Northern District of Ohio to set aside and annul the order of the Commission. The Supreme Court held that the order did not affect Pittsburgh & West Virginia as a carrier and that the claim that the order threatened Wheeling's financial stability and Pittsburgh & West Virginia's financial interest as a minority stockholder was not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. The Court, at page 487, said: "* * * The injury feared is the indirect harm which may result to every stockholder from harm to the corporation," and that the interest of Pittsburgh & West Virginia was insufficient to give it standing to bring the action.

In Moffat Tunnel League v. United States, 289 U. S. 113, the Commission had entered an order authorizing the Denver and Rio Grande Western Railroad Company by stock purchase to acquire control of the Denver and Salt Lake Railway Company, called the Moffat Road. In the proceeding before the Commission the Moffat Tunnel Improvement District and the Public Utilities Commission of Colorado had intervened and they brought an action in the District Court of the United States for the District of Delaware to set aside the Commission's order. In holding that the plaintiffs did not have standing to maintain the suit, the Supreme Court said, at page 119:

"* * * the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. Edward Hines Trustees v. United States, 263 U. S. 143, 148. Sprunt & Son v. United States, 281 U. S. 249, 254. Pittsburgh & W. Va. Ry. v. United States, 281 U. S. 479, 486. Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment, such as may be entertained by members of the public in the territory west of Craig, that the improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points."

The Pittsburgh & West Virginia Railway case and the Moffat Tunnel League case are obviously distinguishable from the instant case.

With respect to cases relied on by the defendants, the statement by the court in Youngstown Sheet & Tube Co. v. United States, 295 U. S. 476, is apposite. "* * * The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were *unreasonable or discriminated against them.*" (Italics ours.) Here, the existing rates are attacked by the Rio Grande on the ground that they are unjust, unreasonable, and discriminatory as against the Rio Grande and shippers on

its line, deny them equality of treatment, and cause injury to them.

It is urged that to maintain the action, equitable grounds for relief must be alleged. But, it should be remembered that in the Rochester Telephone Case, the court, at page 142, said:

> "* * * An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. * * *"

Moreover, in overruling Proctor & Gamble v. United States, 225 U. S. 282, the court, at page 136, in the Rochester Telephone Case, supra, observed

that the shipper in that case "was within the express language of Congress authorizing suits 'to enjoin, set aside, annul, * * * any order of the Interstate Commerce Commission.'"

In the instant case, the Rio Grande, in its complaint, alleges that it was without adequate remedy at law. Clearly, the Rio Grande can maintain no other action which will give it adequate relief or prevent injury to it.

Accordingly, we conclude that the Rio Grande had standing to maintain the action.

The order in so far as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion.

IN THE
DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

Civil Action No. 4492

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

UNION PACIFIC RAILROAD COMPANY, ET AL., INTERVENING DEFENDANTS

FINAL JUDGMENT AND DECREE

The hearing in the above-entitled cause having been held on June 8 and 9, 1953, before Circuit Judge Orie L. Phillips and District Judges Royce H. Savage and William Lee Knous, constituting a District Court of three judges, convened pursuant to Title 28 U.S.C., Sections 2284 and 2325, and all parties being represented by counsel, and the Court having received the evidence offered and heard the arguments of counsel, and the Court being fully adv ed in the premises and having filed its opinion herein on January 13, 1955, and the Court being of the opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297 is invalid and unlawful insofar as it denied relief to the plaintiff above named;

NOW, THEREFORE, upon the basis of said opinion of this Court dated January 13, 1955, and for the reasons therein set forth, IT IS ORDERED, ADJUDGED AND DECREED that the injunction and other relief prayed for by plaintiff and intervening plaintiffs in the complaint be and the same is hereby granted, and the order of the Interstate Commerce Commission dated January 12, 1953, be and the same is hereby annulled and set aside insofar as it

denied and withheld relief to the plaintiff and intervening plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause, insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief to plaintiff and intervening plaintiffs, be and the same is hereby remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of this Court.

Dated this 1st day of February, 1955.

ORIE L. PHILLIPS, *Chief Judge,*
United States Court of Appeals
ROYCE H. SAVAGE, *Judge,*
United States District Court
WILLIAM LEE KNOUS, *Judge*
United States District Court

IN THE
DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT
OF COLORADO

Civil Action No. 4492

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

ORDER DENYING MOTION FOR NEW TRIAL OR REARGUMENT AND RECONSIDERATION

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company; and Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, intervening defendants herein, having

seasonably filed their motion for new trial or re-argument and reconsideration and this Court having entertained and duly considered said motion and brief of plaintiff in opposition thereto,

IT IS ORDERED:

1. That said motion be and it is hereby overruled and denied;

2. That the Clerk of this Court transmit forthwith copies of this Order to counsel in this case.

DATED at Denver, Colorado, this 22 day of April, 1955.

By the Court:

ORIE L. PHILLIPS, *Chief Judge, United States Court of Appeals for the Tenth Circuit*

ROYCE H. SAVAGE, *United States District Judge for the Northern District of Oklahoma*

WILLIAM LEE KNOUS, *United States District Judge.*

A True Copy, TESTE: G. Walter Bowman, Clerk.

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